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Attorneys for Plaintiff
FLO & EDDIE, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO, INC., a Delaware corporation; and DOES 1 through 10,

Defendants.

Case No. CV-13-05693 PSG (RZx)

SUPPLEMENTAL DECLARATION OF MICHAEL WALLACE IN SUPPORT OF FLO & EDDIE, INC.'S MOTION FOR CLASS CERTIFICATION

Date: May 18, 2015
Time: 1:30 p.m.
Place: Courtroom 880
Honorable Philip S. Gutierrez

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DECLARATION OF MICHAEL WALLACE

I, MICHAEL WALLACE, declare and state as follows:

1. I have previously submitted a Declaration in support of plaintiff Flo & Eddie, Inc.'s ("Flo & Eddie") Motion for Class Certification. I submit this supplemental declaration in order to address several statements contained in the declaration of Keith Ugone, Sirius XM Radio, Inc.'s ("Sirius XM") damages expert. I have personal knowledge of the facts set forth herein and if called to testify as a witness I could and would do so competently.

I. Summary of Response.

2. Mr. Ugone challenges the methodology I used in my expert report and my declaration to calculate class damages by proposing no methodology at all, while simultaneously ignoring that the methodology I used has been used and relied on by Sirius XM to calculate and segregate its revenues attributable to pre-1972 recordings. The methodology used by both me and by Sirius XM provides a procedurally reliable and substantively relevant measure of damages on a class-wide basis. As Sirius XM stated in testimony before the Copyright Royalty Board ("CRB"), this methodology is a "carefully tailored approach to reportable revenues." (See Written Rebuttal Testimony of David Frear, June 29, 2012, In the Matter of Determination of Rates and Terms For [SDARS], Docket No. 2011-1, Satellite II (attached hereto as Ex. G)). Mr. Ugone does not address the consistency between my methodology and Sirius XM's methodology for reducing its royalty bearing revenues.

3. Mr. Ugone's assertion that I have not identified revenues "attributable to" Sirius XM's use of pre-1972 recordings is incorrect. My methodology precisely follows the manner by which Sirius XM reduces its "revenue (and thus [its] payments to SoundExchange) to account for the proportion of [its] subscription fees attributable to the performance of Pre-1972 Recordings." (See Dkt 89 ¶ 11, Decl. of David J. Frear In Opposition to Plaintiff's Motion for Summary Judgment). Sirius XM further describes

its methodology for identifying and excluding revenues attributable to pre-1972 sound recordings at pages 8-9 of its Memorandum of Law in Support of its Motion to Dismiss in *SoundExchange, Inc. v. Sirius XM Radio, Inc.*, United States District Court, District of Columbia, Case No. 13-cv-1290 (Dkt. 13-1) (attached hereto as Ex. H):"Sirius XM excludes revenues attributable to the performance of sound recordings created before February 15, 1972, because these sound recordings are not copyrightable under federal copyright law and therefore not covered by the Section 114 statutory license for which Sirius XM pays SoundExchange." Because I follow the same methodology employed by Sirius XM, "revenues attributable to the performance of sound recordings created before February 15, 1972" are precisely what is determined by my methodology, contrary to Mr. Ugone's assertions.

4. Mr. Ugone's contention that my methodology does not consider the "popularity" of recordings in calculating class members' damages is incorrect. The method I used automatically takes popularity into account by attributing revenue to recordings based on the number of plays or performances of each recording, meaning that popular recordings will *automatically* be attributed a greater proportion of the available damages pool. Calculation of revenues attributable to any particular class member's damages is accomplished through the same methodology based on the relative number of plays or performances of the recordings owned by that class member.

5. Mr. Ugone's argument that my methodology does not take into account any direct licenses entered into by Sirius XM is incorrect. To begin with, at the time that I authored my declaration in February 2015, Sirius XM had not entered into or disclosed any direct license it had procured for the use of pre-1972 recordings. Accordingly, there were no pre-1972 recordings covered by direct licenses to be excluded from my analysis. Based on documents produced by Sirius XM in April 2015, Sirius XM now claims that it has entered into approximately eight of those licenses. However, the existence of those licenses does not alter the fundamental workability of my methodology, which can be

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used to calculate and then exclude any revenues attributable to those licenses based on the relative number of plays or performances of any pre-1972 recordings that they encompass.

6. Mr. Ugone's contention regarding "implied licenses" is incorrect. My understanding is that Sirius XM has previously testified that it had no licenses for any pre-1972 recordings, and that this testimony was not limited to written licenses. I also understand that the only intervening change between when that testimony was given and now has been the procurement of licenses mentioned in paragraph 5 above. In any event, my methodology can be used to calculate and then exclude revenues attributable to any license, whether implied or otherwise, based on the relative number of plays or performances of any pre-1972 recordings that they encompass.

7. Mr. Ugone argues that the revenue base I have relied on to calculate revenues attributable to pre-1972 recordings includes revenue derived from Sirius XM's non-music channels and Sirius XM's own unique efforts. Mr. Ugone's argument is undermined by the two applicable proceedings before the Copyright Royalty Board (Satellite I and Satellite II) or 37 C.F.R. §§ 382.11 and 382.12. The revenue base I have relied on is the defined base of "Gross Revenues," calculated in accordance with 37 C.F.R. § 382.11, which has been vetted in both Satellite I and Satellite II following extensive economic testimony in order to "unambiguously relate the fee charged for a service that an SDARS provided to the value of the sound recording performance rights covered by the statutory license." Satellite II, 78 Federal Register, No. 74 at p. 23072. This definition was fully supported by Sirius XM. As Mr. Frear testified in his Written Rebuttal Testimony in the Satellite II proceeding, "[t]he regulations thus define 'Gross Revenue' through a variety of exclusions in order to 'more clearly delineate the revenues related to the value of the sound recording performance rights at issue'" and represent a "carefully tailored approach to reportable revenues." (Ex. G)

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8. Finally, Mr. Ugone notes that I have not deducted costs in preparing my analysis. He is correct, but only because I was asked to assume that costs are not deductible under California law. Even if I had been asked to assume that costs were deductible, however, I would not have deducted the costs specifically identified by Mr. Ugone, but rather only the incremental costs that were incurred as a result of Sirius XM's use of pre-1972 sound recordings. From an economic point of view, the fixed costs and general operating expenses that Mr. Ugone outlines would have been incurred by Sirius XM even if it had never exploited a single pre-1972 recording. In my opinion, Mr. Ugone should have focused on Mr. Frear's testimony in this case claiming that the costs Sirius XM incurred between 2009 and 2014 as a result of its use of pre-1972 recordings were approximately $13 million. (Dkt 89 ¶ 7, Decl. of David J. Frear In Opposition to Plaintiff's Motion for Summary Judgment).

II. The Methodology of Calculating Revenue Attributable to Pre-1972 Recordings Based on Relative Plays or Performances is Economically Sound and Applies Equally to Calculating Revenue Attributable to any Recording or Group of Recordings.

9. In support of his assertion that I have not identified revenues "attributable to" Sirius XM's use of pre-'72 recordings, Mr. Ugone argues that different songs within different genres "may have different values to Sirius XM" and that "to conduct a reliable analysis from an economic perspective, [one] would have needed to develop (or at least propose) a model that attributed weights to each Pre-1972 Recording based on the artist, its popularity, the time of day it was played, and the channel on which it was played, among other considerations." (Ugone Decl. pp. 9-13) Mr. Ugone has failed to appreciate that the equal weighting of revenue attributable to any single "play" or "performance" of a recording allows for just such a determination of a recording's relative value, as the relative "weight" to be given to any recording in terms of total

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revenue is a function of how many times that recording is played or performed.[1] Any single play of a recording has the same revenue "value to Sirius XM" as any single play of any other recording because Sirius XM makes an economic choice to play that recording rather than another recording in order to maximize subscription revenue. Similarly, any single performance of a recording to a subscriber (who Sirius XM tracks through its internet service) has the same revenue value as any other single performance of a recording because that is what the subscriber has chosen to listen to at that time rather than some other recording.

10. Sirius XM is a rational economic actor which seeks to maximize its subscription revenue with an optimal playlist. It decides whether or not and how often to play a particular recording as opposed to any other recording. Each decision to play a recording reflects an economic choice to exploit that recording rather than another. If Sirius XM decides that its listeners do not want to hear a recording, it will not play that recording and no revenue will be attributable to that recording. If Sirius XM decides that its listeners want to hear one recording 1,000 times and another recording one time, then 1,000 times more revenue is attributable to the first recording under my methodology. At the same time, Sirius XM has also decided that it is economically

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[1] As explained in Sirius XM's Supplemental Responses to Flo & Eddie's Second Set of Interrogatories attached to my opening declaration as **Ex. E,** "plays" refers to the number of times a sound recording is played on the Satellite radio service "regardless of the number of listeners to the play" (because Sirius XM cannot yet track who is listening to what in their car). "Performances" refers to the number of times subscribers to Sirius XM's internet service listen to a sound recording. By 2014, more than six million Sirius XM Satellite subscribers also subscribed to its internet simulcast of Satellite radio channels, which is a very large representative sample whereby Sirius XM can track consumption of the recordings it plays on its Satellite service. Ex E. at pp. 9-10 and Attachment B thereto. Sirius XM tracks "transmissions of sound recordings on the Sirius and XM internet radio services and… count[s] every listen to a sound recording as a separate 'performance,' e.g. if ten subscribers listened to the same recording, that is counted as ten 'performances.'" Ex E. at pp. 9-10 and Attachment C thereto.

advantageous to play the second recording one time rather than playing the first record 1,001 times, indicating that even the less popular recording had an equivalent value to Sirius XM with respect to that play. The relative popularity and value of the recordings are reflected in the number of times they are chosen to be played or performed, but the revenue per play or performance remains constant.

11. David Frear, the Chief Financial Officer of Sirius XM, was the original architect of this methodology, and he determined it to be "the most reasonable and logical way" "to account for the proportion of [its] subscription fees attributable to the performance of Pre-1972 Recordings." As Mr. Frear declared:

> Because we pay for the federal statutory license under a percentage of revenue formula, we needed a way to reduce our revenue (and thus our payments to SoundExchange) to account for the proportion of our subscription fees attributable to the performance of Pre-1972 Recordings that are not covered by the Section 114 license. In the 2007 proceeding, the CRB adopted a definition of revenue that exempted revenues from programming "exempt from any license requirement" or "separately licensed." We understood the former to allow a deduction from the revenue base on account of performances of Pre-1972 Recordings (which are not subject to any "license requirement") and reduced the revenue base upon which the statutory rate is applied to reflect such performances. (Specifically, we used a straight pro-ration: if 12% percent of our plays of sound recordings in a particular month were Pre-1972 Recordings, we reduced the revenue base – and thus the payment to SoundExchange – by 12%). We did so because we believed that to be the most reasonable and logical way to implement the above-mentioned revenue exclusion; but the issue of how to account for performances of Pre-1972

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> Recordings was not the focus of either side's trial presentation before the CRB in 2007, and the Copyright Royalty Judges therefore did not explicitly identify the specific mechanism a service should use to reduce its revenue base on account of such performances.

(Dkt 89, ¶ 11, Decl. of David J. Frear In Opposition to Plaintiff's Motion for Summary Judgment).

12. The reason that I refer to both "plays" and "performances" is that Sirius XM has toggled between the relative percentages of each in calculating its revenue attributable to pre-1972 recordings. From October 2009 through September 2011, Sirius XM calculated the pre-1972 revenue exclusion "based on consumption from Sirius/XM Web player," meaning based on the relative percentage of performances on its Internet service that were of pre-1972 recordings. Ex. E. at Attachment F. From October 2011 through December 2012, Sirius XM calculated the pre-1972 revenue exclusion "based on weighted average playlist of Sirius and XM SDARS," meaning based on the relative percentage of plays on its Satellite service that were of pre-1972 recordings. Following the Satellite II decision effective January 1, 2013, the pre-1972 revenue exclusion has been calculated by "dividing the Internet Performances of Pre-1972 Sound Recordings on the [corresponding Satellite] Channels by the total number of Internet Performances of all sound recordings on the…Channels." 37 C.F.R. § 382.12.

13. Whether based on plays or performances, the mathematical equation used by Sirius XM to calculate the amount of the pre-1972 exclusion attributes the same amount of revenue to each play or performance of any single recording regardless of its popularity and regardless of whether it is a pre-1972 or post-1972 recording. The relative popularity and value of the recordings is automatically accounted for by having been chosen to be played more times by Sirius XM on its satellite service and listened to more times by its subscribers as measured by the number of performances tracked on its Internet service.

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14. Mr. Ugone argues that my methodology does not provide for the calculation of the revenues attributable to The Turtles' recordings or to any other class members' respective recordings. That is incorrect. The methodology used to determine the revenue attributable to pre-1972 recordings as a whole is the same methodology for determining the revenue attributable to any particular recording or group of recordings owned by members of the class; namely, the percentage of plays or performances of any one class member's recordings, whether it be The Turtles or another artist, as compared to total plays or performances of all other class members' recordings.

15. Mr. Ugone argues that I have not taken into account owners of pre-1972 recordings who do not fit within the class definition of owners whose recordings are unlicensed – namely, owners who have expressly licensed their pre-1972 recordings to Sirius XM and "implied" licensors. I have reviewed the Summary Judgment Rulings in both this case and in New York, as well as the relevant undisputed facts to the effect that Sirius XM does not license pre-1972 recordings. I have also read Mr. Frear's deposition testimony in which he testified that Sirius XM does not license pre-1972 recordings. When I wrote my declaration, I understood there were no licenses of pre-1972 recordings to be excluded. Thereafter, in April 2015, Sirius XM identified that it had just entered into approximately eight direct licenses. The existence of these new licenses does not alter my methodology. The same methodology would be used to calculate and then exclude revenues attributable to such licensor's recordings based on the relative number of plays or performances of that licensor's recordings.

16. Similarly, as for "implied licenses," I understand that Sirius XM has affirmed there are none, but if any were found to exist, the same methodology would be used to calculate and then exclude revenues attributable to any such purported licensor's recordings based on the relative number of plays or performances of those recordings. My methodology is both scalable and applicable to calculating the exclusion of revenue

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attributable to any recordings or class of recordings in the same way Sirius XM uses it to calculate and then exclude revenues attributable to pre-1972 recordings.

III. "Gross Revenues" As Defined At 37 C.F.R. § 382.11 Is The Appropriate Revenue Base Against Which To Calculate Revenues Attributable to Pre-1972 Recordings.

17. Mr. Ugone argues that the revenue base I have relied on to calculate revenues attributable to pre-1972 recordings includes revenue derived from Sirius XM's non-music channels and Sirius XM's own unique efforts. Mr. Ugone's argument fails to account for the findings in Satellite I and Satellite II, as well as 37 C.F.R. §§ 382.11 and 382.12. "Gross Revenues," calculated in accordance with 37 C.F.R. § 382.11, has been vetted by the Copyright Royalty Board in both Satellite I and Satellite II following extensive economic testimony in order to "unambiguously relate the fee charged for a service that an SDARS provided to the value of the sound recording performance rights covered by the statutory license." Satellite II, 78 Federal Register, No. 74 at p. 23072.

18. This definition of Gross Revenue was fully supported by Sirius XM in Satellite II. As Mr. Frear testified in his related Written Rebuttal Testimony, attached hereto as **Ex. G**, "[t]he regulations thus define 'Gross Revenue' through a variety of exclusions in order to 'more clearly delineate the revenues related to the value of the sound recording performance rights at issue'" and represent a "carefully tailored approach to reportable revenues." At paragraphs 14-34 of his Written Rebuttal Testimony, Mr. Frear explains, in arguing against SoundExchange's proposed changes, how the definition of Gross Revenues fairly limits the base to revenues derived from sound recordings. *Id.*

19. Mr. Frear is correct. Under the definition of "Gross Revenues" as defined at 37 C.F.R. § 382.11, the definition expressly excludes advertising revenues attributable to channels that "use only incidental performances of sound recordings" and "channels, programming, products and/or other services offered for a separate charge where such

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channels use only incidental performances of sound recordings." This definition was designed to assure that the revenue base was related to the value of sound recording performance rights. It also provides Sirius XM with an element of discretion to assure that it is not paying royalties on subscription revenues it believes are not related to the value of sound recordings by offering non-music channels for a separate charge, such as it does for Howard Stern, premium sports packages, and other premium services.

20. Mr. Ugone notes that Sirius XM includes certain news, talk and sports channels in its basic subscription package. However, these channels are supported by advertising revenue (which is expressly excluded from "Gross Revenues") and, as Mr. Ugone argues when drawing a comparison with Pandora, listeners generally do not pay subscription fees for advertising supported services. They either tolerate the advertising or pay a subscription fee in order to not to have to listen to advertising. Here, Sirius XM has made an economic decision to bundle certain advertising supported non-music channels with its music channels rather than to provide them for a separate charge. That suggests to me as an expert in economics, business and finance that these ad-supported non-music channels do not generate subscription revenue as distinct from advertising revenue.

21. As noted in my prior declaration, in its responses to interrogatories, Sirius XM has provided on a monthly basis "the revenue base(s) against which Sirius XM applied the deduction for pre-1972 recordings" calculated in accordance with the definition of Gross Revenues, subject to that further exclusion. (Ex. E at 17 and Attachment G) Sirius XM has identified a specific amount of revenue that it says is attributable to the use of pre-1972 recordings, which is a fraction of the revenue on Attachment G in accordance with Attachment F. I did not exclude any amounts from Attachment G or from my calculation of revenues attributable to pre-1972 sound recordings to account for the possibility that some of that revenue is not related to the

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value of sound recordings. I observed no economic basis for doing so and it would be contrary to Sirius XM's "carefully tailored approach to reportable revenues."

IV. Deduction of Costs.

22. I have been asked to assume that costs are not deductible under California law. If I am asked to assume in the alternative that costs are deductible, it would be my opinion that only the additional incremental costs that were incurred as a result of Sirius XM's use of pre-1972 sound recordings are deductible. From an economic point of view, if one compares Sirius XM's costs in the current state where it uses pre-1972 sound recordings to an alternative state where it does not, Sirius XM's fixed costs (such as satellite costs and general operating expenses Mr. Ugone outlines) are not avoidable. These costs are not incurred as a result of using the pre-1972 sound recordings. Not using pre-1972 sound recordings would not allow Sirius XM to avoid those costs.

23. Moreover, Mr. Frear made the following declaration in this case while explaining the prejudice Sirius XM allegedly suffered because owners of pre-1972 recordings failed to object to its unlicensed use of their recordings: "[B]etween 2009 and 2014 Sirius XM has spent over $2 million per year (and more than $13 million in total) solely on operating expenses related to five channels that feature Pre-1972 Recordings either exclusively…or predominantly…." (Dkt 89 at ¶ 7, Decl. of David J. Frear In Support of Sirius XM's Opposition to Plaintiff's Motion for Summary Judgment). These incremental costs, which would be properly deductible from an economic point of view, are the only incremental costs which Sirius XM has identified.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on May 6, 2015 at Los Angeles, California.

Michael Wallace

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EXHIBIT G

Exhibit G
PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2011-1 CRB PSS/Satellite II**

WRITTEN REBUTTAL TESTIMONY OF DAVID J. FREAR

(On behalf of Sirius XM Radio Inc.)

Introduction

1. My name is David J. Frear. I am Executive Vice President and Chief Financial Officer of Sirius XM Radio Inc. ("Sirius XM" or the "Company"). I previously provided testimony during the direct phase of this proceeding.

2. I offer this rebuttal testimony to address several topics raised during the direct phase of this proceeding: (a) the representativeness of Sirius XM's direct licenses with independent record labels, which licenses are proposed by Sirius XM as the most appropriate benchmark to set royalty rates in this proceeding; (b) SoundExchange's proposed revisions to the regulatory definition of "Gross Revenue"; (c) the Company's recent price increase and the Music Royalty Fee; and (d) the portrayal by several SoundExchange experts of the financial prospects of the company as well as the competitive landscape in which it operates.

I. SIRIUS XM'S DIRECT LICENSING PROGRAM

3. Unlike the licenses between the four major record companies and interactive subscription services such as Microsoft Zune, Napster, Rhapsody, Rdio and MOG (which Dr.

Ordover contends to be the appropriate benchmarks for setting rates for Sirius XM),[1] the direct licenses between Sirius XM and the independent record labels involve the same buyer, same sellers, and same rights as are conferred by the statutory license at issue in this proceeding. As a result, they provide the Judges with data that respond directly to the central inquiry in this rate-setting proceeding: the rates that Sirius XM would be expected to pay individual record companies in the absence of a statutory license. Use of the direct licenses as a benchmark avoids the complicated adjustments that Dr. Ordover undertakes (or should have undertaken) to account for the significant differences between the interactive services and Sirius XM. These differences include the conveyance of very different copyright rights (enabling fully interactive and on-demand usage, not limited by the requirements of Section 114's statutory license) and vastly differing cost structures reflecting the far more circumscribed role performed by interactive services in the delivery of music content to subscribers.

4. As set forth in more detail in the Written Rebuttal Testimony of Ronald H. Gertz ("Gertz WRT"), even in the face of SoundExchange's campaign to discourage record companies from signing direct licenses, Sirius XM has executed a total of 85 direct licenses today, all with royalties set between 5 - 7 percent. Notwithstanding SoundExchange's attempts to denigrate the direct licenses as outliers that do not inform the value of the statutory license that is in issue here, these 85 direct licensees are representative of the quality and variety of the sound recordings that are performed by Sirius XM.

5. I understand that SoundExchange suggested during the direct-phase hearing that there is some sort of informational imbalance as between Sirius XM and the independent labels with which it has reached direct licenses. I disagree. I have personally interacted with the senior

[1] *See* Third Corrected and Amended Testimony of Janusz Ordover at ¶¶ 34-36.

executives of a number of these licensors, and can attest to the fact that they are highly-sophisticated and highly-professional business people who fully understood their options. Rather than give away copyright rights for a fraction of their true value, as SoundExchange would suggest, these record companies acted in their profit-maximizing competitive interests. Among other things, they recognized that by entering into direct licenses with Sirius XM, they gained the potential for enhanced airplay and greater exposure for their recording artists.

6. Neither did Sirius XM force a standard set of terms on these licensors. In a number of instances, illustrated by the direct license agreements with [redacted] and [redacted], among others, negotiations resulted in affording licensors provisions that were not included in Sirius XM's initial proposal, including considerable advances and heightened confidentiality protections.

7. In response to Judge Roberts's request that the Company furnish information about the number of top record labels with which it has signed direct licenses, I instructed Music Reports, Inc. ("MRI") to identify the record companies played most frequently on Sirius XM. Table 1 from Mr. Gertz's rebuttal testimony shows that Sirius XM has direct licenses with seven of the top 20-performed labels.

8. As Mr. Gertz also affirms, about 5.8% of the total plays on Sirius XM's satellite radio service in April 2012 were directly licensed. There are two main types of directly-licensed plays: approximately 4.45% of the plays were licensed through the direct licenses discussed above, while the other 1.35% of the plays were covered by (a) waivers from recording artists for live performances (most of which take place at the Sirius XM studios) and subsequent replays of those performances; and (b) direct licenses between Sirius XM and content providers on artist- or

topic-specific Sirius XM channels including the Metropolitan Opera channel, Jimmy Buffet's Margaritaville, and Book Radio.[2]

9. The foregoing data present an incomplete picture of the success to date of the direct license initiative. This is because, as I previously testified, the four "major" record companies – Sony, Universal Music Group, Warner Music Group and EMI – which themselves account for approximately 59% of Sirius XM's identified spins, have not meaningfully responded to our offers to negotiate a direct license. Not a single one of the majors has indicated a serious interest in entering into negotiations over such a license *at any rate*. Rather, by their palpable lack of interest in engaging in meaningful discussions and by their active participation on the Boards of SoundExchange and other industry organizations such as the Recording Industry Association of America, all have signaled their intent to avoid creating additional evidence of a market rate that might undermine SoundExchange's rate advocacy here.

10. Given that the majors have declined to bargain, the true universe against which Sirius XM's success with direct licensing to date should be measured is, at most, that constituting the remaining 41% of the market, *i.e.*, Sirius XM plays of sound recordings of independent labels. Of that universe, Mr. Gertz's testimony reveals that Sirius XM's directly-licensed catalogs account for some 19% of identified spins. Seven of the top-16 remaining labels are directly-licensed, as are nearly one-third (21) of the top 66.

11. Even this adjustment understates Sirius XM's direct license penetration because many independent labels were effectively foreclosed as direct-license candidates given either

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[2] The Book Radio license [redacted]; the Margaritaville license requires [redacted]; the Metropolitan Opera channel [redacted], which provides exclusive rights to live performances, rights to an archive of recorded performances, and various other promotional considerations that are separate from the grants of statutory performance rights at issue here.

their distribution ties to the majors, *see* Gertz WRT at ¶ 9, or their close association to SoundExchange. For example, the top 20 labels include Concord Music Group (the former employer of Jonathan Bender, SoundExchange's COO) and Beggars Group (home of Simon Wheeler, who testified on behalf of SoundExchange in *Webcasting II*).

12. The Company is engaged in the significant process of making available to Sirius XM programmers the extensive data reflecting which artists' sound recordings are covered by a direct licensing relationship with the Company. Over time, this effort will enable the Company to take fuller advantage of these direct licenses by increasing its performances of directly-licensed sound recordings – consistent with maintaining our programming quality standards.

13. In response to a question raised by Judge Roberts, I can state unequivocally that Sirius XM is fully committed to the direct licensing program and plans to continue to negotiate with record labels for direct licenses regardless of the outcome of this proceeding (unless the Judges were to adopt a revenue definition of the type proposed by SoundExchange that does not allow Sirius XM to deduct payments for directly-licensed performances from the statutory royalty payments payable to SoundExchange). Sirius XM anticipates that it will incur approximately [redacted] of expenses for calendar year 2012 to pursue its direct licensing program, and we plan to budget approximately [redacted] of expenses for calendar year 2013.

II. SOUNDEXCHANGE SEEKS A HIDDEN RATE INCREASE VIA A CHANGE IN THE DEFINITION OF "GROSS REVENUE" THAT WOULD SWEEP IN HUNDREDS OF MILLIONS OF DOLLARS OF SIRIUS XM REVENUE UNRELATED TO THE STATUTORY LICENSE

14. In *Satellite I*, the Judges recognized that "[i]n order to properly implement a revenue-based metric, a definition of revenue that properly relates the fee to the value of the

rights being provided is required."[3] Accordingly, the Judges designed regulations which recognized that certain performances of sound recordings – such as those that are directly licensed or in the public domain – are not compensable under the statutory license and therefore should be excluded. The regulations thus define "Gross Revenue" through a variety of exclusions in order to "more clearly delineate the revenues related to the value of the sound recording performance rights at issue."[4]

15. SoundExchange seeks to undermine this carefully tailored approach to reportable revenues, and would replace it instead with what would amount to a tax on virtually all of Sirius XM's U.S. revenues from its operations.[5]

16. The supposed rationale for SoundExchange's proposed revisions, according to SoundExchange COO Jonathan Bender, is (i) to simplify administration of the license, and (ii) to eliminate the opportunity for Sirius XM to "manipulate" and "obfuscate" its revenue reporting.[6] However, SoundExchange has provided no evidence that the current definition has proved unworkable in practice (and Mr. Bender admitted on the witness stand that he was not aware of any specific evidence).[7] Nor has SoundExchange explained why it cannot compute revenues using the definition that has been in place for six years and resolve any potential issues or questions through the routine audits provided for under the regulations. What is more, despite

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[3] *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, Docket No. 2006-1 CRB DSTRA ("*Satellite I*"), Fed. Reg. Vol. 73, No. 16 p. 4087 (Jan. 24, 2008).

[4] *Id.*

[5] *See Direct Written Testimony of Jonathan Bender* ("Bender WDT"), page 16 (SoundExchange proposal designed to "approximat[e] Sirius XM's total revenues from the operation of an SDARS in the U.S.").

[6] *Id.*

[7] *See* Direct Phase Hearing Transcript ("Hearing Tr.") at 2501-04.

the many insinuations contained in his testimony, Mr. Bender concededly presented no evidence of any improper practices by Sirius XM warranting the sweeping changes SoundExchange proposes.[8]

17. Adopting the revenue definition proposed by SoundExchange would instead accomplish a number of wholly inappropriate outcomes, including: (i) without any accompanying increase in the royalty rate, generate more than a 30% increase in fees payable by Sirius XM in comparison to the fees payable under the current revenue definition, (ii) create copyright royalty payment obligations with respect to separately-priced sports, talk and other programming that make only incidental use of sound recordings, (iii) undermine Sirius XM's direct license program, and (iv) entitle record companies to royalties for performances of sound recordings in the public domain.

18. The premise of Mr. Bender's testimony appears to be that Sirius XM currently is obligated to make payments to SoundExchange based on virtually all of its revenues from whatever source, but has failed to do so. Mr. Bender makes much of the fact that Sirius XM's revenue, as reported to SoundExchange, is less than its enterprise-wide revenue as reported in its public filings.[9] But the total revenue reported in Sirius XM's Annual Report on Form 10-K includes significant revenue for programming and services that is unrelated to the statutory license and is therefore properly excluded from the base revenues to which the statutory royalty rate is applied. Examples include: revenue earned from the sale of radios and hardware accessories; revenue earned from business establishment services and internet webcasting; advertising revenue from non-music stations; Canadian revenue; and – most importantly –

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[8] *Id.*

[9] *See* Bender WDT pp. 5-6.

revenue from performances that are directly licensed or not subject to federal copyright. SoundExchange's contention that excluding such revenue somehow evidences an overstatement of deductions misapprehends the Judges' rulings in *Satellite I* and the underlying logic of the current regulations, which the Company's reports and payments to SoundExchange have faithfully implemented.

19. The definitional changes proposed by SoundExchange – basically eliminating Sirius XM's ability to exclude much of the revenue described above – would have swept in some ***$700 million*** a year (at 2011 levels) in unrelated revenue and nearly ***$54 million*** in additional royalties based on revenues having nothing to do with music. In other words, under the guise of "simplifying" reporting, SoundExchange seeks to award itself a rate increase of more than 30%. Were SoundExchange's proposed revenue definition to be adopted, I estimate that SoundExchange would garner over ***$300 million in undeserved royalties above and beyond those to which it legitimately would be entitled over the five-year license period in issue, assuming 2012 royalty fee levels***. SoundExchange provides no principled rationale for this fee windfall, and a review of the specifics of SoundExchange's proposal only underscores its impropriety.

A. Revenue for Separately Priced Sports, Talk and Entertainment Channels

20. SoundExchange proposes eliminating sub-clause 3(vi)(B) of 37 C.F.R. 382.11, which excludes revenues recognized by Sirius XM for "channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings." The principal result of this change would be to sweep in revenue from Sirius XM's separately priced "Premier" packages, which provide access to

marquee non-music programming such as Howard Stern and NFL games, as well as from "News, Sports & Talk" packages, which have no music channels.

21. SoundExchange's proposed change represents an unwarranted attempt to take a cut of separately charged subscription revenue earned for programming having no relation to statutorily licensed performances of sound recordings – a result directly at odds with the Judges' *Satellite I* ruling, which explicitly entitled Sirius XM to price such channels separately in order that such revenue would not come into the SoundExchange revenue pool.[10] Sirius XM's revenue from this category in 2012 is budgeted at [redacted]; at the current 8% rate, including this revenue in the base would generate an additional [redacted] per year in royalty obligations to SoundExchange and its members. There is no rationale whatsoever for such a payout.

B. Performances of Sound Recordings Separately Licensed under a Direct License or Exempt from a License Requirement

22. SoundExchange also proposes changing sub-clause 3(vi)(D) to eliminate the current exclusion of revenue recognized from "[c]hannels, programming, products and/or other services for which the performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement or is separately licensed." The only exception SoundExchange proposes to allow is for revenue earned where the separately licensed service is "priced separately from Licensee's SDARS, and offered at the same price both to subscribers to Licensee's SDARS and persons who are not subscribers to Licensee's SDARS."

23. The impact of this change would be to allow SoundExchange to collect royalties for performances that are not subject to the SDARS statutory license either because Sirius XM has directly licensed them from the copyright holder, or because they are not protected by federal copyright and thus not covered by the Section 114 statutory license (chiefly sound recordings

[10] *See Satellite I*, Fed. Reg. Vol. 73, No. 16 p. 4087.

fixed prior to February 15, 1972). In 2011, [redacted] of Sirius XM performances fell into one of these non-covered categories, and Sirius XM reduced its reportable subscription revenue (less bad debt expenses and transaction fees) by the same percentage – resulting in a deduction of [redacted] in revenue (and a savings of [redacted] in royalties) for the year.[11] The deleterious effect this change would have on Sirius XM's ongoing direct licensing activities is evident. Absent such a deduction, Sirius XM would be forced to double-pay for the directly-licensed performances: once directly to the copyright owner (via the direct license), and again to SoundExchange under the statutory license (where revenue allocable to such performances would be included in the revenue base). As Mr. Bender conceded, this would create a major disincentive to direct licensing.[12] Every new license Sirius XM signs only increases the amount of double-payment injury the Company stands to suffer under SoundExchange's proposed definition of revenue.

24. As set forth above, under the current regulations, which contain no such disincentive, Sirius XM's direct licensing program has continued to grow: in April 2012, our satellite radio performances of directly licensed and public domain (pre-1972) works – works *not* licensed (or licensable) via SoundExchange – totaled over [redacted] of plays, corresponding to more than [redacted] on an annualized basis).

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[11] The lost deduction and added royalties would have been even greater under SoundExchange's proposed revenue definition because significantly more revenue would be included in the first instance, prior to the deduction.

[12] *See* Hearing Tr. at 2510. It would also unfairly reward labels that decline to enter into direct licenses, since they would divide the full, un-reduced pool of Sirius XM royalties over a smaller number of performances (because the directly licensed performances presumably would be excluded from SoundExchange distributions).

C. Internet Webcasting Revenue

25. As noted above, SoundExchange's proposed change to sub-clause 3(vi)(D) would also prevent Sirius XM from excluding revenue for its webcasting and other non-SDARS services unless "such services are provided on a standalone basis." Because SDARS subscribers pay only $3.50 month for a "linked" webcasting subscription, as opposed to the $14.49 charged to standalone subscribers, the revenue for the linked subscribers – despite having nothing to do with the SDARS statutory license, and despite being separately licensed – would come into the revenue base and be paid as if it were revenue earned for performances on the satellite radio service.

26. In other words, Sirius XM would pay twice for webcasts: once through the per-performance fees charged for the webcasting statutory license, and again when the revenue for the webcasting service is included in the SDARS revenue base. Sirius XM projects that revenue from linked subscribers will come to approximately [redacted] in 2012. At the current 8% rate, this would result in an additional [redacted] payment to SoundExchange to which it is not entitled. There can be no possible economic rationale for such a double payment. Sirius XM pays for all performances streamed to its webcasting subscribers – regardless of the retail price they pay – according to the per-play fee under the webcasting statutory license. Whether webcasting subscribers pay $3.50, $14.49 or $.01 is irrelevant. SoundExchange's proposal is an unjustified overreach for a double payment it does not deserve.[13]

[13] Similarly, SoundExchange proposes eliminating the exclusion for revenue from data services, currently found at sub-clause 3(vi)(A) if such services are priced differently for satellite radio and "standalone" subscribers. The category represents revenue from a variety of Sirius XM services other than its satellite radio service: NavTraffic, NavWeather, Sirius XM Traffic, Sirius XM Travel Link, XMWX Marine, Sirius Marine Weather, and XMWX Aviation, at least some of which are indeed priced differently. Like the webcasting revenue discussed above, there is no rationale that would entitle SoundExchange to claim a share of this revenue – a projected [redacted]

D. Equipment Revenue

27. SoundExchange has also proposed to eliminate the current exclusion of Sirius XM revenue attributable to equipment sales found in sub-clause (3)(i) and to explicitly *include* "[r]evenues attributable to the sale, lease or other distribution of equipment and/or other technology for use by U.S. subscribers to receive or play the SDARS service, including any shipping and handling fees therefor." This change – which would sweep in some [redacted] in revenue and generate [redacted] in additional royalties at 2012 levels – also is unjustified.[14]

28. Sirius XM is unable to separate revenue earned for devices that receive services *other* than (or in addition to) satellite radio programming – such as internet webcasting, weather, and traffic services – meaning that revenue unrelated to the SDARS statutory license would inevitably be swept in. More fundamentally, there is no reason that SoundExchange should take a share of revenue even for devices that do receive satellite radio services. SoundExchange does not take a cut of equipment revenue earned by webcasters or preexisting subscription services. Moreover, in the interactive services market that SoundExchange itself offers as a benchmark, where the receiving devices (personal computers, mobile phones, iPads, etc.) are sold separately, the record companies quite obviously receive no cut of the equipment proceeds. There is no

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[redacted] in 2012 – under the satellite radio statutory license solely because it may be discounted for satellite radio subscribers.

[14] Sirius XM has invested hundreds of millions of dollars in developing its receivers, and continues to pay significant subsidies to automakers for their pre-installation of radios in new cars – far more than it can expect to recoup through the relatively small amount it earns from current equipment sales. Given the tremendous net losses Sirius XM sustains in developing and distributing its receivers, it would be unfair in the extreme for SoundExchange to be paid a share of equipment revenue that only partially offsets the vastly greater costs incurred by Sirius XM in manufacturing and distributing radios – especially when SoundExchange shares fully in the subscription revenue generated by such investment. Were revenue from equipment sales to be including in the definition of Gross Revenues, it would only be fair to allow Sirius XM to exclude the costs of such equipment.

reason SoundExchange should receive a share of the Company's equipment revenue simply because it happens to sell receiving equipment in addition to its SDARS service.

E. Transaction Fees And Bad Debt Expense

29. SoundExchange also proposes to eliminate the current exclusions for transaction fees (sub-clause 3(iv)) and bad debt expense (sub-clause 3(v)). Transaction fees relate to consumers who pay Sirius XM via credit card; although Sirius XM recognizes subscription revenue for such fees, the credit card companies deduct their fees off the top prior to passing the revenue to Sirius XM. As a result, the revenue actually collected by Sirius XM is less than what is initially recognized. Similarly, bad debt expense reflects revenue that was initially booked as earned but that was not ultimately collected from the customer (and thus is, as a technical accounting matter, booked as a corresponding expense). SoundExchange proposes that it and its members should get a cut of revenue that is never actually collected – totaling [redacted] (credit card fees) and [redacted] (bad debt) in 2012.

30. SoundExchange's proposed elimination of these exclusions from the revenue definition is unfair and would result in a windfall. While credit card fees and uncollectible bad debt differ from other exclusions (each is technically an allowance for an expense paid rather than an exclusion of revenue earned), these exclusions properly look to ensure that Sirius XM need only report revenue it actually collects. In this regard, credit card fees and bad debt are similar to the allowance for a deduction of advertising commissions from advertising revenue, which SoundExchange's proposal retains in 1(ii). The exclusion for bad debt is not only common to revenue-based agreements, but consistent with the definition that applies to New Subscription Services (37 C.F.R. § 383.2), Preexisting Subscription Services (37 C.F.R. § 382.2),

and the Sirius XM agreement with SoundExchange for residential cable music service, each of which requires the inclusion of bad debt only if it is ultimately recovered.

F. Other User Fees and Taxes Unrelated to Statutorily Licensed Performances

31. This category includes a variety of fees that the Company charges for various activities related to customer account administration. Activation fees are charged, in certain cases, when a user activates a subscription, and partially offset the costs of setting up and administering a new account. Invoice fees are charged if a user opts for a periodic invoice rather than paying via credit card. Swap fees are charged if a user changes out a radio on her account. Early termination fees are charged if a user terminates service on a discounted equipment plus subscription offer prior to the minimum term required by the offer. These fees – projected to total about [redacted] in 2012 – are not included under the current definition of Gross Revenues either because they do not constitute "subscription revenue" in the first instance, or because the current definition explicitly excludes "[s]ales and use taxes, shipping and handling, credit card, invoice and fulfillment service fees" (clause (3)(iv)). These fees are not a profit center for Sirius XM; rather, they simply enable the Company to recover a portion of its equipment subsidies, call center and other costs it incurs to initiate subscription revenues.

32. SoundExchange seeks to include in the revenue definition all fees and payments from Sirius XM subscribers. This unwarranted expansion of the definition would result in egregious overreaching that would allow SoundExchange to share in revenue that is totally unrelated to performances under the Section 114 license – Gross Tax Receipts, which just gets passed through to the appropriate taxing authority. There is no relation between such

administrative fees and the performances of music licensed under the statutory license. SoundExchange has no entitlement to any of the forgoing fees and taxes.[15]

G. Reporting of Aggregate Tuning Hours Data

33. SoundExchange's Mr. Bender testified that Sirius XM has not reported Aggregate Tuning Hours (ATH) for its SDARS channels, as required under the regulations.[16] What Mr. Bender did not say is that this practice has been pursuant to a longstanding *agreement* with SoundExchange in which Sirius XM has been excused from ATH reporting because the service is a one-way broadcast. As SoundExchange is well aware, Sirius XM does not know who is listening to any of its channels at any time, and reporting a number of performances or hours of listening is technologically impossible. In accordance with this reality, a November 24, 2008 letter agreement between SoundExchange and Sirius XM specifically excluded aggregate tuning hours per channel from the required SDARS reporting data elements (though the Company was required to – and does – report ATH for its webcasting services). The November 24, 2008 letter agreement is attached as SXM Rebuttal Exhibit 1.

34. Subsequent to Mr. Bender's testimony, in a letter dated June 22, 2012, SoundExchange informed the Company that it was unilaterally renouncing this prior 2008 agreement in favor of demanding that Sirius XM comply with every reporting requirement to the letter, including reporting ATH for all its satellite radio channels. This letter is attached hereto as SXM Rebuttal Exhibit 2. Given that SoundExchange suddenly appears intent on holding the

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[15] SoundExchange has also proposed a change to § 382.13(d), which would enable it to collect separate late fees for the payment and for the statement of account. The statement of account serves no purpose that would justify charging a separate late fee and as the Judges stated in *Satellite I* in rejecting a similar request from SoundExchange, such a double fee would be "onerous." *Satellite I*, Fed. Reg. Vol. 73, No. 16 p. 4087 (Jan. 24, 2008).

[16] Hearing Tr. at 2506.

Company to a requirement with which it is physically impossible to comply, Sirius XM will recommend a change to sub-clause (d)(2)(vii) of 37 C.F.R. 370.4 to make clear that the requirement of reporting ATH or performances does not apply to SDARS.[17]

III. THE MUSIC ROYALTY FEE AND PRICE INCREASE

35. In its direct case, SoundExchange sought to leave the impression that Sirius XM will be in a position to readily pass along to its customers any rate increase that may be imposed by the Judges. The principal bases for this argument appear to be the Company's experience with the U.S. Music Royalty Fee ("MRF") instituted in July 2009 and the recent price increase which Sirius XM began implementing in January 2012. There is no support for the notion that a significantly increased royalty fee – let alone one of the magnitude of approximately two billion dollars in estimated incremental fees sought by SoundExchange – simply can be passed on without increasing subscriber churn and seriously affecting the Company's profitability or the long term viability of the business. Our experience to date with the MRF and recent price increase (which occurred after my direct testimony was submitted) in no way alters that conclusion.

A. Implementation of the MRF

36. The merger of Sirius Satellite Radio Inc. and XM Satellite Holdings Inc. required, among other things, approval from the Federal Communications Commission ("FCC") because it would require the companies to transfer their satellite radio licenses to the merged company. The companies submitted their license transfer application to the FCC on March 20, 2007.

[17] It appears plain that the requirement that Sirius XM report ATH is essentially an oversight in the regulations – the result of a reporting regulation intended to have general applicability to a range of services, all of which (except Sirius XM) can report ATH data.

37. The FCC reviewed the proposed merger and, on July 25, 2008, issued an Order (the "FCC Order") granting the license application as being in the public interest and permitting the necessary license transfers by Sirius and XM. In approving the license transfers, the FCC imposed a number of conditions on the Company, and extracted a series of "voluntary commitments" that Sirius and XM had offered in discussions with the FCC. Among those voluntary commitments, the Company agreed not to raise the retail prices of specified satellite radio programming subscription packages for thirty-six months after the consummation of the merger. However, Sirius and XM requested – and the FCC granted – an exception that allowed the merged company to pass along the significant increases in music royalty costs that had been building since the March 20, 2007 license transfer application.[18]

38. In accordance with the FCC Order, Sirius XM began to charge subscribers the MRF on July 29, 2009. The MRF was set at $1.98 for the $12.95 base subscription package for primary radios and $0.97 for the $8.99 reduced-price subscription for secondary radios. Certain of Sirius XM's other subscription packages, including the "Mostly Music" and "Family Friendly" packages, which had monthly subscription rates lower than $12.95, were charged MRFs that were calculated at approximately 15.3% of those subscription rates (just as $1.98 is approximately 15.3% of the $12.95 base subscription rate at the time). In order to prevent a potential over-recovery of permitted fees, effective December 6, 2010, Sirius XM reduced the amount of the MRF for primary radios on the base subscription from $1.98 to $1.40.

39. For the period 2007 through the end of 2011, the MRF permitted Sirius XM to recover approximately 53% of the satellite radio royalties incurred to SoundExchange and other

[18] The FCC Order also permitted recovery of certain device recording fees, which relate to fees paid to certain record companies for devices capable of recording functionality. These device recording fees were not included in the calculation of the pool of increased royalty expenses that were recoverable through the MRF, which I describe below.

PROs; in 2012, the Company expects to recover approximately 85% of the costs incurred in this category.

40. The Company fully expected to experience subscriber churn as the result of the implementation of the MRF, and we are certain that the Company did. There is simply no way to quantify how many subscribers left specifically as the result of the MRF, particularly because it was implemented during one of the worst economic downturns in United States history and shortly after new vehicle sales in the U.S. reached thirty-year lows. The Company has made no decision as to whether, were the Judges to implement a rate increase over the 2013-2017 period, it would seek to recover all or part of that increase via this MRF mechanism nor has it analyzed the impact on customer churn were it to attempt to do so.

B. Sirius XM's Price Increase

41. After the submission of the direct testimony in this case, Sirius XM implemented its first post-merger price increase, increasing the base annual subscription price from $12.95 to $14.49 effective January 1, 2012.[19] The increase was first announced in approximately September 2011, and subscribers were personally notified, as required by law, at varying times depending on the expiration of their current subscription plans. Notifications began to roll out in approximately October 2011.

42. To be clear, the Company expects that the price increase will have an impact on Sirius XM's self-pay churn levels; however, it is simply too early to tell what that impact will be. The price increase has now been in effect for certain subscribers for approximately six months, but because their subscriptions expire at varying points in time, only about a third of the

[19] The MRF represents a smaller percentage of the base subscription price after the price increase (*i.e.*, it is now 9.8% of the subscription price of plans that include musical performances), and is currently $1.42 on our base $14.49 per month subscriptions and $0.98 for plans that are eligible for the second radio discount.

Company's overall subscriber base has been affected by the increase. That is because certain of the Company's subscribers are on a multi-month, annual, or even longer-term subscription plan, and their prices will not be increased until their current subscriptions expire. It will take approximately 18 months from the implementation of the price increase – or approximately in the middle of 2013 – for 85-90% of the Company's subscriber base to experience the price increase, and the new pricing structure will not be fully implemented on the entire subscriber base for some time after that. Thus, it will take at least that long (and likely longer) for the impact of that price increase to be fully reflected in the Company's subscriber metrics such as churn and conversion rates.

43. SoundExchange apparently believes that because the Company has made some optimistic statements about churn levels in the near future, its subscriber base is somehow impervious to price increases and will simply continue to pay even if their out-of-pocket payments increase in the future. SoundExchange misapprehends basic principles of economics as well as the economics that are specific to the Company's business. Sirius XM's satellite radio service is a luxury, not a necessity – and in the current uncertain economic climate, it simply is not a foregone conclusion that subscribers will continue to pay for that luxury irrespective of price. The Company's annual churn rate approaches 25% of self-paying subscribers. As Mr. Meyer testified in the direct phase of this proceeding,[20] approximately two-thirds of Sirius XM subscribers churn because they just do not want to pay. In fact, the Company's churn rate is now significantly higher than it was as the time of the last proceeding. The increasing availability of free-to-the-consumer music listening alternatives in the face of rising prices for satellite radio is ample evidence of the robust competition faced by Sirius XM. It defies reason and logic to

[20] Written Direct Testimony of James E. Meyer at ¶ 64; Hearing Tr. at 560-61.

assert that any further price increases the Company may impose, whether resulting from a rate increase in this proceeding or otherwise, will have no discernible impact on customer retention.

44. The music labels benefit from the Company's cautious approach to increasing cost of service to customers. Increased prices dampen demand for the Company's service, effectively shifting listening to free-to-the-consumer competitors. Overwhelmingly, listeners who leave Sirius XM go to terrestrial radio – which doesn't pay a performance royalty – or, to a lesser extent, internet radio competitors who have so far failed to monetize listening to create viable business plans. Such a shift in listening will reduce total royalties paid to artists and labels.

IV. TESTIMONY FROM PROFESSORS LYS AND SIDAK REGARDING SIRIUS XM'S LONG-TERM FINANCIAL PERFORMANCE AND COMPETITIVE LANDSCAPE SHOULD NOT BE CREDITED

45. SoundExchange's experts Professors Thomas Lys and Gregory Sidak suggest that Sirius XM is a recession-proof business. But in reality, Sirius XM is not immune from economic downturns. Moreover, as David Stowell and I noted in our written direct testimony, the Company's long-term performance has, in the past, fallen well short of analysts' long-term predictions, as well as those of economic experts in CRB proceedings. Financial forecasting for the Company beyond a 12- to 18-month period necessarily entails speculation about inherently unknowable events, including changing consumer preferences and spending, new car sales, investment decisions by automotive manufacturers, the ability of competitors (including ones that have yet to emerge) to achieve technical advances that may have the effect of replacing satellite radio in the dashboard and the Company's ability to repay or refinance its substantial debt. For this reason, the Company does not give guidance or projections more than 12 to 18 months in the future; any internal forecasting should not be relied upon for longer-term projections of its performance.

46. Professor Lys's projections for revenue, EBITDA and free cash flow growth are also at odds with the Company's 20-year history and ignore the rapidly changing pressures and risks that the Company faces, including those posed by the terms and amount of its debt that matures before 2017 and the fast-paced technological advances that have led to substantially more competition in its market. Professor Lys incorrectly assumes that the Company functions in a static market of steady, continued revenue growth. The error of this facile assumption is compounded by the remarkable suggestion of Professor Sidak that Sirius XM is virtually immune from competition over the duration of the entire forthcoming rate period. Were that only the case.

47. In just the seven months that have elapsed since my written direct testimony, new agreements have been reached between digital service providers and automakers that will reshape the competitive environment in which Sirius XM operates. For example, in the midst of the direct phase hearing of these very proceedings in June, Verizon Wireless announced the formation of the 4G Venture Forum for Connected Cars, which Toyota, Honda, BMW, Hyundai, and Kia joined, to collaborate and explore ways to directly install connectivity into those manufacturers' vehicles and obviate the need for a user smartphone to receive internet-delivered content. As part of the effort, Verizon also announced plans to purchase Hughes Telematics, a leading in-dash technology provider. Verizon's press releases announcing these efforts are attached hereto as SXM Rebuttal Exhibits 3 and 4. Just a few weeks ago, it was reported that Apple had successfully patented a remote "click wheel" that would allow drivers to operate an iPhone from the steering wheel. These are not upstart companies, but the leading wireless provider and electronics device manufacturer in the country, and they are moving aggressively to provide content in the vehicle.

48. At the same time, Sirius XM's royalty obligations to SoundExchange for sound recording performance rights have risen disproportionately to other expenses of the Company, increasing some 90% since 2007. As I explained in my direct-phase testimony, Sirius XM has been successful in cutting costs in virtually every category, including in all of its non-music content agreements and even its royalty agreements with the musical works performing rights organizations. Royalty obligations to SoundExchange for sound recording performances is the only category of costs that (subject to our direct-license initiative) the Company has not been able to reduce. Since *Satellite I*, Sirius XM has reduced non-music programming costs by [redacted], or [redacted] per year. At the same time, the Company's music programming costs have increased by [redacted], or [redacted] per year.

49. Table 1 below shows actual and projected Gross Revenues (utilizing the existing definition in the regulations) drawn from Sirius XM's actual revenues through 2011 and its projections through 2012. As the Company has not provided guidance beyond 2012, the 2016 figures are SoundExchange's own projections, drawn from the Morgan Stanley projections relied upon by Professor Lys. Table 1 also shows actual and projected music costs, assuming the statutory sound recording performance royalty rate remains at 8%, is reduced to 5%, or is increased to 13%, and non-music costs.

50. Sirius XM began the term of the current license with a ratio of music to non-music costs of approximately [redacted] That ratio has effectively doubled over the term to where the Company expects it to exceed [redacted] in 2012. Today, for a service that Dr. Ordover has testified is evenly split in consumer value, the Company pays [redacted] more for the music content than the non-music content. If the current statutory rate is left unchanged from 8%, by the end of the next license term Sirius XM would, under these various assumptions, pay [redacted] for music as for the equally valuable non-music content it offers. If the bottom end of the SoundExchange range were adopted, even without the revenue definition changes it has requested, Sirius XM would be paying nearly [redacted] for music as for its equally-valuable non-music counterpart. If the current rate were reduced to the 5% rate Sirius XM has proposed, by the end of the term, the Company would still pay more than [redacted] more for music than the contribution Dr. Ordover believes it makes to the consumer value of its service.

51. This result is even harder to justify in light of the lack of success both interactive and non-interactive on-line music listening services have encountered in attracting paying subscribers, despite offering substantially more music than Sirius XM. Pandora, the strongest brand in internet radio with access to more than 900,000 songs, has attracted over 50 million active users to the free component of its service, but only roughly 2% have elected to pay for a $3.99 subscription. iHeartradio attracts 45 million unique visitors by offering access to 14 million songs over a free service with no ads and no subscription. Spotify offers access to 15 million songs but has fewer than three million subscribers worldwide to its $9 unlimited listening tier. On the other hand, Sirius XM, with an active daily play list of less than 50,000 songs, has amassed over 22 million subscribers at $14.49/month. Sirius XM has the most subscribers, who are paying the most money, for access to the smallest music offering. How can one explain this?

52. Many of our on line competitors have been through our offices asking the same question. How did you get so many subscribers? The design of Sirius XM radios and broadcast system delivers 99.9% service availability in the continental U.S., higher than existing cellular networks. Sirius XM's engineering team has smoothly integrated its radios into nearly two-thirds of the cars produced in North America, allowing customers to easily access the content they want. Sirius XM's programming staff curates music to present to the customer in a non-interactive, lean back environment; it carries a human touch not replicated by algorithms. Lastly, the Company has invested in an unparalleled array of talk, news and sports content to bring a unique listening experience that customers cannot replicate on terrestrial radio, online or on smartphones. What our customers value is clearly something significantly more than just music listening.

Exhibit G

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	Docket No. 2011-1 CRB PSS/Satellite II

DECLARATION OF DAVID J. FREAR

I, David J. Frear, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 29th day of June 2012 at New York, New York.

David J. Frear

Exhibit G

soundexchange 1121 FOURTEENTH STREET, NW, SUITE 700, WASHINGTON, DC 20005
P: 202.640.5858 F: 202.640.5859
WWW.SOUNDEXCHANGE.COM

November 24, 2008

BY EMAIL

Patrick Donnelly, Esq.
General Counsel
Sirius XM Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Re: Reports of Use Submitted by Sirius XM for its SDARS, webcasting, and CABSAT services (as defined by 37 C.F.R. Part 383)

Dear Pat:

I am writing to confirm our understanding regarding the Reports of Use submitted pursuant to 37 C.F.R. Part 370 by the Satellite Digital Audio Radio Services ("SDARS"), webcasting services, and new subscription services (as described in 37 C.F.R. Part 383) (referred to herein as its "CABSAT service") operated by Sirius XM Radio Inc., including any subsidiaries (referred to collectively as Sirius XM).

1. Scope of Reports of Use

Under 37 C.F.R. § 370.3, Sirius XM may submit Reports of Use that cover only a two-week period per calendar quarter – that is, a report based on a sample of sound recordings. Nonetheless, Sirius XM is willing to provide Reports of Use covering all sound recordings (with the exceptions set forth below) in each calendar quarter, and to provide additional data not required by § 370.3, in order to accommodate the request of SoundExchange. Sirius XM, however, has asked SoundExchange to accommodate certain operational limitations. First, Sirius XM faces operational limitations related to certain programming provided by third parties. Specifically, Sirius XM has indicated that a subset of the third parties who supply Sirius XM with programming do not provide the information necessary for complete reporting for that programming. Second, Sirius XM has indicated that it faces operational constraints related to channels that it has classified as news, talk, or sports. Under the March 18, 2003, private agreement ("the Private Agreement") between SoundExchange and Sirius Satellite Radio Inc. and XM Satellite Radio Inc., which established the initial reporting obligations for the SDARS, Sirius and XM were not required to provide reporting on channels that they reasonably classified as news, talk or sports. Because the processes established by Sirius XM implement the Private Agreement, Sirius XM explained that it faces substantial operational difficulties in providing reporting on those channels.

circumstances. Specifically, SoundExchange understands that Sirius XM will report at least 90% of all non-incidental performances of sound recordings on channels other than those channels that are reasonably classified as news, talk, or sports, and that the remaining 10% or less of sound recordings performed on such channels will consist primarily of sound recordings performed in connection with programming provided by third parties. SoundExchange further understands that Sirius XM will, consistent with the obligations established under the Private Agreement, undertake commercially reasonable efforts to encourage and contractually require those third parties to provide the information necessary to properly report to SoundExchange, and that Sirius XM will also cooperate with SoundExchange to identify and implement commercially reasonable alternative methods of identifying works transmitted in the course of any such third-party programming. SoundExchange further understands, based on Sirius XM's representations, that the channels that Sirius XM designates as news, talk, or sports do not include a significant number of non-incidental performances of sound recordings within the meaning of the pertinent regulations. Sirius XM understands that SoundExchange may, in the future, ask Sirius XM to consider providing reporting on one or more channels that Sirius XM designates as news, talk, or sports. SoundExchange understands that if SoundExchange requests such additional reporting, Sirius XM may decide in the alternative to provide the sample reporting authorized by the regulations.

This mutual accommodation is not, and shall not be construed as, an admission by SoundExchange that any channels that Sirius XM is not now reporting are in fact reasonably classified as news, talk or sports, or are otherwise properly excluded from the reporting requirements established by 37 C.F.R. § 370.3. This mutual accommodation is not, and shall not be construed as, any evidence regarding any aspect of the rate for any transmissions pursuant to the statutory license set forth in 17 U.S.C. §§ 112 and 114, including, among other things, an admission or any other evidence related to the determination of revenues for purposes of 37 C.F.R. § 382.11 or § 383.2, or for the determination of a compensable performance within the meaning of 37 C.F.R. § 380.2. Sirius XM and SoundExchange recognize that the performance of certain sound recordings may in fact not be reported to SoundExchange. That fact does *not* mean that those performances are or are not compensable within the meaning of the webcasting regulations or that revenues associated with channels or programming in which those performances were made may or may not be excluded from the definition of revenues for purposes of calculating royalties. Likewise, this mutual accommodation shall not be used as evidence in any future proceeding on the question whether any particular channel, station, or program should be subject to a royalty obligation, or whether any particular channel, station, or program, or type of channel, station, or program should be the subject of reporting obligations.

2. Content of Report of Use

The Reports of Use shall include the data elements set forth in Attachment A. Sirius XM shall only be required to provide the catalog number and ISRC code for each sound recording to the extent such information can be provided using commercially reasonable

efforts. SoundExchange further understands that Sirius XM will continue to cooperate with SoundExchange to identify commercially reasonable measures that can further improve the quality of the reporting submitted by Sirius XM.

Sirius XM may submit a principal report of use covering all of its services (namely, its SDARS, webcasting, and CABSAT services), provided that Sirius XM also (i) identifies which channels are available on which services, (ii) provides the aggregate tuning hours on a channel basis for the webcasting reporting, and (iii) separately reports any channel or channels that may not be reported on the principal report of use subject to the limitations described above.

3. Timing of Report of Use

Sirius XM will submit reports of use on a monthly basis, forty five days after the end of each month.

* * *

As discussed above, the understanding set forth here is a mutual accommodation designed to address certain operational and business needs of both parties in a manner that maximizes the benefit to the artists and rights owners to whom SoundExchange distributes royalties. Therefore, the understanding set forth in this letter is not a release or waiver of any claims that may exist, and Sirius XM and SoundExchange expressly reserve any and all rights.

If this letter reflects an accurate description of your understanding, please sign below and return it to me.

We appreciate Sirius XM's cooperation on these matters and I look forward to working with you in the future. Please do not hesitate to let me know if I can be of any assistance.

Best regards,

Colin Rushing
Senior Counsel

Patrick Donnelly
General Counsel
Sirius XM Radio Inc.

Exhibit G

ATTACHMENT A

SDARS REPORTING DATA ELEMENTS

(A) The name of the service or entity;

(B) The channel;

(C) The sound recording title;

(D) The featured recording artist, group, or orchestra;

(E) The retail album title;

(F) The marketing label of the commercially available album or other product on which the sound recording is found;

(G) The catalog number;

(H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ℗ (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(J) The date of transmission;

(K) The time of transmission; and

(L) The release year of the retail album or other product (as opposed to the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ℗ (the letter P in a circle)).

Exhibit G

WEBCASTING REPORTING DATA ELEMENTS

(A) The name of the service or entity;

(B) The channel;

(C) The sound recording title;

(D) The featured recording artist, group, or orchestra;

(E) The retail album title;

(F) The marketing label of the commercially available album or other product on which the sound recording is found;

(G) The catalog number;

(H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ℗ (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(J) The date of transmission;

(K) The time of transmission;

(L) The release year of the retail album or other product (as opposed to the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ℗ (the letter P in a circle)); and,

(M) Aggregate tuning hour per channel.

CABSAT DATA ELEMENTS

(A) The name of the service or entity;

(B) The channel;

(C) The sound recording title;

(D) The featured recording artist, group, or orchestra;

(E) The retail album title;

(F) The marketing label of the commercially available album or other product on which the sound recording is found;

(G) The catalog number;

(H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;

(I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ℗ (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;

(J) The date of transmission;

(K) The time of transmission; and

(L) The release year of the retail album or other product (as opposed to the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ℗ (the letter P in a circle)).

Exhibit G

733 10th Street, NW | 10th Floor | Washington, DC 20001
P: 202.640.5858 | F: 202.640.5859 | SoundExchange.com

June 22, 2012

BY E-MAIL & FEDEX

Patrick Donnelly, Esq.
Executive Vice President and General Counsel
Sirius XM Radio Inc.
36th Floor
1221 Avenue of the Americas
New York, NY 10020

Re: Reports of Use Submitted by Sirius XM

Dear Pat:

We refer to our letter dated November 24, 2008, which summarized certain accommodations made by SoundExchange, Inc. in view of certain operational limitations and constraints identified at that time by Sirius XM Radio, Inc. in its course of providing Reports of Use.

Given that the reporting obligations as set forth in the federal regulations have changed since that time, it is no longer appropriate for those accommodations to remain in place. As you know, at the time that we entered into those accommodations, Sirius XM was not required under the regulations to provide year-round, census reporting, but was willing to do so if SoundExchange provided certain accommodations. Now, however, the regulations *do* require year-round, census reporting. In addition, our letter contemplated that Sirius XM would identify and implement measures to improve the quality of reporting submitted by Sirius. With the time that has passed since our letter, Sirius XM has had ample amount of time to implement such measures.

Therefore, as soon as possible and no later than for transmissions made in August 2012, we expect Sirius XM to provide Reports of Use to SoundExchange in full compliance with the applicable federal regulations. *See* 37 C.F.R. § 370. In particular, pursuant to 37 C.F.R. § 370.4, Sirius XM should report to SoundExchange 100 percent of Sirius XM's performances of sound recordings transmitted pursuant to the statutory license, across all channels, regardless of the format or genre of those channels, and regardless of whether third parties provide certain programming to Sirius XM.

In addition, the content of Sirius XM's Reports of Use should be consistent with the federal regulations. Please note in particular that the federal regulations require Sirius XM to provide, *for each sound recording transmitted,* the featured artist, sound recording title, ISRC (or, alternatively, the album title and marketing label), and either actual total performances or, alternatively, the aggregate tuning hours, channel or program name, and play frequency. *See* 37 C.F.R. § 370.4(d)(2).

Further, Sirius XM should begin to submit separate, complete, and accurate Reports of Use for each of its services. Under Sirius XM's current practice, it submits a raw log and a channel list that identifies which of Sirius XM's channels are available on each of Sirius XM's services and the aggregate tuning hours for each webcasting channel. The data on the raw log and channel list are frequently in conflict each month. This results in undue burden on SoundExchange's resources and, more important, is inconsistent with current federal regulations. Sirius XM must submit separate, complete, and accurate Reports of Use that are in accordance with 37 C.F.R. § 370.4 for each of its services.

This letter does not constitute a waiver of any rights by SoundExchange or by the performers and copyright owners on whose behalf SoundExchange collects royalties, and such rights as well as all claims for relief are expressly retained.

Please contact me with any questions.

Best regards,

Brad Prendergast
Senior Counsel, Licensing & Enforcement

cc: Cynthia Greer, Esq. (e-mail only)

Exhibit G

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News Release

For customer inquiries, please call 800-922-0204 or go to
Contact Us

June 6, 2012

Debra Lewis
Debra.Lewis@VerizonWireless.com
908-559-7512

BASKING RIDGE, NJ — Verizon today announced the formation of the 4G Venture Forum for Connected Cars, a group of leading global automotive companies brought together by Verizon to accelerate the pace of innovation across the automotive and telematics 4G LTE ecosystem.

BMW, Honda, Hyundai Motor Company, Kia Motors and Toyota Motor Sales, Inc. are joining Verizon as the initial members of the Forum. Professor Sanjay Sarma of the Massachusetts Institute of Technology also joins the Forum, providing members a link to track important advancements in related academic research. The group will collaborate and explore ways to deliver connectivity to vehicles of all types, by leveraging open standards and discussing ways to accelerate development of the 4G LTE ecosystem across automotive OEMs, suppliers, device manufacturers, application developers and content publishers.

"There are many challenges to designing next generation telematics and infotainment solutions, including supporting safe and responsible driving, advancing vehicle-to-vehicle solutions and improving sustainability, among others," said Tami Erwin, chief marketing officer for Verizon Wireless. "As an innovator in the technology industry, Verizon is a natural impetus for this collaboration, which we all expect will include other companies and spur results that will benefit not only the industry, but millions of consumers around the world."

Telematics is a growing opportunity that integrates telecommunications and information into vehicles to provide functionality to drivers and passengers. The 4G Venture Forum for Connected Cars will help discover ways to increase the value of services, ranging from embedded cloud-connected solutions to mobile applications; help define features and explore safety systems; and encourage third-party developers in this space.

Verizon has a strong commitment to collaboration and innovation through its Innovation Program, and through the 4G Venture Forum, which was created in 2009 to identify and support new ideas related to advanced wireless networks and to provide market validation for innovative companies. The 4G Venture Forum for Connected Cars complements and extends the approach of the 4G Venture Forum, focusing exclusively on the automotive space to address the specific needs of this growing market.

SXM REB EX 3

Verizon Wireless has the largest 4G LTE network, now available in 258 markets and covering more than two-thirds of the U.S. population. The Forum may support and fund advancements regardless of underlying network technology; companies will not be obligated to work with Verizon and are not precluded from working with other service providers.

About Verizon Wireless
Verizon Wireless operates the nation's largest 4G LTE network and largest, most reliable 3G network. The company serves 93.0 million retail customers, including 88.0 million retail postpaid customers. Headquartered in Basking Ridge, N.J., with 80,000 employees nationwide, Verizon Wireless is a joint venture of Verizon Communications (NYSE, NASDAQ: VZ) and Vodafone (LSE, NASDAQ: VOD). For more information, visit www.verizonwireless.com. To preview and request broadcast-quality video footage and high-resolution stills of Verizon Wireless operations, log on to the Verizon Wireless Multimedia Library at www.verizonwireless.com/multimedia.

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News Release

Verizon to Expand Capabilities in Automotive and Fleet Telematics and Accelerate Growth in Emerging Machine-to-Machine Services

For customer inquiries, please call 800-922-0204 or go to
Contact Us

June 1, 2012

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NEW YORK and ATLANTA — Verizon Communications Inc. (NYSE, Nasdaq: VZ) and Hughes Telematics, Inc. (OTCBB: HUTC) today announced a definitive merger agreement under which Verizon will acquire Hughes Telematics, Inc. (HTI) for $12.00 per share in cash, or a total of $612 million.

The transaction will expand Verizon's capabilities in the automotive and fleet telematics marketplace and accelerate growth in key vertical segments, including emerging machine-to-machine (M2M) services applications driven by consumer trends and increasingly connected lifestyles. HTI is a leader in implementing the next generation of connected services for vehicles, centered on a core platform of safety, security, convenience and infotainment offerings. HTI offers a portfolio of services through its commercial fleet, aftermarket and original equipment manufacturer (OEM) offerings as well products and services for mHealth providers and users.

The Board of Directors of HTI has unanimously approved the transaction upon the recommendation of its special committee, and the transaction was unanimously approved by the directors of Verizon present and voting. The transaction has also been approved by a written consent executed by holders of a majority of HTI's voting shares.

The transaction is subject to the expiration or early termination of the Hart-Scott-Rodino antitrust waiting period and other customary closing conditions.

The merger is expected to close in the third quarter of 2012, and Verizon plans to retain the existing management team and operate the new unit as a subsidiary within Verizon and

SXM REB EX 4

operated as part of its Verizon Enterprise Solutions group. The business will continue to be headquartered in Atlanta.

"We expect M2M and telematics to drive significant growth for Verizon and we're taking an important step forward to accelerate solutions that will unlock more opportunities for existing and new HTI and Verizon customers," said John Stratton, president of Verizon Enterprise Solutions. "Joining Hughes Telematics' robust service-delivery platform and suite of applications with our existing assets will create a premier set of capabilities. In powerful combination with Verizon's global IP network, cloud, mobility and security solutions, Hughes Telematics' flexible service-delivery platform has the potential to reach beyond the automotive and transportation realm to create new opportunities in mHealth, asset tracking and home automation."

HTI will play a key role in Verizon's strategy to offer platform-based solutions tailored to specific industries. Verizon earlier this year launched a new practice focused on developing telematics solutions that leverage the company's cloud and information technology (IT), security, global IP network and communications, and mobility and M2M technology platforms.

Jeff Leddy, CEO of HTI, said, "This transaction provides Hughes Telematics' stockholders with a substantial premium over today's market price of our common stock. We are proud to join a world-class organization like Verizon which will help us continue to build and expand on our industry-leading services. This combination represents an exciting opportunity to accelerate our innovation of new services and global growth and to bring these services to more customers and industries worldwide."

Verizon Enterprise Solutions creates global connections that generate growth, drive business innovation and move society forward. With industry-specific solutions and a full range of global wholesale offerings offered over the company's secure mobility, cloud, strategic networking and advanced communications platforms, Verizon Enterprise Solutions helps open new opportunities around the world for innovation, investment and business transformation. Visit verizon.com/enterprise to learn more.

Verizon was represented by UBS Investment Bank and Debevoise & Plimpton LLP. HTI was represented by Barclays and Skadden, Arps, Slate, Meagher & Flom LLP; and the special committee of the Board of Directors of HTI was represented by Moelis & Company LLC and Nelson Mullins Riley & Scarborough LLP.

About Verizon
Verizon Communications Inc. (NYSE, Nasdaq: VZ), headquartered in New York, is a global leader in delivering broadband and other wireless and wireline communications services to consumer, business, government and wholesale customers. Verizon Wireless operates America's most reliable wireless network, with 93 million retail customers nationwide. Verizon also provides converged communications, information and entertainment services over America's most advanced fiber-optic network, and delivers integrated business solutions to customers in more than 150 countries, including all of the Fortune 500. A Dow 30 company with $111 billion in 2011 revenues, Verizon employs a diverse workforce of nearly 192,000. For more information, visit www.verizon.com.

About Hughes Telematics, Inc.
Hughes Telematics, Inc. (OTCBB: HUTC) is a leader in implementing the next generation of connected services. The company offers a portfolio of location-based services for consumers, manufacturers, fleets and dealers through two-way wireless connectivity. In-Drive®, HTI's aftermarket solution, offers safety, security, convenience, maintenance and data services. Networkfleet, Inc., a wholly owned subsidiary of HTI located in San Diego, California, offers remote vehicle diagnostics, an integrated GPS tracking and emissions monitoring system for wireless fleet vehicle management. A majority owned subsidiary of HTI, Lifecomm, located in Atlanta, Georgia, plans to offer mobile personal emergency response services through a wearable lightweight device with one-touch access to emergency assistance. Additional information about HTI can be found at www.hughestelematics.com.

VERIZON'S ONLINE NEWS CENTER: Verizon news releases, executive speeches and biographies, media contacts, high-quality video and images, and other information are available at Verizon's News Center on the World Wide Web at www.verizon.com/news. To receive news releases by email, visit the News Center and register for customized automatic delivery of Verizon news releases.

Additional Information and Where to Find It

In connection with the proposed acquisition, Hughes Telematics intends to file relevant materials with the SEC, including Hughes Telematics' information statement in preliminary and definitive form. Hughes Telematics stockholders are strongly advised to read all relevant documents filed with the SEC, including Hughes Telematics' information statement, because they will contain important information about the proposed transaction. These documents will be available at no charge on the SEC's website at www.sec.gov. In addition, documents will also be available for free from Hughes Telematics by contacting Hughes Telematics' Investor Relations at ir@hughestelematics.com.

Cautionary Statement Regarding Forward-Looking Statements

Certain statements in this communication regarding the proposed transaction between Verizon and Hughes Telematics, the expected timetable for completing the transaction, benefits of the transaction, future opportunities for the combined company and products and any other statements regarding Verizon's and Hughes Telematics' future expectations, beliefs, goals or prospects constitute forward-looking statements made within the meaning of Section 21E of the Securities Exchange Act of 1934 (collectively, forward-looking statements). Any statements that are not statements of historical fact (including statements containing the words "may," "can," "will," "should," "could," "expects," "plans," "anticipates," "intends," "believes," "estimates," "predicts," "potential," "targets," "goals," "projects," "outlook," "continue," "preliminary," "guidance," or variations of such words, similar expressions, or the negative of these terms or other comparable terminology) should also be considered forward-looking statements. A number of important factors could cause actual results or events to differ materially from those indicated by such forward-looking statements, including the parties' ability to consummate the transaction; the results and impact of the announcement of the transaction; the timing for satisfying the conditions to the completion of the transaction, including the receipt of the regulatory approvals required for the transaction; the parties' ability to meet expectations regarding the timing and completion of the transaction; the possibility that the parties may be unable to achieve expected synergies and operating efficiencies within the expected time-frames or at all and to successfully integrate Hughes Telematics' operations into those of Verizon or that such integration may be more difficult, time-consuming or costly than expected; operating costs, customer loss and business disruption (including, without limitation, difficulties in maintaining relationships with employees, customers, clients or suppliers) may be greater than expected following the transaction; the outcome of any legal proceedings that may be instituted against Hughes Telematics and others related to the transaction; the retention of certain key employees of Hughes Telematics may be difficult; changes in technology and competition; implementation and results of Hughes Telematics' ongoing strategic initiatives; changes in customer needs or demands; Hughes Telematics' ability to negotiate and enter into new commercial relationships or strategic alliances if at all; and the other factors described in Verizon's Annual Report on Form 10-K for the fiscal year ended December 31, 2011 and in its most recent quarterly report filed with the SEC, and Hughes Telematics' Annual Report on Form 10-K for the year ended December 31, 2011 and in its most recent quarterly report filed with the SEC. Verizon and Hughes Telematics assume no obligation to update the information in this communication, except as otherwise required by law. Readers are cautioned not to place undue reliance on these forward-looking statements that speak only as of the date hereof.

####

Exhibit G
PUBLIC VERSION

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2011-1 CRB PSS/Satellite II**

WRITTEN REBUTTAL TESTIMONY OF RONALD H. GERTZ

(On behalf of Sirius XM Radio Inc.)

Introduction

1. My name is Ron Gertz. I am the chairman of Music Reports, Inc. ("MRI"). I previously provided testimony during the direct phase of this proceeding concerning direct licenses between Sirius XM Radio Inc. ("Sirius XM" or "the Company") and independent record labels. I offer this rebuttal testimony to respond to certain questions and contentions raised during the direct phase of this proceeding about that direct licensing initiative.

2. SoundExchange criticizes the direct licenses as unrepresentative outliers. I disagree. At the time of submission of Sirius XM's written direct case in November 2011, Sirius XM had signed 62 direct licenses with a wide variety of independent record companies.[1] Since that time, Sirius XM has added 23 new direct licenses, to reach a total of 85 direct licenses today. These 23 licenses are attached hereto as SXM Rebuttal Exhibits 5-27.

3. Like the first group of 62 licenses, the royalty rates for all of the new direct licenses are set at 5, 6, or 7 percent of revenue. While the first group of 62 licenses all signed the license

[1] Those licenses were listed in SXM Dir. Ex. 14, which was appended to my written direct testimony.

form attached to my written direct testimony as SXM Dir. Ex. 7 (with some limited variation, mainly in agreement duration),[2] a few of the more recent licensors have negotiated somewhat different terms. [redacted] And while the vast majority of the later licenses have a three-year term, some of the record companies asked for, and received, shorter terms. [redacted] (Although of shorter duration, the [redacted] licenses automatically renew at the end of their terms unless one of the parties affirmatively terminates the agreement.) None of the 85 licenses contains a "most favored nations" clause.

4. From the negotiations, it is clear that these independent labels are run by experienced professionals who skillfully protect the financial and reputational interests of the artists they represent. These independent record companies regularly and capably negotiate

[2] [redacted]

[3] [redacted]

[4] Even without Schedule A, these licenses still offer public performance and ephemeral recording rights that cover other Sirius XM services (e.g., internet webcasting) and extend beyond the limits of the Section 112 and 114 statutory licenses. As I explained in my direct testimony, the expanded rights – particularly relaxation of the sound recording performance complement – are significant, because they allow Sirius XM to play the directly licensed tracks more frequently, generating additional royalties.

agreements; as noted, a number have been able to bargain for terms that were not in Sirius XM's initial proposal, as illustrated by SXM Rebuttal Exhibit 28, which is an email summarizing some of the terms that eOne Records negotiated.

5. The catalogs represented by these additional direct licenses, taken together with those of the direct licenses previously entered into, reinforce the broadly representative nature of the directly-licensed music and comedy offerings to Sirius XM's overall performance of sound recordings. The licenses cover tracks spanning every significant genre featured on Sirius XM – rock, country, jazz, Broadway, classical, children's music and more – and tracks played on nearly every Sirius XM channel. Among the 23 new direct licenses are agreements with the following record companies:

- eOne Entertainment (formerly known as Koch Records): One of the largest independent labels in North America, with dozens of albums having charted on the Billboard independent albums chart over the past 10 years, eOne/Koch Records was one of Billboard's Top 5 Independent Labels for eight of the past nine years (2002-2011) including the #3 spot for 2011. Their artists have won numerous Grammy awards, including a 2012 Grammy win for Best Instrumental Composition for artist Bela Fleck.
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

- [redacted]

- Fair Trade Services: Many of the artists on the Fair Trade label are supported by Sirius XM's The Message channel. This label boasts significant accomplishments in the Contemporary Christian Music field:

  - Fair Trade artist Laura Story won a 2012 Grammy for Best Contemporary Christian Music Song.

  - As of the March 17, 2012 Billboard issue, Fair Trade had three songs in the Contemporary Christian Top 10: Laura Story, "What a Savior," (#6); Phillips Craig & Dean, "When the Stars Burn Down (Blessing and Honor)" (#7); and The Afters, "Lift Me Up" (#10).

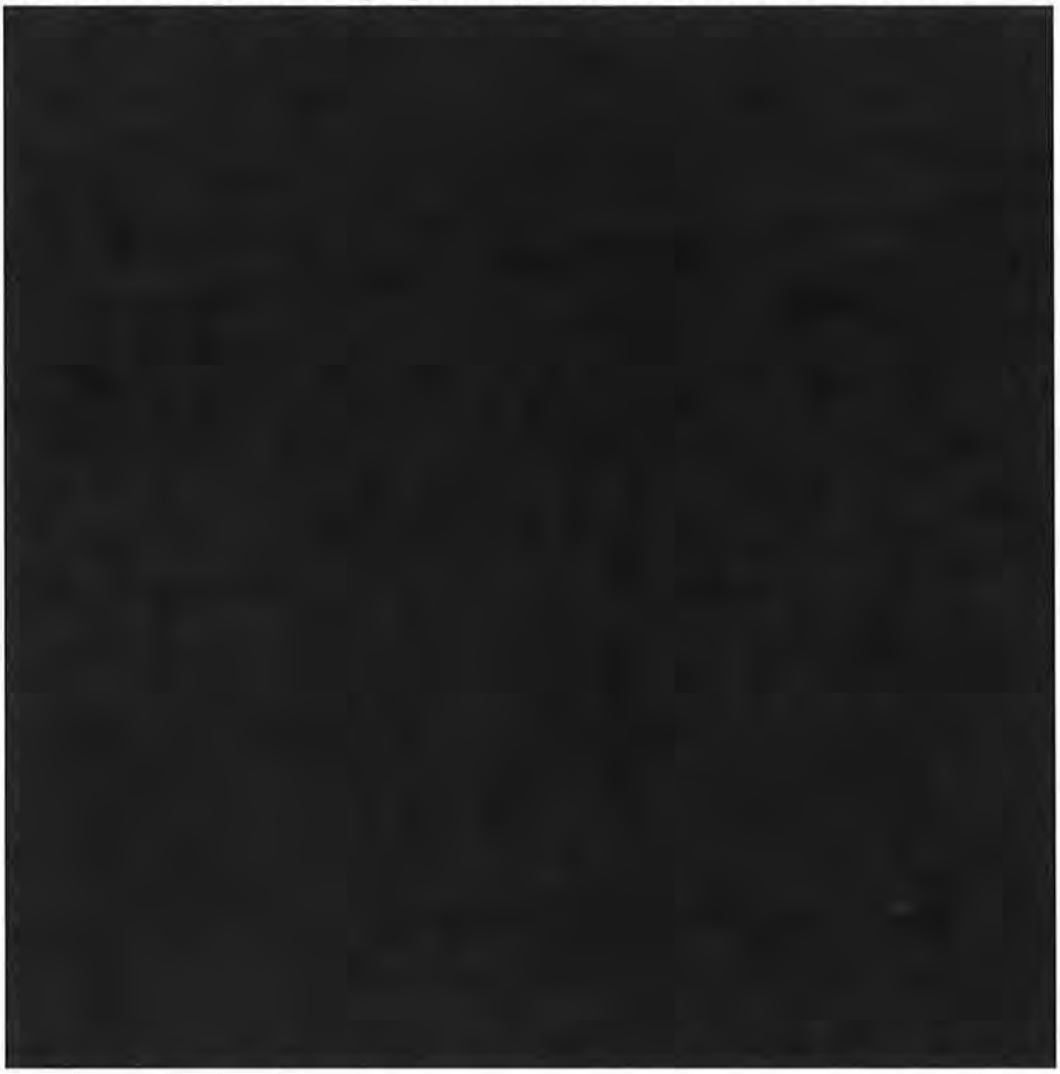
  - The label's roster includes MercyMe, whose album *The Hurt & The Healer* debuted at #7 on the Billboard 200 for the week of June 9, 2012, debuted at #1 on the Christian Albums chart, and has regained that top spot for the week of July 7, 2012. The band's song "The Hurt & The Healer" remains at #1 on the Christian Songs chart (for the third week running) and the Christian AC Songs (for the fourth week running).

  - Fair Trade releases hold eight of the 50 spots on the current (July 7, 2012) Christian Songs chart: #1, 10, 27, 35, 37, 40, 43, and 45. Fair Trade was also listed as Billboard's #3 Top Christian Songs label for 2011.

- [redacted]

- Dangerbird Records: This label's artist roster includes Silversun Pickups, a Best New Artist Grammy nominee in 2010 whose album *Swoon* was Billboard's #6 independent album in 2009, whose album *Neck of the Woods* debuted at #6 on the Billboard 200 and #1 on the Billboard Independent Albums chart for the week of May 26, 2012 (and was Billboard's "Hot-Shot Debut" for the week), and who is played regularly on the Sirius XM Alt Nation channel. The Dangerbird roster also includes Fitz & The Tantrums, a VH1 "You Oughta Know" artist in April 2011 whose album *Pickin' Up the Pieces* was a #1 Billboard Heatseeker album in 2011, and who is currently played on Sirius XM's Spectrum, Alt Nation, and Radio Margaritaville channels.

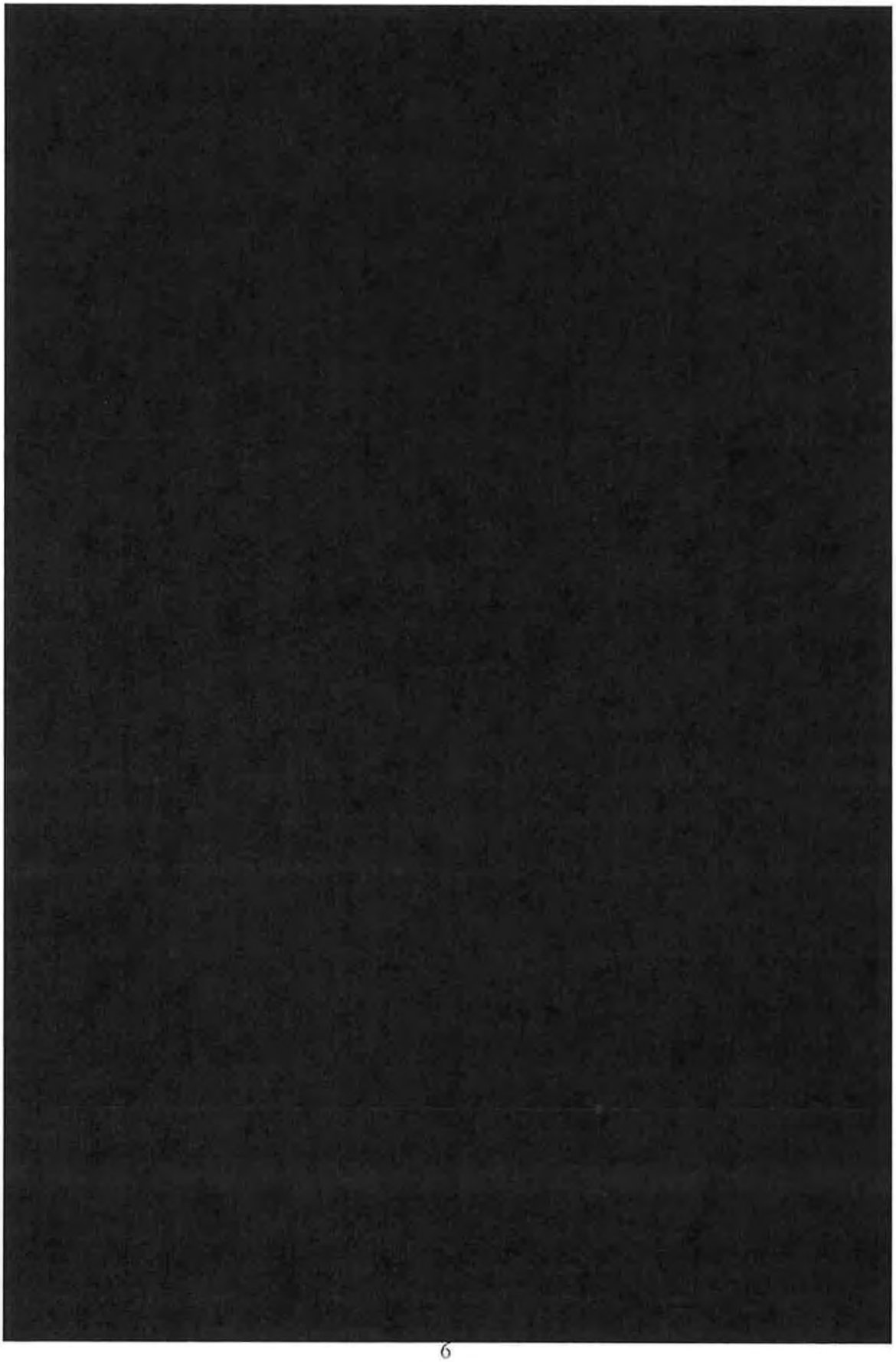
6. In response to Judge Roberts's request that Sirius XM furnish information as to how many of the top record labels played on the service signed direct licenses, I instructed my staff to identify the independent record companies played most frequently on Sirius XM music channels during April 2012 (the most recent month for which we have processed such data) and to identify which of those labels have executed direct licenses. The results of that analysis through the top 75 labels, with the direct licensors highlighted in yellow, are set forth in Table 1 below:



[5] The play share represents the label share of all plays across all services covered by the Sirius XM direct licenses, including (in the denominator) plays where the label could not be identified. Because the unidentified tracks are not assigned to any label, this has the effect of understating each label's share.

Exhibit G

RESTRICTED – Subject to Protective Order
in Docket No. 2011-1 CRB PSS/Satellite II



7. As Table 1 depicts, Sirius XM has direct licenses with seven of the top 20 labels and 13 of the top 50 labels as measured by Sirius XM plays. These direct licensors not only are prominent labels with a number of important, high-profile artists but also are labels with artists played regularly on a wide variety of Sirius XM channels.

8. About 5.8% of total plays, or "spins," on Sirius XM's satellite radio service in April 2012 were directly licensed, through a combination of the 81 direct licenses of the kind described above in effect as of April 2012 (covering about 4.45% of the total plays), and certain additional direct licenses and waivers that have been executed by Sirius XM, as described in the Written Rebuttal Testimony of David Frear (accounting for approximately 1.35% of the total plays).[6]

9. As Mr. Frear also describes, the four "major" record companies – Sony, Universal Music Group, Warner Music Group and EMI – did not meaningfully respond to the Company's offers to negotiate a direct license. Consequently, the universe against which Sirius XM's success with direct licensing to date should be measured is, at most, the 41% of the market representing Sirius XM plays of sound recordings of independent labels.[7] Viewed in this fashion, Sirius XM to date has direct licenses with eight of the 25 most-played labels and with 15 of the top 50. The direct licenses cover approximately 19% of Sirius XM's identified non-major-label spins across all platforms covered by the direct licenses.[8]

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[6] These figures are calculated across all plays on the satellite radio channels. If pre-1972 plays are excluded, then 5.4% of plays are directly licensed (3.9% and 1.5% across the two license categories described in the text, respectively).

[7] This statistic derives from the plays we have identified. I have no reason to believe that the 41% / 59% split would be significantly different among the unidentified plays.

[8] Even this adjusted statistic understates Sirius XM's direct license penetration, because many independent labels rely on the major record companies for distribution, and thus were effectively foreclosed as direct-license candidates. As an example, upon receiving Sirius XM's direct license offer through MRI, one such independent label responded: "As you know we are distributed by Universal. It is my understanding that they are advising against signing directly

10. While I firmly believe that the licenses already executed are broadly representative of the value of Sirius XM's performances of sound recordings, there remains no doubt in my mind that, were it not for the vehement opposition and interference of SoundExchange and other record industry trade groups, Sirius XM would have been successful in entering into numerous additional direct licenses within the royalty range offered. Numerous labels responded to MRI's direct-license outreach by making clear that one or more industry organizations had dissuaded them from entering into a direct license. For example, one label stated explicitly that the "[Recording Industry Association of America] has asked everyone to hold off," while another simply stated, the "[American Association of Independent Music ("A2IM")] is opposed to this I believe." Another label responded that the "[redacted]" Yet another label responded to MRI's communication of the direct license offer by stating their belief that, by virtue simply of being members of certain recording industry organizations, they were necessarily foreclosed from entering into direct licenses: "We're members of A2IM and Merlin. I think that prevents a direct license."[9] These communications, which are just a sampling of those received by MRI, are attached hereto as SXM Rebuttal Exhibits 30-33.

11. Other communications MRI has received have made abundantly clear that independent labels have been speaking among themselves and with other music industry

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distributed by Universal. It is my understanding that they are advising against signing directly with SiriusXM [*sic*] in this matter" – ending discussions. MRI's email chain with this label is attached hereto as SXM Rebuttal Exhibit 29.

[9] Merlin Network is a global rights agency that represents independent music rights and touts itself as the "virtual fifth major." Merlin's website states that its mission is "to ensure its members have effective access to new and emerging revenue streams and that their rights are appropriately valued and protected." *See* http://www.merlinnetwork.org/home/. Merlin has rebuffed efforts by Sirius XM to discuss direct licensing for the various independent labels it represents. Rich Bengloff, President of A2IM, is also on the Board of Merlin Network.

organizations regarding their responses to the direct license offer, and that certain organizations and their board members were placing considerable pressure on independent labels to get them to reject Sirius XM's direct license offer. For example, one label stated that they would "look at the license, but will also confer with A2IM and other indies." This email is attached hereto as SXM Rebuttal Exhibit 34. MRI never heard from that label again.

12. The all-out pressure tactics employed by these industry organizations – designed, in significant part, to minimize the evidence in this proceeding as to prevailing market rates – have gone so far as urging record companies that had already entered into direct licenses to back out of them. Record labels Paracadute and TMB Productions, home to the well-known bands OK Go and They Might Be Giants, respectively, entered into direct licenses with Sirius XM on or about November 28, 2011. On approximately February 9, 2012, MRI's licensing contact at the labels with whom MRI had negotiated the deals – Darren Paltrowitz – asked MRI whether there was any opportunity for those entities to "opt out" of their direct licenses. When asked by MRI for an explanation, Mr. Paltrowitz responded with a list of issues, strikingly similar to SoundExchange's and A2IM's earlier press releases,[10] which Mr. Paltrowitz indicated had been supplied by the bands' business manager, RZO Business Management. MRI learned that Paracadute and TMB Productions were being "encouraged" to get out of their agreements by Perry Resnick of RZO, who sits on SoundExchange's Board of Directors.

13. On February 22, 2012, after intervening phone calls with a representative from MRI regarding the issue, Mr. Paltrowitz wrote MRI that he had "relayed Sirius XM's feedback to RZO and they – per conversations with A2IM and other folks beyond SoundExchange – stand their ground about wanting us to opt out." That same day, Mr. Paltrowitz sent MRI an email

[10] These are in evidence as Sirius XM Direct Trial Exs. 2 and 4, and attached as Exhibit 6 to the Written Direct Testimony of David Frear, in evidence as Sirius XM Direct Trial Exhibit 12.

copying portions of a note from Mr. Resnick stating that he "know[s] for a fact that Rich Bengloff, the head of A2IM (the indie label body) is against [the direct license offer]" and that he and Bengloff "have had this exact conversation, and are both in agreement that SoundExchange is the better way to go." The email communications surrounding Paracadute and TMB Productions are attached hereto as SXM Rebuttal Exhibit 35.

14. Another example of an independent label being pressured to reject the direct license offer was [redacted], whose founder informed MRI in approximately early December 2011 that a SoundExchange Board member, who also is the founder of an independent label, was "[redacted]," [redacted] withstood the pressure and, after arms-length negotiations, did ultimately execute a direct license with Sirius XM effective January 1, 2012. The email from MRI informing Sirius XM about that conversation with [redacted] founder is attached hereto as SXM Rebuttal Exhibit 36.[11]

[11] The Judges will note that the names of [redacted] are marked as "restricted" in this testimony. That is done specifically at the request of these companies, who were so concerned about the repercussions they would suffer if it became known by their industry peers that they entered into direct licenses with Sirius XM that they negotiated explicit provisions in their direct license agreements whereby Sirius XM is bound to keep the agreements confidential and seek to keep them restricted under the protective order in this proceeding.

Exhibit G

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
DETERMINATION OF RATES AND TERMS FOR PREEXISTING SUBSCRIPTION AND SATELLITE DIGITAL AUDIO RADIO SERVICES	)	**Docket No. 2011-1 CRB PSS/Satellite II**

DECLARATION OF RONALD H. GERTZ

I, Ronald H. Gertz, declare under penalty of perjury that the statements contained in my Written Rebuttal Testimony in the above-captioned matter are true and correct to the best of my knowledge, information and belief. Executed this 28th day of June 2012 at Woodland Hills, CA.

Ronald H. Gertz

Exhibit G

SIRIUS XM REBUTTAL EXHIBITS 005 - 036

RESTRICTED – SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. 2011-1 CRB PSS/SATELLITE II

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUNDEXCHANGE, INC., 733 10th St., N.W. 10th Floor Washington, DC 20001 **Plaintiff,** v. **SIRIUS XM RADIO INC.,** 1221 Avenue of the Americas 36th Floor New York, NY 10020 **Defendant.**	**Case No. 1:13 cv 1290 (RJL)**

DEFENDANT SIRIUS XM RADIO INC.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant Sirius XM Radio Inc. ("Sirius XM") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6).

PRELIMINARY STATEMENT

This lawsuit is premised on the unfounded and illogical assertion that Sirius XM should pay royalty fees to Plaintiff SoundExchange, Inc. ("SoundExchange") for the performance of pre-1972 sound recordings and non-music programming *exempt* from the statutory license SoundExchange administers. This contention has been repeatedly rejected by both the specialized regulatory agency charged with determining the statutory royalty rates—the Copyright Royalty Board ("CRB")—and the United States Court of Appeals for District of Columbia Circuit. It is no surprise, then, that SoundExchange has chosen to frame its Complaint not to argue that its members actually deserve royalties for performances not covered by the statutory license, but rather as a technical issue—that is, whether Sirius XM has properly interpreted and applied highly detailed and technical regulations written by the CRB setting forth the rates and terms of the statutory license, and in particular whether Sirius XM has properly construed the definition of the term "Gross Revenues"—the baseline used to calculate royalty payments. The CRB, and not a federal court, is the proper forum to decide in the first instance whether the regulations the CRB itself wrote allow the exemptions Sirius XM has implemented.

As we explain herein, this lawsuit asks the Court to rule on a question that lies squarely within the unique competence of the CRB, the specially qualified body to which Congress delegated the authority to deal with highly technical questions concerning the rates and terms of the statutory license, *see* 17 U.S.C. § 801 *et seq.* These include how to interpret the definition of Gross Revenues written by the CRB itself and, relatedly, whether Sirius XM's calculation of royalty payments under that definition was proper. Not only is the CRB the tribunal best situated

to interpret a definition that it wrote, the governing statute expressly provides the CRB with "continuing jurisdiction" to modify or clarify the terms of its own rate determinations to address controversies that arise as parties operate under those determinations, including the dispute reflected in SoundExchange's Complaint.

It is precisely in such circumstances as these that district courts routinely dismiss or stay claims under the doctrine of "primary jurisdiction." That doctrine permits a court to "refer" actions to an administrative agency when the core questions raised in a lawsuit "require[] the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956). The purpose of the doctrine, courts have emphasized, is to utilize "the advantages of allowing an agency to apply its expert judgment" including weighing "the policy judgments needed to implement an agency's mandate." *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992).

The questions presented here fall squarely within the scope and purposes of the primary jurisdiction doctrine, *i.e.*, whether Sirius XM's exclusion of revenues associated with pre-1972 sound recordings and non-music programming—both exempt from the statutory license—was a correct application of the definition of "Gross Revenues" within the meaning of the CRB's rate determination. Answering those questions requires an understanding of the proper interpretation and application of the CRB's own regulations—regulations formulated after detailed evidentiary and expert submissions by Sirius XM and SoundExchange, and multi-week hearings before the Copyright Royalty Judges—questions the CRB is undoubtedly in the best position to answer. Moreover, the questions directly implicate the technical and policy expertise Congress has expressly delegated to the CRB. Finally, because the questions at issue implicate the copyright

law, an area where Congress has promoted national uniformity, *see, e.g.*, *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002), the agency itself, rather than the several federal district courts, should have the first opportunity to clarify their meaning. Accordingly, the case should be dismissed or stayed under the doctrine of primary jurisdiction.

STATEMENT OF FACTS

A. The Parties

Plaintiff SoundExchange, originally organized as an arm of the Recording Industry Association of America, is a Delaware nonprofit organization designated by CRB as the sole entity in the United States to collect digital performance royalties from services operating under the statutory licenses provided for at 17 U.S.C. §§ 112 & 114. Compl. ¶ 10. Pursuant to its authority under the governing regulations, *see, e.g.*, 37 C.F.R. § 380.4, SoundExchange collects statutory royalties from, *inter alia*, providers of satellite radio, Internet radio services and cable TV music channels, and distributes those royalties to artists and record companies. *See* Compl. ¶ 10.

Defendant Sirius XM is a Delaware corporation with its principal place of business in New York City. Sirius XM also has offices in Washington, D.C. and elsewhere. Sirius XM operates a satellite digital audio radio service ("SDARS") broadcasting more than 135 channels of music, sports, news, talk, comedy, entertainment, traffic and weather to over 25 million subscribers. Although many of Sirius XM's channels are devoted to commercial-free music, roughly half of Sirius XM's programming consists of non-music programming, including, *inter alia*, the well-known Howard Stern show, numerous news, political and other talk-radio channels, and extensive college and professional sports programming. This non-music programming is not subject to the statutory license administered by SoundExchange. And on some of its music channels, Sirius XM broadcasts sound recordings created before February 15,

1972, which are not federally copyrightable, and likewise not covered by the Section 112/114 statutory license. *See* 17 U.S.C. § 301(c).

B. Statutory Licensing Framework

Section 106 of the Copyright Act, 17 U.S.C. § 106(6), grants record companies and their artists the right to be compensated under U.S. copyright law for public performances of their federally copyrighted sound recordings performed by means of a digital audio transmission. At the same time, the Copyright Act also provides for a compulsory licensing mechanism that enables users like Sirius XM to obtain a "statutory license" to cover the prescribed performances of sound recordings and to transmit them by way of a digital audio service, like Sirius XM's. *See* 17 U.S.C. §§ 112(e); 114(d)(2). If a user and a copyright owner are unable to agree to royalty rates and terms, as happened here, the Copyright Act provides that the CRB—an agency consisting of three Copyright Royalty Judges ("CRJs") appointed by the Librarian of Congress—shall set "reasonable rates and terms of royalty payments." *See* 17 U.S.C. § 114(f).

The CRJs are appointed for staggered six-year terms. 17 U.S.C. § 802(c). In order to ensure that the CRJs bring to bear sufficient relevant experience, the Copyright Act specifies certain required qualifications. Each CRJ must be an attorney with at least seven years' experience; in addition, the chief CRJ must have five years' experience in adjudications, arbitrations or court trials. One of the remaining CRJs must have significant knowledge of copyright law; the other remaining CRJ must have significant knowledge of economics. *See* 17 U.S.C. § 802(a)(1). As the legislative history suggests, these highly specific qualifications ensure that the CRJs have the requisite "mastery of economics and marketplace factors as well as considerable knowledge of copyright law," H.R. Rep. No. 108-408, at 25 (2004), and reflect an intent to commit questions arising under the statutory license provisions to this specialized tribunal.

The CRB sets the rates and terms for the statutory licenses for license periods lasting five or six years;[1] it does so by adjudicating adversarial proceedings—essentially live trials—between the affected parties (typically SoundExchange and the services in the particular license category). 17 U.S.C. § 803(b); 37 C.F.R. § 351. In the course of such proceedings, the CRJs take written direct and rebuttal statements from the participants, supervise comprehensive discovery between the parties, and hear live testimony from witnesses, including economic and technical experts. In the proceeding at issue here, which took place between January 2006 and January 2008, the CRJs considered written direct and rebuttal statements, heard twenty-six days of testimony from 39 witnesses filling over 7,700 transcript pages, admitted more than 230 exhibits, and amassed a docket of over 400 pleadings, motions and orders. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services (the "*Satellite I* Final Determination"), 73 Fed. Reg. 4080, 4080–81 (Jan. 24, 2008) (codified at 37 C.F.R. § 382) (detailing the record evidence on which the determination was made).

To make the determination of reasonable rates and terms of royalty payments, the Copyright Act directs the CRJs to consider and balance four objectives:

- "To maximize the availability of creative works to the public";
- "To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions";
- "To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication"; and

[1] For the first such proceeding involving preexisting satellite digital audio radio services, the services at issue here, the Copyright Act provided for a six-year period beginning January 1, 2007 and ending December 31, 2012. *See* 17 U.S.C. § 804(b)(3)(B). Thereafter, the Act provides for five-year terms. *Id.* It is the initial license period that is at issue in this case.

- "To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

17 U.S.C. § 801(b)(1)(A)–(D). Congress granted the CRJs considerable "legislative discretion" in applying their expert knowledge of the industry and the prevailing economics to balance these statutory factors appropriately to determine reasonable copyright policy. *See SoundExchange Inc. v. Librarian of Congress*, 571 F.3d 1220, 1223–24 (D.C. Cir. 2009) (quoting *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 9 (D.C. Cir. 1981)) (affirming in part and remanding in part the CRJs' final determination on petition for review from agency's decision under the Administrative Procedures Act). This substantial latitude in balancing the factors is warranted, courts have held, "because the four objectives [the CRJs] must pursue point in different directions, requiring the agency first to predict the future course of the music industry and then to work an equitable division of projected music industry profits." *SoundExchange*, 571 F.3d at 1225.

Within a given statutory license category, the determination of the CRJs is "binding on all copyright owners of sound recordings and entities performing sound recordings." 17 U.S.C. § 114(f)(1)(B). The CRJs' final determination is reviewable under the Administrative Procedures Act by the D.C. Circuit. *See* 17 U.S.C. § 803(d). This review, as is typical under the APA, is extremely limited and deferential. The D.C. Circuit grants "substantial deference" to the CRJs' determination, with "judicial review [ ] limited to determining whether the agency's decision reasonably advances at least one of those objectives." *SoundExchange*, 571 F.3d at 1224, 1225 (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999)).

In addition, the Copyright Act expressly grants the CRJs "continuing jurisdiction" to "issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to

unforeseen circumstances that would frustrate the proper implementation" of the final determination. 17 U.S.C. § 803(c)(4).[2]

C. The *Satellite I* Final Determination

On January 9, 2006, the CRB commenced the proceeding to determine the royalty rates and terms for the statutory license for preexisting satellite digital audio radio services ("SDARS") for the period 2007 through 2012 (the "*Satellite I* Proceeding"), the period at issue here. The CRJs issued their final determination on January 24, 2008. *See Satellite I* Final Determination, 73 Fed. Reg. at 4080. Under the determination, the royalty fees for an SDARS, like Sirius XM, was 6% of Gross Revenues (as defined in the determination) for 2007 and 2008; 6.5% of Gross Revenues for 2009; 7.0% of Gross Revenues for 2010; 7.5% of Gross Revenues for 2011; and 8.0% of Gross Revenues for 2012. 73 Fed. Reg. 4084; *see also* 37 C.F.R. § 382.12(a).

The CRJs determined that for purposes of calculating the applicable royalty payment, the term Gross Revenues would generally include the user's subscription and advertising revenue. *See* 73 Fed. Reg. 4102; 37 C.F.R. § 382.11. But the CRJs expressly *excluded* certain items from the calculation of Gross Revenues, including, as relevant here, "[r]evenues recognized by [the] Licensee for the provision of":

- "Channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings"; and

[2] The CRJs and the Register of Copyrights take a broad view of the CRJs' authority to exercise continuing jurisdiction to amend a rate determination. For example, continuing jurisdiction has been exercised to modify the definition of an "interactive stream" so as more closely to comport with copyright law. *See, e.g.*, Copyright Office, Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537, 4543 (Jan. 26, 2009); Copyright Royalty Board, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 6832, 6833 (Feb. 11, 2009).

- "Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement or is separately licensed, including by a statutory license."

73 Fed. Reg. 4102; 37 C.F.R. § 382.11(3)(vi)(B) & (D). These exclusions from Gross Revenues, the CRJs explained, reflected their effort to "clearly delineate the revenues related to the value of the sound recording performance rights at issue in this proceeding." *Satellite I* Final Determination, 73 Fed. Reg. at 4087. Put simply, the CRJs recognized that there is no reason for a user like Sirius XM to have to pay royalties on revenue earned for activities not covered by the statutory license, and set the royalty rates with these Gross Revenues ground rules in mind. The D.C. Circuit, considering SoundExchange's petition for review from the CRJs' final determination, agreed: "SoundExchange never contended, and the CRJ[s] never opined that revenue from such non-music sources should be included in calculating the royalty payments." *SoundExchange*, 517 F.3d at 1225.[3]

D. Sirius XM's Exclusions from Gross Revenues

Pursuant to its understanding of the CRJs' ruling, Sirius XM excluded revenues associated with certain of its programming from its calculation of Gross Revenues during the 2007-2012 license period. As relevant to this motion, these exclusions fall into two general categories:

- *Pre-1972 sound recordings*. Sirius XM excludes revenues attributable to the performance of sound recordings created before February 15, 1972, because these

[3] SoundExchange appealed the CRJs' final determination in *Satellite I* to the D.C. Circuit on grounds other than those at issue here. That appeal was filed pursuant to 17 U.S.C. § 803(d), which calls for appeals court review of CRJ determinations issued under § 803(c) and specifies that the review be conducted under the Administrative Procedures Act, 5 U.S.C. § 706. Appellate review of CRJ determinations by the Court of Appeals would also appear to include *amendments* to such determinations issued under the CRJs grant of continuing jurisdiction, as that paragraph granting such continuing jurisdiction to the CRJs is included in the same section (803(c)) as that providing for the initial determination.

sound recordings are not copyrightable under federal copyright law and therefore not covered by the Section 114 statutory license for which Sirius XM pays SoundExchange. Thus, such revenues fall within the revenue exclusion for sound recordings "exempt from any license requirement." 73 Fed. Reg. 4102; 37 C.F.R. § 382.11(3)(vi)(D); and

- *Sirius XM Premier Packages*. Sirius XM excludes incremental subscription fees for upgrades to its premier subscription package because the programming obtained when users upgrade includes all-talk or other non-music content that makes only "incidental" use of covered sound recordings. *See* 73 Fed. Reg. 4102; 37 C.F.R. § 382.11(3)(vi)(B).[4]

E. SoundExchange's Complaint

On August 26, 2013, SoundExchange filed this Complaint purporting to seek relief under Section 114(f)(1)(B) of the Copyright Act (and the corresponding CRB regulations) for Sirius XM's alleged underpayment pursuant to the terms of the statutory license. Specifically, SoundExchange alleges that Sirius XM wrongly excluded from Gross Revenues monies attributable Pre-1972 sound recordings (Count I), Sirius XM's Premier offerings (Count II), and Sirius XM's Family Friendly and Mostly Music subscriptions (Count III). In addition, SoundExchange alleges that Sirius XM failed to make certain late payments it purportedly owed under 37 C.F.R. §§ 380.4(e), 382.13(d) & 384.4(e) (Count IV).

ARGUMENT

The Court Should Refer this Action to the CRB under the Doctrine of Primary Jurisdiction

SoundExchange's Complaint should be dismissed (or held in abeyance) under the doctrine of primary jurisdiction.

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[4] As noted below, the Complaint also asserts two claims based on Sirius XM's exclusion of revenue associated with its Family Friendly and Mostly Music subscription packages, and alleges the failure to make certain late payments. These claims are small in size compared with the claims relating to the pre-1972 sound recordings and the Sirius XM premier packages. Nonetheless, to the extent that the doctrine of primary jurisdiction counsels this Court's deference to the CRB on the principal issues in this case, it counsels deference on these less significant issues as well.

A. The Doctrine of Primary Jurisdiction

The primary jurisdiction doctrine permits a court to "suspend" the judicial process "pending referral" of issues to an administrative agency when the core questions before it "require[] the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Western Pacific*, 352 U.S. at 64. Courts have recognized that an administrative agency may be "best suited to make the initial decision on the issues in dispute," when Congress has entrusted an agency with special competence over the matter. *Allnet*, 965 F.2d at 1120. Courts have held that the primary jurisdiction doctrine is particularly applicable to "matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique market-place involved." *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 305 (1973). Applying the doctrine "requires the court to enable a 'referral' to the agency staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).

Courts evaluating whether to refer a question to an agency under the primary jurisdiction doctrine have typically considered "the advantages of allowing an agency to apply its expert judgment . . . Expertise, of course, is not merely technical but extends to the policy judgments needed to implement an agency's mandate." *Allnet,* 965 F.2d at 1120 (internal citation omitted); *see also United States v. Philip Morris USA, Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012) (identifying the applicable factors). In addition, courts have considered the extent to which the issue in question involves "a concern for uniform outcomes (which may be defeated if disparate courts resolve regulatory issues inconsistently)." *Allnet*, 965 F.2d at 1120. In the end, as the D.C. Circuit has concluded, "we have found the primary jurisdiction doctrine applicable when

the precise question before the district court was one within the particular competence of an agency." *Philip Morris*, 686 F.3d at 837.

This case presents a prime candidate for referral to the CRB under the primary jurisdiction doctrine. Most critically, the precise question involved here falls squarely within the special competence of the CRB and the policy judgments Congress has entrusted the Board with determining. The core questions here concern the proper interpretation and application of a definition authored by the CRJs themselves—and one that reflects the Judges' own effort to apply the guiding Section 801(b) policy factors to a massive evidentiary record developed over the course of a multi-week trial between the parties. *See Allnet*, 965 F.2d at 1120. The CRJs should have the opportunity to interpret and clarify the meaning of their own regulation in the first instance. *See id.* at 1123 (primary jurisdiction appropriate where question involves "the Commission's interpretation of its own regulations, on which it is owed great deference"). Finally, courts have concluded that primary jurisdiction referral is especially appropriate where, as here, the questions presented implicate the Copyright Act, an area where concerns for national uniformity are paramount. *See Syntek*, 307 F.3d at 781.

B. The Questions Presented Require Resolution of Issues Committed to the CRJs' Expertise and Policy Judgment

As the Supreme Court has emphasized, referral under the primary jurisdiction doctrine is particularly appropriate where the action implicates "matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique market-place involved . . . . matters typically lying at the heart of an administrative agency's task." *Ricci*, 409 U.S. at 305 (internal citations omitted). The precise issues presented in this action fall squarely within the realm of issues Congress committed to the CRB for the

CRB to apply its expertise and policy judgment to determine "reasonable rates and terms of royalty payments." 17 U.S.C. § 114(f).

Specifically, the Complaint raises technical questions, not about the interpretation of a particular provision of the copyright law, but about the proper construction and application of the CRJs' own final determination setting the rates and terms of the 2007-2012 statutory license. For example, Count I of the Complaint alleges that Sirius XM improperly excludes from "Gross Revenues"—the baseline on which the royalty payment is calculated—revenues associated with pre-1972 sound recordings. Because, as noted, sound recordings created before February 15, 1972 are not subject to the statutory license, Sirius XM excludes revenues associated with such sound recordings under the provision of the final determination that permits revenue deductions for programming "exempt from any license requirement." 73 Fed. Reg. 4102; 37 C.F.R. § 382.11(definition of the term "Gross Revenues" in paragraph (3)(vi)(D)). SoundExchange contends that the definition covering the 2007-2012 rate period did not permit Sirius XM's deduction. *See* Compl. ¶ 45. Accordingly, whether Sirius XM properly construed the CRJs' final determination and appropriately computed its royalty obligation during the 2007-2012 rate period by accounting for the exempt nature of performances of pre-1972 sound recordings are questions that essentially ask what the CRJs meant when they defined the exclusion from the term "Gross Revenues" that is at issue. The CRJs should have the opportunity to address that question in the first instance; indeed, they are perhaps the only ones who could supply an informed and authoritative response.[5]

[5] When the issue of allowing a deduction from royalties for pre-72 recordings was placed squarely before them in the recent *Satellite II* proceeding, the CRJs did not hesitate in holding that "pre-1972 recordings are not licensed under the statutory royalty regime and should not factor into determining the statutory royalty obligation" and, at the urging of the parties, clarified the mechanism for reducing Sirius XM's royalty payment on account of pre-72 performances.

Similarly, Count II of the Complaint mounts a technical challenge to Sirius XM's Gross Revenues exclusion for programming that makes only "incidental" use of covered sound recordings. As noted, the CRJs' final determination excludes from Gross Revenues those revenues associated with "channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings." 73 Fed. Reg. 4102; 37 C.F.R. § 382.11 ("Gross Revenues" paragraph (3)(vi)(B)). During the 2007-2012 license period, Sirius XM excluded incremental revenues it earned when its subscribers upgraded from its "Select" to its "Premier" Package because the incremental difference is directly and solely attributable to additional offerings available in the Premier Package that are exempt from the statutory license, *i.e.*, that contain talk and other non-music programming that makes only incidental, if any, use of covered sound recordings. SoundExchange challenges as improper Sirius XM's exclusion of the upcharge as within the meaning of the Gross Revenues exclusion. *See* Compl. ¶¶ 52, 58. Again, this question goes directly to what the CRJs intended when they drafted the Gross Revenues definition and the exclusion for non-music programming.

It is clear that these technical questions about the construction and application of the CRJs' Gross Revenues definition fall squarely within the expertise of the CRJs as the body "especially familiar with the customs and practices of the industry and of the unique market-place involved." *Ricci*, 409 U.S. at 305. As the D.C. Circuit has explained in connection with SoundExchange's earlier appeal of the CRJs' *Satellite I* determination, *see* n.3, *supra*, Congress delegated to the CRJs "legislative discretion" to determine the reasonable royalty rates and terms and to use their expertise and policy judgment in balancing the specified statutory factors:

Copyright Royalty Board, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23073 (Apr. 17, 2013) (governing the 2013-2017 rate period).

> First, the agency is required to estimate the effect of the royalty rate on the future of the music industry, which requires a forecast of the direction in which the future public interest lies based on the expert knowledge of the agency. Second, the agency has legislative discretion in determining copyright policy in order to achieve an equitable division of music industry profits between the copyright owners and users. Finally, the statutory factors pull in opposite directions, and reconciliation of these objectives is committed to the agency as part of its mandate to determine reasonable royalty rates.

SoundExchange, 571 F.3d at 1223–24 (internal citations, quotation marks and alterations omitted). The CRJs' final determination and the proper interpretation of that determination necessarily both engage the CRJs' expertise and weighing of policy factors; such "expertise, of course, is not merely technical but extends to the policy judgments needed to implement an agency's mandate." *Allnet*, 965 F.2d at 1120. How the terms should be constructed so as to exclude revenue earned on account of exempt pre-72 recordings and non-music programming is precisely such a "policy judgment." Because Congress has delegated the questions at issue here to the CRB, giving the CRB the opportunity to decide them in the first instance is not only more efficient, but true to Congress's design.

That Congress expressly committed questions as to the detailed implementation of the statutory license to the CRB is confirmed by the legislative history to the Copyright Royalty and Distribution Reform Act of 2004. That Act replaced the prior "CARP" regime—a panel of lay arbitrators convened on an ad hoc basis—with the CRB, a full-time board of expert judges appointed for a specified term of years to gain and exploit their experience and exposure to the regulated industries. Critics of the prior system, Congress observed, argued that the arbitrators' decisions were "unpredictable and inconsistent" and that the "[a]rbitrators lack[ed] appropriate expertise to render decisions." H.R. Rep. No. 108-408, at 18 (2004); *see also id.* at 25 ("[A]rbitrators selected under the current CARP system do not have the training, education, or experience in [the] relevant subject matter."). By comparison, the CRB—composed of experts

trained in the relevant fields—was designed to address the "concern that the evidence presented in the determination of a rate necessitates a significant mastery of economics and marketplace factors as well as considerable knowledge of copyright law." *Id.* Congress designed the CRB to ensure that it had the relevant expertise to properly address the rate-setting issues committed to it.

Finally, this action presents circumstances analogous to other cases where courts have referred questions to agencies on primary jurisdiction grounds. In *Allnet*, for example, the D.C. Circuit referred a question of tariff application and construction to the FCC, the agency responsible for its implementation and regulation. *See Allnet*, 965 F.2d at 1120 ("[I]t is hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations—an issue closely related to the central issues here, compliance of a tariff with regulatory standards and the consequences of imperfect compliance."); *see also Syntek*, 307 F.3d at 781(referring a question to the Register of Copyrights where the "resolution of the question at hand requires an analysis of whether the agency acted in conformance with its own regulations").

In sum, because "this case requires the resolution of an issue within the jurisdiction of an administrative body exercising statutory and comprehensive regulatory authority over a national activity that requires expertise and uniformity in administration," *Syntek*, 307 F.3d at 782,[6] the court should refer the matter to the CRJs under the primary jurisdiction doctrine.

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[6] "Congressional intent to have national uniformity in copyright laws is clear." *Syntek*, 307 F.3d at 781 (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964) and 17 U.S.C. § 301 and referring the case under primary jurisdiction); *see also Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (Congress enacted the Copyright Act with the "express objective of creating national, uniform copyright law."). For just this reason, section 301 of the Copyright Act generally provides for the preemption of federal copyright law over state law. The need for national uniformity is no less acute with respect to the interpretations of the CRJs' regulations, as inconsistent constructions of the CRJs' regulations by district courts across the country could destabilize the regulated entities and industries. Referral to the CRJs to

C. The Court Should Refer the Action to the CRB and Dismiss Without Prejudice

A court referring a case to an agency under primary jurisdiction grounds either stays the proceedings or dismisses the action without prejudice. *See Reiter*, 507 U.S. at 268. "Normally, if the court concludes that the dispute which forms the basis of the action is within the agency's primary jurisdiction, the case should be dismissed without prejudice so that the parties may pursue their administrative remedies." *Syntek*, 307 F.3d at 782. Only if the parties will be prejudiced by a dismissal do courts stay or otherwise hold the lawsuit in abeyance pending the resolution of the agency proceedings. *Id.*; *see also Allnet*, 965 F.2d at 1123 ("We can discern no present prejudice to either party from dismissal."). SoundExchange cannot show any prejudice from a dismissal here.

Finally, as to the mechanics of the referral, a "referral" of the matter to the agency does not involve a formal "transfer" of the action the CRB. Rather, the court dismisses without prejudice or stays the action and the parties must initiate appropriate proceedings before the agency. *See Syntek*, 307 F.3d at 782 n.3; *see also Reiter*, 507 U.S. at 269 n.3 (stating that the proper procedure is for the district court to stay or dismiss "to give the plaintiff a reasonable opportunity within which to apply to [the relevant agency] for a ruling"). Here, SoundExchange would initiate proper proceedings before the agency, utilizing the CRJs' "continuing jurisdiction" to amend the determination to make technical corrections and resolve unforeseen questions concerning their final determination. *See* 17 U.S.C. § 803(c)(4).[7]

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determine in the first instance the proper construction and application of their own regulations would further the Congressional intent to maintain uniform national copyright laws.

[7] Sirius XM hereby preserves, and does not by this motion waive, all additional and affirmative defenses it has available to it, including but not limited to laches and the statute of limitations.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Complaint without prejudice or stay the action under the doctrine of primary jurisdiction.

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Respectfully submitted,

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