

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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DETERMINATION OF RATES AND TERMS) Docket No. 14-CRB-0001-WR
FOR DIGITAL PERFORMANCE IN SOUND)
RECORDINGS AND EPHEMERAL)
RECORDINGS (WEB IV))
)

WRITTEN DIRECT STATEMENT OF SIRIUS XM RADIO INC.

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INTRODUCTORY MEMORANDUM TO THE
WRITTEN DIRECT STATEMENT OF
SIRIUS XM RADIO INC.

Sirius XM Radio Inc. (“Sirius XM” or “the Company”) hereby submits its written direct statement, pursuant to 37 C.F.R. § 351.4 and the Judges’ Order Establishing Revised Case Schedules, dated August 29, 2014. Sirius provides, among other services, a subscription-based Internet radio service and utilizes the Section 112 and 114 licenses to make ephemeral copies and digital performances of sound recordings on that service.

ROYALTY RATE REQUEST FOR 2016-2020 LICENSE PERIOD

Sirius XM requests that the Copyright Royalty Judges set the royalty rate for the public performance of sound recordings pursuant to 17 U.S.C. § 114(d)(2), and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. § 112(e), at .16 cents per performance. The fee for ephemeral phonorecords shall be included within that rate, and Sirius XM takes no position at this time as to what, if any, percentage of the Section 114 royalty should be deemed attributed to the Section 112 ephemeral license. Sirius XM proposes that, other than the royalty rate, the terms currently applicable to commercial

webcasters be retained in their current form.

SUMMARY OF TESTIMONY

Sirius XM is presenting written direct testimony from one witness, David J. Frear. Mr. Frear is the Chief Financial Officer of Sirius XM having held that position since 2003 (with Sirius Satellite Radio Inc. (“Sirius”) before the merger of Sirius and XM Satellite Radio Holdings, Inc. (“XM”). Mr. Frear explains the unique nature of Sirius XM’s satellite radio business, the ancillary nature of its Internet radio business, the extenuating circumstances that surrounded the settlement agreement reached in 2009 with SoundExchange under the Webcaster Settlement Act (“WSA”), and why those circumstances resulted in an above fair market value royalty rate being reached in the negotiations.

Mr. Frear’s testimony describes how Sirius XM determined that it needed compelling non-music programming that consumers could not obtain anywhere else in order to support its subscription-based revenue model. To achieve this goal, Sirius XM has made major investments in non-music content including major sports such as the NFL and Major League Baseball as well as celebrity programming from personalities such as Howard Stern. Given that music is widely available from a number of sources, this unique package of non-music content is extremely important in differentiating Sirius XM and driving consumer demand.

Mr. Frear’s testimony also describes the business model of the Company’s Internet radio service. The Sirius XM Internet radio service is a subscription-based service and is not predominantly supported through advertising like some other webcasters. The Internet radio service only accounted for █% of Sirius XM’s total revenue last year and its subscriber base is a fraction of the satellite radio subscriber base.


Mr. Frear's testimony explains why the settlement agreement reached in 2009 with SoundExchange under the Webcaster Settlement Agreement ("SXM WSA Settlement Agreement") resulted in an above fair market value royalty rate. He testifies that the massive increase in rates from the Web II proceeding from .07 cents per performance to .18 cents per performance caused Sirius XM to drop all free streaming, resulting in a ■% drop in listening hours and a resulting decrease in royalty payments.

Three primary factors caused the SXM WSA Settlement Agreement rates to be above market: a) the extreme financial distress experienced by Sirius XM, including a brush with bankruptcy, that continued during the negotiation; b) the litigation costs saved by entering into a settlement agreement and not pursuing a rate determination outweighed the potential savings to be gained from litigation because of the relatively small size of the revenues from the Internet radio service at that time; and c) SoundExchange had incentive to hold out for an above market rate because it had to consider the precedential effect of the SXM WSA Settlement Agreement on future rate proceedings. The combined pressure of these three factors made it reasonable for Sirius XM to accept an above market rate at that time.

Mr. Frear's testimony also presents the Sirius XM rate proposal and describes the basis for the rate proposal. The rate proposal, as explained above, is .16 cents per performance. Mr. Frear testifies that a recurring problem for licensed services in these proceedings is a lack of access to potentially comparable marketplace benchmarks prior to discovery. With that in mind, Sirius XM uses the starting point of the SXM WSA Settlement Agreement as the upper bound of a zone of reasonableness. The escalating rates of the Agreement are not within the zone of reasonableness because of their arbitrary nature and the circumstances surrounding the negotiation of the Agreement. The rate set for the prior rate period in the *Web I* proceeding, .07

cents per performance, sets the lower bound of the zone of reasonableness.

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WRITTEN DIRECT 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”). Prior to the merger of a subsidiary of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings, Inc. (“XM”), I served as Executive Vice President and Chief Financial Officer of Sirius, which I joined in 2003. I hold a Master of Business Administration degree from University of Michigan Graduate School of Business Administration as well as a Bachelor of Arts degree from University of Michigan.

2. In my current position, I am responsible for overseeing Sirius XM’s finance, accounting, treasury, investor relations, information technology and satellite development operations.

3. I testified on behalf of Sirius XM before the Copyright Royalty Judges in proceedings to set rates and terms for the digital performance of sound recordings and the making of ephemeral recordings by preexisting subscription services and preexisting satellite

digital audio radio services under the statutory licenses set forth in Sections 112 and 114 of the Copyright Act for the 2007 – 2012 period (“*Satellite I*”) and the 2013 – 2017 period (“*Satellite II*”).

4. My testimony in *Satellite I* covered, among other topics, the risks of the satellite radio business, the start-up and ongoing costs incurred by Sirius in running its business, as well as how Sirius generated revenues.¹ My testimony in *Satellite II* covered, among other topics, Sirius XM’s financial health, the negative impact that an increase in the sound recording royalty rate beyond the rate applicable for 2012 would have on Sirius XM, and Sirius XM’s efforts to procure licenses in direct dealings with individual record labels that would encompass the rights for which rates were set in the *Satellite II* proceeding.

SIRIUS XM’S BUSINESS

5. Sirius XM is unique. Sirius XM built from scratch an audio entertainment service rich in content, along with the hardware (i.e., receivers) necessary to access that service and the satellite network that enables it to be seamlessly delivered. Sirius XM broadcasts music, sports, entertainment, comedy, talk, news, traffic and weather channels, as well as infotainment services, in the United States on a subscription fee basis through its two proprietary satellite radio systems.²

6. The Company has invested billions of dollars to date in creating and supporting this service.

¹ Sirius XM designated my testimony in *Satellite I* for inclusion in the *Satellite II* proceeding.

² The Company currently owns a fleet of ten orbiting satellites, five in the Sirius system (FM-1, FM-2, FM-3, FM-4 and FM-6) and five in the XM system (XM-1, XM-2, XM-3, XM-4 and XM-5). Four of these satellites are currently used as spares, two of which are expected to be de-orbited in 2014 as they have reached the end of their useful lives.

7. Today, Sirius XM is the world's largest radio broadcaster measured by revenue and currently has over 26 million subscribers. Specifically, at the end of the second quarter of 2014, Sirius XM's total paid subscriber base reached a record 26.3 million, up 5% from a year earlier. Self-pay net subscriber additions were 379,711, and the self-pay subscriber base reached a record high of 21.6 million, up 7% from the second quarter of 2013. Paid and unpaid trials combined to produce a total trial funnel of 7.3 million at the end of the second quarter of 2014, the largest in the Company's history.

8. Sirius XM's primary source of revenue is subscription fees. The Company offers discounts for longer term prepaid subscription plans as well as discounts for multiple subscriptions. It also derives revenue from activation and other fees, the sale of advertising on select non-music channels, the direct sale of satellite radios and accessories, and other ancillary services, such as weather, traffic, data and Backseat TV services.

9. Sirius XM originally aimed at becoming the world's best music service, but quickly discovered that the ubiquitous availability of music – especially for free on terrestrial radio – required a new business strategy. The Company realized that to be successful, it needed not only an outstanding music product, but also compelling non-music programming that, in many cases, consumers could not get anywhere else. Given the increasingly competitive market in which Sirius XM operates, this need remains compelling today.

10. Sirius XM continues to make major investments in music programming, including in quality on-air talent and expert music programmers. The Company's music offerings feature unique music catalogs and channels dedicated to particular genres of music that, due to their rather narrow appeal, might not be available on other services. This breadth and depth of music offerings has a significant promotional effect on music sales. In fact, the Company regularly

sees evidence of a direct correlation between the performances of an artist's music on its services and a spike in that artist's record sales. This phenomenon has been explicitly recognized by recording artists and their representatives.

11. Sirius XM's current commercial-free music offerings, which are available on both Sirius and XM channels, are fully outlined on the programming grids attached hereto as **Exhibit A**.

12. As important as music is to the Company's business, Sirius XM's non-music content is what truly distinguishes the service from its competitors and allows the Company to compete vigorously with new market entrants. Sirius XM offers an impressive array of exclusive content that spans virtually all genres and interests, including programming featuring such personalities and brands as Howard Stern, Oprah Winfrey, Joel Osteen, Dr. Laura, Michael Smerconish, Jamie Foxx, Bob Edwards, Coach K, John Madden, Chris "Mad Dog" Russo, Cristina Saralegui, Comedy Central, Entertainment Weekly, TODAY Show Radio and many others. Sirius XM also broadcasts the audio feed from several television channels such as Fox, CNN, and CNBC.

13. Today, Sirius XM has over 30 sports channels, and is the ultimate destination for sports fans, offering listeners sports talk (including fantasy sports) and live play-by-play from the NFL, Major League Baseball, NASCAR, NBA, NHL, PGA TOUR, IZOD IndyCar Series, FORMULA 1, soccer, college sports, and more. These channels are critical to subscriber acquisition and retention because of the exclusive programming that is not available elsewhere. Sirius XM also has over 80 other non-music channels, which offer a variety of third-party and original news, talk, entertainment, comedy, family, health, religion, and traffic and weather programming and information.

14. Sirius XM's exclusive non-music programming can be found only on Sirius XM. This exclusivity is critically important to its subscribers and is what attracts new subscribers. Exclusive programming is more valuable to Sirius XM than non-exclusive programming such as music, which is ubiquitous and often available to consumers for free. If a consumer can only obtain desired programming from one outlet, then the consumer is more likely to pay to receive that programming and other programming from that outlet. Further, advertisers trying to reach that consumer are likely to pay more to advertise on that platform in connection with that programming.

15. With this exclusive non-music content comes many additional "brand" benefits that Sirius XM receives from its myriad high-profile non-music providers like Howard Stern, the NFL and MLB that go beyond attracting and retaining subscribers: benefits like advertising and promotional advantages, media exposure, and credibility in the eyes of consumers. This is particularly true of entertainment options like the NFL and MLB, which cannot be easily replicated by competitors.

16. Sirius XM's non-music arrangements provide other benefits in addition to actual programming content. These additional benefits make the non-music content more valuable than a mere music copyright license that only gives Sirius XM sound recording performance rights as one of several inputs necessary to create compelling music programming. For example, the Company's agreements with the NFL and NASCAR include the rights to broadcast live game and race feeds, and pre- and post-game and race shows. Similarly, Sirius XM's deal with Howard Stern does not simply afford the right to use that celebrity's name or put preexisting content from that celebrity on the air. That agreement, and similar agreements, also include the creation of the programming content to be broadcast on branded channels.

17. In contrast, the sound recording performance right does not, in itself, provide the programming content featured on Sirius XM's music channels. It merely provides one input to that programming. What makes Sirius XM's music channels compelling and differentiates Sirius XM from other music services is the quality of the programming of the channels, i.e., the selection of which of the millions of licensed tracks to actually play on a given channel, as well as the hosts and other on-air personalities who provide commentary and make connections with the listeners in-between songs.

18. Given that music is widely available from a variety of sources other than satellite radio (although not presented as powerfully or with the expertise and focus Sirius XM adds to it), it is the Company's non-music content – particularly the exclusive non-music content – that drives subscriptions and prevents defections. An illustration that leads me to this conclusion is that Sirius XM has approximately 22 million subscribers most of whom pay over \$100 a year for its content with 65 million satellite-enabled vehicles. Pandora, the largest non-interactive webcaster in the market, has only approximately 3 million paying subscribers on the approximately 150 million smartphones in the United States. The price of music-only webcasting services is much lower with Pandora, for example, charging either \$4.00 or \$5.00 per month for a commercial-free subscription. For Sirius XM to attract vastly more subscribers at a higher price point, the subscribers must be valuing the non-music content they cannot obtain through other sources. Differentiating Sirius XM's service, therefore, is critical to supporting the Company's subscription model. Given the dramatically increased availability of streamed music to compete with Sirius XM in the vehicle and on other platforms, this unique package of non-music content – both exclusive and from third-parties – has taken on even more importance as a differentiator and selling point of the Sirius XM service.

19. Sirius XM's current non-music offerings are outlined on the programming grids attached hereto as **Exhibit A**. For convenience, they are summarized as follows:³

News/Public Radio Programming (13 XM channels, 11 Sirius channels) – *CNBC, Bloomberg Radio, FOX News Channel, FOX Business, CNN, HLN, MSNBC, BBC World Service, Sirius XM Public Radio, NPR Now, CBC Radio One* (available on both services), *PRX Public Radio, C-Span Radio* (XM only);

Political Programming (5 XM and Sirius channels) – *POTUS Politics, FOX News Talk Radio, Sirius XM Patriot, Sirius XM Urban View, Sirius XM Progress* (available on both services);

Entertainment Programming (12 XM and Sirius channels) – *Howard Stern (Howard 100 and Howard 101), Oprah Radio, Indie; Entertainment Radio, OutQ, TODAY Radio, Sirius XM Stars, Business Radio, Joel Osteen Radio, Sirius XM Talk, Road Dog Trucking* (available on both);

Family & Health (3 XM and Sirius channels) – *Rural Radio, Doctor Radio, Radio Classics* (available on both services);

Sports Programming (13 regular XM channels, 12 regular Sirius channels, plus numerous play-by-play channels) – *ESPN Radio, ESPN Xtra, Mad Dog Radio, Sirius XM NBA, Sirius XM Fantasy Sports Radio, NFL Radio, NASCAR Talk, MLB Radio, NHL Radio, The PGA TOUR Radio, Sirius XM College Sports Nation, Sirius XM Sports Zone, Sirius XM FC, Sports Play-by-Play* (Sirius XM provides listeners with live sports play-by-play from: *NFL, NHL, NBA, Soccer, Horse Racing, NASCAR, IndyCar, College*

³ For completeness, the list includes the Canadian-produced channels, which are available to U.S. subscribers. The Canadian-produced channels are not, however, available on the Company's Internet radio service.

PUBLIC VERSION

Sports, PGA TOUR and MLB) (available on both services), *SEC, ACC, BIG; PAC-12; Big 12 Conference; Verizon IndyCar Radio* (XM only);

Religious Channels (3 Sirius channels, 2 XM channels) – *The Catholic Channel* and *Family Talk* (available on both services), *EWTN Radio (Global Catholic Radio Network)* (Sirius only);

Comedy Channels (6 XM and Sirius channels) – *Comedy Central Radio, Laugh USA, Blue Collar Radio, The Foxxhole, Raw Dog Comedy, Canada Laughs* (available on both services);

Kids (1 XM and Sirius channel) – *Kids Place Live*;

Traffic and Weather Channels (10 Sirius and XM channels) – 9 traffic channels covering 22 metropolitan areas plus one Canadian weather channel;

Latin Channels (7 XM channels, 6 Sirius channels) – *Cristina Radio, ¡Inspírate!, CNN En Español, RadioFórmula México, ESPN Deportes, Bein Sports* (available on both services), *MLB Radio En Español* (XM only); and

“More” Channels (6 XM channels, 5 Sirius channels) – *BYU Radio, H.U.R. Voices, HBCU* (available on both services), *Korea Today Radio Network* (XM Only).

SIRIUS XM’S INTERNET RADIO SERVICE

20. Although Sirius XM’s primary business is broadcasting on a subscription fee basis over its two proprietary satellite systems, it also provides a simulcast over the Internet on a subscription fee basis. Sirius XM’s Internet radio strategy has developed and changed over time.

21. From its inception until 2006, Sirius and XM did not charge a separate subscription fee or otherwise attempt to monetize its Internet radio offering: the companies offered free streaming of a subset of its satellite radio channels as part of its subscriptions.

22. Beginning in September 2006, Sirius started charging “linked” Internet radio subscribers (those who already were paying for a satellite radio subscription) \$2.99 per month to add a higher-bandwidth version of its Internet radio product but continued to provide free low-bandwidth Internet radio for its satellite subscribers. Sirius also charged “standalone” Internet radio subscribers (those without a satellite subscription) the (then) full satellite radio subscription fee of \$12.95 per month.

23. In March 2009, Sirius’ low bandwidth service was eliminated, except for certain legacy subscribers, and the subscription charges for the offering were standardized across the Sirius and XM platforms.

24. Currently, a standalone subscription to Sirius XM Internet radio is priced at \$14.99 a month (which is the same price as a basic satellite radio subscription), or \$4.00 a month when purchased as a complement to a Sirius XM satellite radio subscription (such subscriptions range from \$9.99 a month to \$14.99 a month depending on the package selected) or included in the All Access subscription package for \$18.99 a month. Discounts are available for prepaying for an annual or longer period.

25. Given the various free options in the market,⁴ these monthly charges have the effect of keeping the Sirius XM subscriber count low in comparison to the number of its satellite subscribers. Although it has over 26 million subscribers to its satellite radio service, Sirius XM’s Internet radio service has only [REDACTED] million self-pay subscribers as of March 2014.⁵

⁴ For example, terrestrial radio has approximately 200 million listeners in the U.S. and Pandora has 76 million active listeners on its free, advertising-supported service.

⁵ This number excludes promotional trials of limited duration and consists of standalone subscribers, linked subscriptions to a satellite radio service account and All Access subscribers who receive Internet radio service access by virtue of subscribing to all Sirius XM’s premium content.

26. Though some non-music channels contribute relatively small amounts of advertising revenue (in comparison to Sirius XM's subscription revenues), the advertising is sold on an undifferentiated basis, covering both the satellite and Internet radio services (because the Internet radio service in most cases merely simulcasts the satellite feed). This advertising is predominantly sold to reach the much larger satellite radio audience rather than the much smaller Internet radio audience. Sirius XM does not have a separate advertising opportunity for its Internet radio service (as other webcasters do) and the Sirius XM Internet radio service revenue model is not primarily advertising based.

27. Subscribers can access the Sirius XM Internet radio service on a variety of devices including computers, smartphones, tablet computers, and certain types of Internet-connected audio and video equipment. The Internet service is primarily a simulcast of Sirius XM's satellite service but a small number of additional channels not broadcast over the satellite service are available. These channels consist of additional music, news, and sports channels as well as Sirius XM Latino, a collection of dedicated Spanish language channels. The usage of these channels, however, is relatively small.

28. The Sirius XM Internet radio service also includes two innovative products offered at no extra charge to Internet radio subscribers. The first is Sirius XM On Demand, which allows subscribers to choose favorite episodes from a catalog of thousands of hours of exclusive Sirius XM shows, specials, series, live events and more. The On Demand offerings consist predominately of non-music content. The second is My Sirius XM, which allows subscribers to personalize a select group of music and comedy channels to create a more tailored, yet still non-interactive, listening experience. Subscribers can adjust characteristics like library depth, familiarity, music style, tempo, region, and other channel-specific attributes on seventy-

two music channels and three comedy channels to customize their listening experience. Usage of these two products has been relatively small in comparison to the simulcast channels. In terms of listening-hours, the Internet radio simulcast comprises approximately █% of the Company's subscribers' Internet radio usage, with Sirius XM On Demand and My Sirius XM listening, together, comprising the other █%.

29. The Sirius XM Internet radio service is a minor part of Sirius XM's overall business both on a subscriber and revenue basis. In fiscal year 2013, self-pay subscription revenue (i.e, excluding promotional trial subscriptions that include access to the Internet radio service) attributable to the Internet radio service accounted for only █% of Sirius XM's total revenue.

30. The number of Internet radio subscribers is also a small fraction of Sirius XM's total subscriber base. Of Sirius XM's 26.3 million subscribers at the end of the first quarter of 2014, only approximately █ had standalone Internet radio subscriptions and approximately █ had add-on subscriptions linked to their satellite radio service. An additional █ million self-pay subscribers had access to Sirius XM's Internet radio service by virtue of their purchase of an All Access subscription that allows access to virtually all of Sirius XM's programming and platforms. Although Sirius XM's Internet radio is bundled with the Company's All Access package, demand for the All Access subscription is driven by non-music content such as Howard Stern, Oprah Radio, every NFL game, every NASCAR race, up-to-the minute traffic and weather updates for twenty-two cities along with other premium content. Of all these self-pay Internet radio service subscribers (standalone, linked and All Access), only █% log onto the Internet radio service in a given month (March 2014 used for illustration).

31. As of December 31, 2013, the mix of usage for Internet radio subscribers for that year, based upon listening time, was ■■■% music and ■■■% non-music (talk). This ratio does not necessarily reflect the relative value of Sirius XM's non-music programming. Consumer studies consistently indicate that one of the top reasons Sirius XM subscribers give for their willingness to pay for the Company's Internet radio service is the exclusive content that is not available from any other webcasting service.

32. In many respects, Sirius XM's Internet radio service is ancillary to the Company's satellite radio service. Originally, the Internet radio service was offered as a way to "test drive" or sample the satellite service at home. This was an element of the Company's distribution and marketing strategy at a time in the Company's development when most automobiles were not equipped with satellite receivers. Today, there are likely some Sirius XM subscribers who still want to test drive the service before investing in a radio receiver if they need to buy one. The Company believes that other subscribers use the Sirius XM Internet radio service to "time shift" or complement their satellite radio listening usually done in their automobile. Whatever the reason, the subscribers' demand for the Sirius XM Internet radio service is heavily influenced by the existence of the satellite radio service.

**CIRCUMSTANCES SURROUNDING THE NEGOTIATION
OF THE 2009 SIRIUS XM WSA SETTLEMENT AGREEMENT**

33. The rates currently paid by Sirius XM for its Internet radio service are the product of a settlement agreement between Sirius XM and SoundExchange pursuant to the Webcaster Settlement Act (the "SXM WSA Settlement Agreement"). In order to consider those rates, it is important to understand the genesis and circumstances surrounding the negotiation of the SXM WSA Settlement Agreement.

34. In 2007, the Copyright Royalty Judges issued their rate determination in the second webcasting rate proceeding (“*Web II*”). That determination implemented a massive increase in the already high rates applicable to Sirius XM’s webcasting activities. Those rates increased from .07 cents per performance for the entire prior rate period to .18 cents for the first year of the *Web II* rate period, with further increases each year of that period.

35. As a result of the *Web II* rates, Sirius XM made the decision to drop all free streaming on both the Sirius and XM platforms, a decision that resulted in a ■% drop in the Internet radio service’s reported listening hours and a resulting decrease in royalty payments to SoundExchange.

36. Other webcasters were also significantly impacted by the rates set in *Web II*, eventually leading to Congress’s passage of the Webcaster Settlement Act (the “WSA”), which allowed webcasters and SoundExchange to negotiate lower rates in lieu of the *Web II* rates, and at the same time settle rates for the period that would be covered by the third webcasting rate proceeding (“*Web III*”). Notably, although the WSA allowed SoundExchange to enter into such settlements, it did not require SoundExchange to do so.

37. SoundExchange entered into separate negotiations with several different types of webcasters. One of those negotiations was with Sirius XM. The Company’s WSA negotiation was affected by a number of factors that were unique to Sirius XM and that particular point in the Company’s history, which would not be present in a hypothetical competitive marketplace negotiation: a) Sirius XM was under severe economic duress at the time of the negotiation and the avoidance of litigation costs in further regulatory proceedings was a major incentive for Sirius XM, but not SoundExchange, in the negotiations; b) the relatively small size and ancillary nature of Sirius XM’s Internet radio service’s revenue and subscriber base compared to the

litigation costs involved made it rational for Sirius XM to accept an above market rate to avoid those costs; and c) the regulatory backdrop of rate court affected the negotiations because SoundExchange had economic incentives to set a precedential rate that exceeded the scope of the incentives existing solely in the sale of rights for the Sirius XM Internet radio service.

38. The SXM WSA Settlement Agreement was negotiated in the spring and summer of 2009. At that time, Sirius XM was under severe financial distress that affected its ability to negotiate fair market rates. Foremost among the cause of the duress was Sirius XM's brush with bankruptcy.

39. Prior to their merger in 2008, the separate companies – Sirius and XM – were experiencing financial hardship after having sustained years and years of losses. Searching in part for an answer to improve their financial position, on February 19, 2007, Sirius and XM announced their intent to merge. Sirius' shareholders approved the transaction in November 2007, but it was not until July 2008 that the Federal Communication Commission announced it had approved the merger. The companies officially merged on July 29, 2008.

40. The challenging conditions that had plagued the separately-owned entities continued in the immediate aftermath of the merger – a time when many companies struggled to stay afloat in the midst of the credit crisis. By late 2008, Sirius XM had insufficient cash to repay hundreds of millions of dollars due in February 2009, and was unable to access the capital markets to refinance this (and other) debt. In an effort to avoid bankruptcy, the Company sought out investors to raise capital to refinance the notes coming due. Twenty-one prospective investors were solicited, spanning the range of likely private equity, debt investor, and corporate sources. None was willing to provide the necessary financing to the Company.

41. The reasons given by investors included the facts that: (1) Sirius XM and its predecessors had experienced nearly twenty years of losses and still did not have positive EBITDA margins; (2) its business was subject to significant risk; (3) it faced competition from new technologies; (4) its business was dependent on the automotive industry and General Motors and Chrysler were on the verge of bankruptcy; and (5) institutional investors were facing outflows of investment funds.

42. After a failure to receive any viable offers, Sirius XM instructed its consultants to start preparing to file a Chapter 11 bankruptcy on the date the Notes were scheduled to come due. Sirius XM narrowly avoided filing for Chapter 11 bankruptcy protection only when, after brief but intense negotiations, Liberty Media Corporation (“Liberty”), a potential lender to which Sirius XM had only recently been introduced, agreed to provide a \$380 million loan (in two phases) in a series of transactions that enabled Sirius XM to avert a default on its debt and bankruptcy.

43. The terms of the Liberty arrangement, while acceptable to Sirius XM given the circumstances, were onerous: Liberty demanded and received an extraordinary 15% interest rate on its loans; a \$30 million “restructuring” fee that further increased the cost of the loans; preferred stock equal to 40% of the Company’s equity on a converted basis; liens on substantially all of the Company’s assets; and the right to nominate directors to the Company’s Board of Directors proportional to its equity interest in the Company.

44. In 2009, the same year in which Sirius XM was negotiating the SXM WSA Settlement Agreement, Sirius XM was weeks away from default on notes for hundreds of millions of dollars, was preparing bankruptcy filings, negotiated a last minute deal to save the Company as it was preparing to file bankruptcy, and had to issue over \$800 million in non-

investment grade “junk” bonds. By any definition, these circumstances constitute extreme financial distress for a public company.

45. The Sirius XM stock price reflected its difficulties at this time. The price fell from over \$4.00 per share in January 2007 down to a low of \$0.05 per share on February 11, 2009, when bankruptcy seemed inevitable. On September 15, 2009, Sirius XM received a delisting notice from NASDAQ because its common stock had closed below \$1.00 per share for 30 consecutive days and was therefore not in compliance with the NASDAQ Marketplace Rules.

46. Compounding Sirius XM’s financial problems related to the bankruptcy, it had also recently spent tens of millions of dollars in legal fees defending the merger before the Federal Communications Commission and the Department of Justice. The two companies, Sirius and XM, had combined merger costs of close to \$150 million. In addition, Sirius and XM had each participated separately in the *Satellite I* proceeding, which consumed a tremendous amount of each company’s time, attention and resources – financial, legal, and executive – between 2006 and 2007. At the time Sirius XM was negotiating the SXM WSA Settlement Agreement in 2009, the *Satellite I* decision remained on appeal and the *Satellite II* proceeding – which would entail millions more in legal fees – was less than a year and a half away. Given the Company’s extremely precarious financial position and litigation and regulatory fatigue, Sirius XM was ill-prepared to expend further funds litigating *Web III*.

47. This pressure to avoid litigation expenses was not equally felt by SoundExchange. As a preliminary matter, neither SoundExchange nor its members were experiencing any kind of economic distress that would be similar to the distress experienced by Sirius XM and its stockholders. Moreover, SoundExchange funds rate litigation expenses out of the royalty payments it collects, so the costs of litigation are spread widely among its thousands of members.

Finally, SoundExchange was going to have to litigate the *Web III* proceeding irrespective of whether it reached an agreement with Sirius XM so any savings in litigation costs from such an agreement would be minimal.

48. Another factor affecting the negotiations was the reality that the relatively small size of Sirius XM's Internet radio business meant that the saved litigation costs were more material in the negotiations because a potentially lower rate applied to a relatively small number of music performances could not justify the expenditure of millions in litigation costs. The converse was also true: the imposition of a higher rate would be mitigated by the small number of music listeners.

49. In July 2009, Sirius XM had only [REDACTED] self-pay Internet radio subscribers (consisting of standalone subscribers plus linked satellite subscriptions and excluding promotional and legacy free streaming). Under the *Web II* rate of \$0.0018, Sirius XM's royalty cost would have been only \$[REDACTED] for July 2009. At that level of subscribers and royalty payments, even a significant decrease in the per-performance fee from the *Web II* rates would not have saved enough in royalty fees to cover the litigation costs and the risk inherent in litigation.

50. Unlike in a hypothetical fair market licensing negotiation with individual copyright owners, SoundExchange not only exercised the market power of a collective representing the entire industry (and therefore precluding any competition among rights owners) but also had to consider the effect of its negotiating position on future rate proceedings because of its potential precedential effect. For example, in the summer of 2009 before Sirius XM and SoundExchange finished negotiating the SXM WSA Settlement Agreement, a settlement agreement between NAB and SoundExchange was finalized (the "NAB WSA Agreement"). Even if it might have been economically rational for SoundExchange to agree to lower rates with

Sirius XM, such an outcome could have harmed SoundExchange's ability to use the NAB WSA Agreement rates as benchmarks in future rate proceedings such as this one. At the time of negotiating the SXM WSA Settlement Agreement, the NAB WSA Agreement – which formed the basis of SoundExchange's negotiating position with Sirius XM – could serve as a precedent if Sirius XM were to participate in *Web III* (and SoundExchange was loathe to negotiate a lower rate with us that would compromise that precedent). Moreover, the WSA did not require SoundExchange to enter into a settlement agreement with Sirius XM. If no agreement was reached, Sirius XM would be stuck with the rates set in *Web II*. This fact greatly minimized SoundExchange's incentive to agree to substantially lower rates. Sirius XM also recognized that, in part because there are no good benchmarks that have not previously been rejected by the Judges and SoundExchange was able to ensure that the significantly lower pureplay WSA license rates could not be used as a benchmark in the proceedings, Sirius XM would be unlikely to obtain rates significantly below those agreed to by NAB if the Company litigated – certainly not low enough to make the litigation expense and burden on the Company's legal and executive teams worth it given the Company's Internet radio economics described above.

51. Given all these circumstances, it made economic sense to accept the SXM WSA Settlement Agreement rates even though they were substantially higher than fair market value. At the time of negotiating the SXM WSA Settlement Agreement, the economic strain on Sirius XM made it uncertain whether the Company would survive in the long term. The role of the Company's Internet radio service as an adjunct to Sirius XM's core satellite radio business was equally uncertain. Thus, avoiding expensive litigation and resolving regulatory uncertainty made it reasonable for Sirius XM to accept an above market rate *at the time*.

SIRIUS XM'S RATE PROPOSAL

52. On behalf of Sirius XM, I present the following proposal for the royalty rates payable by Sirius XM, and any similarly situated subscription-based webcasters with services featuring significant non-music content, for the Section 114 digital sound recording public performance license for the 2016 – 2020 rate period: .16 cents per performance.

53. The Section 112 ephemeral license has no value independent of the Section 114 performance license. Consequently, Sirius XM proposes that the royalty for the Section 112 license be deemed included within the Section 114 royalty payment. Sirius XM takes no position at this time as to what, if any, percentage of the Section 114 royalty should be deemed attributed to the Section 112 ephemeral license.

54. Sirius XM is proposing a rate on a per-performance basis, which is the same basis currently used. Because of the importance of non-music content in Sirius XM's Internet radio service, a percentage-of-revenue rate would not accurately reflect the value of the use of the licensed sound recordings by its subscribers. The All Access subscribers, constituting the largest category of subscribers with Internet radio access, subscribe to obtain access to exclusive satellite radio channels and Internet radio service is incidental to their subscription decision. It is the satellite radio service content, which pays royalty under a different license, that actually drives the demand for subscriptions to the All Access pass. This is clearly evinced by the fact that All Access subscribers have, by far, the lowest usage of the Internet radio service compared to the other categories of subscribers. In March 2014, only █% of self-pay All Access subscribers logged onto the Internet radio service.

55. Sirius XM's programming comprises significant non-music content. A per-performance rate has the benefit of being directly tied to the amount of music used, and consequently would dynamically adjust to reflect any changes in listening habits, i.e., if

subscribers listened to more or less music as compared to non-music content. A percentage-of-revenue royalty rate would not adjust in such a manner, and may result in a windfall or shortfall to the copyright holders and recording artists over time.

56. For example, a Sirius XM All Access subscriber may purchase a subscription, obtain webcasting logon credentials but rarely (or never) log onto the service. In fact, in a given month, only █% of self-pay Internet radio subscribers with logon credentials actually use the service. Other subscribers may log in and only listen to the Howard Stern show or other proprietary programming. In any of those cases, under a percentage-of-revenue rate, Sirius XM would have to pay a disproportionately high amount for a subscriber who listened to no music or perhaps only one or two songs in a month.

57. Although it may be theoretically possible to attempt to mitigate this problem by either reducing the revenue base from which the sound recording royalty is calculated or reducing the royalty rate applied to that revenue base, either approach would require adjustments that could introduce imprecision and error. While the relative amount of time spent by subscribers listening to music versus non-music programming may be calculated at a given time (though that ratio may change over the course of a rate period), the relative contribution of each type of content to generating the overall subscription revenue is far more difficult to quantify. Moreover, even if such a calculation could be done for Sirius XM's Internet radio service, it would not necessarily apply to other similarly situated webcasters. All of these factors militate in favor of using a per-performance metric, and not a percentage of revenue metric, for the webcasting license rates for subscription webcasters with substantial non-music programming.

58. Sirius XM is not proposing any change to the current per-channel minimum payment or the regulatory terms associated with the statutory licenses at issue in this proceeding.

BASIS FOR THE RATE PROPOSAL

59. One threshold problem in setting a rate for subscription-based webcasting services, particularly those featuring significant non-music programming, is a lack of comparable marketplace benchmarks. I am not aware of any marketplace transactions for comparable services. It is a recurring problem, inherent in the procedures before the Copyright Royalty Judges, that individual licensees such as Sirius XM do not have access to any potential benchmark licenses issued by the record companies (if any do exist) prior to filing their written direct cases.

60. The only comparable marketplace referent for sound recording performance rights currently available to Sirius XM is the SXM WSA Settlement Agreement rate. As noted above, however, the SXM WSA Settlement Agreement does not reflect the fair market value of the licenses at issue in this proceeding. The circumstances surrounding the SXM WSA Settlement Agreement resulted in a higher than fair market value rate due to Sirius XM's desire to avoid litigation costs in light of its precarious financial position and limited exposure to the effects of an above-market rate.

61. The most that may be gleaned from the SXM WSA Settlement Agreement is that the starting rate of .16 cents per performance may set the upper bound of a range of potential fair market rates. There is no rational basis for the annual rate increases included in the SXM WSA Settlement Agreement, at least none tied to the fair market value of the statutory licenses. The lower bound of such a range is .07 cents per performance, which was the rate determined to be the fair market value of the statutory licenses in the *Web I* proceeding. Sirius XM is proposing a rate at the very top of this range, although it anticipates that discovery may yield marketplace data justifying a downward revision of this proposal.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)
 DETERMINATION OF RATES AND TERMS)
 FOR DIGITAL PERFORMANCE IN SOUND)
 RECORDINGS AND EPHEMERAL)
 RECORDINGS (WEB IV))

Docket No. 14-CRB-0001-WR

DECLARATION OF DAVID J. FREAR

I, David J. Frear, declare under penalty of perjury that the statements contained in my
Written Direct Testimony in the above-captioned matter are true and correct to the best of my
knowledge, information, and belief. Executed this 6th day of October 2014 in New York, New
York.



David J. Frear

EXHIBIT A

POP

- 02 Top 40 Hits
- 03 Rhythmic Pop from the 2000s – Today
- 04 '40s Pop Hits/Big Band
- 05 '50s Pop Hits
- 06 '60s Pop Hits with Cousin Bruce
- 07 '70s Pop Hits
- 08 '80s Pop Hits
- 09 '90s Pop Hits
- 10 2000s Pop Hits
- 15 2000s and Today
- 16 Lite Pop Hits
- 17 Love Songs

ROCK

- 19 Elvis 24/7 Live from Graceland
- 20 Bruce Springsteen 24/7
- 21 Little Steven's Underground Garage
- 22 Pearl Jam 24/7
- 23 Grateful Dead 24/7
- 24 Escape to Margaritaville
- 25 '70s & '80s Classic Rock
- 26 '60s & '70s Classic Rock
- 27 Deep Classic Rock
- 28 Adult Album Rock
- 29 Jam Bands

SPORTS

- 83 ESPN's Sports Talk Channel
- 84 The Latest Sports News
- 85 "Mad Dog" Russo, Dan Patrick
- 88 24/7 NFL News & Talk
- 90 24/7 NASCAR® Talk
- 91 All College Sports – All the Time
- 92 Sports Games and Talk
- 93 Horse Racing Talk & MLB® Play-by-Play

- 30 Contemporary Eclectic
- 31 Acoustic Singer-Songwriters
- 32 Mellow Rock
- 33 Classic Alternative
- 34 '90s Alternative/Grunge
- 35 Indie Rock
- 36 New Alternative Rock
- 37 New Hard Rock
- 38 Classic Hard Rock Presented by Ozzy
- 39 '80s Hair Bands
- 40 Heavy Metal
- 41 Music of Action Sports, Tony Hawk
- 42 Reggae

HIP-HOP

- 44 Hip-Hop Hits
- 45 Eminem's Uncut Hip-Hop Channel
- 46 Classic Hip-Hop

R&B

- 47 R&B Hits
- 48 Adult R&B Hits
- 49 Classic Soul/Motown
- 50 Old Skool R&B

DANCE & ELECTRONIC

- 51 Dance Hits
- 52 Progressive House, Trance & Electro

- 94 Your SiriusXM Home for Soccer
 - 207 24/7 NBA News & Talk
 - 208 Live PGA TOUR® Golf & Talk
 - 209 24/7 MLB® Talk
 - 210 Fantasy Sports Talk
 - 211 24/7 NHL® News, Talk & Play-by-Play
 - 212-220 **SPORTS PLAY-BY-PLAY**
Play-by-Play Coverage of Verizon IndyCar® Series, MLB®, NHL®, NBA, College Sports and More
- Plus Live Games & Races from and More

COMMERCIAL-FREE MUSIC

- 53 Smooth Electronic
- 54 Studio 54 Radio
- 55 Dance Hits from the '90s & 2000s

COUNTRY

- 56 New Country
- 57 Country Hits from the 2000s
- 58 '90s Country & More
- 59 Classic Country
- 60 Rockin' Country Rebels
- 61 Bluegrass

CHRISTIAN

- 63 Christian Pop & Rock
- 64 Gospel, Presented by Kirk Franklin
- 65 Southern Gospel

JAZZ/STANDARDS

- 66 Smooth/Contemporary Jazz
- 67 Classic Jazz
- 68 New Age
- 69 Beautiful Music
- 70 B.B. King's Blues
- 71 Sinatra/American Standards
- 72 Show Tunes

CLASSICAL

- 74 Opera/Classical Vocals
- 76 Traditional Classical

TRAFFIC & WEATHER

- Not Available on Internet Radio**
- | | |
|---------------------------------------------|----------------------------------------------------|
| 132 BOSTON • PHILADELPHIA
PITTSBURGH | 138 ST. LOUIS
MINNEAPOLIS/ST. PAUL
LAS VEGAS |
| 133 NEW YORK | 139 SAN FRANCISCO
SEATTLE • SAN DIEGO |
| 134 WASHINGTON DC
BALTIMORE • ATLANTA | 140 LOS ANGELES |
| 135 CHICAGO • DETROIT | 172 Canada's News/
Weather by AMI-Audio |
| 136 MIAMI • ORLANDO
TAMPA/ST. PETERSBURG | |
| 137 DALLAS/FT. WORTH
HOUSTON • PHOENIX | |
- ▼ Available only with the All Access package
 ▼ Requires All Access package for Satellite; standard on Internet Radio
 ▼ Preemptible for Play-by-Play sports
 ▼ Not available on Internet Radio

HOWARD STERN

100 101

ENTERTAINMENT

- 204 Live Your Best Life
- 102 Indie Talk Radio
- 105 Pop Culture News and Reviews
- 106 Gay & Lesbian Radio
- 108 Keep Up with TODAY – All Day
- 109 Celebrity Hosts & Lifestyle Shows
- 111 24/7 Business Talk from Wharton
- 128 Joel Osteen Radio
COMING THIS FALL
- 146 Just for Truckers
- 206 Opie, Jim Norton & Special Guests

CANADIAN

Not Available on Internet Radio

- 161 The New Rock Alternative
- 162 Canadian Indie Music First
- 163 SiriusXM's "Chansons" Music Channel
- 164 The New Rock Alternative
- 165 The Cultures of Canada
- 166 Francophone & Canadian Country-Folk
- 167 Canadian Current Affairs & Talk
- 170 Radio-Canada News & Information
- 171 Adult Alternative Artists

MORE

- 11 KIIS FM Los Angeles
- 12 Z100 Plays All the Hits
- 141 Real Talk with Real People
- 142 HBCU Excellence in Education
- 143 Talk About Good

NEWS/PUBLIC RADIO

- 112 First in Business Worldwide
- 113 The Power to Prosper™
- 114 We Report. You Decide.
- 115 The Worldwide Leader in News
- 116 News & Views
- 117 Lean Forward
- 118 BBC World Service
- 119 The World Leader in Business News
- 121 Bob Edwards and Car Talk
- 122 NPR News & Conversation
- 169 Canada's #1 Rated Radio News Source

POLITICS/ISSUES

- 124 Unfiltered Political Talk
- 125 Conservative Talk
- 126 African-American Talk
- 127 Progressive Talk

▼ Available only with the All Access package

▼ Requires All Access package for Satellite; standard on Internet Radio

▼ Preemptible for Play-by-Play sports

▼ Not available on Internet Radio

COMEDY

- 95 Uncut Comedy Direct to Your Brain
- 96 Presented by Jamie Foxx
- 97 Blue Collar Radio
- 98 Family Comedy
- 99 Comedy Hits
- 168 Canadian Comedy Uncensored 24/7

RELIGION

- 129 Not What You'd Expect
- 130 Radio for the Serious Listener
- 131 Christian Talk

FAMILY & HEALTH

- 80 Agriculture & Western Lifestyle
- 81 Real Doctors Helping Real People
- 82 Classic Radio Shows

ADDITIONAL INTERNET RADIO CHANNELS

MUSIC

- 310 Music by Rock Hall Inducted Artists
- 311 Pink Floyd 24/7
- 312 Tom Petty's Buried Treasure 24/7
- 313 Rock & Roll Jukebox Songs
- 316 Live Classic Rock
- 319 Classic Indie Rock
- 340 Tiësto's Electronic Dance Channel
- 350 Country Bar Songs
- 360 Chanting, Sacred and Spiritual Music
- 700 Neil Diamond 24/7
- 701 U.K. Pop Hits
- 702 Today's Pop Vocalists
- 703 Reimagined Pop & Rock Classics
- 705 More Limited Engagements
- 715 More Limited Engagements
- 716 More Limited Engagements
- 730 More Limited Engagements
- 713 Jason Ellis Show Archives Nonstop
- 714 All Metallica Non-Stop 24/7
- 724 Smooth R&B Love Songs

LATINO

- 500 Contemporary Latin Pop & Ballads
- 506 Latin Urban Music
- 520 Latin Love Songs
- 523 Classic Ballads in Spanish & English
- 530 Latin Jazz
- 533 Classic Salsa
- 540 Latin Rock
- 563 The World of Showbiz
- 970-994 Sports Play-by-Play en Español

SPORTS

- 370 The Latest Sports News from ESPN
- 800-831 Live NFL Play-by-Play
- 840-869 Live MLB Play-by-Play

COMEDY

- 400 The One and Only George Carlin

LATINO

- 147 Piolin, Fun, Laughs & Music!
- 148 Regional Mexican Music
- 149 Hits in Spanish and English
- 150 Tropical Latin Music
- 152 Contemporary English & Spanish Hits
- 153 Advice & Current Affairs
- 154 Inspired Hispanic Talk Radio
- 155 All-News Spanish Language
- 156 News and More from Mexico
- 157 Spanish Sports Talk & Play-by-Play
- 158 America's Int'l Sports Network

KIDS

- 78 All Fun for Kids
- 79 Music Destination for Kids & Family

- 725 Hip-Hop and R&B from the '90s & 2000s
- 741 Folk
- 749 Experience Jazz at Lincoln Center
- 750 Movie Soundtracks & More
- 760 Classical Pops
- 770 '70s & '80s Super Party Hits
- 771 Hands Up for '80s & '90s Party Hits
- 772 Party Like It's 1999, '90s/2K Style
- 773 Non-Stop Classic Rock Party Tunes
- 774 Rock Songs for Perennial Collegians
- 775 An Upbeat Mix of Hip-Hop Music
- 776 Hit Party Songs from the '50s & '60s
- 777 The Ultimate Party Soundtrack
- 778 Every Era of Punk Slammed Together
- 779 A New Wave Dance Party Mix
- 780 The Girl Group Sound 24/7
- 781 Contemporary Holiday Hits

NEWS, TALK & ENTERTAINMENT

- 77 Pop Hits Sung by Kids for Kids
- 120 C-SPAN Radio
- 123 Independent Public Radio
- 144 Korean Music, News, Entertainment
- 450 Talk Radio from FOX News
- 790 More Limited Engagements
- 791 More Limited Engagements
- 793 Martha Live and More
- 796 TheBlaze Radio Network
- 797 More Conservative Talk
- 798 More Progressive Talk

- 880-909 Live NBA Play-by-Play
- 920-949 Live NHL Play-by-Play
- 960-969 Live NBA and NHL Play-by-Play

- 403 The Premier Comedy Showcase

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- 41 Music of Action Sports, Tony Hawk XL
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- 880-909 Live NBA Play-by-Play
- 920-949 Live NHL® Play-by-Play
- 960-969 Live NBA and NHL® Play-by-Play

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of

**DETERMINATION OF RATES AND TERMS
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)**

Docket No. 14-CRB-0001-WR

DECLARATION AND CERTIFICATION OF JACKSON D. TOOF

(On behalf of Sirius XM Radio Inc.)

1. I am counsel for Sirius XM Radio Inc. (“Sirius XM” or the “Company”) in the above-captioned proceeding. I respectfully submit this declaration and certification pursuant to 37 C.F.R. § 350.4(e)(1) per the terms of the Interim Protective Order entered by the Judges on October 2, 2014 (the “Interim Protective Order”) and the proposed protective order attached as Appendix A to the Joint Motion to Adopt Protective Order (the “Proposed Protective Order,” and together with the Interim Protective Order, the “Protective Orders”). I am authorized by Sirius XM to submit this Declaration on Sirius XM’s behalf.

2. I have reviewed the Introductory Memorandum to the Written Direct Statement of Sirius XM Radio Inc., the Written Direct Testimony of David J. Frear, and the exhibits, and Redaction Log submitted in this proceeding. I also have reviewed the definitions, terms and provisions provided in the Protective Orders. After consultation with Sirius XM, I have determined to the best of my knowledge, information and belief that portions of the Introductory Memorandum to the Written Direct Statement of Sirius XM Radio Inc., the Written Direct Testimony of David J. Frear, and accompanying exhibits contain information that is “Protected

Material” as defined by the Proposed Protective Order. The Protected Material is identified in the Redaction Log, shaded in the printed copies of Sirius XM’s filing, and described in more detail below.

3. Such Protected Material includes, but is not limited to, testimony and exhibits involving highly confidential internal business information, financial projections, financial data, Internet usage data, subscriber data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive.

4. If this strategic and financial information were to become public, it would place Sirius XM at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of Sirius XM, and jeopardize its business interests.

5. With respect to the financial information in the Restricted materials, I understand that Sirius XM has not disclosed to the public or the investment community the financial information that it seeks to restrict here (including spending and investment projections, specific royalty payment information, and the like). As a result, neither the Company’s competitors nor the investing public has been privy to that information, which the Company has viewed as highly confidential and sensitive, and has guarded closely. In addition, when Sirius XM does disclose information about the Company’s finances to the market as required by law, the Company provides accompanying analysis and commentary that contextualizes disclosures by its officers. The information that Sirius XM seeks to restrict under the Protective Order, while truthful and accurate to the best of Mr. Frear’s knowledge, was not intended for public release or prepared with that audience in mind, and therefore was not accompanied the type of detailed explanation and context that usually accompanies such disclosures by a company officer. Moreover, the statements and exhibits containing the information have not been approved by Sirius XM’s

Board of Directors, as such sensitive disclosures usually are, or accompanied by the typical disclaimers that usually accompany such disclosures. Sirius XM could experience negative market repercussions, competitive disadvantage, and even possible legal exposure were this confidential financial information released publicly without proper context or explanation.

6. The Introductory Memorandum to the Written Direct Statement of Sirius XM Radio Inc. and the Written Direct Statement of David J. Frear, Executive Vice President and Chief Financial Officer of Sirius XM, contain material non-public information concerning Sirius XM's Internet radio subscriber base, Internet radio usage data for music and non-music programming, confidential financial information concerning Sirius XM's costs and royalty payments over the 2007–2012 and 2012–2016 licensing periods, respectively, and Sirius XM's proposed royalty rate for the 2016–2020 licensing period. Mr. Frear's testimony also contains certain material non-public details of negotiations with potential lenders. None of this information is publicly known or available. Disclosure of the non-public usage data and financial data would, for reasons discussed in paragraphs 4 and 5 above among others, competitively disadvantage Sirius XM.

7. The commercial and financial information described in the paragraphs above and detailed on the accompanying Redaction Log must be treated as restricted "Protected Material" under the Proposed Protective Order in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Sirius XM to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: October 7, 2014



Jackson D. Toof (D.C. Bar No. 482609)

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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of

**DETERMINATION OF RATES AND TERMS
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)**

Docket No. 14-CRB-0001-WR

**REDACTION LOG FOR THE WRITTEN DIRECT STATEMENT OF
SIRIUS XM RADIO INC.**

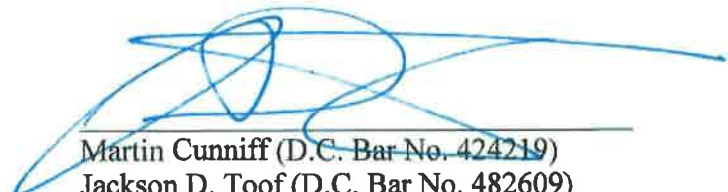
Pursuant to the requirements of the Interim Protective Order entered by the Judges on October 2, 2014 (the “Interim Protective Order”) and the proposed protective order attached as Appendix A to the Joint Motion to Adopt Protective Order (the “Proposed Protective Order,” and together with the Interim Protective Order, the “Protective Orders”), Sirius XM Radio Inc. (“Sirius XM” or the “Company”) hereby submits the following list of redactions from Sirius XM’s Written Direct Statement and the Written Direct Testimony of David J. Frear filed October 7, 2014.

Document	Page No. / Paragraph No. / Exhibit No.	General Description
Introductory Memorandum to The Written Direct Statement of Sirius XM Radio Inc.	Page 2, line 21	Confidential financial information.
Introductory Memorandum to The Written Direct Statement of Sirius XM Radio Inc.	Page 3, line 5	Commercially sensitive information concerning subscriber behavior.
Written Direct Testimony of David J. Frear	Page 9, ¶ 25	Commercially sensitive information regarding subscription data.
Written Direct Testimony of David J. Frear	Page 11, ¶ 28	Commercially sensitive information regarding details of subscriber behavior.

Written Direct Testimony of David J. Frear	Page 11, ¶ 29	Confidential financial information.
Written Direct Testimony of David J. Frear	Page 11, ¶ 30	Commercially sensitive subscription data and information regarding subscriber behavior.
Written Direct Testimony of David J. Frear	Page 12, ¶ 31	Commercially sensitive information regarding subscriber behavior.
Written Direct Testimony of David J. Frear	Page 13, ¶ 35	Commercially sensitive information regarding subscriber behavior.
Written Direct Testimony of David J. Frear	Page 17, ¶ 49	Commercially sensitive subscription and financial data.
Written Direct Testimony of David J. Frear	Page 19, ¶ 54	Commercially sensitive information regarding subscriber behavior.
Written Direct Testimony of David J. Frear	Page 20, ¶ 56	Commercially sensitive information regarding subscriber behavior.

The undersigned certify, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration and Certification of Jackson D. Toof submitted herewith, that the listed redacted materials meet the definition of "Restricted" contained in the Protective Orders.

Dated: October 7, 2014



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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of)
)
)
DETERMINATION OF RATES AND TERMS) **Docket No. 14-CRB-0001-WR**
FOR DIGITAL PERFORMANCE IN SOUND)
RECORDINGS AND EPHEMERAL)
RECORDINGS (WEB IV))
)

CERTIFICATE OF SERVICE

I, Jackson D. Toof, hereby certify that a copy of the foregoing Written Direct Statement of Sirius XM Radio Inc. has been served electronically by agreement of the parties on this 7th day of October, 2014, with hard copy sent by first class mail upon the following parties:

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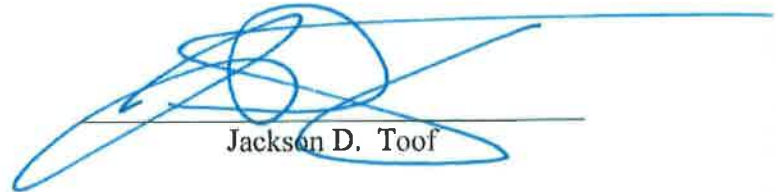
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