

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

<i>In re</i>)
)
DETERMINATION OF ROYALTY RATES)
AND TERMS FOR TRANSMISSION OF)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

WRITTEN DIRECT STATEMENT OF SIRIUS XM RADIO INC.

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

In the Matter of)
DETERMINATION OF RATES AND TERMS FOR) Docket No. 16-CRB-0001-
SATELLITE RADIO AND “PREEXISTING”) SR/PSSR (2018-2022)
SUBSCRIPTION SERVICES (SDARS III))
)

**INTRODUCTORY MEMORANDUM TO THE WRITTEN
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. Sirius XM is a preexisting satellite digital audio radio service (“SDARS”) as defined in 17 U.S.C. § 114(j)(10).

ROYALTY REQUEST FOR 2018-2022 LICENSE PERIOD

Sirius XM requests that the Copyright Royalty Judges set the SDARS monthly 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 recordings to facilitate such performances pursuant to 17 U.S.C. § 112(e), in the range of 8.1% to 11% of Sirius XM’s monthly U.S. Gross Revenues as defined in 37 C.F.R. § 382.11. The fee for ephemeral phonorecords shall be included within, and constitute 5% of, such royalty payments. Sirius XM proposes that, other than the royalty rate, the terms currently applicable to SDARS, as codified at 37 C.F.R. § 382.10–17, be retained largely in their current form, although Sirius XM is proposing certain clarifications to the Direct License and Pre-1972 Recording Shares, the regulations governing licensor audits, and several other terms.

SUMMARY OF TESTIMONY

This is the third contested rate proceeding under 17 U.S.C §§ 112(e) and 114(f) to determine rates and terms for digital audio transmissions by SDARS. The license period encompassed by this proceeding is 2018 through 2022. The prior adjudicated periods were 2007-2012 (herein “*SDARS I*”) and 2013-2017 (“*SDARS II*”). The sole entity engaging in the satellite radio business today in the United States is Sirius XM, as was the case when statutory rates and terms were set in the *SDARS II* proceeding. In the *SDARS I* proceeding, rates and terms were set for two legally distinct SDARS: Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings, Inc. (“XM”) (the merger of which occurred in July 2008).

The legal framework governing these proceedings has been identical throughout: the Judges are to determine “reasonable” rates and terms for public performances of post-1972 sound recordings¹ meeting the policy objectives of 17 U.S.C. 801(b)(1). *See* 17 U.S.C. § 114(f)(1). Unlike the standard applicable to setting rates in the recent *Web IV* proceeding, *see Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg. 26,316 (May 2, 2016) (to be codified at 37 C.F.R. pt. 380), this proceeding is not simply a matter of determining rates based upon what a hypothetical willing buyer and willing seller would pay. The methodological approach adopted by the Judges in the *SDARS I* and *SDARS II* proceedings entailed, first, a determination of the rates that a willing SDARS buyer would pay to a willing record company seller in a workably competitive market, followed by consideration of the degree to which application of the Section 801(b)(1) policy objectives warranted adjustment from such market-approximating rates.

¹ By “post-1972” is meant sound recordings “fixed” on or after February 15, 1972.

The law is clear that the rates ultimately determined to be “reasonable” in this proceeding need *not* approximate market rates so long as they satisfy the Section 801(b) criteria. *See Recording Indus. Ass’n of Am. v. Librarian of Congress*, 176 F.3d 528, 533 (D.C. Cir. 1999) (a “claim that the statute clearly *requires* the use of market rates is simply wrong. Section 801(b)(1) requires only that [the Judges] set ‘reasonable copyright royalty rates’ . . . [T]here is no reason to think that the two terms are coterminous” (emphasis in original)).

The Judges’ recent *Web IV* Determination clarified the meaning of the concept of workable (or, synonymously, effective) competition in undertaking what is the first – willing buyer/willing seller – prong of the analysis called for in these SDARS proceedings. As the Judges there concluded, a market exhibits workable competition where there is meaningful price competition between and among record companies to have their works performed by the licensed service(s) – competition which takes the form of record labels offering reduced royalty rates in an effort to increase their share of performances. Markets characterized by one or more “must have” sellers (as was found in *Web IV* to be the case in the interactive services market) exhibit, instead, monopoly conditions (or worse) that do not meet the requisite test and, accordingly, cannot (at least without adjustments to account for such market distortion) serve as probative benchmarks for fee-setting in statutorily-licensed markets. Conversely, evidence in a given upstream market of “steering,” that is, offers of lower prices by individual record companies to induce services to play additional music from their catalogs, is highly probative of such workable competition.

Sirius XM proposes rates for the 2018-2022 time period that are within the parameters of the rates that were set in the *SDARS I and II* Determinations. Those rates were set in *SDARS I* at 6%, escalating to 8% of Sirius and XM’s respective revenues by the end of that license term.

Those rates reflected both an evaluation of proposed marketplace benchmarks and application of several Section 801(b) mandates, including an acknowledgement of the companies' extraordinary investments in technology to maintain their unique service offerings, as well as the risk of disruption to their businesses had higher rates been imposed over that time period. In *SDARS II*, based on a 2012 hearing record, the Judges increased the percent-of-revenue rates payable by the combined Sirius XM to 9% effective 2013, escalating to 11% by 2017. Those rates again reflected the Judges' appraisal of various proffered market benchmarks, leavened by Section 801(b) considerations pertaining primarily to ongoing significant technological investments on the part of Sirius XM. The Judges further determined to minimize any prospect of disruption to Sirius XM by phasing the rate increase in over the five-year license term.

Against this backdrop of two prior, exhaustive rate-setting proceedings, Sirius XM begins its economic analysis here by examining what, if anything, of relevance has changed since 2012 to warrant either an upward or downward adjustment of rates for the 2018-2022 license period. As the Written Direct Testimony of Sirius XM's economic expert, Professor Carl Shapiro, explains, there is no basis for further escalating the amount Sirius XM pays to the record industry. Neither developments in relation to the record industry and music consumption (which have not altered the record industry's overall economic fortunes over the past five years) nor the fundamental nature of the service offerings of Sirius XM (which remain essentially unchanged over the current license period) nor Sirius XM's own strong business performance warrants such an increase. A percentage-of-revenue royalty formula, which Sirius XM believes should be left in place, affords the record industry increased royalties in direct relation to Sirius XM's own commercial success. Sirius XM's payments to the record industry have already grown from approximately \$ [REDACTED] in 2013 to an estimated \$ [REDACTED] in 2016 (exclusive of the

additional license fees paid out to the directly-licensing record labels), a number that will continue to rise with the growth of Sirius XM’s business. Consideration of changes that have occurred since *SDARS II* that relate to the 801(b) factors further confirms that no upward adjustment is warranted. If anything, the 801(b) factors counsel in favor of lowering the existing 11% rate.

Sirius XM’s evidentiary presentation demonstrating that there is no sound basis for increasing the percentage of Sirius XM revenues payable to the record industry will stand in stark contrast to SoundExchange’s announced intention to seek, from day one of the next license term, *a more than doubling of the percent of Sirius XM’s Gross Revenues payable to the record industry*. At that, SoundExchange has signaled that it also will seek a “greater of” royalty formulation by inserting into the royalty mix a per-subscriber fee that could, if implemented, drive the effective rates payable by Sirius XM still higher.

In contrast to SoundExchange’s royalty “moon shot,” as Professor Shapiro explains, there is compelling evidence that a rate of 11% *overstates* the reasonable royalty rate that should govern the next license term. That conclusion derives from Professor Shapiro’s examination of two bodies of licenses reflecting the very types of price competition to which the workable competition branch of the governing analysis aspires. The first entails nearly 500 license agreements entered into between Sirius XM and individual record companies – five times as many as were in place at the time of *SDARS II* – encompassing the same rights at issue here: spot-on rights transactions between the same buyer and record-company sellers in the target market itself. Such benchmark agreements require minimal adjustment to fit the frame of the statutory license, including as relates to the Section 801(b) criteria. These licenses were negotiated with record companies aware of the statutory license alternative and thus can be

presumed to accommodate the 801(b) criteria that must be accounted for here. Drawing upon, among other sources, the Written Direct Testimony of Sirius XM’s Senior Vice President, Music Licensing, George White, Professor Shapiro’s analysis of those transactions leads him to derive a reasonable rate of 9.87% of Sirius XM’s revenue for the 2018-2022 license term.

Professor Shapiro supplements his analysis by considering a second body of licenses. Those are among those the Judges closely analyzed during the *Web IV* proceeding: the direct licenses from which the Judges derived the rate to govern subscription non-interactive webcasting for the 2016-2020 rate period. Professor Shapiro explains why these licenses, and the willing-buyer/willing-seller rate derived from them, constitute an excellent additional benchmark for rate-setting in this proceeding, not least of which is the fact that they include licenses entered into by both major and independent record labels, and either directly reflect, or have been adjusted by the Judges to reflect, the forces of competition at work. To further confirm the validity of using webcasting rates as a benchmark for satellite radio, Professor Shapiro analyzes potentially relevant adjustments necessary to conform these webcast-market agreements to the competitive dynamics of the SDARS market. Drawing, among other sources, on a survey conducted by Edison Research as presented in the Written Direct Testimony of Joe Lenski, as well as on the Written Direct Testimony of Sirius XM CEO James Meyer and Sirius XM’s Senior Vice President and General Manager of Music Programming, Steven Blatter, Professor Shapiro addresses both the promotional and substitutional effects on record industry revenue of webcasters such as Pandora as compared to Sirius XM as well as the relative ability of both categories of services to engage in steering. The net result of this analysis is a benchmark pointing to a rate of 8.1% of Sirius XM’s revenues.

From the foregoing analysis, and factoring in the economic import of the 801(b) factors, Professor Shapiro recommends that a rate at the lower end of the range between 8.1% and 11% of revenue be adopted. Sirius XM adopts that recommendation as its fee proposal here.

The rate range recommended by Professor Shapiro has been informed, and is further supported by, the following areas of testimony provided by various Sirius XM fact witnesses:

- The continuing unique nature of Sirius XM's service offering, which combines in one subscription package a wide variety of expertly curated music together with (in some cases exclusive) non-music content, the entirety of which is not offered nationwide by any other provider.
- The enormous capital expenditures Sirius XM has historically made and will face during the next license term to maintain and enhance its service. Such expenditures are expected to total nearly \$ [REDACTED] over the 2018-2022 license term for a satellite replacement project, along with other technological and facilities' upgrades and enhancements.
- The extraordinary demand for airplay on the part of major and independent record labels alike, in recognition of the strong promotional value of exposure on Sirius XM.
- The competitive environment in which Sirius XM operates:
 - in which terrestrial radio, which pays no royalties whatsoever to the record industry, remains by far its largest competitor.
 - which poses a number of challenges for Sirius XM, including the changing dynamics of the audio entertainment market, featuring the entry of Google and Apple into the now-rapidly developing "connected car," in which drivers are

able to access Internet-delivered, lean-back streaming services such as Pandora and iHeartRadio in the dashboard in increasingly user-friendly fashion.

- Uncertain economic conditions which can affect the numbers of automobiles manufactured and the rate of consumer adoption of Sirius XM's service.

Fact Witnesses

In support of its royalty rate request, Sirius XM will present in its Written Direct Statement the testimony of the following fact witnesses:

James E. Meyer

James E. Meyer has been the Chief Executive Officer of Sirius XM since December 2012. Prior to becoming Chief Executive Officer, he served as the Company's President, Operations and Sales, responsible for technological operations, sales and marketing, and its customer-facing organization. He offered testimony in the *SDARS II* proceeding regarding Sirius XM's business, the competitive landscape at the time, Sirius XM's distribution channel, and its continuing investments and innovations in its technological infrastructure.

Mr. Meyer's testimony provides an overview of the current state of Sirius XM, focused on the main developments since the *SDARS II* record closed. He discusses the continued importance of the automobile industry to subscriber acquisition and how Sirius XM's value proposition for consumers – including bundling non-music content and exclusive offerings in a convenient package with music programming – will help the Company compete going forward. He also addresses the continuing, most significant source of competition to Sirius XM – terrestrial radio, as well as expected in-car technology developments over the next license term that are likely to create an increasingly challenging competitive environment.

Bridget Neville

Bridget Neville is Vice President, Satellite and Terrestrial Engineering and Operations, of Sirius XM. She is responsible for various technological operations at the Company and aspects of the technology underlying its products and services, including its satellite delivery networks. She oversees and works with Sirius XM's engineering departments and technology vendors to facilitate launching, maintaining, reinforcing, and upgrading the Company's fleet of satellites. Ms. Neville's testimony addresses upgrades and improvements to Sirius XM's satellites and repeater network that have taken place during the 2013-2017 period and highlights Sirius XM's anticipated investments and innovations in those technological areas during the 2018-2022 period, including an anticipated \$ [REDACTED] to develop, build, and launch two new satellites.

Terrence Smith

Terrence Smith is Corporate Vice President and Chief Engineering Officer of Sirius XM with responsibility for Broadcast Operations and Engineering. He directs all of Sirius XM's engineering activities and technology developments as they relate to the aggregation, curation, and distribution of content through the Sirius XM satellite and terrestrial repeater networks. He also is involved in securing the necessary licenses for Sirius XM's devices and operations and collaborates on the development of chipset and antenna design, product design and development, and testing and quality control. Mr. Smith, who also testified on behalf of Sirius in the *SDARS I* proceeding, describes Sirius XM's recent and planned enhancements and innovations with respect to its broadcast studios, its chipsets, and its satellite radio receivers. He further outlines the investments Sirius XM has made and will continue to make in the development of more robust automobile antennae to eliminate interference from other carrier signals. Sirius XM

anticipates expenditures of some \$ [REDACTED] over the next license term covering this range of enhancements and innovations.

George White

George White is Senior Vice President, Music Licensing, for Sirius XM. He was hired by the Company to negotiate direct licenses with record companies for sound recording performance rights and other associated rights necessary to operate Sirius XM's services. Mr. White explains how Sirius XM's direct license efforts have expanded since the time of the *SDARS II* hearing. He summarizes the rates and key terms of the licenses, highlights leading artists and tracks covered by the licenses, and describes how record companies enter into the licenses with the goal of getting more of their music played more often on Sirius XM. He also discusses some of the impediments to direct licensing the Company has faced, including record industry resistance to creating perceived negative CRB precedent.

Steven Blatter

Steven Blatter is Senior Vice President and General Manager of Music Programming at Sirius XM. Mr. Blatter, who testified on behalf of Sirius in the *SDARS I* proceeding and Sirius XM during the *SDARS II* proceeding, discusses the range and coverage of the Sirius XM music channels, the differences between satellite radio and terrestrial radio, and the promotional benefits of satellite radio that are valued by recording artists, artist managers, and recording companies. He describes the Company's current music channel lineup and programming offerings and provides information regarding recent developments in the latest license term, including recent artist and label recognition of Sirius XM's ability to break new artists and hit songs; increasing media recognition of Sirius XM's ability to jumpstart artists' careers and

promote music sales; and data concerning Sirius XM's promotional impact on music purchasing and consumption.

Thomas D. Barry

Thomas Barry is Senior Vice President and Controller of Sirius XM. He provides an overview of Sirius XM's recommended revisions to the regulations governing satellite digital audio radio services under 37 C.F.R. § 382.

Expert Witnesses

In addition, Sirius XM will present the testimony of the following expert witnesses:

Carl Shapiro

Dr. Carl Shapiro, Transamerica Professor of Business Strategy at the Hass School of Business at the University of California at Berkley, presents testimony establishing the economic basis for the Sirius XM rate proposal. Professor Shapiro's analysis proceeds along three fronts. First he analyzes whether there is any economic basis for adjusting, either upward or downward, the 2017 statutory rate of 11% set by the Judges in the *SDARS II* proceeding. Professor Shapiro concludes that, if anything, the changes of relevance that have taken place since *SDARS II* call for either maintaining the *status quo* or for reducing the rates paid by Sirius XM. As a result, Professor Shapiro concludes that the 11% rate can serve as an upper bound on the range of reasonable royalty rates.

Professor Shapiro then goes on to analyze two sets of benchmark agreements. He begins his benchmarking analysis with the direct license agreements entered into between Sirius XM and nearly 500 individual record labels. As Professor Shapiro explains, these benchmark agreements are ideal in many respects as they grant Sirius XM exactly the rights at issue in this proceeding, are between the same sellers (record labels) and the same buyer (Sirius XM), are

negotiated under competitive market conditions, and require only minor adjustments.

Collectively, these licenses cover approximately 23,000 catalogs, five million tracks, and account for more than 6% of Sirius XM plays on its satellite service. When fully adjusted, these competitive market transactions suggest a reasonable royalty rate of no more than 9.87% of Sirius XM revenue.

To supplement the direct license evidence, Professor Shapiro looks to a second benchmark – the rates set in the *Web IV* proceeding for subscription services. This benchmark is also highly informative for the rate-setting task at hand, as the agreements that underlie the *Web IV* subscription rate are with the same sellers, including both independent and major record labels, are for the same rights, and either directly reflect, or have been adjusted by the Judges to reflect, the forces of competition at work. When properly adjusted, including accounting for the 801(b)(1) policy objectives, the *Web IV* subscription service rate yields a Sirius XM rate of not more than 8.1% of revenue. Based on these three analyses, Professor Shapiro arrives at a range of reasonable Sirius XM royalty rates between 8.1% and 11% of revenue. For the reasons elucidated in his testimony, Professor Shapiro concludes that a rate at the lower end of this range will best satisfy the rate-setting standard at issue in this proceeding.

Joe Lenski

Joe Lenski is the co-founder and Executive Vice President of Edison Research (“Edison”), a leading survey research company with extensive experience in the music industry. He provides testimony regarding what current Sirius XM listeners listened to before they began listening to Sirius XM and what they would listen to if Sirius XM were no longer available, and about what current Pandora listeners listened to before they began listening to Pandora and what they would listen to if Pandora were no longer available. At Mr. Lenski’s

direction and under his supervision, Edison conducted a survey in August 2016 to gather data on where the bulk of each respondent's current Sirius XM and/or Pandora listening had come from, and to quantify where that listening would go if Sirius XM and/or Pandora were no longer available.

As Mr. Lenski explains, the most commonly stated source of where most Sirius XM listening time came from is, by a wide margin, traditional over-the-air AM/FM radio. Mr. Lenski also reports that Sirius XM respondents indicated that, if Sirius XM were no longer available, the largest percentage of listening time would go to AM/FM radio. Mr. Lenski explains that this AM/FM radio percentage was almost double the amount of listening hours that would go to listening to CDs and music downloads, and almost three times the amount that would go to non-interactive online radio such as Pandora and iHeartRadio.

Mr. Lenski also explains the survey results as relate to Pandora listening. The most commonly stated source of where most Pandora listening time came from is CDs or downloads, with traditional over-the-air radio reported at a level slightly more than half that of Sirius XM's draw from AM/FM radio. If Pandora was no longer available, about one-quarter of current Pandora listening time would go back to traditional, over-the-air AM/FM radio stations – about 40% less than the reported number by Sirius XM subscribers.

Designated Testimony from SDARS I (Docket No. 2006-1) & SDARS II (Docket No. 2011-1)

Sirius XM has also designated certain testimony from the *SDARS I* and *SDARS II* proceedings. Much of this designated testimony describes the early efforts of Sirius and XM in developing and building the satellite radio industry, the investments made by each company to do so, and their programming offerings at the time of those proceedings. Rather than having the

current Company witnesses restate that testimony, they cross-reference the designated testimony in their current submissions, explain its relevance, and provide updates as appropriate.²

² Certain of the designated *SDARS I* and *SDARS II* written testimony references separate exhibits from that proceeding. Consistent with 37 C.F.R. 351.4(b)(2), and in the interests of not burdening the Judges with irrelevant or unnecessary material, Sirius XM has designated the written testimony and hearing testimony (direct, cross, and redirect examination) from *SDARS I* and *SDARS II*, but has not designated the separate exhibits, which were determined to be unnecessary to the purposes for which the written testimony has been designated. (In addition, in some instances the exhibits referenced in the written testimony were not offered or admitted at trial.) Sirius XM will promptly make copies of any referenced exhibits available should the Judges so request.

October 19, 2016

Respectfully submitted,



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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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In the Matter of:)
)
)
Determination of Royalty Rates and) Docket No. 16-CRB-001-SR/PSSR (2018-
Terms for Transmission of Sound	) 2022)
Recordings by Satellite Radio and)
“Preexisting” Subscription Services)
(SDARS III))
)

PROPOSED RATES AND TERMS OF SIRIUS XM RADIO INC.

Pursuant to 37 C.F.R. § 351.4(b)(3), Sirius XM Radio Inc. (“Sirius XM”) proposes that the Copyright Royalty Judges set the SDARS monthly royalty rate for the public performance of sound recordings pursuant to 17 U.S.C. § 114(d)(2) during the period January 1, 2018 through December 31, 2022, in the range of 8.1% to 11% of Sirius XM’s monthly U.S. Gross Revenues as defined in 37 C.F.R. § 382.11. The fee for making ephemeral recordings to facilitate such performances pursuant to 17 U.S.C. § 112(e) shall be included within, and constitute 5% of, the Section 114 royalty payments.

The following pages display, in redline, the changes that Sirius XM proposes to the regulations governing preexisting SDARS at 37 C.F.R. §§ 382.10-17, including certain technical and conforming changes to the existing regulations. These changes are discussed in the written testimony of Sirius XM Senior Vice President and Controller Thomas Barry. Other than the changes shown below in redline, Sirius XM proposes that the terms currently set forth in 37 C.F.R. § 382.10-17 be continued.

TITLE 37 -- PATENTS, TRADEMARKS, AND COPYRIGHTS

CHAPTER III -- COPYRIGHT ROYALTY BOARD, LIBRARY OF CONGRESS

SUBCHAPTER E -- RATES AND TERMS FOR STATUTORY LICENSES

PART 382 -- RATES AND TERMS FOR DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SUBSCRIPTION SERVICES AND PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

SUBPART B -- PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

§ 382.10 General.

(a) Scope. This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period from January 1, 20132018, through December 31, 20172022.

...

§ 382.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 201320172018-2022 license term, the Collective is SoundExchange, Inc.

...

GAAP shall mean U.S. Generally Accepted Accounting Principles in effect from at the time to time in the United States a Licensee calculates and makes its payment to the Collective.

...

Qualified Auditor is a Certified Public Accountant who is independent of the Licensee and the Collective within the meaning of the AICPA Code of Professional Conduct.

...

Term means the period commencing January 1, 20132018, and continuing through December 31, 20172022.

§ 382.12 Royalty fees for the public performance of sound recordings and the making of ephemeral recordings.

(a) In general. The monthly royalty fee to be paid by a Licensee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of Ephemeral Recordings to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be ~~a percentage 8.1 percent of monthly Gross Revenues as follows: for 2013, 9.0%; for 2014, 9.5%; for 2015, 10.0%; for 2016, 10.5%; and for 2017, 11.0%~~, except that the royalty fee so determined may be reduced by the Direct License Share or the Pre-1972 Recording Share as described in paragraphs (d) and (e), respectively, of this section.

(b) Ephemeral recordings. The ~~royalty fee for all Ephemeral Recordings is part of the total fee payable under 17 U.S.C. 112(e) for the making of phonorecords used by the this section and constitutes 5% of it. All ephemeral recordings that a Licensee solely to facilitate makes which are necessary and commercially reasonable for making noninteractive digital transmissions for which it pays royalties as and when provided in this subpart shall be are included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.~~ the 5%.

(c) Ephemeral recordings minimum fee. Each Licensee making Ephemeral Recordings pursuant to 17 U.S.C. 112(e) shall make an advance payment to the Collective of \$100,000 per year, payable no later than January 20th of each year. The annual advance payment shall be nonrefundable, but it shall be considered as an advance of the Ephemeral Recordings royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this section; Provided, however, that any unused annual advance payment for a given year shall not carry over into a subsequent year.

(d) Direct license share. The percentage of monthly Gross Revenues royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the “Direct License Share”).

(1) Subject to paragraph (d)(3) of this section, for each month, the Direct License Share is the result of dividing the ~~Internet Performances transmissions~~ of Directly-Licensed Recordings on ~~the Reference Channels Licensee's SDARS~~ by the total number of ~~Internet Performances transmissions~~ of all sound recordings on the ~~Reference Channels Licensee's SDARS~~.

(2) For purposes of paragraph (d)(1) of this section:

(i) ~~A "Performance" is each instance in which any portion of a sound recording is publicly performed to a listener within the United States by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding an incidental performance that both:~~

(A) ~~Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and~~

~~(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).~~

~~(ii) The "Reference Channels" are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio, or either or both, and on which the programming consists primarily of music.~~

~~(23) A Direct License Share adjustment as described in paragraph (d) of this section is available to a Licensee only if~~

~~(i) The Reference Channels constitute a large majority of the music channels offered on the Licensee's SDARS and are generally representative of the music channels offered on the Licensee's SDARS; and~~

~~(ii) the Licensee timely provides the relevant information required by § 382.13(h).~~

~~(34) No performance transmission shall be credited as an Internet Performance a transmission of a Directly-Licensed Sound Recording under this section if that performance transmission is separately credited as an Internet Performance a transmission of a Pre-1972 sound recording under paragraph (e)(1) of this section.~~

(e) Pre-1972 Recording Share. The percentage of monthly Gross Revenues royalty fee specified in paragraph (a) of this section may be reduced by a percentage as set forth in this paragraph (referred to herein as the "Pre-1972 Recording Share").

(1) Subject to paragraph (e)(3) of this section, for each month, the Pre-1972 Recording Share is the result of dividing the Internet Performances transmissions of Pre-1972 Sound Recordings on the Reference Channels Licensee's SDARS by the total number of Internet Performances transmissions of all sound recordings on the Reference Channels Licensee's SDARS.

~~(2) For purposes of paragraph (e)(1) of this section:~~

~~(i) A "Performance" is each instance in which any portion of a sound recording is publicly performed to a listener within the United States by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding an incidental performance that both:~~

~~(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and~~

~~(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).~~

~~(ii) The "Reference Channels" are Internet webcast channels offered by the Licensee that directly correspond to channels offered on the Licensee's SDARS that are capable of being received on all models of Sirius radio, all models of XM radio or both, and on which the programming consists primarily of music.~~

(23) A Pre-1972 Recording Share adjustment as described in paragraph (e) of this section is available to a Licensee only if

~~(i) The Reference Channels constitute a large majority of the music channels offered on the Licensee's SDARS and are generally representative of the music channels offered on the Licensee's SDARS; and~~

~~(ii) the Licensee timely provides the relevant information required by § 382.13(h).~~

§ 382.13 Terms for making payment of royalty fees and statements of account.

...

(c) Monthly payments. A Licensee shall make any payments due under § 382.12 on a monthly basis on or before the 45th day after the end of each month for that month and, in the case the 45th day is on a weekend or holiday, the first workday thereafter. All payments shall be rounded to the nearest cent.

...

§ 382.15 Verification of royalty payments.

...

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, ~~and shall be binding on all parties~~.

(d) Acquisition and retention of report. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. The auditor shall determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay all costs associated with the verification procedure, unless it determines that the Licensee underpaid royalties in an amount of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

(h) Interest on underpayments or overpayments discovered during an audit shall be allowed from the date of the underpayment, and charged at the post judgment interest rate specified in 28 U.S.C. 1961.

§ 382.17 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective ~~may apply the must handle~~ unclaimed funds ~~to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the in accordance with applicable federal, state and~~ common law ~~or statutes of any State.~~

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

<i>In re</i>))
DETERMINATION OF ROYALTY RATES	)	Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF	)	(2018-2022)
SOUND RECORDINGS BY SATELLITE)	
RADIO AND "PREEXISTING")	
SUBSCRIPTION SERVICES (SDARS III))	

INDEX OF WITNESS TESTIMONY

Witness	Title
James E. Meyer	Chief Executive Officer, Sirius XM Radio Inc.
Bridget Neville	Vice President, Satellite and Terrestrial Engineering and Operations, Sirius XM Radio Inc.
Terrence Smith	Corporate Vice President and Chief Engineering Officer, Sirius XM Radio Inc.
George White	Senior Vice President, Music Licensing, Sirius XM Radio Inc.
Steven Blatter	Senior Vice President for Music Programming, Sirius XM Radio Inc.
Thomas D. Barry	Senior Vice President and Controller, Sirius XM Radio Inc.
Joe Lenski	Co-Founder and Executive Vice President of Edison Research
Carl Shapiro	Transamerica Professor of Business Strategy, Hass School of Business, University of California at Berkley.

Designated Witnesses from <i>SDARS I</i> (Docket 2006-1)	
Terrence Smith	Corporate Vice President and Chief Engineering Officer, Sirius XM Radio Inc.
Steven Blatter	Senior Vice President for Music Programming, Sirius XM Radio Inc.
Anthony J. Masiello	Senior Vice President, Operations, XM Satellite Radio Inc.
Designated Witnesses from <i>SDARS II</i> (Docket 2011-1)	
David J. Frear	Senior Executive Vice President and Chief Financial Officer, Sirius XM Radio Inc.
Steven Blatter	Senior Vice President for Music Programming, Sirius XM Radio Inc.

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

<i>In re</i>)))
DETERMINATION OF ROYALTY RATES	)	Docket No. 16-CRB-0001-SR/PSSR	
AND TERMS FOR TRANSMISSION OF	)	(2018-2022)	
SOUND RECORDINGS BY SATELLITE)		
RADIO AND “PREEXISTING”)		
SUBSCRIPTION SERVICES (SDARS III))		

INDEX OF SIRIUS XM EXHIBITS

Exhibit No.	Sponsoring Witness	Description	Bates No.
SXM Dir. Ex. 001	Steven Blatter	Sirius XM Current Music Channel Lineup.	N/A
SXM Dir. Ex. 002	Steven Blatter	June 20, 2016 email regarding “Brand New” by Ben Rector.	SXM_DIR_00020884
SXM Dir. Ex. 003	Steven Blatter	January 11, 2016 email regarding “Lose It” by Oh Wonder.	SXM_DIR_00020806-08
SXM Dir. Ex. 004	Steven Blatter	November 12, 2015 email regarding “Shades of Gray” by Oliver Heldens.	SXM_DIR_00020786
SXM Dir. Ex. 005	Steven Blatter	May 6, 2015 email regarding “Body Talk” by Dimitri Vegas.	SXM_DIR_00020527
SXM Dir. Ex. 006	Steven Blatter	April 21, 2015 email regarding Alina Baraz.	SXM_DIR_00020526
SXM Dir. Ex. 007	Steven Blatter	March 11, 2015 email regarding Sons of Texas.	SXM_DIR_00024841
SXM Dir. Ex. 008	Steven Blatter	November 5, 2014 email regarding “500 Miles” by Haley & Michaels.	SXM_DIR_00024830
SXM Dir. Ex. 009	Steven Blatter	July 10, 2014 email regarding “Thank God I Got Her” by Jonny Diaz	SXM_DIR_00024811
SXM Dir. Ex. 010	Steven Blatter	June 5, 2014 email regarding “I’m in a Hurry” by Florida Georgia Line.	SXM_DIR_00024808

Exhibit No.	Sponsoring Witness	Description	Bates No.
SXM Dir. Ex. 011	Steven Blatter	January 29, 2014 email regarding “Mind Over Matter” by Young The Giant.	SXM_DIR_00020380-81
SXM Dir. Ex. 012	Steven Blatter	October 22, 2013 email regarding Brandy Clark.	SXM_DIR_00024781
SXM Dir. Ex. 013	Steven Blatter	October 16, 2013 “Thank you!” email.	SXM_DIR_00020331
SXM Dir. Ex. 014	Steven Blatter	April 24, 2013 email regarding AWOLNATION.	SXM_DIR_00020265
SXM Dir. Ex. 015	Steven Blatter	April 22, 2013 email regarding “Changes” by Chubby Checker.	SXM_DIR_00024770
SXM Dir. Ex. 016	Steven Blatter	February 20, 2013 email regarding “Bad Ass” by Kid Ink.	SXM_DIR_00020252
SXM Dir. Ex. 017	Steven Blatter	January 3, 2013 email regarding Alt-J.	SXM_DIR_00020243
SXM Dir. Ex. 018	Steven Blatter	July 30, 2014 email regarding “Shut Me Up” by Old Dominion.	SXM_DIR_00020478
SXM Dir. Ex. 019	Steven Blatter	June 14, 2016 email regarding “Strangers” by The Rebel Light.	SXM_DIR_00020874
SXM Dir. Ex. 020	Steven Blatter	December 10, 2014 email regarding FKA Twigs.	SXM_DIR_00020519
SXM Dir. Ex. 021	Steven Blatter	October 14, 2013 email regarding “Pompeii” by Bastille.	SXM_DIR_00020330
SXM Dir. Ex. 022	Steven Blatter	SXM Pop-Up Channel for Billy Joel.	N/A
SXM Dir. Ex. 023	Steven Blatter	June 24, 2015 <i>Rolling Stone</i> article regarding James Taylor’s first number one album.	N/A
SXM Dir. Ex. 024	Steven Blatter	Recent pop-up channels created by Sirius XM.	N/A
SXM Dir. Ex. 025	Steven Blatter	SXM press release “Garth Brooks to Launch His Own Exclusive SiriusXM Channel,” dated July 7, 2016.	N/A
SXM Dir. Ex. 026	Steven Blatter	January 31, 2014 Universal Music’s Republic Records press release regarding “Love Me Again” by John Newman.	N/A

Exhibit No.	Sponsoring Witness	Description	Bates No.
SXM Dir. Ex. 027	Steven Blatter	March 14, 2013 press release regarding “Sleepy Little Town” by JT Hodges.	N/A
SXM Dir. Ex. 028	Steven Blatter	January 5, 2015 <i>Rolling Stone</i> article titled, “How Satellite Radio Is Breaking Country’s Next Big Stars.”	N/A
SXM Dir. Ex. 029	Steven Blatter	January 15, 2013 <i>The New York Times</i> article titled, “Star-Making Machinery’s New Player.”	N/A
SXM Dir. Ex. 030	Steven Blatter	April 12, 2015 <i>AllAccess</i> interview with Logan Mize.	N/A
SXM Dir. Ex. 031	Steven Blatter	September 30, 2014 email circulating <i>Rolling Stone Country</i> interview with Ray Scott, dated September 29, 2014.	SXM_DIR_00024825
SXM Dir. Ex. 032	Steven Blatter	May 14, 2016 <i>Billboard Magazine</i> article titled “The Top 25 Rock Radio Programmers.”	N/A
SXM Dir. Ex. 033	Steven Blatter	July 13, 2015 email regarding “S.O.B.” by Nathaniel Rateliff & The Nights Sweats.	SXM_DIR_00020550
SXM Dir. Ex. 034	Steven Blatter	<i>Billboard</i> advertising regarding “S.O.B.” by Nathaniel Rateliff & The Nights Sweats.	N/A
SXM Dir. Ex. 035	Steven Blatter	January 22, 2015 <i>MusicRow</i> interview with Old Dominion regarding “Break Up With Him.”	N/A
SXM Dir. Ex. 036	Steven Blatter	April 2, 2015 email circulating <i>Cleveland.com</i> interview with Alan Wilkis regarding “Dangerous” by Big Data, dated April 1, 2015.	SXM_DIR_00024838
SXM Dir. Ex. 037	Steven Blatter	February 8, 2015 <i>AllAccess</i> interview with Cole Swindell regarding “Chillin’ It.”	N/A
SXM Dir. Ex. 038	Steven Blatter	August 8, 2013 <i>Billboard Magazine</i> article regarding “Chillin’ It” by Cole Swindell.	N/A

Exhibit No.	Sponsoring Witness	Description	Bates No.
SXM Dir. Ex. 039	Steven Blatter	February 20, 2016 <i>The New York Times</i> article titled “SiriusXM Fights to Dominate the Dashboard of the Connected Car.”	N/A
SXM Dir. Ex. 040	Steven Blatter	August 6, 2015 email regarding “Hide Away” by Daya.	SXM_DIR_00024851
SXM Dir. Ex. 041	Steven Blatter	Emails from Liam Davenport regarding artist appearing on the SXM channels.	N/A
SXM Dir. Ex. 042	George White	Compendium of Sirius XM’s direct licenses.	N/A
SXM Dir. Ex. 043	James E. Meyer	SiriusXM Radio’s Most Popular Packages	N/A
SXM Dir. Ex. 044	George White	Sample Sirius XM direct license agreement.	SXM_DIR_00024659

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION AND CERTIFICATION OF TODD D. LARSON
(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 case. I respectfully submit this declaration and certification pursuant to Rule 350.4(e)(1) of the Copyright Royalty Judges Rules and Procedures, 37 C.F.R. § 350.4(e)(1), and per the terms of the Protective Order issued June 15, 2016 (“Protective Order”). I am authorized by Sirius XM to submit this Declaration on Sirius XM’s behalf.

2. I have reviewed Sirius XM’s Introductory Memorandum to the Written Statement of Sirius XM, witness written direct testimony, exhibits and appendices, designated testimony, and Redaction Log submitted in this proceeding. I have also reviewed the definitions and terms provided in the Protective Order. After consultation with my client, I have determined to the best of my knowledge, information and belief that portions of Sirius XM’s written direct statement contain “confidential information” as defined by the Protective Order (“Protected Material”). 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 (a) contracts, contractual terms, negotiations, and contract strategy that are proprietary,

not available to the public, highly competitively sensitive and, at times, subject to express confidentiality provisions with third parties; and (b) highly confidential internal business information, financial projections, financial data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive.

4. If this contractual, strategic, negotiation, 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. Information related to confidential contracts or relationships with third-party content providers could be used by Sirius XM's terrestrial radio and Internet-based competitors, or by other content providers, to formulate rival bids, bid up Sirius XM payments, or otherwise unfairly jeopardize Sirius XM's commercial and competitive interests.

5. With respect to the financial information in the ProtectedMaterial, 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 each witness's knowledge, was not intended for public release or prepared with that audience in mind, and therefore was not accompanied by 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 information released publicly without proper context or explanation.

6. Sirius XM has also marked certain additional material as Restricted where the material was so designated by SoundExchange, Inc. (“SoundExchange”), the American Association of Independent Music (“A2IM”), the Recording Industry Association of America (“RIAA”), Sony Music Entertainment (“Sony”), Universal Music Group (“UMG”), Warner Music Group (“WMG”), the American Federation of Musicians (“AFM”), or the Screen Actors Guild and the American Federation of Television and Radio Artists (“SAG-AFTRA”) (collectively, the “Copyright Owner Participants”).

7. The written direct statement of James E. Meyer, the Chief Executive Officer of Sirius XM, contains material non-public information concerning Sirius XM’s financial investments during the 2013-2017 period, as well as Sirius XM’s anticipated financial investments in the 2018-2022 period. It also contains material, non-public information regarding Sirius XM’s past and estimated future royalty payments. Disclosure of this information could, for reasons discussed in paragraph 5 above among others, competitively disadvantage Sirius XM.

8. The written direct statement of Bridget Neville, Vice President, Satellite and Terrestrial Engineering and Operations, of Sirius XM, contains material non-public information concerning Sirius XM’s financial investments in the development and operation of state of the art satellites and terrestrial repeaters in Sirius XM’s satellite delivery system during the 2013-2017 period, as well as Sirius XM’s anticipated financial investments in the 2018-2022 period.

This information is not publicly known or available. Disclosure of the financial details of these investments would, for reasons discussed in paragraph 5 above among others, competitively disadvantage Sirius XM.

9. The written direct statement of Terrence Smith, Corporate Vice President and Chief Engineering Officer, of Sirius XM, contains material non-public information concerning Sirius XM's recent and planned financial investments and innovations with respect to broadcast studios, chipsets, and satellite radio receivers. This information is not publicly known or available. Disclosure of the financial details of these investments and innovations would, for reasons discussed in paragraph 5 above among others, competitively disadvantage Sirius XM.

10. The written direct statement of George White, Senior Vice President, Music Licensing, for Sirius XM contains certain material non-public terms of agreements with content providers that are subject to confidentiality provisions as well as material non-public details of negotiations and other conversations with licensors and potential licensors. This information is not publicly known or available. Disclosure of this Protected Material would, for reasons discussed in paragraphs 4 and 5 above among others, competitively disadvantage Sirius XM.

11. The written direct statement of Steven Blatter, Senior Vice President and General Manager of Music Programming, of Sirius XM, contains material non-public information concerning private communications from artists' managers and others, including third-party content providers, regarding Sirius XM's promotional impact on sales and its ability to break new artists on the national stage. This information is not publicly known or available. Disclosure of the identities of these individuals or entities, who communicated with Sirius XM

with the understanding the communications were private and confidential, could jeopardize the Company's relationships with them and thereby cause Sirius XM competitive harm.

12. The written direct statement of Carl Shapiro, Transamerica Professor Business Strategy at the Haas School of Business at the University of California at Berkeley, contains material non-public information concerning terms of non-public contracts and negotiations, and material non-public information concerning Sirius XM's recent and planned financial investments. For the reasons discussed above, disclosure of the details of these contractual arrangements and negotiations and financial information would competitively disadvantage Sirius XM. Further, disclosure of the identities of certain third-parties who communicated with Sirius XM with the understanding that the communications were private and confidential, could jeopardize the Company's relationships with them and thereby cause Sirius XM competitive harm. In addition, Mr. Shapiro's written direct statement contains forecasts of Sirius XM's subscriber growth and corresponding revenue growth. Disclosure of this financial data would, for reasons discussed in paragraph 5 among others, competitively disadvantage Sirius XM. Mr. Shapiro's testimony also contains information designated Restricted by the Copyright Owner Participants.

13. The Sirius XM's Introductory Memorandum to the Written Statement of Sirius XM contains information that Sirius XM has designated as Restricted where it appears in the witness written direct testimony, exhibits, and appendices.

14. In addition to these written direct statements and exhibits and appendices, Sirius XM also has submitted designated testimony from Docket No. 2006-1 CRB DSTRA ("SDARS I") from Anthony J. Masiello and Terrence Smith, and from Docket No. 2011-1 CRB PSS/Satellite II ("SDARS II") from David Frear and Steven Blatter. Portions of that testimony

include, *inter alia*, detailed discussions of contractual arrangements and financial information that were protected by the Judges under a similar protective order in the prior proceedings. Sirius XM is not seeking to keep all such Protected Material out of the public record in this proceeding; rather, after a careful review of the designated testimony, the Company seeks to restrict only specific materials, which are detailed on the Redaction Log. Disclosure of the financial details of the specified contractual arrangements and non-public financial data would, for reasons discussed in paragraphs 4 and 5 above among others, competitively disadvantage Sirius XM, and Sirius XM respectfully requests protection of the material consistent with the Judges' prior rulings.

15. The contractual, commercial and financial information described in the paragraphs above and detailed on the accompanying Redaction Log must be treated as Restricted Protected Material 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 19, 2016
New York, NY



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Counsel for Sirius XM Radio Inc.

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress**

In re

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR
TRANSMISSION OF SOUND
RECORDINGS BY SATELLITE RADIO
AND “PREEEXISTING” SUBSCRIPTION
SERVICES (SDARS III)**

**Docket No. 16-CRB-0001-SR/PSSR
(2018–2022)**

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

Pursuant to the requirements of the Protective Order entered by Judges on June 15, 2016, Sirius XM Radio Inc. (“Sirius XM”) hereby submits the following list of redactions from its Written Direct Statement filed October 19, 2016, and the undersigned certify, in compliance with 37 C.F.R. § 350.4 (e)(1), that the listed redacted materials meet the definition of “Restricted” contained in the Protective Order.

<u>Document</u>	<u>Page/Paragraph/Exhibit No.</u>	<u>General Description</u>
Introductory Memorandum to the Written Statement of Sirius XM Radio Inc.	Page 4	Contains material non-public financial data concerning Sirius XM’s cumulative payments to the record industry in 2013 and 2016.
	Page 7	Contains material non-public internal financial data regarding Sirius XM’s anticipated expenditures on new satellites and other technological upgrades during the 2018-2022 period.
	Page 9	Contains material non-public

	Page 10	internal financial data concerning Sirius XM's anticipated expenditures on new satellites during the 2018-2022 period. Contains material non-public financial data concerning Sirius XM's anticipated expenditures on developing improved automobile antennae during the 2018-2022 period.
Written Direct Testimony of James E. Meyer	Page 3, Paragraph 9, Line 2	Contains material non-public internal financial data concerning Sirius XM's expenditures to acquire subscribers in previously owned vehicles.
	Page 5, Paragraph 12, Line 4	Contains material non-public internal financial data concerning Sirius XM's anticipated expenditures on new satellites and other technology and upgrades during the 2018-2022 period.
	Page 5, Paragraph 12, Line 6	Contains material non-public internal financial data concerning Sirius XM's annual subsidies to automakers to install satellite chipsets in vehicles.
	Page 9, Paragraph 19, Lines 6-8	Contains material non-public internal financial data regarding Sirius XM's cumulative royalty payments to SoundExchange during the 2013-2016 period.
	Page 16, Paragraph 35, Lines 4-5	Contains material non-public internal financial data

		concerning Sirius XM's anticipated costs to develop and roll out a new wireless technology platform.
Written Direct Testimony of Bridget Neville	Page 5, Paragraph 14, Line 11	Contains material non-public internal financial data concerning the costs associated with Sirius XM satellites.
	Page 5, Paragraph 15, Line 5	Contains material non-public internal financial data concerning investments in the development and construction of the XM-5 satellite.
	Page 7, Paragraph 18, Bullets 4–5	Contains material non-public information concerning the development of new satellite technology during the 2018–2022 period.
	Page 8, Paragraph 20, Lines 4–6	Contains material non-public internal financial data concerning Sirius XM's satellites during the 2018–2022 period.
	Pages 8 and 9, Paragraph 22, Lines 4–8	Contains material non-public internal financial data concerning the cost of retirement of Sirius XM satellites.
	Page 10, Paragraph 27, Line 6	Contains material non-public internal financial data concerning the cost of projects, expansions, upgrades and replacements involving Sirius XM's repeater network.
	Page 10, Paragraph 28, Line 4	Contains material non-public internal financial data concerning the cost of

	<p>Page 10, Paragraph 29, Line 5</p> <p>Page 11, Paragraph 30, Lines 8–10</p>	<p>expansion of Sirius XM’s repeater network.</p> <p>Contains material non-public internal financial data concerning the cost of replacement of Sirius XM’s terrestrial repeaters.</p> <p>Contains material non-public internal financial data concerning the anticipated cost of deploying Sirius XM repeaters.</p>
Written Direct Testimony of Terrence Smith	<p>Page 4, Paragraph 8</p> <p>Page 4, Paragraph 9, Lines 9–10</p> <p>Page 5, Paragraph 10, Lines 9–10</p> <p>Page 7, Paragraph 15, Line 8</p> <p>Page 7, Paragraph 16, Lines 7–8</p>	<p>Contains material non-public internal financial data concerning Sirius XM’s business plans during the 2016-2022 period.</p> <p>Contains material non-public internal financial data concerning the cost of upgrades to Sirius XM’s broadcast studio infrastructure.</p> <p>Contains material non-public internal financial data concerning Sirius XM’s past and anticipated expenditures related to Content Factory.</p> <p>Contains material non-public internal financial data concerning anticipated cost to development of Sirius XM chipsets.</p> <p>Contains material non-public internal financial data concerning anticipated cost of development of Sirius XM</p>

	<p>Page 7, Paragraph 17, Line 3</p> <p>Page 8, Paragraph 21, Lines 3-4</p> <p>Page 9, Paragraph 22, Line 1</p> <p>Page 9, Paragraph 23, Line 1</p> <p>Page 9, Paragraph 24, Line 4</p>	<p>chipsets.</p> <p>Contains material non-public internal financial data concerning anticipated cost to upgrade Sirius XM's repeaters and satellite uplink infrastructure.</p> <p>Contains material non-public internal financial data concerning cost of developing aftermarket radio products.</p> <p>Contains material non-public internal financial data concerning expenditures and support provided to Original Equipment Manufacturers.</p> <p>Contains material non-public internal financial data concerning anticipated expenditures to support Original Equipment Manufacturers with technological integration.</p> <p>Contains material non-public internal financial data concerning anticipated cost to develop Sirius XM receivers.</p>
Written Direct Testimony of George White	<p>Page 8, Footnote 4</p> <p>Page 9, Paragraph 14, Lines 4-6</p>	<p>Contains material non-public data regarding the specific royalty rate agreed to by a Sirius XM direct licensor.</p> <p>Contains material non-public data regarding royalty rates agreed to by Sirius XM direct licensors.</p>

	<p>Page 16, Paragraph 30, Lines 5 and 9</p> <p>Page 16, Paragraph 30, Lines 5 and 9.</p> <p>Page 17, Paragraph 31, Lines 4-10 and 12-13.</p>	<p>Contains non-public confidential communications between Sirius XM personnel and a representative of third-party content providers.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers.</p>
Written Direct Testimony of Steven Blatter	<p>Page 6, Paragraph 8, Line 1</p> <p>Page 7, Paragraph 9, Lines 1 and 3</p> <p>Page 7, Paragraph 10, Line 1</p> <p>Page 7, Paragraph 11, Line 1</p>	<p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p>

	<p>Page 7, Paragraph 12, Line 1</p> <p>Page 8, Paragraph 13, Lines 1 and 3</p> <p>Page 8, Paragraph 14, Lines 1 and 3</p> <p>Page 8, Paragraph 15, Lines 1-2</p> <p>Page 9, Paragraph 16, Line 1</p> <p>Page 9, Paragraph 17, Line 1</p>	<p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p>
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	<p>Page 9, Paragraph 18, Line 1</p> <p>Page 10, Paragraph 19, Heading and Lines 1 and 3</p> <p>Page 10, Paragraph 20, Lines 1, 2, and 6</p> <p>Page 10, Paragraph 21, Lines 1 and 4</p> <p>Page 11, Paragraph 22, Line 1</p> <p>Page 11, Paragraph 23, Line 1</p> <p>Page 11, Paragraph 24, Lines</p>	<p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public,</p>
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	1-2	confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 12, Paragraph 25, Line 4	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 12, Paragraph 27, Lines 1 and 3	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 13, Paragraph 28, Line 1	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 13, Paragraph 29, Lines 1-2	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 21, Paragraph 47, Lines 4-5	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Pages 28-29, Paragraph 60, Lines 13, 15, and 17	Contains non-public, confidential communications

		between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
Written Direct Testimony of Thomas D. Barry	Page 5	Contains material non-public internal financial data concerning fees.
Written Direct Testimony of Carl Shapiro	<p>Page 13</p> <p>Page 28, Figure 5</p> <p>Page 29 and Footnotes 37-39</p> <p>Page 33</p> <p>Page 33, Footnote 45</p> <p>Page 37</p> <p>Page 44, Figure 6</p>	<p>Contains material non-public internal financial data concerning the anticipated cost of replacing Sirius XM satellites.</p> <p>Contains material designated as Restricted by the Copyright Owner Participants.</p> <p>Contains material non-public information concerning past and forecasted subscriber growth and corresponding revenue increases.</p> <p>Contains material non-public internal financial data concerning the anticipated cost of launch of Sirius XM satellites.</p> <p>Contains material designated as Restricted by the Copyright Owner Participants.</p> <p>Reflects material designated as Restricted by the Copyright Owner Participants.</p> <p>Contains material non-public</p>

	<p>Page 46</p> <p>Page 47</p> <p>Page 53, Footnote 87</p> <p>Page 58, Footnote 91, Lines 2-5</p> <p>Page 58, Footnote 91, Line 6</p> <p>Page 59</p>	<p>information concerning the direct license share of spins on satellite radio versus share of plays on reference channels.</p> <p>Contains material non-public information concerning confidential communications between Sirius XM and third party content providers.</p> <p>Contains material non-public information concerning confidential communications between Sirius XM and third party content providers.</p> <p>Contains material non-public information concerning the estimated listening share of specific channels.</p> <p>Contains material designated as Restricted by the Copyright Owner Participants.</p> <p>Contains non-public financial data concerning Sirius XM's anticipated satellite expenditures.</p> <p>Reflects material designated as Restricted by the Copyright Owner Participants.</p>
Exhibits	<p>SXM Dir. Exs. 2–21, 33–34, 40</p> <p>SXM Dir. Exs. 31, 36, 41</p>	<p>Contain non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contain non-public contact information of Sirius XM personnel.</p>

	SXM Dir. Ex. 42	Contains material non-public information concerning the terms of contracts with content providers that are subject to confidentiality provisions.
	SXM Dir. Ex. 44	Contains material non-public information concerning the terms of contracts with content providers that are subject to confidentiality provisions.
SIRIUS XM DESIGNATED TESTIMONY FROM SDARS II (DOCKET NO. 2011-1)		
Designated Written Direct Testimony of Steven Blatter	Page 22, Paragraph 55, Footnote 7	Contains non-public commercial information pertaining to terms of confidential agreements.
	Page 24, Paragraph 61, Lines 1 and 5	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 24, Paragraph 62, Lines 1 and 2	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Pages 24-25, Paragraph 63, Line 1	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.
	Page 25, Paragraph 64	Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.

	<p>Pages 25-26, Paragraph 67, Lines 2, 3, 4, 6, 11</p> <p>SXM Dir. Ex. 39</p> <p>SXM Dir. Exs. 42 – 45, 47</p>	<p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p> <p>Contains non-public Sirius XM artist marketing proposal.</p> <p>Contains non-public, confidential communications between Sirius XM personnel and representatives of third-party content providers to Sirius XM.</p>
Designated Hearing Testimony of David Frear	June 7, 2012 Trial Transcript	Session was closed to the public by the Judges pursuant to protective order in Docket No. 2011-1; contains material non-public information concerning financial forecasts.
Designated Written Direct Testimony of David Frear	<p>Page 5, Paragraph 11, Lines 8–15</p> <p>Pages 8-9, Paragraph 20 and footnote 5</p> <p>Page 11, Paragraph 27, Lines 1 and 2</p> <p>Page 11, Paragraph 28, Lines 1 and 2</p>	<p>Contains material non-public information concerning negotiations with lenders.</p> <p>Contains material non-public information concerning the terms of contracts with content providers that are subject to confidentiality provisions.</p> <p>Contains material non-public internal financial data concerning sales and marketing costs.</p> <p>Contains material non-public internal financial data concerning revenue sharing arrangements with automobile manufacturers pursuant to terms of confidential</p>

		agreements.
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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, I caused a copy of the PUBLIC version of Sirius XM Radio Inc.'s Written Direct Statement, to be served by email to the participants listed below:

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Leason Hoilett

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

**WRITTEN DIRECT TESTIMONY OF JAMES E. MEYER
(On behalf of Sirius XM Radio Inc.)**

Introduction

1. My name is James E. Meyer. I have been the Chief Executive Officer of Sirius XM Radio Inc. (“Sirius XM” or “the Company”) since December 18, 2012. Prior to becoming Chief Executive Officer, I served as Sirius XM’s President, Operations and Sales, a role in which I was responsible for the Company’s operations, including technological operations, sales and marketing, and Sirius XM’s customer-facing organization.

2. Before joining Sirius XM in 2004, I served as President of Aegis Ventures Incorporated, a general management consulting firm, and also as Senior Vice President and Chief Operating Officer of Thomson Inc., a leader in consumer electronics. I also have held senior management positions at Thomson, General Electric, and RCA.

3. As Chief Executive Officer of Sirius XM, I oversee all aspects of the Company’s operations and have knowledge of its finances, business metrics, customer acquisition efforts, relationships with automobile manufacturers, programming offerings, and the competition we face from other audio entertainment options, among other aspects of our operations. I routinely provide guidance to the Board of Directors, our investors, and the financial community at large

regarding these topics, including as to the performance of our business and our prospects and expectations going forward.

4. I provided testimony on a number of topics on behalf of Sirius XM in the proceeding before the Copyright Royalty Judges that set SDARS rates for 2013 through 2017 (the “*SDARS II*” proceeding), including the increased importance of the automobile market to Sirius XM’s marketing efforts; the advent of the Internet-enabled “connected car”; the increasing competition between Sirius XM and Internet-based services in the car; and the differences between the businesses of Sirius XM and its Internet-based competitors, including Sirius XM’s massive investment in its satellite delivery networks.

5. My testimony for this proceeding will include an overview of the current state of the Company, focused on the main developments since the *SDARS II* record closed. I also will discuss how Sirius XM’s value proposition for consumers – including bundling non-music content and exclusive offerings in a convenient package with music programming – will help us compete going forward. Finally, I will address anticipated developments over the next license term, during which the Company expects to face an increasingly challenging competitive environment.

Snapshot of Sirius XM’s Current Business

6. When I testified in the *SDARS II* proceeding, Liberty Media Corporation (“Liberty”) owned approximately 40% of the Company’s equity, a stake Liberty acquired in 2009 in exchange for a commitment to loan up to \$530 million that helped Sirius XM avert bankruptcy. Since that time, Liberty has increased its ownership interest to approximately 65%. Liberty’s ownership interest gives it control of the company, including the ability to approve or disapprove of matters subject to the general vote of stockholders and to elect or remove members

of the Company's Board of Directors. Although majority-owned by Liberty, Sirius XM operates as a separate business. The balance of common stock not owned by Liberty is publicly traded and listed on the NASDAQ Select Market under the symbol "SIRI."

7. As of July 2016, Sirius XM had approximately 30.6 million paying subscribers. Approximately 25.1 million of these customers currently are self-paying, meaning the customer receives and pays a monthly, quarterly, annual, or other periodic bill, while approximately 5.5 million of them have access to Sirius XM as part of a subscription paid for by an automaker for a limited time in connection with the purchase or lease of a vehicle.

8. The growth in Sirius XM's subscriber base in the last four years – some 6.7 million subscribers – can be attributed almost completely to the booming automobile market in the United States. Sirius XM attracts new customers almost exclusively through the sale or lease of new—and, more recently, used—cars. Sirius XM radios are available in over 75% of new cars sold or leased in the United States, and nearly 70% of new car buyers and lessees in the United States receive the Sirius XM service for a trial period with their new car purchase or lease. In the last four quarters, more than 90% of Sirius XM's gross additional subscribers have been obtained through the Original Equipment Manufacturer (OEM) – i.e., automobile – market, and nearly 85% of our overall self-pay subscriber base is attributable to our marketing and sales efforts in the OEM channel.

9. While the Company traditionally has relied on new car sales to attract subscribers, since the last proceeding Sirius XM has invested over \$ [REDACTED] in marketing, personnel, lead generation, and commission expense to acquire subscribers through sales of previously owned and leased cars. There are approximately 82 million Sirius XM-enabled cars on the road, and the Company estimates that approximately 28% of the used cars sold in 2015 had Sirius XM radios

in them. Sirius XM has entered into agreements with auto dealers, service centers, and other companies that sell or service vehicles to obtain data on sales of previously-owned satellite radio-enabled cars and to offer trials of our service. The Company also has reached agreements with car insurance companies and financial institutions to provide us with contact information when a previously owned car is sold to a new owner, and plans to continue to invest in that sales-generation channel. At year-end 2013, 22% of Sirius XM's self-paid OEM subscribers were attained through the used car market; by 2016, that number had grown to 30%.

Sirius XM's Value Proposition in the Developing Entertainment Marketplace

10. Sirius XM's growth and continued success is attributable to its unique value proposition in the audio entertainment marketplace. We offer, in one convenient, easy-to-access package, a wide variety of (1) commercial-free music and broadcasts of live music events; (2) sports, news, and other talk and entertainment content, some of which may otherwise be available in certain areas (e.g., CNN, live sports) but the entirety of which is not available nationwide from any other single provider; and (3) exclusive non-music content like Howard Stern that is not available anywhere *but* Sirius XM.

11. We offer this package to a car-buying demographic – customers aged 35-64 (over 70% of Sirius XM's customer are in this age range) – that is educated, relatively affluent, and busy and that places a premium on convenience over attempting to assemble, on their own and from separate sources, the package of content we offer. And we offer this package through an end-to-end satellite delivery system – from production and broadcast studios to a constellation of satellites to terrestrial repeaters to proprietary antennae and receiver units in moving vehicles – that has required literally billions of dollars of investment to launch and maintain over the past

two decades, all to provide a convenient, viable, and attractive alternative to free terrestrial radio in the vehicle.

12. Since its founding, Sirius XM has made a cumulative investment of \$14.8 billion in developing, maintaining, and servicing its satellite delivery business. Over the next five years, as detailed in the accompanying testimony of Bridget Neville and Terry Smith, Sirius XM will spend nearly [REDACTED] to replenish its satellite constellation and improve and maintain its broadcast facilities, chipsets, and transmission infrastructure. We will also continue to spend about [REDACTED] per year in subsidies and revenue-shares to automakers to put our chipsets into their vehicles.

13. With respect to our programming content, Steve Blatter's testimony addresses at length the many amazing features of our music channels, and I will not repeat that testimony here. I note, however, the reality that music, perhaps more than any other entertainment source, is available to our customers for free from a wide variety of sources. Thousands of terrestrial radio broadcasters reach approximately 250 million listeners each week. Ad-supported webcaster Pandora reaches more than 75 million monthly listeners with its free service, and iHeartRadio has more than 80 million registered users for its free service. Tens of millions more tune in to the free-to-the-listener, ad-supported versions of interactive music services such as Spotify and YouTube. In addition to these free sources, on-demand music-only services from Spotify, Apple, Google, and Amazon offer on-demand, anytime-anywhere access to 30 million or more tracks – functionality well beyond what Sirius XM can offer under the statutory license – for individual subscription prices ranging from \$3.99 to \$9.99, a substantial discount to Sirius XM's subscription price for its diversified content bundle.

14. In light of these alternatives, the Company's success – the reason 25 million subscribers are willing to pay \$15 or more each month for Sirius XM's services and continue to do so month after month – can only be explained by the fact that we combine our expertly-curated music channels with a diverse selection of non-music content, some exclusive to Sirius XM and some licensed from third-party providers, into an easy-to-use content bundle that no one else can match in the audio entertainment industry. If what consumers wanted was just music, they could get that music either for free (via advertising-supported terrestrial radio, ad-supported Pandora, or the “free” tier of Spotify) or from a less expensive on-demand subscription service instead of paying for Sirius XM.

15. Our non-music content includes exclusive offerings from Howard Stern, Joel Osteen, Andy Cohen, and Comedy Central, among others, as well as the ability to hear every NFL, MLB, NHL, and NBA game, every major college football and basketball game, every NASCAR race, and every PGA tournament – all complemented by Sirius XM talk channels devoted to each sport (e.g., Sirius XM NFL Radio, Sirius XM PGA Tour Radio, Sirius XM MLB Radio). Much of this content is exclusive to Sirius XM, and even where some of it is available elsewhere (for example, play-by-play sports), no other provider aggregates it all, across all sports leagues and all cities, into a single, affordable, convenient national subscription package.¹

¹ What I describe here are the contents of our standard “Select” packages. Sirius XM offers a variety of alternative packages, for example “Mostly Music,” “News, Sports & Talk,” “Family Friendly,” and various “A la Carte” offerings, that include only a subset of the Select channels I discuss here. But the vast majority of our subscribers choose either the Select/Select Family Friendly package (currently over 19 million paid or promotional subscribers) or the Premier or All Access upgrades to the Select package (currently nearly 8 million paid or promotional subscribers), which provide all of the Select channels from the subscriber’s own platform (our subscribers are technically still Sirius or XM subscribers depending on their vehicle and radio), plus the premium channels from the other platform (e.g., XM All Access subscribers get Howard Stern, which is in the Sirius Select package but not in the XM Select package). SXM Dir. Ex. 043 describes each of these packages in more detail.

16. Our exclusive and semi-exclusive offerings are complemented by a suite of news, talk, and sports programming from third parties. Again, some of these – CNN, NPR, etc. – are available elsewhere, but not in one place.

17. SXM Dir. Ex. 001 details the full range of our non-music offerings, but I summarize them below for the Judges' convenience.

A. News and Issues Programming

- 16 News Channels: *BBC World Service, CNBC, Fox News Channel, Fox News Headlines, CNN, HLN, MSNBC, Bloomberg Radio, Fox Business, Sirius XM Insight, NPR Now, PRX Public Radio (XM Only), Rural Radio, CNN En Español, CBC Radio One, C-Span Radio (SXM only)*²
- 5 Politics Channels: *POTUS Politics, Sirius XM Patriot, Sirius XM Urban View, Sirius XM Progress, FOX News Talk (SXM only)*
- 7 traffic channels (covering 21 metropolitan areas)

B. Talk and Entertainment Programming

- 8 comedy channels:³ *Sirius XM Comedy Greats, Comedy Central Radio, The Foxxhole, Jeff & Larry's Comedy Roundup, Laugh USA, Raw Dog Comedy Hits, Canada Laughs, Carlin's Corner (SXM only)*
- 14 entertainment channels: *Howard Stern (Howard 100 and Howard 101); Opie Radio; Doctor Radio, XM Preview (XM only), Entertainment Weekly Radio, Volume, Today Show Radio, Sirius XM Stars, Radio Andy, Wharton Business Radio, Joel Osteen Radio, Road Dog Trucking, Radio Classics*
- 3 religion channels: *The Catholic Channel, EWTN Radio (Sirius, SXM only), Family Talk*

² Those channels identified as “SXM only” are available solely to a small group of subscribers with a “highband” x65H chipset in their radio allowing them to receive more channels than are available given the bandwidth of our standard chipsets. I also have noted, where applicable, the handful of channels that are available solely on the Sirius or XM platform.

³ I understand that the comedy channels use sound recordings that are covered by the statutory license at issue in this proceeding, but I include them here for completeness.

C. Sports Programming

- 17 sports news/talk channels: *Sirius XM NFL Radio, ESPN Radio, Mad Dog Sports Radio, Sirius XM Bleacher Report Radio, Sirius XM College Sports Nation, Sirius XM FC* (soccer talk), *Sirius XM NBA Radio, Sirius XM Fantasy Sports Radio, ESPN XTra, MLB Network Radio, Sirius XM NASCAR Radio, Sirius XM NHL Network Radio, Sirius XM PGA Tour Radio, Sirius XM Rush, ESPN Deportes, Sports Center* (SXM only), and *Verizon IndyCar Series*
- Numerous devoted and part-time sports play-by-play channels: NFL, NHL, NBA, MLB, *MLB en Espanol* (XM only), NASCAR, IndyCar, soccer, PGA golf, horse racing, and college sports play-by-play for all professional teams and major collegiate divisions

D. “More” Channels

- 4 Canadian channels: *Canada Talks, Ici Premiere, Multicultural Radio* (Sirius only), *Canada 360 by AMI*
- 7 other channels: *BYU Radio, HUR Voices, Korea Today* (XM only), *HBCU, Sirius XM 153, American Latino (Talk) Radio, El Paisa* (SXM only)

The Outlook and Competitive Environment Going Forward

18. Sirius XM’s impressive growth must be balanced against several countervailing trends that will continue into the next rate period. To start, our subscriber growth has occurred even though our conversion rate – the number of trial subscribers who convert to a paid subscription when their free trial ends – has declined steadily since I testified in *SDARS II*. At that time, Sirius XM’s new car conversion rate was about 45%; it now stands at about 40%. While to date this steadily declining new car conversion rate has been more than offset by increasing new car sales (and the new trial subscribers such sales generate), it is increasingly difficult to get those trial subscribers to become paid subscribers – a trend that will hurt us if car sales plateau or decrease rather than grow, and our pipeline of trial subscribers in new vehicles diminishes accordingly.

19. In addition, as our subscriber base has grown so has our music royalty expense, both in percentage terms and in absolute dollars. From 9% in 2013, the royalty rate will rise to

11% of revenue in 2017, and this increasing percentage is being applied against a growing revenue base thanks to our increased subscriber count. The result has been a massive increase in royalty income for SoundExchange and its members: from January 2013, when the current rate period began, through April 2016, we have paid over [REDACTED] in royalty payments to SoundExchange – [REDACTED] in 2013, [REDACTED] in 2014, [REDACTED] in 2015, and an estimated [REDACTED] in 2016 – for our satellite radio service. The increasing royalty rate, coupled with the Company's recent success, has produced tremendous financial benefits for SoundExchange members and an increasing burden on the Company.

20. Looking forward, we currently are predicting that we will hit our 2016 guidance to the market, but we cannot ignore the traditional trends in the United States economy and the related effects on vehicle sales. Over the coming license term, Sirius XM anticipates that new car sales will plateau or decline, and the subscriber growth rates we have experienced over the past several years will flatten. We expect to continue to grow our subscriber base, albeit not as rapidly as in the past, in part because of growth in the used car market and our millions of dollars in investments in unlocking that market.

21. We also recognize that the competitive dynamics in the audio entertainment market in which we operate are changing. Terrestrial radio, which boasts 250 million U.S. listeners and pays no sound recording public performance royalties, has long been, and remains, Sirius XM's principal competition. According to Edison Research, terrestrial radio accounts for 66% of total listening in the car,⁴ the place where the vast majority of Sirius XM listening occurs.⁵ In our internal research, terrestrial radio is the number one "other source" cited as a

⁴ By comparison, Sirius XM accounts for 16% of in-car listening and streaming audio only 6%.

⁵ Edison reports that 84% of Sirius XM listening is in the vehicle.

reason for cancelling a Sirius XM subscription, and terrestrial radio listening dominates among trial subscribers who do not convert to a paying subscription. Similarly, in the study conducted by Edison Research for this proceeding and presented by Sirius XM witness Joe Lenski, 62% of Sirius XM subscribers report that their Sirius XM listening replaced terrestrial radio listening, as compared to low single-digit percentages for non-interactive (5%) and interactive (2%) streaming. Of direct relevance to this proceeding, every listener hour drawn from terrestrial radio to our service is an additional royalty-bearing hour for the record industry.

22. In the *SDARS II* proceeding, I and other witnesses, including expert Bill Rosenblatt, presented testimony concerning a new competitive threat: the advent of what is called the “connected car.” In the connected car, drivers are able to access Internet-delivered streaming services such as Pandora and iHeartRadio, either by connecting their smartphones to their car audio systems and then accessing and operating the streaming services via service-specific icons or “buttons” on the touch-screen of the car audio system, or through a modem embedded in the car. At the time of *SDARS II*, we predicted that Internet music streaming – along with the ability to access Internet-based non-music content in the car – would become a significant competitive threat to Sirius XM during the most recent license term.

23. While that threat has emerged to some degree, it has not materialized as rapidly as we expected. This appears to be result of at least a couple of factors. For one, it turns out that connecting one’s smartphone to the car audio system and initiating a streaming service – most commonly accomplished by “pairing” the device and audio system through a wireless Bluetooth connection – has been more burdensome than most consumers are willing to put up with every

time they start up their car.⁶ So even where it is possible to stream music in the car, this feature often goes unused. In addition, until recently, each automaker – motivated in part by a reluctance to cede the dashboard or share personal information about its customers with third-party software and device makers like Apple and Google – was attempting to develop its own proprietary dashboard audiovisual interface, such as Ford Sync and Toyota Entune. These interfaces, which differ from car to car, have proven to be clunky, overly complicated, and less than intuitive to use – especially as compared to the “one-click” ease of terrestrial radio and Sirius XM – thus forming yet another barrier to the use of streaming services.

24. The bottom line is that even though use of streaming media on smartphones or home/work computers is widespread *outside* the car (over 50% of the U.S. population has listened to online radio in the past month), it has not yet been adopted for use *in* the car at the rate we expected. As of 2015, only 35% of cellphone owners (and 10% of those aged 55 and older) had ever listened to Internet Radio in a car using a cellular phone.⁷ Thus, terrestrial radio continues to be Sirius XM’s principal competition.⁸

25. Several developments suggest the foregoing scenario will change over the next few years. The first is the increasing base of fully connected cars (i.e., cars in which users will be able to wirelessly control the streaming apps via the in-dash entertainment system interface,

⁶ For example, in the 2016 J.D. Power Vehicle Dependability Study, the number one customer complaint was problems with Bluetooth paring and undependable voice recognition systems, accounting for 20 percent of all customer complaints.

⁷ The figures in this paragraph are taken from Triton Digital/Edison Research’s study *The Infinite Dial 2015*.

⁸ In the research presented here by Mr. Lenski, subscribers reported that about 41% of their listening time would go to terrestrial radio in the event that Sirius XM did not exist, as compared to 23% for CDs and downloads, 14% for noninteractive streaming, and 8% for interactive streaming.

as opposed simply to plugging the phone into to the car audio system so that the sound is run through the car speakers but the apps are still operated from the smartphone screen). In 2015, only about 10% of U.S. drivers reported having an in-dash system that could receive Internet-based entertainment. It has been estimated that in 2021, 15.3 million connected cars will ship in the U.S., which is about 90% of the cars expected to be sold that year.

26. Perhaps more important than the raw numbers is the fact that automakers are outsourcing their once-proprietary in-dash “infotainment” systems to Google and Apple, which have launched products called Android Auto and Apple CarPlay, respectively. Android Auto and CarPlay are software extensions of car infotainment systems that display a selection of the user’s smartphone apps on the car’s in-dash screen, using an interface that mimics the display on the user’s phone. The image below (from the Apple website) shows an implementation of Apple CarPlay, which closely mimics the look and feel of an Apple iPhone.



27. For owners and lessees of new vehicles, the introduction of Android Auto and Apple CarPlay – which are free to the customer and automaker – should be a transformative experience, as the products are expected to eliminate many of the “convenience” barriers to streaming Internet-based audio in the car. For example, even though such systems typically will still rely (at least for now) on the user’s smartphone devices to provide the Internet signal, the vehicle should recognize the user’s device each time the occupant starts the car and automatically and seamlessly connect the device with the in-dash unit, eliminating the most significant current barrier to consumer adoption.

28. Android Auto and CarPlay also will offer a user interface in the dash similar to those found on the connected smartphone, i.e., the Apple and Android interfaces with which customers already are familiar. This will save users from having to learn how to operate a different interface created for the specific automaker’s audio system as well as different versions of the streaming apps than those already found on his/her smartphone. Android Auto and CarPlay will allow the user to operate the phone’s native apps (text messaging, phone, maps, navigation and traffic, music player, audio books, podcasts, etc.) from the dashboard along with a growing selection of third-party apps, including Pandora, Major League Baseball’s “AtBat,” NPR One, CBS Radio, iHeartRadio, Stitcher Radio, Slacker Radio, Audible, and Spotify.⁹

29. Once the impediments to consumers’ streaming via car audio systems are reduced, growth in streaming use will increase. Almost all major car manufacturers already have committed to implementation deals with Apple or Android, and many car companies have committed to deals with both. Growth in use of Android Auto and CarPlay will initially be driven

⁹ The information is taken from the Apple website, <http://www.apple.com/ios/carplay/>. Apple Music will of course also enjoy a significant “home court advantage” for those consumers using an iPhone.

by the popular navigation and traffic apps found on smartphones (imagine Google Maps and Waze on your dashboard). But they will bring along a wide variety of streaming services, Pandora in particular, that will, for several reasons, provide more significant competition for Sirius XM in the car than they do today.

30. One main reason is that such services are available for free. Most consumers are simply not willing to pay to subscribe to a music service. Despite the fact that there are 200 million smartphones in the U.S., and about 80% of streaming music listening occurs on those mobile devices, the number of subscribers in the U.S. actually paying for a subscription to music-only service remains a small fraction of that total. The easy availability of free streaming media in the vehicle will present consumers with more free alternatives to Sirius XM than ever before, including a range of content options that are not only free, but better than what's current available on terrestrial radio, both in terms of breadth of content (music and non-music) and functionality (including personalized stations based on particular artists or songs and the ability to skip tracks).

31. Another reason free-to-the-listener streaming alternatives concern us as competition is because Sirius XM users already appear to be more ready to adopt streaming than the general public: whereas streaming accounts for 6% of in-car listening amongst the general population, Sirius XM subscribers devote 18% of their in-car listening time to streaming of some form – a number comparable to the amount of time devoted to terrestrial radio.¹⁰

32. Our research indicates that approximately half of our users already stream Pandora each month (most currently outside of the car), much more than any other service.¹¹ And

¹⁰ According to McKinsey consulting, our subscribers on average report devoting 52% of in-car listening time to Sirius XM, 19% to terrestrial radio, 8% to Pandora, 4% to streaming AM/FM, 3% to podcasts, and 3% to on-demand streaming.

¹¹ More specifically, 51% have listened to Pandora in the last month versus 31% for iTunes Radio, 27% for iHeartRadio, and 25% for Spotify.

more than 70% of our customers rated being able to skip songs and being able to eliminate songs they do not like – features offered by Pandora’s free service, but not Sirius XM’s satellite radio service – as very important to them in their music listening experience. For these customers, once barriers to accessing free-to-the-listener, ad-supported streaming services such as Pandora and iHeartRadio in the car are minimized, adoption will accelerate.

33. So strong is Sirius XM’s belief that connected technology is the future in the vehicle – and that consumers will want and expect it – that we are investing heavily to incorporate it into our own connected offerings. The first example of this was our \$530 million purchase of the connected vehicle unit of Agero in 2013. As a result of that purchase, we now provide telematics – emergency support, stolen vehicle tracking, roadside assistance, etc. – to a large number of leading automakers.

34. In addition, with respect to in-dash entertainment, we currently are developing a new wireless technology platform, tentatively called “360-L,” that we anticipate will be ready to launch in approximately three years. This new platform will add 4G LTE service, the cellular broadband frequency used for smartphones, to our (one-way) satellite radio service, allowing for two-way communication with consumers in the car. This will open up a range of potential ways for us to supplement our core satellite radio product (which will remain compliant with the statutory license) with an enhanced layer of personalized programming options: personalized recommendations; preset preference profiles for each car user; alerts about sports scores while listening to other content; and other options.

35. Currently, Sirius XM has several demo cars on the road that incorporate 360-L technology and is learning from real-world testing what works and what does not work. The Company is in the process of planning deployment of the 360-L platform with the OEMs and will

have to make an initial investment of more than [REDACTED] developing the platform, plus an additional [REDACTED] to roll out the product to the leading OEMs

36. In sum, although we believe our unique bundle of content, our ease of use, and our heavy investment in acquiring new subscribers through the OEM and used-car channels will allow us to continue to compete successfully against both terrestrial radio and Internet-based streaming services, we expect the latter to emerge as a viable competitive threat during the next license term. This additional competition for in-car listeners will make even more important our continued ability to invest in the substantial subscriber acquisition expenditures described above; in our provision of seamless nationwide service through the technological investments described in the testimony of Bridget Neville and Terrence Smith; and in our unique mix of curated music and non-music content (much of it exclusive) – the latter being a principal differentiator of Sirius XM from terrestrial radio as well as from Pandora and other Internet-based services.

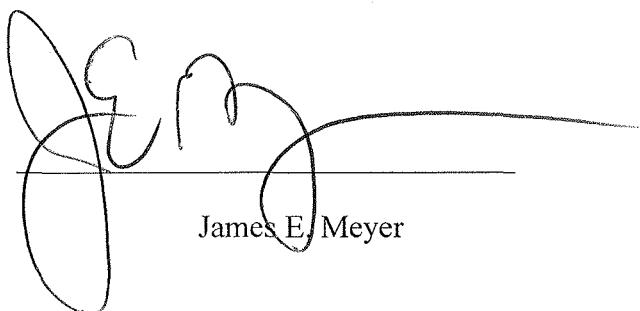
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF JAMES E. MEYER

I, James E. Meyer, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 19th day of October, 2016 in New York, New York.



James E. Meyer

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

WRITTEN DIRECT TESTIMONY OF BRIDGET NEVILLE
(On Behalf of Sirius XM Radio Inc.)

I. Background and Experience

1. My name is Bridget Neville. I am Vice President, Satellite and Terrestrial Engineering and Operations, of Sirius XM Radio Inc. (“Sirius XM” or “the Company”). I joined Sirius Satellite Radio Inc. (“Sirius”) in 2007, prior to its merger with XM Satellite Radio Inc. (“XM”), as Vice President, Satellite Engineering and Operations. I retained that position at Sirius XM after the July 2008 merger between Sirius and XM and assumed my current position in 2014.

2. I earned a Bachelor of Science degree in Electrical Engineering from the University of Notre Dame and a Master of Science degree in Electrical Engineering from the University of Southern California. I also earned a Master of Business Administration from UCLA’s Anderson School of Management.

3. Before joining Sirius in 2007, I was Senior Vice President, Engineering and Operations, of PanAmSat Corporation (now Intelsat), where I worked from 1998 to 2006. I have also consulted for Philip A. Rubin & Associates (now RKF Engineering, a satellite systems

design and manufacturing consulting services group) and worked on systems engineering for Hughes Space and Communications (now Boeing).

4. In my role as Vice President, Satellite and Terrestrial Engineering and Operations, I am responsible for various technological operations at the Company and aspects of the technology underlying our products and services, including our satellite delivery networks, with the goal of ensuring a seamless delivery of satellite radio programming and other content to our subscribers. My responsibilities include, among other things, overseeing and working with several of our engineering departments and outside technological partners to facilitate launching, maintaining, reinforcing, and upgrading the Company's fleet of satellites.

5. I have reviewed the testimony of Terrence Smith and Anthony Masiello from the proceeding that set rates for the Company's satellite service for the period 2007 through 2012 ("SDARS I"), as well as the testimony of James E. Meyer from the proceeding that set rates for the Company's satellite service for the period 2013 through 2017 ("SDARS II"). Among several other subjects, this testimony outlined in detail the extraordinary level of investment and effort involved in conceptualizing, creating, and launching the Sirius and XM systems as well as in the development and maintenance of satellite radio technology, including satellites, terrestrial repeaters, chipsets, receivers, and product innovations.

6. I understand that certain of this prior testimony has been designated to be included in this proceeding, and I will not restate most of it. My testimony will instead update that prior testimony where appropriate; address recent upgrades and improvements to Sirius XM's satellites and terrestrial repeater network that have taken place during the 2013-2017 period; and highlight Sirius XM's projected investments and innovations with respect to its satellites and repeaters for the 2018-2022 period.

7. I also have reviewed the testimony of Terrence Smith that is being filed in this proceeding. That testimony focuses specifically on Sirius XM's recent and planned investments and innovations with respect to (1) broadcast studios; (2) chipsets; and (3) satellite radio receivers (*i.e.*, the radios themselves). Read in tandem, our testimony addresses the core components of Sirius XM's operational system, providing a window into the technological enhancements and improvements that we continually make to our satellite radio technology. Our ability to deliver our programming to subscribers seamlessly depends upon all of these components working together, which requires constant maintenance, improvement, and advance planning.

II. Overview of Sirius XM's Satellite Delivery System

8. Sirius XM's unique satellite radio system has been developed to provide continuous and reliable satellite radio service to tens of millions of cars (and, to a more limited extent, boats and airplanes) throughout the continental United States, through varied geographical areas and terrain. To our knowledge, we are the only company in North America providing satellite-delivered content to moving vehicles (as opposed to, say, stationary dishes positioned on rooftops).

9. Sirius XM (including, for older generations of technology, Sirius and XM separately) has planned and designed each component of its satellite radio system in-house and then engaged vendors to manufacture the equipment to Sirius XM's unique specifications. It has been necessary throughout the Company's history to carefully develop unique customized designs for its equipment and technology rather than purchasing it "off-the-shelf," given Sirius XM's singular task of delivering satellite radio content to tens of millions of moving vehicles.

10. Sirius XM and/or its predecessor companies have obtained hundreds of patents in connection with its innovations. These patents have covered, among other things, the

fundamentals of the satellite radio broadcasting technology, such as satellite placement and receiver technologies; “spread spectrum modulation” (a transmission mode that minimizes signal loss); the satellite transmission frame; the modulation scheme used by terrestrial receivers; a Transmitter Identification Information (“TII”) signal (technology enabling terrestrial repeaters to make themselves known to receivers); various aspects of receiver functionality; technologies used to optimize the fixed bandwidth allocated to satellite radio; and technologies designed to enhance user experience (such as leveraging the system’s “knowledge” of channel content to create personalized channels for individual users).

11. The following sections address the satellite and terrestrial repeater components of our satellite delivery system.

III. Sirius XM’s Satellite Network

Sirius XM’s Existing Satellite Network

12. Since the merger of Sirius and XM in 2008, Sirius XM has maintained and operated two separate satellite networks. Because the legacy Sirius and XM platforms used different satellite networks that were built upon and utilized different technologies, the combined Company must continue to maintain both networks to ensure uninterrupted service to all its customers – about half of whom had Sirius radio units installed in their cars and about half of whom had XM radio units – until all those customers replace their vehicles with newer vehicles containing newer versions of the Sirius XM radio units. (The radio units at the time of the merger were not designed to be used interchangeably.)

13. XM’s first-generation satellites were XM-1 and XM-2. As each of these satellites reached their end of life, they were replaced. XM-3 launched in 2005 to replace XM-1, and XM-4 launched in 2006 to replace XM-2. XM-3 and XM-4 are currently in operation and exclusively service the XM platform, operating in what is called a Geostationary Orbit (or “GEO orbit”), a

circular orbit 22,236 miles above the Earth's equator and following the direction of the Earth's rotation. Satellites in a GEO orbit have orbital periods equal to the Earth's rotational period and therefore appear at a fixed position in the sky to ground observers; this means that the satellite antennas that communicate with them do not have to rotate to track them.

14. Sirius's first-generation satellites were Sirius FM-1, Sirius FM-2, and Sirius FM-3.¹ The original Sirius satellites operated in the Highly Elliptical Orbit (or "HEO orbit"), which is an inclined orbit that allowed Sirius to maintain a satellite position over North America but required a constant switching on and off of the three satellites in regular intervals to ensure consistency of service. Two of the three satellites were in use at any given time. After the merger of Sirius and XM, the Company decided to replace the Sirius first-generation satellites as they reached the end of their life span with new satellites that would operate in the GEO orbit already utilized by XM's satellites. To that end, Sirius XM launched Sirius FM-5 in 2009 and Sirius FM-6 in 2013, each operating in the GEO orbit. By April of this year, each of the three original Sirius satellites had been officially retired and replaced by FM-5 and FM-6, at a total cost of approximately [REDACTED].

15. In addition to its main satellites (currently, XM-3, XM-4, Sirius FM-5, and FM-6), Sirius XM also maintains a fifth satellite, XM-5, launched in 2010, which functions as an in-orbit spare that can be brought into service if any of the active Sirius or XM satellites ever is damaged or needs to be temporarily taken out of service. It took a tremendous amount of work and expense – over [REDACTED] – to develop and construct the XM-5 satellite and to enable it to function as a back-up for either of our satellite systems. XM-5 can operate in either the XM or

¹ Sirius also built, but never launched, a fourth satellite – Sirius FM-4 – as a ground spare. It was donated to the Smithsonian Museum in 2012 and is on display in the James S. McDonnell Space Hangar at the National Air and Space Museum in Washington, D.C.

the Sirius frequency band, but due to limitations in the available technology at the time it was built, its performance level while operating in Sirius mode will be degraded as compared to the normal performance of the Sirius FM-5 and FM-6 satellites.

Plans for Technological Investments and Improvements to Satellites During the 2018-2022 Period

16. The typical expected useful life of a satellite is approximately fifteen years; although satellites may last longer, use beyond fifteen years is by no means certain. It is therefore necessary for Sirius XM to plan to replace each of its satellites on a fifteen-year cycle. Because the XM-3 and XM-4 satellites were launched in 2005 and 2006, respectively, they are expected to reach the end of their lives in 2020 and 2021, respectively. Constructing and launching any new satellite requires an extraordinary amount of time, planning, and investment: typically, replacement campaigns extend approximately three years from concept through contracts, construction, testing, and launch. Sirius XM has already begun the process of developing its next generation of satellites to replace XM-3 and XM-4.

17. Specifically, Sirius XM is in the early stages of its effort to build and launch two new XM satellites – SXM-7 and SXM-8. Following an extensive bidding process involving four manufacturers, we have engaged Space Systems Loral (“SSL”) to build these two satellites to our specifications. The construction process began recently, and the Company expects to launch SXM-7 in late 2019 and SXM-8 in mid-2020.

18. Immediately upon launch, SXM-7 and SXM-8 will be the most powerful and flexible satellites in Sirius XM’s fleet, thanks to advances in satellite technology that we have developed and are implementing with this new generation of satellites. Some of the more significant enhancements we are pioneering with this generation include:

- For the first time in the history of Sirius XM, the satellites will operate in either XM or Sirius mode without any loss of performance when operating in either

mode. This dual-use capability will provide Sirius XM important flexibility in managing its fleet and positioning its satellites. For example, if one satellite encounters a problem or becomes damaged, it will be possible to move other satellites into position in order to maintain consistent service coverage.

- SXM-7 and SXM-8 will have an expanded coverage area, improving service in eastern Canada and enabling XM service to be offered in Puerto Rico.²
- SXM-7 and SXM-8 each will be more powerful than the recently launched XM-5. In comparison to XM-5's 250 watt power, SXM-7 and SXM-8 will have traveling-wave tube amplifier ("TWTA") power of 300 watts. Even with the expanded coverage area, we anticipate performance from SXM-7 and SXM-8 that is approximately 1 decibel greater than that of XM-5. This will enable the satellites to be even more effective in overcoming interference issues posed by foliage and the like.

- [REDACTED]
- [REDACTED]

19. The enhancements planned for this new generation of satellites represent unprecedented, cutting-edge advances in satellite technology. Sirius XM has worked closely with its suppliers to develop technology and equipment designed specifically to meet the Company's unique needs (which, as noted, are distinct from those of most satellite

² Sirius has covered this area since its inception.

communications and television companies). Sirius XM's new generation of satellites will provide tremendous flexibility, increased power, and greater optionality for the future.

Projected Costs of Planned Investments and Improvements to Satellites

20. There are substantial costs associated with constructing and launching any satellite, including costs the Company incurs for construction, testing, launch, insurance, capitalized labor, and new ground equipment to support telemetry, tracking and command ("TT&C"), launch, and uplink. Our contract with SSL to build two new satellites exceeds [REDACTED] [REDACTED]. Additional launch vehicle, insurance, and other costs incremental to the manufacturing price are expected to drive the total cost to about [REDACTED], or [REDACTED] per satellite.

21. The above numbers do not account for the substantial costs the Company incurs over the lifetime of a satellite. Sirius XM prides itself on providing excellent coverage and signal quality while minimizing outages. But maintaining such a high standard of service requires constant monitoring and adjustments. Any satellite failure after launch (the launch itself is insured) could require an earlier investment in a replacement to maintain the integrity of our satellite service, along with a potentially crippling loss of revenue if we were to have another failure before replacing the first failed satellite.

22. There are also substantial costs associated with taking older satellites offline at the end-of-life stage. Although some of these costs generally are covered by each satellite's operations contract (*i.e.*, the original contract associated with that satellite), there are often unforeseen costs that arise due to unexpected developments. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

IV. **Sirius XM's Network of Terrestrial Repeaters**

23. As discussed above, Sirius XM's satellites provide service to tens of millions of moving motor vehicles, which makes our technology distinct from that of other communication satellite companies (*e.g.*, DirecTV and DISH Network), which provide service to static antennae on rooftops. Satellite coverage, however, provides clear reception only insofar as areas have an unobstructed line-of-sight between one of the satellites and the roving antennae – something not always possible with moving cars, which cross under bridges, drive amidst tall buildings in cities, and operate in mountainous regions. For this reason, Sirius XM has had to navigate and develop solutions to service impediments not encountered by other satellite delivery networks. In order to fill any gaps in coverage caused by the above-mentioned obstructions that may block signals from Sirius XM's satellites and adversely affect reception of satellite signals, Sirius XM maintains a vast network of “terrestrial repeaters.”

24. These repeaters receive the broadcast signal from one of the main satellites (in the case of the XM network) or from a third-party satellite (in the case of the Sirius network).³ The repeaters translate the signals they receive into the correct frequency to be transmitted to satellite radios and then send the signal out at a modulation that allows for better transmission in dense or obstructed areas. Our satellite radios are designed to receive up to three signals (one from each satellite plus a terrestrial repeater signal) and recombine them into a single audio output.

³ The Highly Elliptical Orbit (HEO) used by the first generation Sirius satellites made it impractical to deliver the programming content to terrestrial repeaters directly from the Sirius satellites since the HEO orbit would have required expensive tracking antennas at each repeater location. The Sirius network design instead uses a leased transponder on a third-party satellite in a geostationary orbit to deliver the content to the repeaters, enabling the repeaters to use a less expensive and commercially available antenna rather than a custom-designed antenna.

Recent Investments and Improvements in Repeaters

25. Between 2011 and 2016, Sirius XM completed a series of upgrades to increase its repeaters' capabilities and to address end-of-life issues. Particularly with respect to the Sirius satellite network, the introduction of a new generation of satellites increased the risk of increased signal blockages in orbit (because the Sirius satellites now orbit the Earth at the lower elevation of the GEO orbit, unlike the original three satellites). As a result, Sirius XM substantially increased the number of repeaters on the Sirius system from 140 to almost 500.

26. Concurrent with the Sirius repeater network expansion, when many of Sirius XM's repeaters reached their natural end of life, Sirius XM undertook an upgrade and consolidation project, with the result that each of Sirius XM's terrestrial repeaters has new hardware that is expected to last for approximately seven to ten years.

27. In addition, each Sirius XM terrestrial repeater is now "co-located," which means each repeater is able to (i) receive signals from both an XM satellite and Sirius' third-party satellite; (ii) transmit signals in both the Sirius and the XM bands; and (iii) send those signals to both Sirius and XM receivers. The total cost for the expansion of the Sirius repeater network, the upgrade and replacement of XM repeater equipment, and the co-location project, launched in 2011, mostly completed now, and to be finished in 2017, is approximately [REDACTED].

Technological Investments and Improvements for Repeaters Planned for 2018-2022 Period

28. Currently, Sirius XM has approximately 500 terrestrial repeaters and intends to increase that number to approximately 525 during the 2018-2022 period, adding 25 repeaters to Sirius XM's network. The cost of this expansion of the Company's terrestrial repeater network is estimated to be approximately [REDACTED].

29. The Company also spends a significant amount maintaining its network of terrestrial repeaters, replacing them as they reach their natural end of life. Design work on new replacement terrestrial repeaters will be initiated between now and 2022, with replacements occurring between 2023 and 2026. The estimated cost of replacing our terrestrial repeaters as they reach their end of life is approximately [REDACTED].

30. In addition, the Company is currently developing a smaller version of a terrestrial repeater that can receive content via an Internet connection rather than a satellite link. The Internet-fed repeater is intended for use in areas that need a terrestrial signal to supplement the satellite signals where satellite signals cannot be used to deliver the content directly to the repeaters because of blockage from tall buildings in the area. The internet-fed repeaters are intended for use in areas where cellular signals interfere with our satellite or existing repeater signals. The “proof of concept” development and deployment of an initial 30 Internet-fed repeater sites alone is expected to cost approximately [REDACTED]. The cost of deploying a national Internet-fed repeater network could be more than [REDACTED]
[REDACTED] depending on the number of sites required.

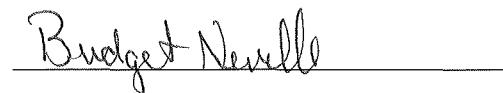
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF BRIDGET NEVILLE

I, Bridget Neville, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 17th day of October, 2016 in New York, New York.



Bridget Neville

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

WRITTEN DIRECT TESTIMONY OF TERENCE SMITH
(On Behalf of Sirius XM Radio Inc.)

I. Background and Experience

1. My name is Terrence Smith. I am the Corporate Vice President and Chief Engineering Officer for Sirius XM Radio Inc. (“Sirius XM” or “the Company”), with responsibility for Broadcast Operations and Engineering. I joined Sirius Satellite Radio Inc. (“Sirius”) in February 2002, years prior to its merger with XM Satellite Radio Inc. (“XM”) and just as Sirius was commencing broadcast operations.

2. I have been involved in digital technology for approximately 37 years. Prior to joining Sirius, I was employed at RCA Labs and at Sarnoff Labs, where I was involved in pioneering work with High Definition Television and the development of a digital satellite television service launched by DIRECTV. I hold a Bachelor of Science in Electrical Engineering degree from the University of Notre Dame and a Master of Science in Electrical Engineering degree from Drexel University. I am a named inventor or co-inventor on 18 U.S. Patents.

3. At Sirius XM, I direct all of our engineering activities and technology developments as they relate to the aggregation, curation, and distribution of content through the

Sirius XM satellite and terrestrial repeater networks. These include our system design and development; our broadcast studios; our satellite uplink; our satellite design development and operations; our ground repeater design, development, and operations; and our digital compression technologies. I also am personally involved in securing the necessary licenses for our devices and operations from the Federal Communications Commission (“FCC”) and other governmental entities, and I collaborate on the development of our chipset and antenna design, our product design and development, and our testing and quality control. I have a team of 176 employees that reports to me, including dozens of engineers with advanced degrees in systems engineering, communication systems, orbital dynamics, and digital compression systems. I am familiar with the engineering challenges that have confronted Sirius XM and its predecessors since its inception and the solutions that have been developed and implemented. I base this testimony on my experience and information I have learned through my work at Sirius XM.

4. I have reviewed my prior testimony from the proceeding that set rates for the Company’s satellite service for the period 2007 through 2012 (“*SDARS I*”), the testimony of Anthony Masiello from that same proceeding, and the testimony of James E. Meyer from the proceeding that set rates for the Company’s satellite service for the period 2013 through 2017 (“*SDARS II*”). Among several other subjects, this prior testimony collectively outlined in detail the extraordinary level of investment and effort that was involved in conceptualizing, creating, and launching the Sirius and XM systems, as well as the development and maintenance of our unique satellite radio technology, including satellites, terrestrial repeaters, chipsets, receivers, product innovations, and development costs. I understand that certain of this prior testimony has been designated to be included in this proceeding, and I will not restate most of what is provided there.

5. I also have reviewed the testimony of Bridget Neville, which is being filed in this proceeding. Ms. Neville's testimony addresses upgrades and improvements to Sirius XM's satellites and repeater network that have taken place during the 2013-2017 period and highlights Sirius XM's anticipated investments and innovations in those technological areas during the 2018-2022 period. As a complement to the points covered by Ms. Neville, I focus here on Sirius XM's recent and planned enhancements and innovations with respect to (1) its broadcast studios; (2) its chipsets; and (3) its satellite radio receivers (that is, the radios in which the chipsets are integrated). Each of these components is necessary to facilitate the delivery of Sirius XM's audio entertainment services to subscribers and reflects a significant degree of technological expertise by, and expense for, the Company. I also will outline the investments Sirius XM has made and will continue to make in the development of more robust automobile rooftop antennae to eliminate interference from other carrier signals.

II. Sirius XM's Broadcast Studios

6. Sirius XM's programming originates principally from its broadcast studios in New York City and Washington, D.C., and to a lesser extent from studio facilities in Los Angeles, Nashville, Cleveland (for the Classic Vinyl and Rock 'n Roll Hall of Fame channels), Memphis (for the Elvis channel), and Orlando (for Jimmy Buffet's Margaritaville channel).

Recent Investments and Plans for Improvements in Broadcast Studios and Technological Investments During 2018-2022

7. In October 2012, Sirius XM opened a studio in Austin, Texas, replacing a studio that had previously been located in Carl's Corner, Texas. Austin was chosen because the studio airs the channel Willie's Roadhouse, featuring the music of Austin native Willie Nelson. Austin also provides proximity to the annual South by Southwest (SXSW) festival, a major event on the film, tech, and music industry calendars.

8. Over the next five years, Sirius XM [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. We currently estimate that Sirius XM will spend approximately [REDACTED]

9. Over the last two years, Sirius XM has embarked on an extensive redesign and upgrade of its studio infrastructures, including refurbishing of its electronic capabilities; expanding its storage; investing in archival tools; and developing and investing in security technology to protect the value of its content and to prevent hacking and other security threats. Sirius XM is roughly halfway through its overhaul of the New York City broadcast studios. We expect to complete work on the New York City and Washington, D.C., studios in four years. The Company also plans to upgrade its studios in other regions and expects to have fully completed its infrastructure upgrade project across its studio facilities by the end of the 2018-2022 period. To date, Sirius XM has invested more than [REDACTED] in studio upgrades and expects that the investment in studio upgrades alone will total in excess of [REDACTED] upon completion.

10. A crucial component of this undertaking is the redesign of Sirius XM's broadcast infrastructure to bridge the compatibility gaps that have existed between the Sirius and XM legacy satellite systems. (As the Judges are aware, Sirius XM has continued to operate the two legacy Sirius and XM systems even after the merger.) Sirius XM has made a significant

investment in developing and implementing new studio technology to put the Sirius and XM networks on a common broadcast platform that it calls the “Content Factory.” This media management system will allow all content—from both the Sirius and XM platforms—to be harnessed and packaged in order to respond to and meet consumer preferences. To date, the Content Factory project has cost approximately [REDACTED], with the completed project estimated to cost approximately [REDACTED].

III. Sirius XM’s Chipsets

11. Chipsets are the “brains” of satellite radio receivers. They are responsible for receiving, decoding, and decompressing the satellite signals transmitted by the Sirius and XM satellites (and terrestrial repeaters) to complete delivery of Sirius XM content to subscribers. Sirius XM’s chipsets typically are composed of two integrated circuits. One, an RF tuner chip, tunes to the appropriate band of frequency; the other, a base band digital chip, demodulates the signal received from Sirius XM’s satellites and terrestrial repeaters, extracts and decompresses individual audio channels, and presents the audio and its associated metadata to the consumer. Because satellite radio faces unique challenges to deliver a seamless listening experience across the continental United States, Sirius XM’s chipsets are uniquely designed for its service and represent proprietary technology created and developed in-house by Sirius XM. There is no secondary market or application for these chipsets, so the burden of designing and developing this proprietary technology falls solely on Sirius XM. The technology embedded in these chipsets is the subject of more than twenty U.S. patents.

12. Sirius XM is constantly working to improve its chipsets. Each successive generation is designed to be less expensive for the customer while increasing the amount of content that can be transmitted over the Company’s existing network. These enhancements not only improve the subscriber’s listening experience but also make the technology more efficient.

This is increasingly important as automobile manufacturers (“OEMs”) seek to reduce the amount of power their vehicles consume and have less physical space available in their vehicles for radio interfaces.

13. Sirius XM typically delivers a new generation of chipsets to the market approximately every two years, and each new generation requires a substantial investment and a dedicated Research & Development team of approximately fifty employees. In total, 140 employees at Sirius XM work on productization efforts in connection with chipsets. In addition to the two-year product development cycle, there is an additional three to four years of on-going development work for in-car deployment.

Recent Investments and Improvements in Chipsets

14. Sirius XM has continually improved its chipset technology, both reducing size and improving performance with each subsequent iteration. To increase the programming that can be delivered using the amount of bandwidth Sirius XM is licensed to use, we launched our “hierarchical modulation scheme” in 2007 on the Sirius network and in 2011 on the XM network. As a result, we are now able to deliver 25% more content over our originally launched networks. This effort involved developing entirely new chipsets (utilizing what we call x65H technology) for both the Sirius and XM networks as well as new technology for error protection of the satellite signals and development and implementation of state-of-the-art compression technology. This technology allows Sirius XM to overlay additional content over its legacy modulations by compressing the data that is delivered and injecting an additional layer of programming on top of it. This is achieved in a backwards compatible fashion – i.e., existing radios are not made obsolete, but new radios can receive both layers of content.

15. In 2014 and 2015 Sirius XM launched its “Generation 7” and “Generation 7.5” chipsets, respectively, both of which integrated the x65H technology and also took advantage of

available smaller geometries to provide increasingly cost-effective solutions. For example, this new generation of chipsets reduced the memory devices utilized by the chipset from three down to two, resulting in a significant cost savings. This x65H technology has been deployed by several OEMs (with full integration expected by 2019), and it is now well-established as the standard in satellite radio technology. The total cost of developing and launching the Generation 7 and Generation 7.5 x65H chipsets was approximately [REDACTED].

Plans for Technological Investments and Improvements in Chipsets During 2018-2022

16. Sirius XM has begun developing its “Generation 8” chipset—with an initial prototype expected in 2017—which will be the first chipset with the capacity to receive both Sirius and XM waveforms simultaneously. Once fully developed, we expect that this new chipset will add additional capabilities and yield more capacity out of Sirius XM’s existing network, using a more advanced version of the modulation schemes Sirius XM has previously developed. We also expect to further reduce the memory devices required from two to one. The estimated cost of developing and launching the Generation 8 chipset is approximately [REDACTED] [REDACTED]. The development of this Generation 8 chipset presents challenges that involve tuning a wider bandwidth while preserving the same sensitivity and noise figure and simultaneously improving the ability to reject nearby interfering signals.

17. In addition to the investment in the chipset development, in order to fully realize the capabilities of Generation 8, upgrades to our repeaters and satellite uplink infrastructure are required and anticipated to cost [REDACTED] through 2019.

18. This amount includes ongoing investments in more robust automobile rooftop antennae, which are necessary to filter out potentially interfering signals from neighboring carriers as the environment within which satellite radio operates becomes “noisier” as a result of new rules associated with the bandwidth spectra adjacent to Sirius XM’s spectrum (opening

those spectra to wireless and LTE technologies). The challenges of receiving extremely low-power satellite signals in a mobile environment are difficult enough; the addition of relative high-power cellular transmissions in adjacent spectra significantly complicates the reception. Sirius XM has invested in filter technology to reject the nearby interfering transmissions while minimizing the insertion loss caused by adding the filter, which impacts the receiver's sensitivity. Because the frequency and requirements for this filter are unique to satellite radio, Sirius XM has borne all of the design and development costs.

IV. Sirius XM's Receivers

19. When Sirius XM launches a new generation of chipsets, it invests in the design and manufacture of a new aftermarket radio receiver (*i.e.*, a stand-alone radio unit available for consumer purchase without integration into an automobile). By initially limiting the deployment of new technologies to the aftermarket distribution channel, Sirius XM enjoys the benefits of testing a new product within a relatively low-volume market while allowing the product to reach the market more quickly (given that automobile manufacturers have a longer time-to-market cycle when it comes to integrating new technologies).

20. In addition to developing aftermarket receivers, Sirius XM also invests heavily in software and tools that it provides to OEMs in order to embed its chipset modules into third-party and OEM-developed receivers that are integrated into an automobile's head unit and user interface. Sirius XM also provides ongoing general support to OEMs as they integrate new satellite radio technologies into their automobiles.

21. The development of the Generation 7 and Generation 7.5 chipsets also involved the development of entirely new radio receivers—the “Edge” and “Lynx” aftermarket radio products. The total cost of developing the Edge and Lynx radios was approximately [REDACTED]
[REDACTED]

22. Over the past five years, Sirius XM has also spent approximately [REDACTED] in providing software, tools, and other support to OEMs as they have integrated these new technologies I have described into their automobiles.

23. We anticipate spending another approximately [REDACTED] going forward in support of the Generation 8 deployment.

24. With the development of the Generation 8 chipset, Sirius XM also will be developing and launching a new radio unit for its aftermarket distribution channel, as detailed above. The expected cost of the development and manufacture of the Generation 8 receiver is approximately [REDACTED]

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF TERENCE SMITH

I, Terrence Smith, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 17 day of October, 2016 in New York, New York.



Terrence Smith

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

<i>In re</i>)	
)	
)	
DETERMINATION OF ROYALTY RATES	)	Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF	)	(2018-2022)
SOUND RECORDINGS BY SATELLITE)	
RADIO AND “PREEEXISTING”)	
SUBSCRIPTION SERVICES (SDARS III))	

WRITTEN DIRECT TESTIMONY OF GEORGE WHITE
(On Behalf of Sirius XM Radio Inc.)

I. Background and Experience

1. My name is George White. I am the Senior Vice President, Music Licensing, for Sirius XM, a position I've held since I started with the company in September 2013. My work prior to joining Sirius XM includes executive posts at *Billboard*, as General Manager of *Billboard* Digital, and Warner Music Group, where I served as Senior Vice President, Strategy and Product Development, working for over a decade to lead the development of new mobile and online distribution and promotion channels for music.

2. My chief responsibility at Sirius XM is to negotiate direct licenses with record companies for sound recording performance rights and other associated rights necessary to operate our services. We are assisted by Music Reports, Inc. (MRI), which acts as our agent in procuring new licenses and administers payments to the direct licensors. Earlier this year I hired two new Sirius XM employees to assist in the direct license effort: Casey Rae (Director, Music Licensing) and Erica Antonelli (Manager, Music Licensing). We have also hired three new employees to assist with royalties processing, part of an effort to move some of that function in-house.

3. My testimony will summarize the rates and key terms of the licenses, highlight some of the leading artists and tracks covered by the licenses, and describe the incentives record companies have to enter into the licenses. I also discuss the basis for some labels' reluctance to enter into direct licensing.

II. Sirius XM's Direct License Program: An Overview

4. Sirius began an effort to secure sound recording performance rights directly from record companies in 2011. That history was detailed in the written direct testimony of David Frear, Executive Vice President and Chief Financial Officer of Sirius XM, parts of which have been designated for use in this proceeding.¹ It was at the outset, and it remains to this day, Sirius XM's interest, as an important element of its overall cost containment efforts, to control the cost of music programming by negotiating royalty rates directly with individual record labels. We continue to believe this initiative is in the best interest of Sirius XM and the record labels themselves.

5. At the time of the *SDARS II* hearings, we had secured about 95 such licenses. Since that time, the number of direct licenses we have signed has grown to 498, covering more than 23,000 catalogs and five million tracks. In the most recent reporting period, directly-licensed tracks accounted for approximately 6.4% of our monthly spins, more than twice the percentage covered by direct license at the time of the *SDARS II* proceeding. Our direct licenses cover 50,490 tracks that have been played by Sirius XM in the past.

III. Direct License Coverage, Prominence, and Representativeness

6. Our direct licenses cover an impressive array of labels, artists, albums, and tracks, including top-ten hits, Grammy winners, and classics spanning all genres. For 2016 alone, there

¹ Specifically, Sirius XM is designating paragraphs 1 and 46-57 of the Written Direct Testimony of David J. Frear.

were 37 Grammy nominees and the following eleven winners represented in our directly-licensed repertory:

- **Best Metal Performance** – Ghost, “Cirice” (Loma Vista/Concord)
- **Best Traditional R&B Performance** – Lalah Hathaway, “Little Ghetto Boy” (eOne)
- **Best New Age Album** – Paul Avgerinos, *Grace* (Round Sky)
- **Best Latin Jazz Album** – Eliane Elias, *Made in Brazil* (Concord Jazz)
- **Best Bluegrass Album** – The Steeldrivers, *The Muscle Shoals Recordings* (Rounder/Concord)
- **Best Folk Album** – Bela Fleck & Abigail Washburn, *Bela Fleck & Abigail Washburn* (Rounder/Concord)
- **Best Score Soundtrack for Visual Media** – *Birdman* (Milan Records)
- **Best Choral Performance** – Rachmaninoff: *All-Night Vigil* (Chandos/Naxos)
- **Best Chamber Music/Small Ensemble Performance** – Eighth Blackbird, *Filament* (Cedille/Naxos)
- **Best Classical Instrumental Solo** – Seattle Symphony, *Dutilleux: Violin Concerto, L'Arbre des Songes* (Naxos)
- **Best Classical Compendium** – Paulus: *Three Pieces of Enlightenment; Veil of Tears & Grand Concerto* (Naxos)

The full list of Grammy nominees is contained in Attachment A to this testimony.

7. The following are some of the more notable record companies among our direct licensors:

- a. **Concord:** Concord Bicycle Music Group is one of the largest and most successful independent label groups. According to its website, “Concord Bicycle Music’s portfolio of more than 10,000 active album recordings includes at least 270 RIAA certified gold, platinum, or multi-platinum releases (including one of only 120 RIAA Diamond® albums, attesting to USA consumer sales in excess of 10 million units).² Its collection also includes 227 Grammy® winners (more than

² Creedence Clearwater Revival, *Chronicle*.

5% of the Grammy® awards ever presented in the 57-year history of the National Academy of Recording Arts and Sciences).” Concord albums won four Grammy awards in 2016 and garnered four additional nominations. Notable releases from Concord labels in the past year include Paul Simon’s *Stranger to Stranger*, Nathaniel Rateliff & The Night Sweats’ self-titled debut, and country legend Dwight Yoakam’s *Swimmin’ Pools, Movie Stars...*, among others. Currently active artists in Concord’s stable include James Taylor (Rock & Roll Hall of Fame member and two-time 2016 Grammy nominee), Alison Krauss (27-time Grammy winner), Bela Fleck (2016 Grammy winner for Best Folk Album), Arturo Sandoval (10-time Grammy winner and 2013 Presidential Medal of Freedom recipient), Iggy Pop (Rock & Roll Hall of Fame member), Kenny G (best-selling instrumental musician of the modern era), and many others. Concord’s back-catalog includes the catalog of Rock & Roll Hall of Fame members Creedence Clearwater Revival and R.E.M., along with the Fantasy, Prestige, Riverside, and Milestone jazz catalogs, including recordings from jazz legends John Coltrane, Miles Davis, and Thelonious Monk, as well as Vince Guaraldi’s *A Charlie Brown Christmas* soundtrack album, which has been certified 4x Platinum by the RIAA and is included in the Grammy Hall of Fame and the Library of Congress’ National Recording Registry.

- b. **Glassnote:** Founded in 2007 by music industry executive Daniel Glass, Glassnote Entertainment Group is home to a number of Grammy award-winning artists. Notable Glassnote acts include the British alternative rock band, Mumford & Sons, whose second album, *Babel*, became a #1 album on the *Billboard* 200 and won the 2012 Grammy Award for Album of the Year, and whose 2015 album, *Wilder Mind*, debuted in the #1 slot on the *Billboard* 200; the French indie rock band Phoenix, whose fourth album *Wolfgang Amadeus Phoenix* won the 2009 Grammy Award for Best Alternative Music Album; Canadian folk rock band The Strumbellas, whose 2016 single, “Spirits” reached #1 on the *Billboard* Alternative Songs chart; the critically-acclaimed electro-pop band Chvrches; and hip-hop artist Childish Gambino, the stage name of the award-winning comedian and writer Donald Glover.

- c. **Entertainment One (eOne):** eOne describes itself as “the #1 Independent Music Brand in North America,” having charted over 100 albums on *Billboard’s* Independent Chart, more than any other U.S. independent label. eOne received the 2016 Grammy for Best Traditional R&B Performance, as well as three other nominations. eOne rap artist, The Game, had two *Billboard* Top 5 albums in 2015, and rock artist Pop Evil had a #1 *Billboard* Independent Album and top 10 *Billboard* Rock Album in 2015.
- d. **Naxos of America, Inc.:** Per its own website, “Naxos Records is the world's leading classical music label as measured by the number of new recordings it releases and the depth and breadth of its catalogue.” Naxos releases won four 2016 Grammy awards and secured 12 additional nominations.
- e. **Empire Distribution:** Originally founded as a digital distributor to music streaming platforms and online retailers, Empire has quickly evolved into one the most successful distributors of hip-hop, Latin, and reggae music in the industry. Empire has partnered with a number of artists who have released chart-topping albums and singles in recent years, including *Section.80*, which was the first album released by Grammy award-winning artist Kendrick Lamar and reached #1 on the *Billboard* Top Heatseekers Albums chart; The Game’s *O.K.E.*, which reached #19 on the *Billboard* Top R&B/Hip Hop Albums chart; the 2016 album *King of Memphis* by rising hip-hop star Young Dolph; and the 2016 single “All the Way Up” by Fat Joe and Remy Ma, which became platinum within six months after its release. Empire was recently the subject of a glowing profile in *Forbes* magazine, “Empire: The Distribution Company That Turned Music Streaming Pennies Into Profit” (Sep. 26, 2016).³
- f. **Fair Trade Services:** Fair Trade (formerly INO Records) is a leader in the Contemporary Christian Music genre, with a catalog including artists Newsboys (whose 2016 album *Love Riot* reached #14 on *Billboard* 200 Album Chart and #1 on the Top Alternative Albums and Top Rock Albums charts); MercyMe, whose 2014 album *Welcome To The New* reached #2 on the *Billboard* 200 and #1 on the

³ See <http://www.forbes.com/sites/ogdenpayne/2016/09/26/empire-the-digital-distribution-company-that-turned-music-streaming-pennies-into-profit/#144de175498e>.

US Christian Albums chart, has been certified Gold by the RIAA, and received a 2015 Grammy nomination for Best Contemporary Christian Music Album; and The Fray, whose 2005 song “How To Save a Life” reached #3 on the *Billboard* Hot 100, charted for 58 consecutive weeks, and has been certified Triple Platinum by the RIAA.

- g. **S-Curve Records:** Founded in 2000 by former Mercury Records executive Steve Greenberg, S-Curve’s catalog includes new records from well-known legacy acts including Tom Jones and Duran Duran. S-Curve scored a major hit in 2014-15 with the song “Honey I’m Good” by artist Andy Grammer, which reached #9 on the *Billboard* Hot 100 and #1 on the Adult Top 40 chart, was certified Triple Platinum by the RIAA, and ranked as one of the 10 best-selling songs of 2015 by Soundscan. More recently, S-Curve released *Autumn Leaves*, an album from the Tony Award-winning star of *Hamilton*, Leslie Odom, Jr.
- h. **Z Entertainment:** Founded in 2015, their first release, the song “Hide Away” by artist Daya, hit #23 on the *Billboard* Hot 100 and #7 on the Mainstream Top 40 chart, and has been certified Platinum by the RIAA. Daya’s official video for “Hide Away” has 13,029,385 views on YouTube as of September 27, 2016.
- i. **Third Pardee Records:** This label is owned by electronic music artist Major Lazer, whose catalog includes the 2015 track “Lean On,” which peaked at #4 on the *Billboard* Hot 100 and #1 on the Mainstream Top 40 Chart, was the fifth best-selling song of 2015 worldwide (13.1 million global sales), has been certified 4x Platinum by the RIAA, and was named by Spotify in November 2015 as the most streamed song of all time.
- j. **LSO LIVE:** Owned by the London Symphony Orchestra, this label launched in 1999, along with sub-label Mariinsky, which is associated with the Mariinsky Theatre in St. Petersburg, Russia. Mariinsky artist Danill Trifonov was recently named 2016 Artist of the Year by *Gramaphone* magazine.
- k. **Eardrum Records:** The label was founded by legendary comedian George Carlin, and is now owned by his estate. This label’s catalog includes the four RIAA Gold-certified albums Carlin originally released in the 1970s, up through

the new album of unreleased material *I Kinda Like It When a Lotta People Die*, released on Sept. 16, 2016.

1. **Amherst Records:** Current owners of the AVCO Embassy/H&L Records catalog, which includes the recordings of legendary artists The Stylistics (twelve consecutive U.S. R&B top ten hits, including “Stop, Look, Listen”, “You Are Everything”, “Betcha by Golly, Wow”, “People Make the World Go Round”, “I’m Stone in Love with You”, “Break Up to Make Up”, and “You Make Me Feel Brand New”), Van McCoy (*Billboard* #1 and Grammy-award winner “The Hustle”), and jazz-fusion band Spyro Gyra (over 10 million albums sold).

IV. Key Terms of the Sirius XM Direct Licenses

8. While there are variations across time and licenses, our direct licenses (a sample of which is appended as SXM Dir. Ex. 44, and a compilation of which is appended as SXM Dir. Ex. 42) share key common features.

9. ***The rights grant:*** Each licensor record company grants Sirius XM reproduction, distribution and performance rights we need to operate our various services, including the same public performance and reproduction rights as are covered in this proceeding. (Ex. 44 ¶ 2.) The licenses relax certain of the restrictions of their Section 112/114 statutory licenses, chiefly the sound recording performance complement, in order to provide Sirius XM greater programming flexibility. From the labels’ perspective, loosening the statutory restrictions – in particular, the limited number of times a given artist or album can be played in a three-hour window – allows for increased plays of their songs on Sirius XM channels, increased promotion of those recordings, and increased payments.

10. ***The rates:*** The direct licenses, with a few exceptions, pay the labels their pro rata share of 7% to 9.5% of gross revenues, with a revenue definition similar to that found at 37 C.F.R. 382.11. (Ex. 44 ¶ 4(a).) These rates reflect an increase of about two percentage points

from the time of the *SDARS II* proceeding, when the direct-license rates ranged from 5% to 7%. That increase reflects the fact that the statutory rate has climbed, during the same time period, from 9 to 11%. Given the statutory rate increase, it was inevitable that prospective and renewing direct licensors, knowing they would receive the statutory rate for performances on Sirius XM in the absence of entering into such licenses, would expect to receive a direct license royalty higher than that which prevailed under the prior statutory rate structure.⁴ Nonetheless, the nearly 500 direct licenses now in place without exception are set at royalty rates below the prevailing statutory rates – continued evidence that many record labels see potential economic benefits of dealing directly with Sirius XM even at rates below the statutory rates. I discuss in Part V below the various drivers of those decisions.

11. ***The Royalty Pool & Licensor Share Calculation:*** Each licensor's share of the royalty pool is calculated by dividing the number of performances of that record company's tracks in the reporting period (not counting pre-1972 recordings) by the *total* number of sound recording performances during the period (whether or not directly licensed). (Ex. 44 ¶ 4(a).) Consistent with the *SDARS II* regulations, those performances are measured on the so-called “reference channels” – i.e., the channels on our Internet webcasting service that match those offered on our satellite radio service. Our methodology for computing payments to the directly licensing record companies is thus consistent with that which governs the amount we are able to deduct from our SoundExchange payments on account of playing those licensors' recordings.⁵

⁴ Reflecting this reality, a large majority of the licenses which were entered into or renewed during the current statutory period, are set at a rate of 9.5%, while about 30 call for payments at 7% or 8%. A small number of older licenses (about 15) are at slightly lower rates of 5 to 6%.

[REDACTED]

⁵ 14 direct licenses in the 5-7% rate range remain on the older “playlist” methodology; when those licenses renew we expect to shift to the new reference-channel methodology.

12. The royalty pool is “gross,” without deduction of any administrative fees and expenses like those deducted by SoundExchange. Accordingly, each licensor receives its share of the entire royalty pool. (Ex. 44 ¶ 4(a).) In addition, pursuant to paragraph 4(d), the payment includes both the label and artist share of the royalties; as is typical of voluntary licenses between record companies and digital music services, the record company is responsible for paying the artist pursuant to the terms of its recording agreement. (Ex. 44 ¶ 4(d).)

13. ***Other notable provisions:*** Paragraph 3 of the direct licenses requires the direct licensors to provide us with complete and accurate metadata for each recording in their catalogs, along with ongoing updates. (Ex. 44 ¶ 3.) This requirement not only helps us identify the tracks in their repertoires that we might include in our programming, but leads to more accurate and timely track identification and payment. Relatedly, Paragraph 5 requires us to pay the direct licensors monthly, within 90 days after the close of the month, and provides the direct licensors with the right to hire an independent certified public accountant to audit the books and records related to our use of the label’s catalog. (Ex. 44 ¶ 5(a), (b).) Paragraph 5(a) also provides us with credits for any overpayments that are discovered. (Ex. 44 ¶ 5(a).)

14. I note as well that as a result of ongoing state-law litigation over the legal status of performance rights in pre-1972 sound recordings, and our decision to enter into a national settlement with the major labels on that issue, Sirius XM has (while reserving all rights) recently agreed with certain record companies to directly license their pre-1972 sound recordings [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Pre-1972 recordings are either exempted or covered but non-royalty-bearing under the remainder of the direct licenses currently in effect.

V. Why Direct Licensors Sign with Sirius XM

15. Some five years into the direct license effort, we have developed a strong understanding as to what direct licensors are looking for in a business relationship with Sirius XM, and we tailor our licensing efforts accordingly. Based on my experience talking to record labels, the most valuable component of a direct license is the direct relationship with Sirius XM it affords and all the benefits that relationship entails. Chief among those benefits is the opportunity to get access to, and attention from, the programmers of the Sirius XM channels in the licensor's genre and the resulting opportunity to have the licensor's tracks, including new label releases, added to the channel playlist and/or performed more often. This access, and the opportunity to "pitch" their new releases to our programmers, can be incredibly valuable to the record companies. Not only can it lead to additional royalty-bearing Sirius XM plays, but those plays can also stimulate additional physical and/or digital sales, and increase other activity that creates revenues for labels and their artists, such as concert ticket sales. Likewise, plays on Sirius XM can lead to additional performances on terrestrial radio stations around the country that often follow our lead in adding new tracks (generating even more sales and other remunerative activity), as well as performances on digital platforms such as Spotify and Pandora (generating more performance royalty revenue).

16. I make clear in my conversations with labels that while we cannot guarantee an increase in plays of their tracks, developing a direct-license relationship with Sirius XM promotes increased access and visibility to our programming staff. To better understand why this enhanced access is so important, it is important to recognize that our channels are curated by human beings, not machines. That means that each week, a programmer for a given channel is tasked with listening to new tracks, deciding which of them should be added, and how many times they will be played. In a given week, we may have only a few open slots for new tracks,

and record labels are constantly pitching our programming staff to have their tracks added to those slots (or to have already added tracks played more). As Steve Blatter describes in his testimony, our programmers are inundated with CDs and mp3 files – not to mention calls, emails, and other inquiries – imploring them to add and/or boost plays of various labels’ tracks.

17. A good example of how this process can benefit a label is provided in the experience of Hopeless Records and their band All Time Low. Hopeless had enjoyed some airplay in the past on Faction, our punk/hip-hop/metal channel geared at action sports fans. Hopeless was convinced that All Time Low, whose forthcoming record was more song-craft oriented and accessible than many Faction tracks, could cross over to Sirius XM stations like Hits 1 and The Pulse. Following Hopeless’ execution of a direct license, we arranged a monthly call and began helping Hopeless develop their pitch for the band, and I introduced the label executives to Kid Kelly, who programs Hits 1. Even though the lead track was a bit of a stylistic stretch for Hits 1, Kid Kelly gave them a chance, and added the song, “Something’s Gotta Give,” to the rotation. The album on which that single was found, *Future Hearts*, debuted at #2 on the Billboard Top 200 Albums chart, and the band credited the early airplay on Hits 1 with contributing to that result. In 2016, Kid Kelly added the second single from the album, “Missing You,” at Hits 1 and the band has performed live in the Sirius XM studios as well. Hopeless executives recently wrote to express their appreciation: “Thanks in large part to you guys bringing this song to your audience, Missing You became the band’s most streamed & sold song of the year and it will remain a significant part of the band’s catalog and live show for the rest of their career.”⁶

⁶ Steve Blatter’s testimony details a number of other examples where our programmers took a chance on tracks because of our direct license relationships, including Andy Grammer’s “Honey I’m Good” (on S-Curve) and Daya’s “Hide Away” (Z Entertainment).

18. For those record companies that are not currently receiving airplay on Sirius XM, a direct license can provide an introduction to Sirius XM programmers that would be next to impossible without hiring an experienced promotions person who has extensive knowledge of our music programming and existing relationships with our programmers. My staff and I offer to work with such labels to provide advice and coaching – a sort of “radio promotions 101” – to help them determine on which Sirius XM channels their music would best fit, and how best to present their material to the programmers of those stations for consideration. I also facilitate contact with those programmers – or contact them directly myself – to help them pitch the directly-licensed material.

19. Our direct licenses provide other important benefits to the record labels that sign them. Having a direct license relationship with Sirius XM – and the fast, transparent royalty accounting we offer – affords participating labels greater transparency in terms of what has been played and how often, minimizing the often lengthy and frustrating delays and uncertainties in receiving proper payments from SoundExchange, and allowing us quickly to identify and remedy any discrepancies that occur. In addition, unlike SoundExchange, we do not deduct an administrative fee off the top: performed works of our direct licensors are payed based on the label’s pro rata share of 100% of the entire royalty pool.

20. A good indicator that the direct licenses are working for labels with existing Sirius XM relationships is the degree to which direct licensors renew their licenses when their initial terms expire. A number of well-known labels with a broad history of Sirius XM airplay have renewed their licenses, including eOne, Naxos, Razor & Tie, S-Curve, K-Tel, Centricity, and Fair Trade. Overall, 79 licensors have renewed their licenses, and 14 continue to operate

under their original licenses, allowing the automatic terms renewals included in the license to extend their original agreements.⁷

VI. Challenges to Direct Licensing

21. Notwithstanding the many successes of our direct licensing initiative, I believe we would have attained even more such licenses were it not for two significant challenges: (1) the carve-out mechanism by which direct licensors' royalties are calculated and (2) the strong aversion within the record industry to license statutory services directly.

A. *The Carve Out Mechanism*

22. It is my understanding that SoundExchange pays out Sirius XM royalties based on our satellite plays, where each play is weighted equally. (One play on Hits 1 gets paid the same as one play on Bluegrass Junction.) Computationally, the payout under the statutory license for plays on Sirius XM equal Sirius XM's total royalty obligation (currently 10.5% of revenue) minus SoundExchange's deductions of administrative expenses, multiplied by a fraction, the numerator of which is the total number of plays of that label's sound recordings on our satellite music channels and the denominator of which is the total number of plays of *all* labels' recordings on our satellite music channels. It is also my understanding that prior to my arrival, Sirius XM calculated royalties due to direct licensors – and credits against its SoundExchange payments – on the same share-of-satellite-plays basis.

23. As a result of the *SDARS II* rate proceeding, a new calculation methodology was ordered by the Judges for determining the credits to which Sirius XM is entitled from its royalty

⁷ Only 19 licenses have been terminated: three because the licensor wished to opt into a different Sirius XM direct license with an aggregator such as The Orchard or INgrooves (and thus remain directly licensed); eight initiated by Sirius XM because the licensor was featured on reference channels with negligible online listening, making the license infeasible (a phenomenon I address in more detail below); and eight for other reasons (which I also address below).

payments to SoundExchange on account of direct licensing. Under this revised methodology, our direct-license credits are based on the ratio that directly-licensed performances on our *webcasting* platform (the so-called “reference channels”) bear to all such performances. In contrast to the past, the current crediting methodology is keyed off of relative listenership of directly-licensed performances on the Internet reference channels, rather than their relative share of total satellite plays.

24. When this new crediting methodology was put in place, Sirius XM followed suit in determining payments to direct licensors, which are now based on the number of performances of the labels’ sound recordings on the *reference channels* in relation to all performances on those channels. For its part, SoundExchange continues to distribute royalties for Sirius XM’s statutory performances based on each label’s pro-rata share of *satellite* plays.

25. This disparate practice has resulted in certain distribution anomalies, because, at least for certain genres of music, listening on the Internet may not closely track plays or listening on the satellite service. For example, Internet usage tends to skew towards a younger demographic and current popular music, such as Hits 1 and The Highway, which tends to over-weight the performances of songs featured on those channels relative to their playlist share on the satellite. Conversely, if a record label’s catalog represents genres that appeal to an audience that is *less* likely to listen online – for example, bluegrass, Latin, comedy, or kids’ music – its performance share as measured/weighted by Internet listening will be *less* than its share as measured by (unweighted) satellite plays.⁸ Either way, this disparity can impact the economics of a direct license for any given record company. Depending upon the mix of its performed

⁸ Of course the under-consumption of these genres of music on the internet reference channels does not mean that such music is less valuable to Sirius XM. In fact, because these genres are often underrepresented on terrestrial radio (our chief competitor), it may well be that this music is actually *more* valuable to driving our subscriptions.

repertory, at the outset, a record label (or certain of its artists) may be either advantaged or disadvantaged by the Internet-based payout under the direct license as compared to its anticipated statutory distributions based on unweighted satellite plays.

26. Because of this difference in distribution methodologies, I have spent a lot of time explaining the implication for a label's anticipated royalties of applying Sirius XM's direct-license methodology (Internet-weighted) versus the SoundExchange distribution methodology (satellite/unweighted). Record labels sometimes provide reports that they received from SoundExchange to enable me to calculate their anticipated royalty payments under the reference-channel methodology in the direct license.

27. It is sometimes the case that the label will receive more royalties under a direct license simply as a result of the difference in calculation methodologies. Where that appears to be the case, we have encouraged labels to take advantage and sign a direct license to enjoy the additional benefits it confers as well. But for every such label that may be advantaged in this fashion, there are just as many others for which the reverse is true, including some of the largest and most sophisticated direct licensors. (In fact, we allowed a few such companies to terminate their licenses after the regulations changed in 2013. These are the eight licenses mentioned in footnote #7 above.)

28. For example, when I calculated the anticipated royalties Concord would receive under a direct license, the results showed that absent an increase in the total number of plays of Concord's sound recordings Concord would likely earn slightly *less* – all else equal – under our direct license than under SoundExchange's methodology. I communicated this fact to Concord, who nonetheless agreed to sign the direct license – a reflection of their belief that greater access

to and attention from our programming staff would ultimately lead to increases in plays and therefore royalties, as well as the value they placed on the transparency of our reporting.

29. Sirius XM’s proposed rates and terms in the proceeding makes a change to the direct license share and pre-1972 recording share at 37 C.F.R. § 382.12(d) and (e) to rectify this imbalance. Specifically, we propose eliminating the use of reference channels to calculate the direct license and pre-1972 shares, and instead propose using plays on our satellite radio channels to calculate those shares, with a grace period for those direct licenses on the reference-channel methodology the term of which extends beyond the end of 2017.

B. Record Industry Intransigence

30. A second, significant impediment to Sirius XM’s obtaining more direct licenses has been the reluctance by many in the recording industry to enter into direct licenses that will, in their estimation, create negative precedent (via their agreeing to rates below the prevailing statutory rates) in Copyright Royalty Board proceedings such as this. For example,

[REDACTED], two well-known indie record companies, each refrained from pursuing direct-license negotiations because they were concerned that any agreement they signed would be used “against them” by the Judges here, as, they suggested, was the case with Merlin’s agreement with Pandora in the *Web IV* proceeding.⁹ Along similar lines, in my direct license discussions [REDACTED] each explicitly cited concerns about setting negative CRB precedent – this despite the fact that our analyses showed that each would earn significantly more from Sirius XM under a direct license.

⁹ The use of the Merlin-Pandora agreement by the CRB has been a hot topic in the music press, including for example, a recent *Billboard* article titled “How a Licensing Deal Between Merlin and Pandora Cast a Tall Shadow Over New Webcasting Rates,” by Glenn Peoples (Feb. 25, 2016) (available at <http://www.billboard.com/articles/business/6889363/merlin-pandora-webcasting-iv-copyright-royalty-board-warner-iheartradio>).

31. This record industry resistance has been further evidenced by the pressure that has been placed by a major record label on several of our direct licensors to terminate those licenses following the major's acquisition of those licensors. Thus, when MRI contacted direct licensor

[REDACTED] about a renewal, they were told [REDACTED]

[REDACTED] Even after we produced data to [REDACTED] showing they stood to earn more under the direct license than they would from SoundExchange, they declined to renew. The same scenario played out with [REDACTED]
[REDACTED], a distribution company that aggregates the repertoires of hundreds of independent labels, [REDACTED]. Although [REDACTED] appeared to be pleased with its direct-license relationship with Sirius XM, and the license had a year left on its term, the company advised us shortly after [REDACTED] that it intended to terminate, a result of the same "directive" that led [REDACTED] to terminate its own license.

32. In short, the history of dissuasion and outright interference by the major labels and their trade organizations with Sirius XM's direct-license efforts as described in Mr. Frear's *SDARS II* testimony appears to continue, albeit perhaps less transparently than in the past.

33. Finally, we also face an internal challenge in implementing the direct licenses we do secure: the programming tools that we use to program our music channels. Currently, our legacy-Sirius and legacy-XM programming tools are totally separate. In the legacy-XM programming tool, each music channel exists in a "silo," such that the same track that is played on Classic Rewind, Classic Vinyl and Deep Tracks, for example, will appear in three separate databases as three separate "instances." Because of these various disparate databases, it has been difficult for our programming teams to gain visibility into what content is directly licensed. I

have developed a number of work-arounds, such as meeting with programmers individually to inform them of newly license tracks, or emailing lists of new releases from directly-licensed labels to the programmers. As explained in Terry Smith's testimony, Sirius XM is investing in a new broadcast infrastructure, including what is known as "Content Factory." When completed, Content Factory will provide our programmers with a single database from which to program all channels, along with greater visibility into the directly-licensed tracks within our music libraries.

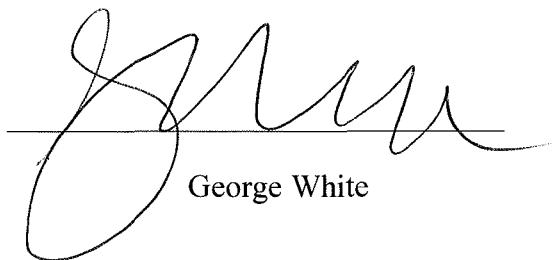
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF GEORGE WHITE

I, George White, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 19th day of October, 2016 in New York, New York.



George White

ATTACHMENT A

George White Written Direct Testimony

Sirius XM Direct License Program: 2016 Grammy Award Nominees and Winners

Best Pop Vocal Album (Nominee)

Before This World by James Taylor

Label: Concord Records

Best Dance Recording (Nominee)

“We’re All We Need” by Above & Beyond feat. Zoë Johnston

Label: Ultra / Anjunabeats

***Best Metal Performance (Winner)**

“Cirice” by Ghost

Label: Loma Vista Recordings / Concord Music Group

***Best Traditional R&B Performance (Winner)**

“Little Ghetto Boy” by Lalah Hathaway

Label: Entertainment One / 8th Floor Music

Best Country Solo Performance (Nominee)

“Chances Are” by Lee Ann Womack

Label: Sugar Hill Records / Concord Music Group

***Best New Age Album (Winner)**

Grace by Paul Avgerinos

Label: Round Sky Music

Best New Age Album (Nominee)

Love by Peter Kater

Label: Mysterium Music

Best Jazz Vocal Album (Nominee)

Jamison by Jamison Ross

Label: Concord Jazz

Best Large Jazz Ensemble Album (Nominee)

Home Suite Home by Patrick Williams

Label: BFM Jazz

***Best Latin Jazz Album (Winner)**

Made in Brazil by Eliane Elias

Label: Concord Jazz

Best Gospel Performance / Song (Nominee)

“Worth [Live]” by Anthony Brown & Group Therapy
Label: Tyscot Music + Entertainment

Best Gospel Album (Nominee)

Destined to Win [Live] by Karen Clark Sheard
Label: Karew Records / Entertainment One

Best Gospel Album (Nominee)

Living It by Dorinda Clark-Cole
Label: Entertainment One / Light Records

Best Gospel Album (Nominee)

Life Music: Stage Two by Jonathan McReynolds
Label: Entertainment One / Tehillah Music

Best Contemporary Christian Music Album (Nominee)

How Can It Be by Lauren Daigle
Label: Centricity Music

Best American Roots Performance (Nominee)

“And Am I Born To Die” by Béla Fleck & Abigail Washburn
Label: Rounder / Concord Music Group

***Best Bluegrass Album (Winner)**

The Muscle Shoals Recordings by The Steeldrivers
Label: Rounder / Concord Music Group

***Best Folk Album (Winner)**

Béla Fleck & Abigail Washburn by Béla Fleck & Abigail Washburn
Label: Rounder / Concord Music Group

Best Musical Theater Album (Nominee)

Fun Home
Label: PS Classics

***Best Score Soundtrack for Visual Media (Winner)**

Birdman
Label: Milan Records

Best Engineered Album, Non-Classical (Nominee)

Before This World by James Taylor
Label: Concord Records

Best Surround Sound Album (Nominee)

Shostakovich: Symphony No. 7
Label: Pentatone / Naxos Music group

Best Engineered Album, Classical (Nominee)

Dutilleux: Métaboles; L'Arbre des Songes; Symphony No. 2 'Le Double'

Label: Seattle Symphony Media / Naxos Music Group

Best Engineered Album, Classical (Nominee)

Monteverdi: Il Ritorno d'Ulisse In Patria

Label: Linn Records / Naxos Music Group

Best Engineered Album, Classical (Nominee)

Rachmaninoff: All-Night Vigil

Label: Chandos / Naxos Music Group

Best Orchestral Performance (Nominee)

Dutilleux: Métaboles; L'Arbre des Songes; Symphony No. 2 'Le Double'

Label: Seattle Symphony Media / Naxos Music Group

Best Orchestral Performance (Nominee)

Spirit of the American Range

Label: Pentatone / Naxos Music Group

Best Orchestral Performance (Nominee)

Zhou Long & Chen Yi: Symphony 'Humen 1839'

Label: Naxos Records

Best Opera Recording (Nominee)

Monteverdi: Il Ritorno d'Ulisse In Patria

Label: Linn Records / Naxos Music Group

***Best Choral Performance (Winner)**

Rachmaninoff: All-Night Vigil

Label: Chandos / Naxos Music Group

***Best Chamber Music / Small Ensemble Performance (Winner)**

Filament

Label: Cedille Records / Naxos Music Group

Best Chamber Music / Small Ensemble Performance (Nominee)

Brahms: The Piano Trios

Label: Ondine / Naxos Music Group

***Best Classical Instrumental Solo (Winner)**

“Dutilleux: Violin Concerto, L’Arbre des Songes”

Label: Seattle Symphony Media / Naxos Music Group

Best Classical Instrumental Solo (Nominee)

Rzewski: The People United Will Never Be Defeated!

Label: Cedille Records / Naxos Music Group

Best Classical Solo Vocal Album (Nominee)

Rouse: Seeing; Kabir Padavali

Label: Naxos Records

***Best Classical Compendium (Winner)**

Paulus: Three Pieces of Enlightenment; Veil of Tears & Grand Concerto

Label: Naxos Records

Best Classical Compendium (Nominee)

As Dreams Fall Apart: The Golden Age of Jewish Stage & Film Music (1925-1955)

Label: Cedille Records / Naxos Music Group

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

<i>In re</i>)	
)	
)	
DETERMINATION OF ROYALTY RATES	)	Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF	)	(2018-2022)
SOUND RECORDINGS BY SATELLITE)	
RADIO AND “PREEEXISTING”)	
SUBSCRIPTION SERVICES (SDARS III))	

WRITTEN DIRECT TESTIMONY OF STEVEN BLATTER
(On Behalf of Sirius XM Radio Inc.)

I. Introduction and Summary of Prior CRB Testimony

1. I am the Senior Vice President and General Manager of Music Programming at Sirius XM Radio Inc. (“Sirius XM”). I have worked in the radio industry, including terrestrial radio, for 30 years. In my current role, which I have filled for 13 years, I am responsible for all music programming at Sirius XM and supervise more than 275 full- and part-time employees. My previous experience includes programming local terrestrial radio stations in New York and Los Angeles as well as creating and overseeing content produced for hundreds of local radio stations across North America.

2. I testified in the two prior satellite radio proceedings before the Copyright Royalty Board (“CRB”), *SDARS I* (on behalf of Sirius) and *SDARS II* (on behalf of the merged Sirius XM). My testimony in those proceedings – which has been designated for inclusion here and is available to the Judges in its entirety – addressed a number of topics regarding our music channels that remain important to this day:

- ***The Creation and Curation of Sirius XM’s Music Channels:*** My prior testimony described the components that make Sirius XM’s music channels unique, engaging, and

memorable to our subscribers. Each Sirius XM-produced music channel offers not just a playlist in a particular genre or from a particular decade but a cohesive experience built around expert programming, song sequencing, skilled and charismatic DJs and on-air hosts, and interstitial elements that support the theme and “feel” of the channel, all in a commercial-free environment. This remains true of our current music channel lineup, which is identified in Section II below.

- ***Sirius XM’s Music Channels vs. Terrestrial Radio:*** Sirius XM is, at heart, a form of radio; given our prominence in the car, we compete most directly with traditional terrestrial radio. My prior testimony highlighted the many ways Sirius XM improves upon traditional radio and offers a range of programming not found among our terrestrial radio competitors. Specifically, because terrestrial radio stations succeed by delivering the largest possible audience to their advertisers, the options in any given market tend to be dominated by stations offering limited playlists of popular music that will attract many and alienate few. By contrast, because Sirius XM works on a subscription model with a national listener base, no particular channel needs to attract enough listeners on its own to appeal to local advertisers. We therefore are able to offer a range of channel offerings that is far broader than what is found on local terrestrial radio, including a wide range of niche channels, across every genre, that are not typically found on local radio (*e.g.*, bluegrass, heavy metal, classic country, deep house, new age jazz, and 90s and 2000s R&B).

Within any given channel, we also are able to offer a much deeper playlist that plumbs the depths of the given subgenre. And on those stations that offer new music, we are able to feature a broader array of such new music than one would encounter on more risk-

averse local stations. Because of these traits, we are widely recognized as an industry leader in new music discovery. Terrestrial radio stations often follow us in adding tracks that we have selected to play on our new music channels to their own playlists. As a result of this approach – still present in our music offerings today – Sirius XM attracts knowledgeable and sophisticated music fans who appreciate, and who are willing to pay for, our more tailored channel offerings and deeper playlists.

- ***Record Company Efforts To Get Airplay on Sirius XM Music Channels:*** My prior testimony also highlighted the degree to which record companies, recording artists, and the artists' management companies work every day to get their music played on Sirius XM. Whether it is providing Sirius XM with free copies of new releases, making their artists available for in-studio interviews and performances, or waiving the restrictions of the "sound recording performance complement," our music programmers continue to receive daily outreach from the record labels (typically from their radio promotions staff) imploring us to play their music on Sirius XM and, if it already is being played, to increase the frequency and extend the plays to additional Sirius XM channels. The message is unmistakable: airplay on Sirius XM – targeted to our sophisticated, educated, music-buying listeners – helps the labels sell more of their music. I discuss below how this dynamic is reflected in our relationship with our direct licensors, and has extended to the promotion of on-demand music services like Spotify, Apple Music, and YouTube.
- ***The Promotional Impact of Airplay on Sirius XM:*** The fourth main topic covered by my *SDARS I* and *SDARS II* testimony was the strong promotional impact of Sirius XM airplay on record sales. My prior testimony described the scores of emails, correspondence, and other positive feedback from artists and their labels highlighting and

thank us for the impact that airplay (including exclusive airplay) on Sirius XM had on their sales. My *SDARS II* testimony supported these testimonials with sales data showing the immediate sales spikes that occurred after Sirius XM added a new track to its playlists, with no other radio support. I also highlighted the many ancillary promotional benefits that Sirius XM offers artists, including artist-specific programs like “Artist Confidential” and Town Hall interviews, guest DJ sessions, email blasts and other direct marketing mentions, artist pages on our website, and contests for tickets to concerts hosted by Sirius XM, among others.

3. The remainder of my testimony, after summarizing our current music channel lineup (Section II below), expands upon several of the above points and updates them to reflect developments during the recent statutory license term, including:

- recent artist and label recognition of Sirius XM’s ability to break new artists and hit songs;
- increasing media recognition of Sirius XM’s ability to launch artists’ careers and promote music sales;
- data concerning Sirius XM’s promotional impact on music purchasing and consumption; and
- Sirius XM’s increasing number of live in-studio events and live coverage of music festivals from around the country on our music channels.

II. Sirius XM’s Current Music Channel Lineup

4. Sirius XM offers its subscribers 73 full-time music channels, which, as explained in my prior testimony, are carefully curated by Sirius XM’s skilled programming hosts and DJs. As shown in SXM Ex. Dir. 1, Sirius XM’s channels fall into the following nine genres:

- **Pop:** 15 stations, including Sirius XM Hits 1 (today's pop hits), our decade stations ('80s on 8, '90s on 9, etc.), The Pulse (adult pop hits), and Pitbull's Globalization (worldwide rhythmic hits).
- **Rock:** 22 stations ranging from dedicated artist channels (Elvis, Bruce Springsteen, Tom Petty, Pearl Jam, Grateful Dead, Jimmy Buffett's "Margaritaville") to classic rock, alternative and indie rock, hard rock and heavy metal, punk, and reggae.
- **Hip-Hop:** 4 stations, including Hip-Hop Nation (hip-hop hits), Backspin (classic hip-hop), and Shade 45 (Eminem's dedicated hip-hop channel).
- **R&B:** 5 stations, consisting of R&B hits (The Heat and Heart & Soul) and throwback channels (Sirius XM FLY, Soul Town, The Groove).
- **Dance/Electronic:** 4 stations, ranging from BPM (electronic dance hits) to Sirius XM Chill (deep house music) to Studio 54 Radio ('70s to '00s dance hits).
- **Country:** 8 stations, including country hits from the '80s to today (Prime Country, The Highway), dedicated artist channels (Willie's Roadhouse, Kenny Chesney's No Shoes Radio, and the recently launched Garth Brooks channel), and specialty channels (Outlaw Country, Bluegrass Junction).
- **Jazz/Standards:** 8 stations, ranging from artist-focused stations (Siriusly Sinatra, BB King's Bluesville) to show tunes, easy listening, classic jazz, smooth jazz, and new age.
- **Classical:** 2 stations, including our exclusive Metropolitan Opera channel.
- **Christian:** 3 stations, including gospel, Christian pop, and Southern gospel.

5. In addition, for those subscribers with radios that have the XMH chipset, which offer higher-bandwidth to the subscriber (as further described in the testimony of Terrence

Smith), we offer an additional 12 music channels, including channels in the Pop, Rock, Country, Dance/Electronic, and R&B genres. *See id.* (denoting XMH channels as “+XTRA Channels”).

III. Sirius XM’s Promotional Value Remains Unmatched

6. My prior testimony explained the degree to which record company promotions personnel, band/artist managers, and artists themselves reach out to me and my programming staff – on a daily basis – to try to persuade us to play their music on Sirius XM. Such outreach is more common today than ever before. As demonstrated by correspondence I and others at Sirius XM have received in the past five years, as well as articles and trade press I have reviewed during that time, the desire for Sirius XM airplay is well-established: artists, their managers, and record labels not only understand and appreciate the tremendous promotional value of airplay on Sirius XM, but frequently thank us for helping boost the sales of their records. These first-person testimonials are buttressed by data showing that airplay on Sirius XM stimulates digital track sales through retailers like iTunes and increases streaming activity on services such as Spotify and Apple Music.

A. Bands, Label Staff, and Artist Managers Routinely Recognize the Promotional Impact of Sirius XM on Sales

7. Since my *SDARS II* testimony, Sirius XM has continued to receive countless emails from artists, labels, and managers thanking Sirius XM for playing their music and recognizing the direct impact that Sirius XM airplay has had in driving sales of their releases, including on iTunes. A sample of these emails is provided below.

“Brand New” by Ben Rector

8. On June 20, 2016, ██████████ thanked Sirius XM for promoting Ben Rector’s “Brand New” on The Pulse (our adult pop hits station): “Back in September . . . The Pulse started playing Ben Rector’s ‘Brand New’ . . . [t]he first station in

America . . . [f]ast forward and today we hit Top 10 on both Adult Top 40 charts, with no end in sight . . . Thank you does not begin to express how much we appreciate you believing in Ben . . .” SXM Dir. Ex. 2.

“Lose It” By Oh Wonder

9. On January 11, 2016, [REDACTED] emailed Sirius XM to share data showing a direct correlation between the number of spins of Oh Wonder’s “Lose It” on Sirius XM Alt Nation and an increase in iTunes sales. [REDACTED] correspondence showed that only three days after Alt Nation first began playing “Lose It,” iTunes daily sales for the track almost doubled. SXM Dir. Ex. 3.

“Shades of Grey” By Oliver Heldens

10. On November 12, 2015, [REDACTED] wrote to Geronimo at Sirius XM describing the dramatic increase in sales of Oliver Heldens’ single “Shades of Grey” after the song was played exclusively on BPM, an electronic/dance music station on Sirius XM: Heldens’ sales on iTunes increased by 95% over the previous week, while his streams increased by 20% on Spotify and by 101% on Apple Music. SXM Dir. Ex. 4.

“Body Talk” By Dimitri Vegas

11. On May 6, 2015, [REDACTED] informed Sirius XM that Dimitri Vegas’s dance single “Body Talk” rose “**+218%**” on iTunes, and that “**100%**” of that rise was attributable to airplay on Sirius XM’s *BPM* dance/electronic channel. SXM Dir. Ex. 5 (emphasis in original).

Alina Baraz

12. On April 21, 2015, [REDACTED] attributed artist Alina Baraz’s success to Sirius XM airplay, writing: “[Y]ou guys have had a MASSIVE impact. We

are over 80,000 sold and now over 10 million streams and you are the station that has really raised its profile to get it there. No way would be here without you guys.” SXM Dir. Ex. 6 (emphasis in original).

Sons of Texas

13. On March 11, 2015, ██████████ told Sirius XM that Sons of Texas, “a baby band that really hasn’t ventured far out of state yet,” experienced “big upticks” in sales after being played on Sirius XM. As ██████████ concluded, “[w]hen I see across the board lifts like that *I know it’s your airplay impacting*. Thanks for everything!!!!” SXM Dir. Ex. 7 (emphasis added).

“500 Miles” By Haley & Michaels

14. On November 5, 2014, ██████████ contacted Sirius XM to credit our support for the increase in downloads of Haley & Michaels’ newest single, “500 Miles,” which outpaced the country duo’s first single. ██████████ “[w]anted to make sure to let you know that thanks to your support, ‘**500 Miles**’ is up 12% on SoundScan from the previous week, and has sold just shy of 5,000 downloads in 2 weeks.” SXM Dir. Ex. 8 (emphasis added).

“Thank God I Got Her” By Jonny Diaz

15. On July 10, 2014, ██████████ contacted Sirius XM to express appreciation for the success of Jonny Diaz’s song “Thank God I Got Her.” ██████████ wrote: “The power of [T]he [H]ighway is HUGE. **Thank God I Got Her** is top ten on the i-tunes chart solely on the strength of The Highway. A million thank yous sir.” SXM Dir. Ex. 9 (emphasis added).

"I'm in a Hurry" By Florida Georgia Line

16. On June 5, 2014, [REDACTED] contacted John Marks, programmer of The Highway, with the following message: “THANK YOU VERY MUCH for spinning *I'm In a Hurry* by [Florida Georgia Line] Just this week alone we've sold over 2,200 downloads in only 3 days! **The track has jumped up on the top 75 Country songs on iTunes.** FGL is hot and this song obviously has immediate impact – a summer hit!” SXM Dir. Ex. 10 (emphasis added).

Young The Giant's Album “Mind Over Matter”

17. On January 29, 2014, [REDACTED] credited airplay and promotion on Sirius XM for the early success of Young The Giant's new album, “Mind Over Matter.” He thanked Sirius XM executives, telling them the label is “thrilled with the start of the YTG Album. And I feel you guys had a real big part in our strong 1st week [T]he show we did with you guys really helped and obviously worked Our sales dept. had this at early projections of 22k. Well we blew that away selling 33,250. Debut 7* Single is about to go Top 5 at the format. Thanks for all the support.” SXM Dir. Ex. 11.

Brandy Clark

18. On October 22, 2013, [REDACTED] thanked the programmer for Sirius XM's The Highway for Brandy Clark's rise on the iTunes Country charts: “Brandy [Clark] is at #4 on iTunes Country chart this morning. **Thank you so much for promoting her like you have. This would have been impossible without your help.**” SXM Dir. Ex. 12 (emphasis added).

[REDACTED]

19. On October 16, 2013, award-winning country music artist [REDACTED] reached out personally to Sirius XM's country music programming executive to thank him for promoting his single “[REDACTED],” writing: **“We did 2600+ singles 1st week without any [terrestrial] radio push. That’s all word of mouth and The Highway spins.** Thank you very much!” SXM Dir. Ex. 13 (emphasis added).

AWOLNATION

20. On April 24, 2013, [REDACTED] and [REDACTED] informed Sirius XM of the explosive impact its airplay had had on AWOLNATION’s record sales: **“AWOLNATION . . . SELLS OVER 50,000 – 60,000 TRACKS EVERY WEEK SINCE SIRIUS HITs1 STARTED PLAYING.”** SXM Dir. Ex. 14 (emphasis in original). The email continued: “This is the biggest PROOF of SiriusXM power I have ever seen.” In [REDACTED] words, **“WE ARE LIVING PROOF OF THE POWER OF SiriusXM HITS 1! . . . I literally felt it from the moment KID decided to give us spins on 20 on 20. Then when we crossed to Hits 1, we exploded into 50k per week status . . . we will cross 3 Million single soon!”** *Id.*

“Changes” By Chubby Checker

21. On April 22, 2013, [REDACTED] emailed Sirius XM programmer Kid Kelly, thanking him and attributing the increase in sales of Chubby Checker’s song “Changes” on iTunes to airplay on Sirius XM, even though the song had already been played on terrestrial radio. As [REDACTED] put it, **“Chubby’s sales of ‘Changes’ has to be due to the Sirius XM play, because I’ve had terrestrial play at some Gospel AM stations for a month. He’s finally getting heard because of Sirius XM – Thank You!”** SXM Dir. Ex. 15. (emphasis added).

“Bad Ass” By Kid Ink

22. On February 20, 2013, [REDACTED] contacted Sirius XM Senior Producer of Specialty Programming at Shade 45 (Eminem’s Uncut Hip-Hop Channel) to thank him for playing Kid Ink’s record and for the sales that immediately followed: “[Y]ou guys were of course the 1st station to add the record and we sold 47k 1st week! Top 10 on iTunes HipHop.” SXM Dir. Ex. 16 (emphasis added).

Alt-J

23. On January 3, 2013, [REDACTED] emailed Sirius XM programming executives, crediting airplay on Sirius XM’s music channel, Alt Nation, for the band’s increased sales and sold out tour dates: “[S]ince you started playing ALT J on Alt Nation our sales have gone way up. Check it out[,] album selling 6,000 a week and single 4,499. The tour dates are selling out 4 months in advance in NYC, Seattle, San Fran, KC, Boston, and more.” SXM Dir. Ex. 17 (emphasis added).

24. These testimonials, including from [REDACTED]

[REDACTED] come from sales and marketing executives whose jobs it is to promote their artists’ recordings and who know firsthand the media outlets that drive such sales. The volume and persistence of requests over the years from such sources to get their artists’ songs played by Sirius XM, together with the kinds of testimonials excerpted above as to the direct correlation between exposure of a song on Sirius XM and spikes in its sales, demonstrate the strong promotional impact performances of recorded music on Sirius XM has on record industry sales.

25. Sirius XM’s promotional impact is not limited to download sales. In the five years since my *SDARS II* testimony, we have also observed that airplay on Sirius XM stations

also leads to a marked increase in on-demand play on streaming services such as Spotify and YouTube. [REDACTED], for example, emailed us to thank Sirius XM for promoting Old Dominion's single, noting the impact on Spotify activity: "Just wanted to let you know that the guys['] **single Shut Me Up has crossed the one million streams mark on Spotify, all thanks to you guys and The Highway airplay**, and in only 6 weeks! Thank you all so damn much! We love you guys and appreciate the support." SXM Dir. Ex. 18 (emphasis added).

B. Record Labels and Managers Frequently Credit Sirius XM with Helping to Break New Artists

26. Sirius XM continues to be identified by record labels and managers as the first major outlet to break bands on the national stage. The following are examples of emails from labels and managers thanking Sirius XM for championing their bands and introducing the rest of the industry to them.

"Strangers" By The Rebel Light

27. On June 14, 2016, [REDACTED] updated Sirius XM on the release of The Rebel Light's single "Strangers" on Daultone Records and credited Sirius XM for much of the band's early success. [REDACTED] wrote: "Your support has now officially helped us sign with 2 record labels in 6 months!! The power of Regan & Alt Nation! Honestly we talk about you and what you have done for us every [] day and how grateful we are for your continued support. **None of this would have been possible without [you]** and we can[']t thank you enough for literally being the person th[at] launched The Rebel Light's career."

SXM Dir. Ex. 19 (emphasis added).

FKA Twigs

28. On December 10, 2014, ██████████ reached out to Sirius XM to thank us for promoting FKA Twigs: “ALL YOUR SPINS got her [onto the] MTV artist to watch program for 2015 now she’s going mainstream . . . thank you, for the crazy support from both of you . . . it’s truly wonderful!!!!” SXM Dir. Ex. 20 (emphasis in original).

“Pompeii” By Bastille

29. On October 14, 2013, ██████████ thanked Sirius XM’s Alt Nation for Bastille’s tremendous success. ██████████ told Sirius XM that our airplay “blazed the trail for us to have a [] massive hit and build the foundation for an excellent band . . . 6 months later[,] ‘Pompeii’ is #1 on the Alternative radio chart and Bastille has a bright future in the States. It started at Alt Nation and, on behalf of the band, management and all of us at the label, thank you very much. We appreciate everything you do for our artists and here’s to many more years of great music and fun!” SXM Dir. Ex. 21 (emphasis added).

C. Artists Provide Exclusive and Live Content to Sirius XM Because of Sirius XM’s Promotional Impact

30. Artists are eager to provide exclusive content to Sirius XM because of the significant promotional impact of our airplay. For example, artists often perform live at our studio and interact with Sirius XM listeners. Artists assist us to create pop-up channels, which are short-term, artist-hosted channels that showcase the artist’s music catalog.

31. **Exclusive In-Studio Interviews/Performances.** Sirius XM often hosts exclusive promotional events on its music channels, which give artists a unique opportunity to connect with fans on-air. The following are just a few examples:

- Hamilton Town Hall hosted by Anderson Cooper: In May 2016, Sirius XM presented an exclusive special featuring the Tony Award-nominated cast of the Broadway hit musical *Hamilton*. The Town Hall, hosted by Anderson Cooper, offered subscribers inside access to the creators and stars of the show.

- Duran Duran Town Hall: In April 2016, Duran Duran held a Sirius XM Town Hall to promote their new album Paper Gods, during which the band took questions from fans.
- Adele Town Hall: In November 2015, Sirius XM hosted a Town Hall with Adele, who sat down with a select group of Sirius XM listeners for an intimate Q&A session about her career and her then-soon-to-be-released, highly anticipated new album, 25.
- Andra Day In-Studio Performance: In November 2015, rising soul artist Andra Day promoted her new album on Sirius XM, performing several live songs and chatting on the air with Sirius XM's host.
- Time for Three In-Studio Performance: In June 2015, classical string trio Time for Three promoted their latest album at Sirius XM studios, where they played live for Sirius XM fans.
- Kelly Clarkson In-Studio Performance: In March 2015, Kelly Clarkson gave a live, in-studio performance at Sirius XM, covering Tracy Chapman's "Give Me One Reason."
- Ingrid Michaelson World Premiere: In February 2014, Ingrid Michaelson appeared live on Sirius XM's *The Pulse* to world premiere her new hit single "Girls Chase Boys."

32. **Pop-Up Channels.** Artists routinely seek to be featured on Sirius XM short-term or “pop-up” channels that feature the recordings of a single artist. This phenomenon powerfully demonstrates their belief, expressed to me time and again, that a Sirius XM channel dedicated to their music represents a powerful promotional opportunity. Their willingness—and strong desire—to have their music featured around the clock also refutes any contention that Sirius XM airplay substitutes for sales or other forms of paid consumption. Some examples of prominent artist pop-up channels follow.

33. In 2014 Sirius XM hosted an exclusive music station devoted to the songs of Billy Joel. The “Billy Joel Channel” was so successful at driving sales for Joel’s concerts that Sirius XM brought the channel back in January 2016 and again in October 2016. SXM Dir. Ex. 22. In addition to playing songs from all of Joel’s live and studio albums, Joel occasionally introduced

his songs on-air, offering unique insight into their meaning. *Id.* Over multiple recording sessions, Joel spent many hours of his time recording these song introductions and relating these stories exclusively to Sirius XM subscribers. The Billy Joel Channel also featured interviews and performances from Joel, as well as special guest DJ sessions from Joel and other artists. *Id.*

34. Sirius XM featured a James Taylor pop-up channel in May and June of 2015 to promote Taylor's new album *Before This World*. Taylor also participated in a Sirius XM Town Hall, where he talked with Sirius XM listeners about his music. As *Rolling Stone* reported on June 24, 2015, Taylor's new album achieved the number one record on the Billboard 200 for the first time in his career—47 years after his first album debuted. The magazine credited Sirius XM for helping Taylor reach number one. The magazine observed that "**the surprise Number One was also aided by a vigorous promotional campaign by SiriusXM**, who dedicated a channel to the singer and hosted a Town Hall with Taylor prior to *Before This World*'s arrival." SXM Dir. Ex. 23 (emphasis added).

35. The 24 pop-up channels created by Sirius XM during the recent rate period featured the music of such diverse and iconic artists as David Bowie, Bon Jovi, Tom Petty, Metallica, Neil Diamond, Pink Floyd, Michael Jackson, Iron Maiden, Prince, and Barbra Streisand. A complete list of these and other pop-up channels is attached hereto as SXM Dir. Ex. 24.

36. **Section 114 Waivers.** Many musicians and record labels, in recognition of the promotional value of airplay on Sirius XM, have granted Sirius XM waivers of certain of the Section 114 statutory license restrictions that would otherwise limit the number of plays an artist's music can receive in a given time period on Sirius XM. These waivers allow Sirius XM to play that artist's music more frequently and thus enable rights-holders who have signed the

waivers to receive even greater promotion from Sirius XM airplay. Section 114 statutory waivers also make possible the album previews and many of the pop-up channels discussed above as well as Sirius XM’s popular artist-dedicated channels, such as Bruce Springsteen’s E Street Radio, Pearl Jam Radio, Tommy Petty Radio, the Grateful Dead Channel, and Elvis Radio.

37. Most recently, Sirius XM launched an exclusive channel devoted to the music of Garth Brooks, which marked the first time Brooks’ music has been presented 24/7 in one place, on radio or online. As Mr. Brooks said: “It’s rare to be handed an opportunity that can grow as big as you can dream. That is exactly what SiriusXM has just done . . . I speak for myself and the entire team when I say we are very grateful for this opportunity and very excited about its potential.” SXM Dir. Ex. 25. In celebration of the launch of The Garth Channel, Mr. Brooks performed a special invitation-only concert for Sirius XM listeners on September 8, 2016, playing a concert at the historic Ryman Auditorium in Nashville for the first time in his career. The Section 114 waiver makes The Garth Channel possible.

D. Bands’ Press Releases Tout the Promotional Impact of Sirius XM

Artists, labels, and their managers often credit Sirius XM in press releases they issue to promote their music. Below are just a few examples.

John Newman’s “Love Me Again” Achieves Gold Status

38. On January 31, 2014, Universal Music’s Republic Records issued a press release that cited the role of *Hits 1*, Sirius XM’s pop hits channel, in breaking John Newman’s gold single “Love Me Again.” According to the press release, the song sold over 500,000 digital copies, but before it could reach that milestone, “**Sirius XM Hits 1, which played the song before any major radio outlet, [] officially spun the song over 1,000 times.**” SXM Dir. Ex.

26 (emphasis added). The release further stated that “[t]he value and reach of the satellite radio juggernaut has proven a **major catalyst for breaking** the UK singer, songwriter, and producer, consistently exposing him to a massive American audience before anyone. They also continue playing the single non-stop, fueling his fire even further.” *Id.* (emphasis added).

JT Hodges is #1 Two Weeks in a Row

39. The artist JT Hodges issued a press release on March 14, 2013, announcing that his single “Sleepy Little Town” was number one on Sirius XM’s The Highway for two consecutive weeks. Mr. Hodges thanked Sirius XM for “giving this song a life and outlet for it to connect with people like I knew it could.” SXM Dir. Ex. 27. Executives at Mr. Hodges’ label, Universal Music, likewise observed that “Sirius XM listeners and young country fans have embraced the music of JT Hodges. **He continues to have a strong download pattern of sales driven by their active listeners.** With the unwavering support of Sirius XM and social media, JT Hodges is carving out a new model of success.” *Id.* (emphasis added).

E. The Media Is Tuned Into the Promotional Impact of Sirius XM Airplay

40. The media also has recognized Sirius XM’s promotional value over the past five years. This has taken the form of articles about Sirius XM programming in industry magazines as well as interviews with artists who have credited Sirius XM airplay and promotion with elevating their success, expanding their fan base, encouraging terrestrial radio stations to add their music to their playlists, and leading them to the top of the Billboard and Mediabase charts. Additionally, and as I discuss further below, a recent *Billboard Magazine* survey of record label executives named three of Sirius XM’s programmers as the most influential rock programmers in the industry, responsible for “shaping the future of rock.”

Rolling Stone: “How Satellite Radio Is Breaking Country’s Next Big Stars”

41. *Rolling Stone* captured this phenomenon in a January 5, 2015, article titled “How Satellite Radio Is Breaking Country’s Next Big Stars,” chronicling the tremendous promotional impact Sirius XM has had on the careers of new country music stars. The article described how Sirius XM’s then-Senior Director of Music Programming, John Marks, carefully curated its contemporary country music channel, The Highway, to play songs from unknown but promising country music artists alongside hits from country’s proven stars. The strategy is to give unfamiliar artists national exposure, in many cases before they have signed with a label. As the article explained:

Thanks to Marks, acts with no label backing whatsoever have gotten a taste of national airplay. *The Highway*’s audience of Sirius XM subscribers may be dwarfed by the number of listeners who tune in to FM country, but its reach stretches from Albuquerque to Anchorage. Kevin Neal, a booking agent whose clients Florida Georgia Line benefited mightily from satellite play, puts it this way: “You get on the national stage immediately, as opposed to getting your song tested in Bossier City.”

SXM Dir. Ex. 28 (emphasis added). Indeed, The Highway’s mission is “to find acts to break nationally.” As Mr. Marks explained, subscribers in large measure tune into Sirius XM for “the curation of new music.” Part of the station’s role is to expose listeners to new music that they are likely to enjoy based on their channel preferences. By contrast, “[t]he opposite of novelty reigns at FM, the idea being that listeners are less likely to start channel surfing when songs they already know come on.” *Id.*

The New York Times: “Star-Making Machinery’s New Player”

42. In an article detailing the profound impact Sirius XM has had on breaking new artists in the alternative rock space, *The New York Times* profiled Jeff Regan (the program director of Sirius XM’s alternative rock music channel Alt Nation) as an alternative rock music tastemaker. SXM Dir. Ex. 29. As the article reported, Mr. Regan “jump-started the careers of

several groups, among them Atlas Genius, Blondfire and Capital Cities . . . plucking [these] artists from obscurity,” and also helped create alt-rock success stories like Foster the People and Grouplove. *Id.* At the time Mr. Regan broke Atlas Genius after discovering their music on a blog, for example, “[n]ot only did the band have no record cont[r]act, but its members were also going to college and had never even toured.” *Id.* Nonetheless, Regan promoted Atlas Genius’s song “Trojans,” which led to “[a] bidding war between several major labels” (the band ultimately signed with Warner), and the song went to number five on Billboard’s 2012 alternative music chart. *Id.* The *Times* also noted that many emerging bands are crediting airplay on Sirius XM’s Alt Nation and XMU (Sirius XM’s new indie rock station) for “increased sales” and for “attract[ing] interest from major labels.” *Id.* The article further observed that Sirius XM’s The Highway was the first to play Florida George Line’s “Cruise,” a hit that topped the Billboard Country Songs chart for four weeks, and that after this early airplay on Sirius, the duo signed a recording contract with Republic Nashville. *Id.*

AllAccess: Interview with Logan Mize

43. *AllAccess*’s April 12, 2015 interview with Logan Mize, a country singer who had recently signed with Sony Music’s Arista Nashville label, attributed Mr. Mize’s success, in significant part, to airplay on Sirius XM’s The Highway. *AllAccess* noted that Mr. Mize’s **“current single, ‘Can’t Get Away From A Good Time,’ . . . earned sales in excess of 100,000 copies and had been streamed more than 1,000,000 times before ever hitting terrestrial radio thanks in part to a boost from SiriusXM’s ‘The Highway.’”** SXM Dir. Ex. 30 (emphasis added).

Rolling Stone Country: Interview with Ray Scott

44. On September 29, 2014, *Rolling Stone Country* published an interview with

newly emerging country artist Ray Scott, who “**credits a lot of his success to the support of Sirius XM, who consistently played his songs and spurred his digital resurgence,**” both when he was signed with Warner Brothers and more recently as an independent. SXM Dir. Ex. 31 (emphasis added).

Sirius XM Programmers Top Billboard Magazine’s List of Most Influential Programmers

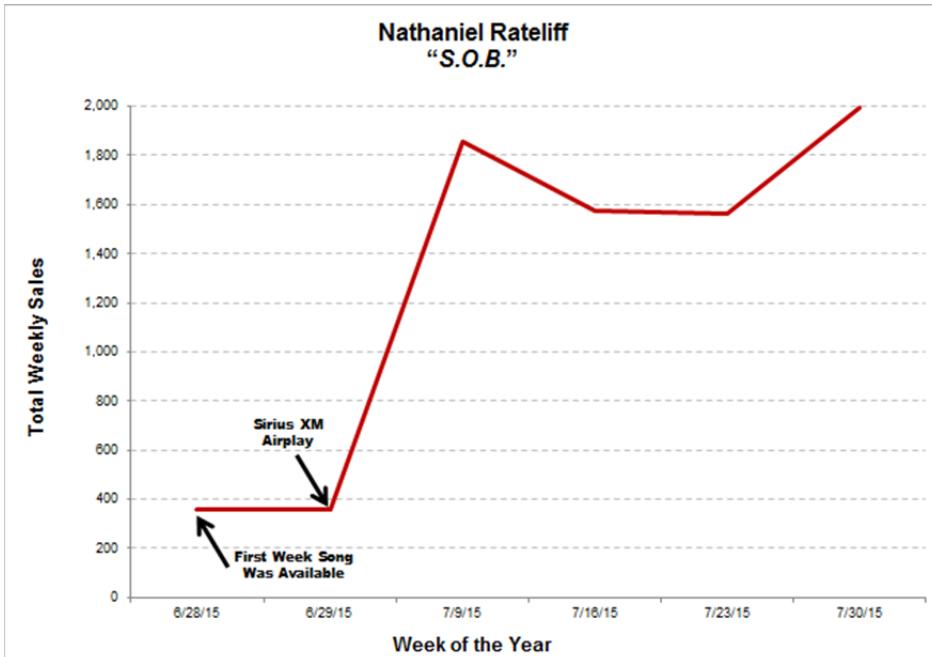
45. In May 2016, *Billboard Magazine* published the results of a survey conducted of record label executives who were asked to identify those rock programmers in the industry “most influential in getting exposure for new rock repertoire.” Three of our programmers – Mr. Regan of Alt Nation, Jess Besack of The Spectrum, and Vincent Usuriello of Octane – collectively took first place. As the article announcing the results of the survey noted, Ms. Besack offered the support of The Spectrum to The Record Company and Barns Courtney, among other acts; Mr. Regan “got behind Twenty One Pilots’ ‘Ride’ before its release as a single, helping the track’s rise to No. 1 on the Alternative airplay chart”; and Mr. Usuriello “has seen his support for the band From Ashes to New propel its album Day One to No. 2 on Hard Rock Albums.” SXM Dir. Ex. 32.

F. Industry Data Confirms That Airplay on Sirius XM Leads to Increased Sales

46. Industry data from sources such as SoundScan (tracks sales data) and Mediabase (tracks airplay data) further support that airplay on Sirius XM leads to greater music sales.

“S.O.B.” By Nathaniel Rateliff & The Night Sweats

47. Once Sirius XM began playing Nathaniel Rateliff & The Night Sweats’ single “S.O.B.” sales jumped 418% that first week:

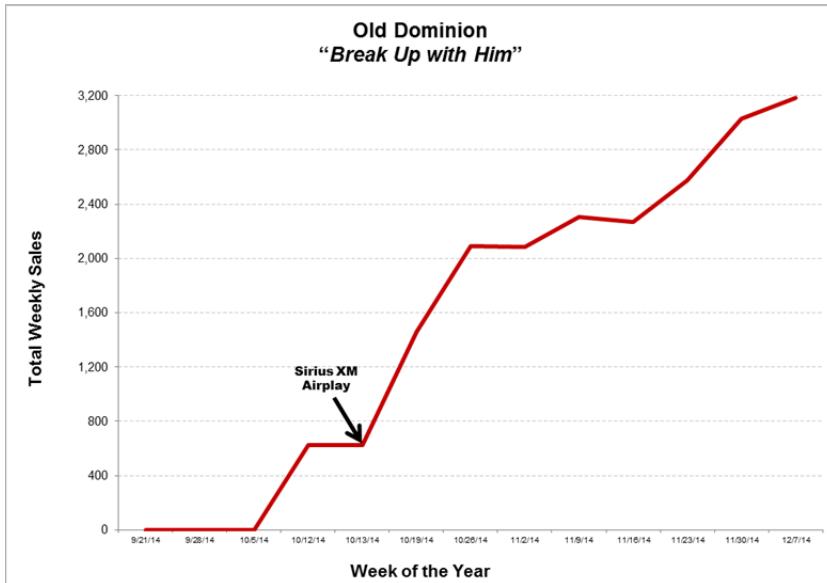


The viral effect of Sirius XM’s airplay on the single is also demonstrated by a July 13, 2015 email to Sirius XM from [REDACTED] (one of Sirius XM’s direct licensors). [REDACTED] thanked Sirius XM for the viral effect Sirius XM’s airplay had on “S.O.B.” She reported that “due to the amazing airplay from Spectrum channel, ‘S.O.B.’ single sales have completely blown up . . . we went from 7 downloads to over 1,600 this week. This song is performing like a hit – instant and undeniable – and it’s ALL SIRIUSXM.” SXM Dir. Ex. 33 (emphasis in original). The band also took out an advertisement in Billboard which credited Sirius XM for launching the band’s hit single, noting that “SiriusXM launched ‘S.O.B.,’ and it became a foot-stompin’ classic.” SXM Dir. Ex. 34.

“Break Up With Him” By Old Dominion

48. Sirius XM’s The Highway added Old Dominion’s song “Break Up with Him” to its playlist on October 13, 2014. In the first week after being added to The Highway, sales of the song increased by 134%. By December, as The Highway continued to feature the song, sales

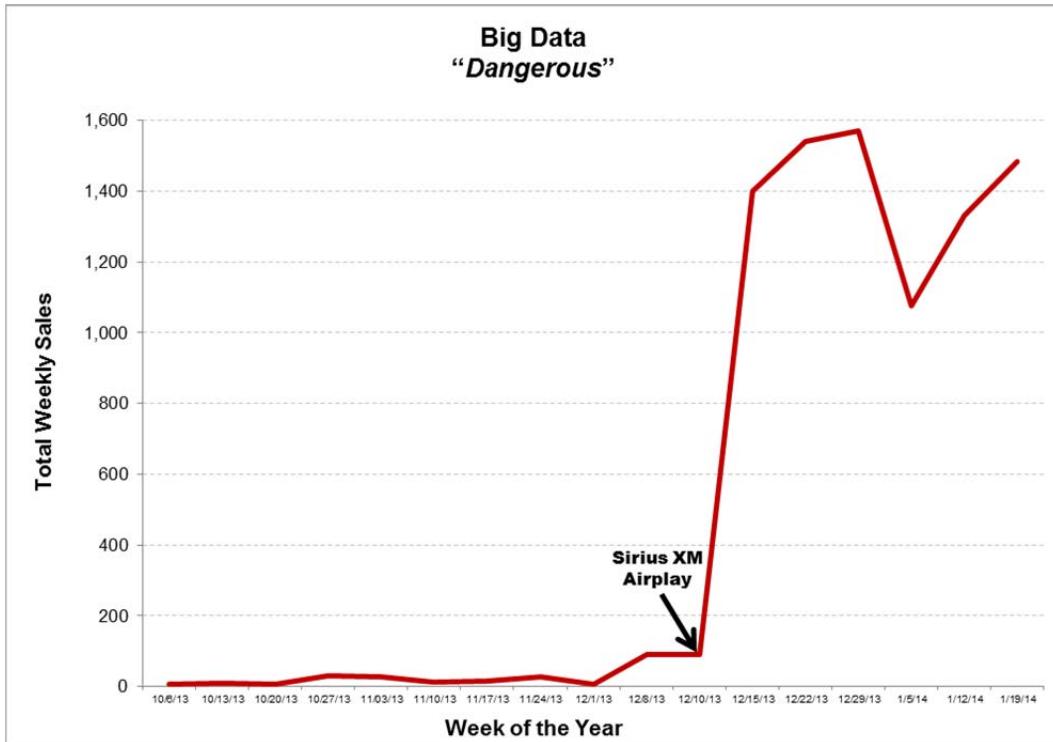
continued to grow. The graph below illustrates the tremendous sales increase that followed Sirius XM's airplay:



49. The band also credited airplay on Sirius XM as the catalyst for spurring interest in the band on terrestrial radio stations across the country. As part of an interview with MusicRow, the author observed that “[t]hanks to early airplay on SiriusXM, [the band’s hit single] ‘Break Up With Him’ piqued the interest of radio programmers across the nation, and several stations began airing the album cut late last year. Responding to demand for the song, the band’s management is rushing out the radio single, with an official impact date of Feb. 9.” SXM Dir. Ex. 35 (emphasis added).

“Dangerous” By Big Data

50. On December 10, 2013, Sirius XM added Big Data’s song “Dangerous” to its rotation. One week prior to Sirius XM adding the song to its playlists, Big Data sold 89 copies of the song. Immediately after Sirius XM began playing it, sales skyrocketed to 1,400. The graph below reflects the dramatic increase in sales following the Sirius XM airplay:



51. On April 1, 2015, Cleveland.com, a news website serving northeastern Ohio, published an interview with Alan Wilkis, a member of Big Data. Asked when he first realized his song “Dangerous” was a hit, Mr. Wilkis cited its airplay on Sirius XM: “The moment I knew my life was really changing was . . . **when Sirius XM started putting the song into rotation. That sort of blew the lid off of everything.**” SXM Dir. Ex. 36 (emphasis added).

“Chillin It” By Cole Swindell

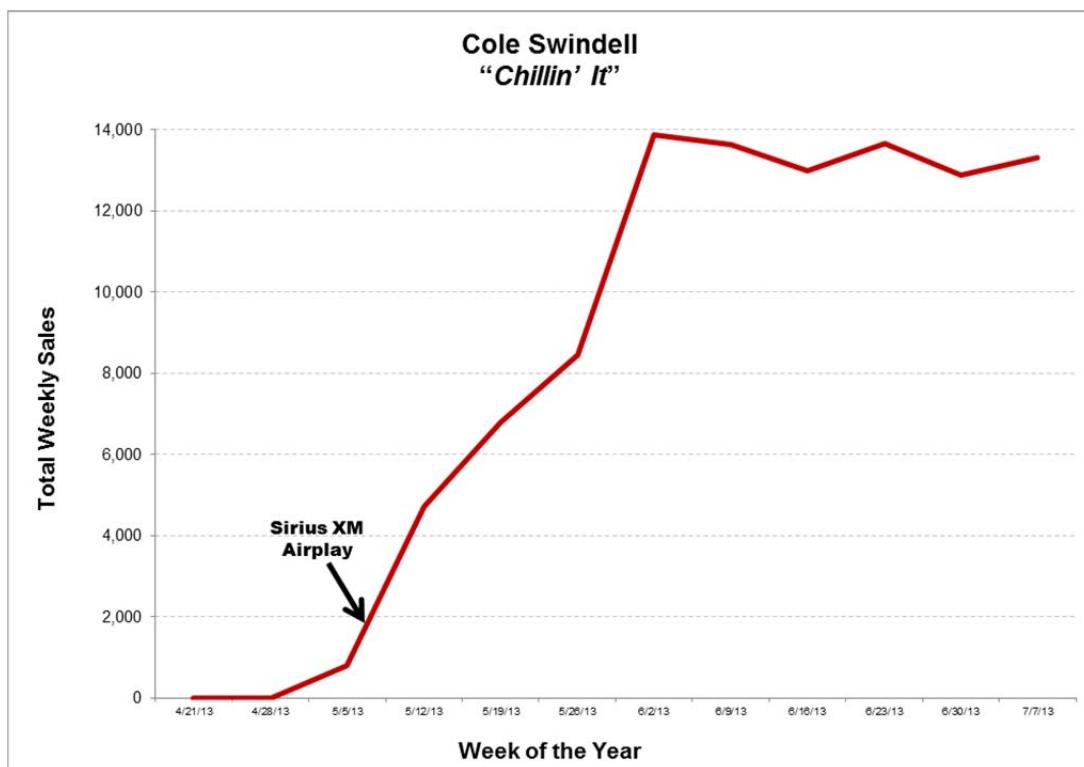
52. On May 7, 2013, Sirius XM’s The Highway debuted country artist Cole Swindell’s single “Chillin It.” This was the first time Swindell’s music was ever played on the radio, and Swindell, at the time an unsigned artist, documented his listening experience on YouTube. Swindell remarked that hearing his song on The Highway “[was] huge for me as an unsigned artist . . . XM is so powerful . . . A huge thanks to John Marks over at XM radio, buddy, thank you for believing in my music and taking a chance on my new song, ‘Chillin It.’”

Mr. Swindell's remarks can be viewed at the following address:

<https://www.youtube.com/watch?v=d1emNSngqrc> (last visited October 13, 2016).

53. In a later interview with *AllAccess*, Swindell attributed his big break to Sirius XM: “[My manager] got the song to John Marks with SiriusXM, and he gave me a shot. After being #1 for several weeks and selling a noticeable amount of downloads, labels began to take interest, and I signed with Warner Bros. Records. They immediately took it to country radio, who really embraced me, and the rest is history.” SXM Dir. Ex. 37.

54. SoundScan and Mediabase data also indicate that downloads of Swindell’s music increased after his Sirius XM debut. Prior to May 2013, Swindell had zero direct sales. The week ending May 5, 2013, digital sales were at 804. The next week ending May 12, 2013, downloads grew to 4,711, with downloads the following week jumping 44% to 6,795. After Memorial Day weekend, when Sirius XM gave Summer-themed music like Swindell’s extra spins, weekly sales jumped to 13,900, with sales remaining strong thereafter:



The correlation between airplay on The Highway and the increase in Swindell's sales during this period is apparent. Indeed, in an August 2013 article entitled "Cole Swindell's 'Chillin It' Cruises With Satellite-Enabled Guidance," *Billboard Magazine* recognized that the Highway introduced "Chillin' It" to the public, and, in turn, helped "land [Swindell] a major-label recording contract." SXM Dir. Ex. 38. Citing the above sales data, *Billboard* noted that Swindell's single "picked up steam quickly" as a result of Sirius XM's "early support," which was "key in the song's cruise to prominence." *Id.* As Swindell put it, "[n]ot only did [Sirius XM] help me get a record deal, they helped put me on the fast track." *Id.*

IV. Sirius XM's Direct Licensing Initiative

55. As discussed in greater detail in the testimony of George White, Sirius XM has signed direct licenses with 498 record companies and artists. A key benefit of those direct licenses is the mutually beneficial relationships that are fostered between Sirius XM programmers and the artist and label of the directly licensed material. As Mr. White describes, the license gives artists and label promotion staff access to the Sirius XM programmers who select songs to air on Sirius XM channels – something they find incredibly valuable given the promotional value of Sirius XM airplay and the fierce competition to place songs on our service.

56. Our programmers value the relationships we have developed with our direct licensors as well. We receive a steady flood of emails, calls, social-media messages, CDs, and mp3 files from record labels seeking airplay – so much so that it is impossible to devote significant attention (or even listen) to all of them. When we receive a submission from a direct licensor, though, we do pay special attention to the tracks and/or pitches that we receive, and seek out opportunities for them when we have open slots in our programming schedule. We know that our direct licensors (along with Mr. White's team) know our channels well, and know

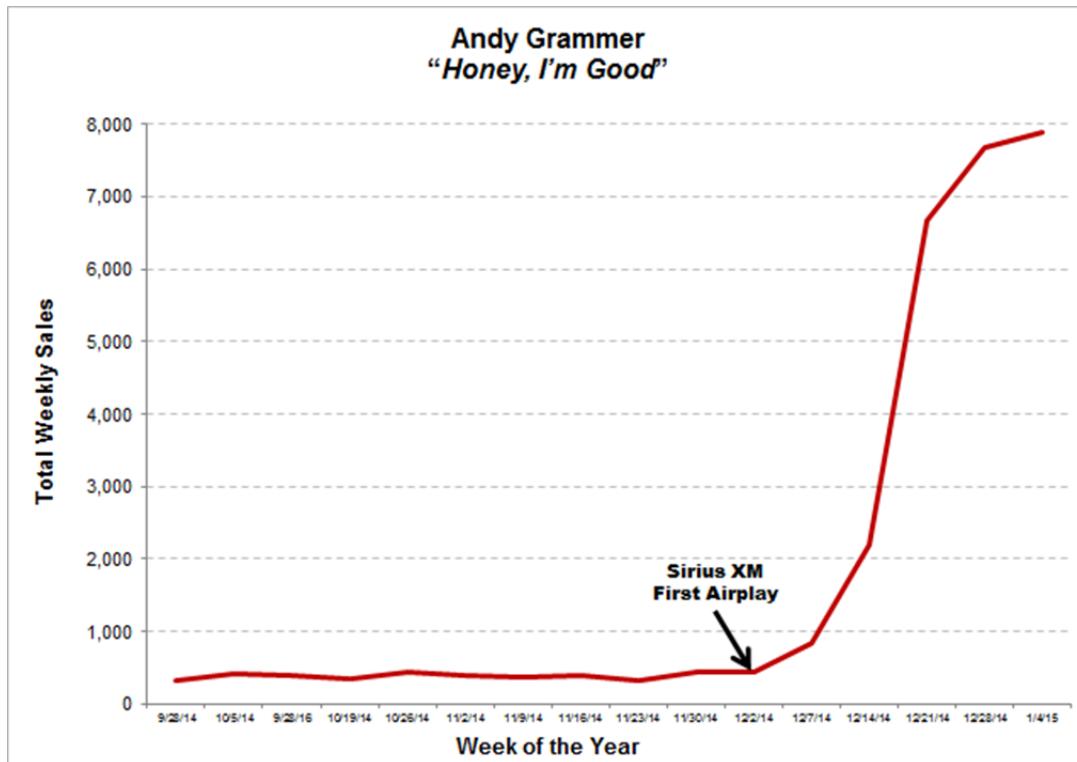
what sort of tracks will potentially fit on those channels. That is valuable to us – as are the DMCA waivers contained in the direct licenses (which allow us to feature several tracks from a new album in a short period) and the willingness of directly licensed artists to come in for interviews and performances.

57. An example that demonstrates our relationship with our direct licensors is the band “Ghost,” whose label Loma Vista is covered by our direct license with Concord. The band’s track “Cirice” was a bit outside the norm of what we typically play on Octane, our contemporary hard rock channel. We nevertheless took a chance on the track because of our direct license relationship with Concord, and we were the first major outlet in the U.S. to do so. Not only was the band appreciative, but the track took off when we started playing it – and ended up winning the 2016 Grammy for Best Metal Performance. Since that time, we have played the band’s second single heavily, and more recently were provided the exclusive world premiere of its newest single, “Square Hammer.”

58. Another great example is Andy Grammer. For several years, Sirius XM has had a direct license with Grammer’s label, S-Curve Records. S-Curve renewed their license in January 2015, when the term of the original license was set to expire. As a result of that license, Steve Greenberg, president of the label, has formed a close relationship with our programming team, including Kid Kelly, who oversees our pop and “hits” stations.

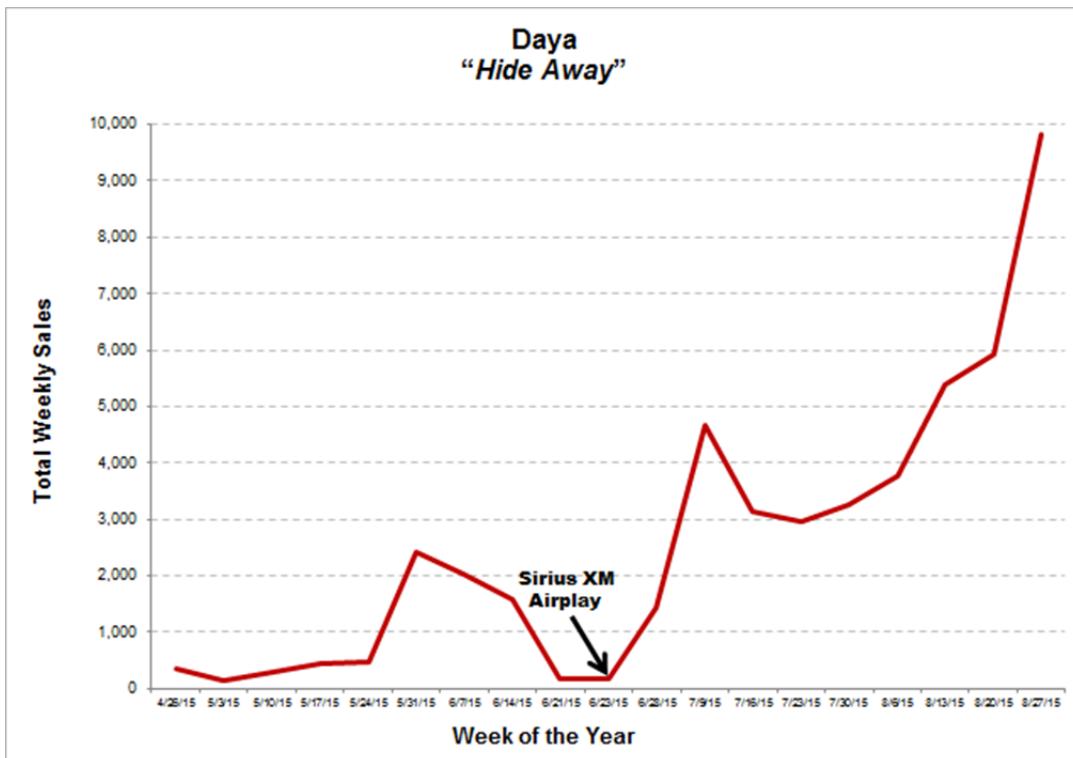
59. Around October 2014, Mr. Greenberg sent us a copy of Andy Grammer’s newest single, “Honey I’m Good.” The track, a hand-clapping, singalong stomp, was something of an outlier as compared to the smoother, R&B-oriented hits popular at the time – more hootenanny than dance club. Had S-Curve not been a direct licensor, we almost certainly would not have taken a chance on a long-shot like this. But Kid Kelly thought the quirky song might resonate

with listeners and worked directly with Mr. Greenberg (who also produced the track) to craft a plan to feature the track on Hits 1 (our main pop hits station) just before Christmas, a period when the major labels largely take a break from promoting new tracks and “Honey I’m Good” wouldn’t be competing as heavily with other new releases. What happened is that sales exploded (without airplay on any other radio stations), as evidenced by the following industry data:



As *The New York Times* reported, following Sirius XM’s airplay, “Honey I’m Good” caught on with FM stations as well, and “eventually sold about 2.5 million copies, making it one of the biggest hits of 2015.” SXM Dir. Ex. 39. The song also reached number 9 on the Billboard Hot 100, was certified triple-platinum by the RIAA, and was ranked one of the ten best-selling songs of 2015 according to SoundScan. Mr. Greenberg told *The New York Times* that “[t]here is absolutely no chance in the world that this record could have launched without the backing of Hits 1.” *Id.*

60. I'll conclude this section with yet one more example, Daya's "Hide Away," which is covered by our direct license with Z-Entertainment. Daya was a developing, unpolished 15-year-old from Pittsburgh with no prior releases. Steve Zap at Z-Entertainment approached us with her new track "Hide Away," and Kid Kelly recognized something special in it. He began playing the track regularly on Venus, our rhythmic pop station, and then Hits 1, rising to well over 100 spins per week – meaning we were playing the track, on average, nearly once every hour. Had we not had a direct license with Z-Entertainment, we likely would never have heard the track in the first place, and there is almost no chance we would have played a completely unknown artist in heavy rotation on our two biggest hits stations. Thanks to our relationship, we did – and the track, which had never reached 2,500 weekly downloads prior to our airplay, soon became a million-selling hit, as indicated by the chart below:



Immediately following airplay on Sirius XM's pop stations, downloads of "Hide Away" increased. [REDACTED] and [REDACTED] emailed me and

Kid Kelly on August 6, 2015, attributing the climb of the song “Hide Away” by Daya on the iTunes charts to airplay on Sirius XM’s Hits 1. [REDACTED] wrote, “**We move up in iTunes every time u spin it** Jumped 30 positions due to [H]its 1 weekday play. INSANE guys.” SXM Dir. Ex. 40 (emphasis added). [REDACTED] likewise observed that this is “[t]he power of Sirius XM Hits 1! But more importantly, **I have never had a record this reactive!!!!** Thank you.” *Id.* (emphasis added).

V. Sirius XM Continues to Differentiate Itself Through the Production and Broadcast of In-Studio Performances and Live Music Festivals

A. In-Studio Guest Interviews and Performances

61. My prior testimony described Sirius XM’s programming philosophy, including our significant investments in on-air talent. We recognize that much of the music that is played on Sirius XM is widely available, often for “free” to the listener, on terrestrial radio. Our on-air hosts provide one of the ways we differentiate our channels from our competition. In addition to our regular on-air hosts, Sirius XM continues to make significant investments in identifying high-profile, talented guests to appear across our music (and non-music) channels. Today, Sirius XM has nine full-time employees and four part-time employees on its talent acquisition staff focused exclusively on identifying, acquiring and scheduling guests and events that we believe improve the listening experience, motivate “trialers” to subscribe, and reduce our “churn” rate.

62. Our talent acquisition staff receives hundreds of solicitations every week for guest appearances on Sirius XM. In addition, many of our music programmers and on-air hosts have developed deep connections in the music and entertainment industries and also regularly receive such solicitations. Because appearing on Sirius XM is an opportunity for exposure in a commercial-free environment, we receive many more solicitations for appearances than we have

space available. We therefore have to be selective in whom we invite and on what channels we schedule appearances.

63. Attached as SXM Dir. Ex. 41 is a sample collection of emails distributed by Liam Davenport, Sirius XM’s Director of Talent Relations, detailing who will be appearing across the various Sirius XM channels on the following day. As shown in Mr. Davenport’s emails, Sirius XM has a very diverse group of daily guests. Obviously, many are recording artists who appear to perform in our studios. For example, Adele’s first national radio appearance was in the Sirius XM studios. In Section III.C above, I highlighted several other exclusive in-studio interviews and performances that Sirius XM has hosted over the last rate period.

64. We also recognize that even subscribers listening to our music channels have other interests. We therefore book as guests non-musicians to offer unique and compelling commentary that our subscribers are unlikely to hear anywhere else – certainly not on their local music station or webcasting service. For example, just this past September, Dr. Neil deGrasse Tyson, the famous American astrophysicist and cosmologist, was interviewed on Hip Hop Nation and Shade 45, two of our hip hop channels. We also routinely welcome actors and actresses to our studio for appearances on our music channels, including such bold-faced names as Samuel L. Jackson, Kate Hudson, and Anna Kendrick. We have also had talented musicians and non-musicians serve as “Guest DJs” on our channels, including Kristen Chenoweth, Bette Midler, Ethan Hawke, Judd Apatow, and Daniel Radcliffe. We will continue to invest in these sorts of live events because we believe it adds to the compelling mix of music and non-music content that creates buzz for our service, keeps audiences engaged and drives subscriptions.

65. Such performances and interviews are not always limited to our studios. Sirius XM produces a number of live events, accessible only to our subscribers, at concert venues

around the country. By broadcasting exclusive live performances from some of the biggest and hottest names in entertainment, these events provide an excellent opportunity to demonstrate our value to prospective and existing subscribers. Just this year, Sirius XM has produced and broadcast the following subscriber-exclusive events:

- Garth Brooks at Ryman Auditorium (Nashville, TN), broadcast on The Garth Channel;
- Coldplay at Stephen Talkhouse (Amagansett, NY), broadcast on Alt Nation;
- Kenny Chesney at the Stone Pony (Asbury Park, NJ), broadcast on No Shoes Radio;
- CHVRCHES at Rough Trade (New York, NY), broadcast on Sirius XMU;
- Kings of Leon at Poisson Rouge (NYC), broadcast on Alt Nation;
- Korn at the Ace Hotel (Los Angeles), broadcast on Octane; and
- Kaleo at The Box (NYC), broadcast on The Spectrum.

B. Live Music Festival Coverage

66. Spotlighting another closely related development during this current rate period, Sirius XM has in recent years focused considerable resources on covering live music festivals. Over the past five years, large-scale music festivals have become an increasingly entrenched part of American culture. Live broadcasts of these music festivals, and other live music events, lead to more passion, excitement, and engagement both for our service and music generally.

67. With input from various members of my team, I am responsible for selecting the music festivals that Sirius XM will broadcast. Rather than occurring on a separate channel, our festival coverage typically “takes over” an existing station during the days the festival is happening. As I describe below, broadcasting a live music event, such as a music festival, is quite complicated and requires significant involvement across a number of our teams, as well as a major expenditure of time and money.

68. **Broadcast Engineering.** Sirius XM has a team of three full-time employees in the Broadcast Engineering group, along with more than twenty independent contractors, to manage the broadcasting of live events. This team handled some 450 live music and non-music events in 2015 and expects to broadcast more than 500 in 2016. In nearly every one of these events, at least one Sirius XM resource is “on the ground” to manage the broadcast engineering logistics. For large events, such as the Coachella Valley Music & Arts Festival described below, as many as seven engineers are on-site to manage the capture and transmission of dozens of artists appearing on multiple stages. This group handles the “backhaul” of the audio (typically via ISDN or satellite uplink) from the event to our New York or Washington, DC facilities, where it is then routed to the appropriate studio (or studios) for broadcast on a particular channel (or channels).

69. **Programming.** Live broadcasting a music festival also requires a significant number of production staff and music programmers on-site. Our production team handles the logistics of capturing and editing live elements from the event for use as interstitials in the broadcast. It is not uncommon for as many as 15 people from the music programming and talent acquisition teams to be on-site at a large festival. Our festival coverage also includes backstage interviews with the performing artists conducted by our on-air hosts. At certain events, our on-air hosts are also the on-stage hosts of the entire event.

70. In 2016, Sirius XM has brought performances from at least 15 festivals and live music events to our subscribers, and Sirius XM hosts were present for each of these events. Included in this year’s line-up are:

- South by Southwest (March 16-18) is a multi-day music festival held in Austin, Texas. A number of Sirius XM hosts broadcast shows from Austin during SXSW, including Outlaw Country host Mojo Nixon, Shade 45 host Sway, and SiriusXMU hosts Jenny Eliscu and Julia Cunningham.

- Ultra Music Festival (March 16-18) is a multi-day event held in Miami, Florida featuring electronic music. This year's festival featured interviews and live DJ sets from Armin van Buuren, Tiesto, Eric Prydz, Martin Garrix, Afrojack, Carl Cox, Carnage, Cedric Gervais, and Hardwell. SMX broadcasted the Ultra festival on UMF Radio. The coverage was anchored by Sirius XM on-air hosts Geronimo, Liquid Todd, Ben Harvey, Danny Valentino, and Tommy West.
- Coachella Valley Music & Arts Festival (April 15-17) consists of two three-day events occurring over two consecutive weekends. This year's festival included interviews and live performances from Guns N' Roses, Ellie Goulding, Jack U, M83, The Kills, Disclosure, Zedd, CHVRCHES, Halsey, Calvin Harris, Sia, and Major Lazer. Sirius XM launched a limited-run, Coachella Radio channel, and also aired performances on Electric Area, Alt Nation, and The Spectrum. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, Julia Cunningham, Geronimo, Liquid Todd, and Ben Harvey.
- Rock On The Range (May 20-22) is a multi-day event outside Columbus, Ohio billed North America's biggest hard rock festival. This year's event featured performances by Disturbed, Five Finger Death Punch, Shinedown, Rob Zombie, Lamb of God, Megadeth, Bring Me The Horizon, Bullet For My Valentine, Sixx:A.M., Hellyeah, Sevendust, Trivium, Pop Evil, Red Sun Rising, Sick Puppies, Ghost, and Highly Suspect. The event was hosted by Octane DJs Kayla Riley, Grant Random, and Jose Mangin. In addition, performances also aired on Liquid Metal and Faction.
- The Bonnaroo Music and Arts Festival (June 9-12) is a multi-day event outside Nashville, Tennessee featuring more than 150 musicians, bands, and comedians performing across 12 separate stages. This year's festival featured performances by Pearl Jam, Dead & Company, LCD Soundsystem, J. Cole, Ellie Goulding, Macklemore & Ryan Lewis, Death Cab for Cutie, M83, Haim Halsey, CHVRCHES, Chris Stapleton, and The Chainsmokers. Sirius XM broadcasted Bonnaroo performances across a number of channels, including The Spectrum, Alt Nation and Jam On. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, Julia Cunningham, and Ari Fink.
- The Electric Daisy Carnival (June 17-19) is a multi-day event held in Las Vegas and one of the largest electronic music festivals in the world. Sirius XM broadcasted sets from famous DJs such as Armin van Buuren, Knife Party, Martin Garrix, Afrojack, Axwell / Ingrosso, Carnage, Duke Dumont, Alesso, Above & Beyond, and NGHTMRE on Electric Area. The coverage was anchored by Sirius XM on-air hosts Geronimo, Liquid Todd, Ben Harvey, Danny Valentino, and Tommy West.
- The Firefly Music Festival (June 19-21) is a multi-day event outside Dover, Delaware and the largest music festival on the East Coast. This year's festival aired on Alt Nation, The Spectrum, SiriusXMU, and Jam On, and featured performances from The Killers, Kings of Leon, Cage the Elephant, Hozier,

Modest Mouse, Foster the People, Spoon, Bastille, Walk the Moon, Gary Clark Jr., Big Data, Awolnation, Sublime with Rome, and Cold War Kids. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, and Madison.

- Panorama Festival (July 22-24) is a multi-day music festival on New York City's Randall's Island Park. This year's festival aired live on SiriusXMU, Alt Nation, and The Spectrum, and featured live performances by Alabama Shakes, The National, Nathaniel Rateliff & The Night Sweats, Run the Jewels, Grace Potter and the Nocturnals, and Major Lazer. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, and Madison.
- Lollapalooza (July 28-31) is a multi-day event featuring live performances held in Chicago's Grant Park and featured interviews and live performances from The Red Hot Chili Peppers, Jane's Addiction, Flume, St. Motel, The Arcs, Foals, Third Eye Blind, Two Door Cinema Club, and more. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, and Julia Cunningham.
- The LOCK'N Festival (Aug. 25-28) is a multi-day event featuring roots, rock, and so-called "jam bands" such as Phish, Ween, Widespread Panic, Gov't Mule, and The Allman Brothers Band. Sirius XM broadcasted the LOCK'N Festival on Jam On, and it was anchored by Sirius XM host Ari Fink.
- The Electric Zoo (Sept. 2-5) is a multi-day event on New York City's Randall's Island featuring some of the biggest names in electronic music. This year's event included interviews and performances by Sam Feldt, Tiesto, Cash Cash, Big Gigantic, GTA, Felix Jaehn, and Steve Aoki. Sirius XM broadcasted the event on Electric Area, and the coverage was anchored by Sirius XM on-air hosts Geronimo, Liquid Todd, Ben Harvey, Danny Valentino, and Tommy West.
- The Farm Aid Concert (Sept. 17) is an annual fund-raising event to aid local farmers that is co-organized by Willie Nelson. This year's event featured performances by Willie Nelson, Neil Young, John Mellencamp, Dave Matthews & Tim Reynolds, Alabama Shakes, Nathaniel Rateliff and the Night Sweats, Sturgill Simpson, Jamey Johnson, and Margo Price. The event was broadcast live on Willie Nelson's own channel, Willie's Roadhouse, with Sirius XM host Dallas Wayne conducting backstage interviews with artists.
- Hair Nation Festival (Sept. 17) is a one-day festival held in Southern California that featured interviews and performances from popular artists played on Sirius XM's Hair Nation channel, including Lita Ford, Kix, Vixen, Enuff 2 Nuff, Slaughter, and more. The coverage was anchored by Sirius XM hosts Luc Carl and Dangerous Darren.
- The Route 91 Harvest Country Music Festival (Sept. 30-Oct. 2) is a multi-day event in Las Vegas, Nevada featuring some of country music's most popular artists as well as up-and-coming talent. This year's festival featured Toby Keith,

Chris Young, Brad Paisley, Tyler Farr, Jana Kramer, William Michael Morgan, Aaron Lewis, The Randy Rogers Band, Aubrie Sellers, Billy Currington, and LoCash. In addition to live broadcasting the event on The Highway, Sirius XM hosts Storme Warren, Buzz Brainard, and Al Skop were on-site to host the broadcast and interview artists backstage; and

- The Austin City Limits Music Festival (Sept. 30-Oct. 1) consists of two three-day events occurring over two consecutive weekends. This year's festival featured Major Lazer, Radiohead, The Chainsmokers, Kendrick Lamar, LCD Soundsystem, and Mumford & Sons. Given the eclectic music line-up, Sirius XM broadcasted portions of Austin City Limits on Alt Nation, The Spectrum, SiriusXMU, and Hip Hop Nation. Hosts from each of these channels were on-site at the festival to host the broadcasts and conduct interviews with artists. The coverage was anchored by Sirius XM on-air hosts Jenny Eliscu, Jeff Regan, and Julia Cunningham.

71. Additionally, this Fall we are presenting the second leg of the Alt Nation Advanced Placement Tour, a multi-city tour featuring up-and-coming alternative rock artists such as The Shelters, Night Riots, and the Hunna. The Tour grew out of Alt Nation's "Advanced Placement" program, a weekly showcase of new alternative rock artists described by *Billboard* as "a place for discovery of new talent." One of the days of this tour will be broadcast on Alt Nation.

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

)
In re)
)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF STEVEN BLATTER

I, Steven Blatter, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 14 th day of October, 2016 in New York, New York.



Steven Blatter

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

<i>In re</i>)	
)	
)	
DETERMINATION OF ROYALTY RATES	)	Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF	)	(2018-2022)
SOUND RECORDINGS BY SATELLITE)	
RADIO AND “PREEEXISTING”)	
SUBSCRIPTION SERVICES (SDARS III))	

WRITTEN DIRECT TESTIMONY OF THOMAS BARRY
(On Behalf of Sirius XM Radio Inc.)

1. My name is Thomas D. Barry. I am Senior Vice President and Controller for Sirius XM Radio Inc. (“Sirius XM”), a position I have held since 2009. Prior to joining Sirius XM, I served as Vice President of Finance and Corporate Controller of The Reader’s Digest Association, Inc. I have also served in executive and finance capacities at Books are Fun, Inc., Xerox Engineering Systems, and Avon, and as a Senior Associate at PricewaterhouseCoopers.

2. I graduated from Creighton University in 1988 with a Bachelor of Science in Business Administration. After working for several years following graduation, I earned an MBA from the University of Connecticut School of Business. In 2005, I completed the Advanced Management Program at Harvard Business School.

3. In my position at Sirius XM as the Chief Accounting Officer, I oversee transactions and accounting for our organization, including the ad sales traffic department, accounting, fraud department, revenue assurance, tax accounting, external reporting, and billing. I oversee approximately 110 people in the accounting department.

4. I offer this testimony to describe Sirius XM’s proposed changes to the terms governing SDARS at Subpart B of 37 C.F.R. Part 382 (§§ 382.10 to 382.17). Apart from routine

changes to the terms to reflect Sirius XM’s proposed rates, the dates of the new license term, and the like, Sirius XM proposes the following changes:

5. **§ 382.11 Definition of “GAAP”:** Sirius XM proposes a change to make clear that generally accepted accounting principles should refer to those U.S. accounting principles that govern at the time a payment and/or report to SoundExchange is made. Because GAAP changes from time to time, disputes between Sirius XM and SoundExchange should, in our view, be determined based on the GAAP existing at the time of the disputed payment calculation, not based on a different version of GAAP existing at the time of the dispute.

6. **§ 382.11 Definition of “Qualified Auditor” and § 382.15(e) Acceptable**

Verification Procedure: Sirius XM proposes that a Qualified Auditor must be objective and independent of both the licensee and the Collective within the meaning of the AICPA Code of Professional Conduct. Sirius XM also proposes that the regulations shall require the auditor to determine the accuracy of royalty payments or distributions, including whether an underpayment or overpayment of royalties was made. The Judges made similar alterations in the *Web IV* determination, adding in the concept of independence to the definition of “Qualified Auditor,” and the underpayment/overpayment requirement to 37 C.F.R. § 380.6(d). In our experience, SoundExchange hires auditing firms who conduct “royalty examinations” or “royalty inspections” of statutory licensees in which the examiners explicitly explain that “the procedures employed do not constitute an audit or examination under attestation standards established by the AICPA,” and coordinate with SoundExchange personnel on the inspection findings and positions taken within those findings – to the point that the auditors look only for underpayments by the licensee that favor SoundExchange, not overpayments that might redound to the benefit of the licensee. Requiring the auditor to adhere to AICPA standards – which prohibit the

“subordination” of the auditor’s “judgment” to the interests of its client (Section 0.300.050.03) – will help ensure that the audits are independent, objective, and not compromised by coordination between the auditor and SoundExchange.

7. **§ 382.15(c) Notice of Intent to Audit:** Sirius XM proposes that the phrase “and shall be binding on all parties” be stricken from the regulation. This change too is consistent with the Judges’ decision in *Web IV*, where the Judges rightly noted that “the subject of any audit should be permitted to contest audit results,” and explained that SoundExchange’s own witness has testified that requiring an audit report be dispositive would be unreasonable.¹ Audit provisions in our own contracts with various vendors (auto manufacturers to whom we owe a rev-share, for example) are never automatically binding (unless we agree to bind ourselves to such a provision prospectively, which we almost never do), and thus leave the opportunity to contest the audit findings. Moreover, as I discuss more in the next section, SoundExchange’s auditors often simply adopt SoundExchange’s legal positions on contested issues (for example, whether or not we were right to deduct revenue for pre-1972 performances), and then assess millions of dollars in underpayments and interest based on SoundExchange’s positions. It would be tremendously inequitable to bind us to, and deprive us the right to contest, such one-sided assessments.

8. **§ 382.15(h) Interest:** Sirius XM proposes a new subsection addressing the interest to be paid on underpayments or overpayments revealed in the course of an audit, and assessing such interest at the rate for post-judgment interest specified at 28 U.S.C. § 1961 – although other public measures of interest, e.g., the LIBOR rate, would be acceptable as well.

¹ Order Denying in Part SoundExchange’s Motion for Rehearing and Granting in Part Requested Revisions to Certain Regulatory Provisions, Docket No. 14-CRB-0001-WR (2016-2020) (Feb. 10, 2016).

What would be unacceptable, in Sirius XM’s view, is applying the 1.5% per month late fee applicable to late payments and statements of account under 37 C.F.R. § 382.13(d), which serves a very different purpose. That fee is essentially a high monthly penalty – well above any prevailing measures of interest – and is meant, as I understand it, to motivate licensees to submit timely payments and statements of account. That punitive and deterrent rationale – which may make sense for payments that are a month or two late – does not and should not apply to good-faith underpayments identified several years after the fact in an audit, which typically stem from inadvertent calculation errors or reasonable interpretive disagreements related to the governing regulations.

To apply the 18% late-fee rate would be inequitable in the extreme, and open to abuse, especially given the three-year audit window in the regulations. Based on that allowance, SoundExchange typically conducts its audits in three-year chunks, and sends notices for those audits in December of the year *after* the end of the three-year audit period. For example, SoundExchange’s notice of intent to audit Sirius XM for the 2010-2012 rate period was submitted in December 2013 and published in the Federal Register in January of 2014, *four years after* the first month of the audit period (January 2010). Even at that point, were the late fee to apply, any underpayment from that first month would already be subject to a whopping 72% interest penalty.

But it is worse than that. Once the notice of intent to audit is filed, it can take another two years or more for SoundExchange to select its auditor and for the auditor to complete its examination. SoundExchange’s auditor delivered the results of its 2010-2012 royalty examination of Sirius XM in June 2016 – almost three years after noticing the audit, and six and a half years after the beginning of the audited period. That examination, wrongly applying the

1.5% per month late fee from 37 C.F.R. 382.13(d), assessed [REDACTED] in late fees, a number almost equal to the actual underpayments identified in the examination, most of which related to Sirius XM and SoundExchange's ongoing dispute over Sirius XM's deduction of revenue for pre-1972 performances and incremental Premier channels (which I discuss more below). While we acknowledge that some delays are inevitable (and can stem from a licensee's schedules and availability as well as those of the auditor), this ridiculous, confiscatory doubling of the amount allegedly owed – the result of charging 18% per year for several years – highlights the problems of using an ill-fitting monthly late fee as a measure of interest on underpayments revealed in an audit. This is especially true in a climate where interest rates have hovered below 1% annually, and where SoundExchange claims *overpayments* are non-recoupable at all, much less with interest.

This episode also suggests the perverse effects that can result if the interest rate is set too high. Licensees may avoid taking deductions or credits that are warranted out of fear that if any eventual audit reveals them to be incorrect, they will face interest charges that dwarf the savings from the deduction. SoundExchange, for its part, is stripped of any incentive to identify and rectify reporting or calculation errors that it identifies when it processes a licensee's statement (something we have been trying to encourage for years), as it will earn more in late fees if it waits for those errors to surface in an audit years later. The parties might also find it hard to settle disputed items that arise in an audit when the actual liability has been inflated by massive late fees.

9. **§ 382.12(b) Ephemeral Recordings:** Sirius XM proposes that the Judges conform the payment term for ephemeral recordings to the language adopted by the Judges in the *Web IV* determination at 37 C.F.R. § 380.10(d). The Judges' rationale there for editing the prior

definition holds here as well: first, limiting the ephemeral license to copies “for which [the licensee] pays royalties” could inadvertently exclude copies of tracks that do not generate royalties (e.g., skips, incidental performances); second, it is often “necessary and commercially reasonable” to make more than one ephemeral copy of a recording to facilitate statutorily-licensed transmissions.

10. **§ 382.12(d) (Direct License Share) and (e) (Pre-1972 Recording Share):** For reasons discussed in the written direct testimony of Sirius XM witness George White, Sirius XM proposes that these shares be calculated based on plays on Sirius XM’s satellite radio service, as opposed to on its Internet service “reference channels” as mandated under the current regulations.

11. **§ 382.13(c) Monthly Payments:** Sirius XM proposes a clarification making clear that where the 45-day payment deadline falls on a weekend, the monthly payment can be made on the Monday after the weekend.

12. **§ 382.17 Unclaimed Funds:** Sirius XM proposes that the Judges change this provision to conform with the change made in *Web IV*, and for the same reason as stated in that determination: to avoid a rule that might preempt state law, including state escheatment laws.

13. **§ 37 C.F.R. 370.4 Reports of Use:** Sirius XM proposes that the Judges strike from sub-paragraph (d)(2)(vii) the requirement that SDARS report actual performances of a sound recording or aggregate tuning hours. As has been well known for years, satellite radio is a one-way medium, meaning Sirius XM does not know who is listening to what channel at what time or for how long. As a result, it is physically impossible for Sirius XM to report either performances or aggregate tuning hours, each of which are based on measures of listening versus mere transmission (for example, each discrete listener hearing a transmission is a performance

under the existing definitions). We believe that the inclusion of satellite radio in this regulation was an oversight – the case of reporting regulation intended for general applicability to a range of services – and that the oversight should be rectified.

14. **§ 382.11 Definition of “Gross Revenues”:** As the Judges are aware, Sirius XM and SoundExchange are currently involved in a separate dispute before the Judges regarding certain of Sirius XM’s exclusions from “Gross Revenues,” under paragraph (3)(vi) of this definition, during the 2007-2012 *SDARS I* license period. Pending a ruling on the disputed issues, Sirius XM is not yet in a position to assess whether any changes to the definition are warranted for the forthcoming license period, and it would be premature to propose any such changes. The Company therefore would like to reserve the opportunity to propose one or more changes to the disputed regulations should that later be warranted, either in amended direct or rebuttal testimony. Alternatively, if the Judges prefer that Sirius XM presently address this topic and propose changes to the regulations on a conditional basis, I am prepared to amend my testimony to do so.

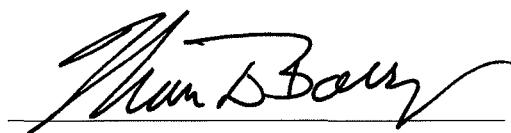
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF THOMAS D. BARRY

I, Thomas D. Barry, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 19th day of October, 2016 in New York, New York.



Thomas D. Barry

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
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RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

WRITTEN DIRECT TESTIMONY OF CARL SHAPIRO

(On behalf of Sirius XM Radio Inc.)

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1. Qualifications and Assignment

A. *Qualifications*

My name is Carl Shapiro. I am the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley, where I have taught since 1990. I also hold an appointment as Professor in the Department of Economics at UC Berkeley.

I am an economist who has been studying antitrust economics, the economics of innovation and intellectual property rights, competitive strategy, and government policies to promote competition and innovation for over thirty years. I have published extensively on these topics. My curriculum vitae is attached as Appendix A.

In 2014, I was honored by being advanced to the rank of “Above Scale” Professor, the highest rank in the professoriate at the University of California. This rank is “reserved for the most highly distinguished faculty … whose work of sustained and continuing excellence has attained national and international recognition and broad acclaim reflective of its significant impact.”¹

I served as the Director of the Institute of Business and Economic Research at UC Berkeley from 1998 to 2008. I also have served as Co-Editor and then Editor of the *Journal of Economic Perspectives*, a leading economics journal published by the American Economic Association.

During 2011-2012 I had the great honor of serving as a Senate-confirmed Member of the President’s Council of Economic Advisers. The Council of Economic Advisers, an agency within the Executive Office of the President, is charged with offering the President of the United States objective economic advice on the formulation of economic policy. The Council bases its recommendations and analysis on economic research and empirical evidence, using the best data available to support the President in setting our nation’s economic policy.

I served during 1995-1996 and again during 2009-2011 as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice. In this position I was the highest-ranking economist in the Department of Justice. As the chief

¹ University of California Academic Personnel Manual Section 220-18(b)(4), available at http://www.ucop.edu/academic-personnel-programs/_files/apm/apm-220.pdf.

economist in the Antitrust Division, I advised the Assistant Attorney General for Antitrust on a wide range of enforcement matters and competition policy issues. I supervised more than 50 Ph.D. economists in conducting investigations of mergers, civil non-merger cases, and price-fixing cases. I also played a leading role in formulating the Antitrust Division's position on a wide range of competition policy issues, including numerous issues related to intellectual property. I led the Department of Justice work that culminated in the updated Horizontal Merger Guidelines released in August 2010.² These Guidelines are highly influential in a range of settings well beyond horizontal mergers where government agencies seek to assess competitive conditions, define relevant markets, and determine whether or not those markets are workably competitive.

An important strand of my research involves the information technology sector of the economy. For example, my book with Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy*, examines competitive strategy in high-tech industries and includes chapters on the pricing of information and the management of digital rights. This book received critical acclaim and was widely adopted for classroom use.

I have served on numerous occasions as an expert witness or consultant to the Antitrust Division or the U.S. Federal Trade Commission. I have also consulted or served as an expert witness on numerous antitrust matters for private companies in a wide range of industries, including the music industry, the telecommunications sector, and the high-tech sector, including companies that provide content, hardware, software, services, and infrastructure. I testified before the Copyright Royalty Judges in the *Web IV* proceeding on behalf of Pandora Media, Inc. A list of the matters in which I have provided testimony during the past four years is provided in Appendix B.

I am being compensated for my work on this case at a rate of \$1,100 per hour. This compensation is not dependent in any way on the opinions I express or the outcome of this matter. My work in this case has been supported by Charles River Associates ("CRA"), a consulting firm at which I am a Senior Consultant. I also receive compensation from CRA based on CRA's staff billings on this case.

² Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," August 2010, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

B. Assignment

I have been asked by Sirius XM to undertake an economic analysis to estimate a reasonable royalty rate (or range of rates) for its performances of sound recordings made after February 15, 1972 over its satellite service in the United States, and for its making of ephemeral copies of those sound recordings, for the 2018-2022 time period. For simplicity, when I refer below to “reasonable royalty rates,” unless otherwise noted, I will be referring to these rights and this time period.

In undertaking this analysis, I have read the decisions by the Copyright Royalty Judges (“Judges”) in the prior Satellite Digital Audio Radio Services proceedings (“*SDARS I*” and “*SDARS II*”) and in the prior webcaster proceedings (“*Web I*,” “*Web II*,” “*Web III*,” “*Web III Remand*,” and “*Web IV*”), as well as the testimony provided by various economists in some of those proceedings. In addition, I have interviewed George White, Senior Vice President, Music Licensing at Sirius XM and Steven Blatter, Senior Vice President and General Manager of Music Programming at Sirius XM. I have also reviewed the written direct testimonies of Joe Lenski, James Meyer, Steven Blatter, George White, Bridget Neville, and Terry Smith filed in this proceeding, along with a number of internal Sirius XM documents, documents produced in discovery, a variety of public materials, and economic literature relevant to my analysis.

The list of materials that I considered in preparing this written direct testimony is attached as Appendix C.

2. Summary of Conclusions

For the reasons discussed in detail below, it is my view that a reasonable royalty rate for the statutory license at issue in this proceeding for the years 2018-2022 should be set at the lower end of the range of 8.1 to 11 percent of revenue. This royalty rate is inclusive of 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).

To arrive at this range of rates, my analysis proceeds along three fronts. After providing relevant context, including a discussion of the recorded music industry (Section 3), Sirius XM (Section 4), and the general approach to rate-setting that I use (Sections 5-7), I ask whether there is an economic basis for adjusting, either upward or downward, the 2017 statutory rate of 11

percent set by the Judges in the *SDARS II* proceeding (Section 8). In this portion of my testimony, I conclude that each of the major changes of relevance that have taken place since *SDARS II* either call for maintaining the *status quo* or for reducing the rates paid by Sirius XM. This analysis supports my view that the 11 percent of revenue rate can serve as an upper bound on the range of reasonable royalty rates for the 2018-2022 license term.

I then turn to an analysis of the relevant benchmark agreements. In Section 9, I study the direct license agreements entered into between Sirius XM and 498 individual record labels and explain why these benchmark agreements are very attractive in many respects. Most notably, they grant Sirius XM the same rights as are at issue in this proceeding, they are between the same sellers (record labels) and the same buyer (Sirius XM), they are negotiated under competitive market conditions, and they require only minor adjustments. When properly adjusted, these competitive market transactions suggest a reasonable royalty rate of no more than 9.87 percent of Sirius XM revenue. As I also discuss, the only potential concerns in using these agreements as benchmarks for setting industry-wide rates are (1) whether the direct licensors are fully representative of recorded music companies overall, and (2) how the “shadow” of the statutory license influences the royalty rates in the direct licenses. For the reasons detailed below, the available evidence (1) does not definitely answer the first of these questions, or (2) tell us the degree to which the statutory license served as a magnet, pulling the royalty rate in the direct licenses up above the competitive level.

To fill this analytical gap, in Section 10, I look to a second benchmark – the rate set in the *Web IV* proceeding for subscription non-interactive webcaster services. This benchmark is also highly informative for the rate-setting task at hand, as the agreements that underlie the *Web IV* subscription rate are with the same sellers, including both independent and major record labels, are for the same rights, and either directly reflect, or have been adjusted by the Judges to reflect, the forces of competition at work. When properly adjusted, including accounting for the any differences in the buyers (webcasters as compared to Sirius XM) and the 801(b)(1) policy objectives, the *Web IV* subscription service rate yields a Sirius XM rate of not more than 8.1% of revenue. Because my analysis of the *Web IV* rate – which forms the basis for the low end of the range that I propose – is the more robust, I conclude that a rate at the lower end of the range that I propose will best satisfy the rate-setting standard at issue in this proceeding.

The remainder of this testimony contains the bases for these conclusions.

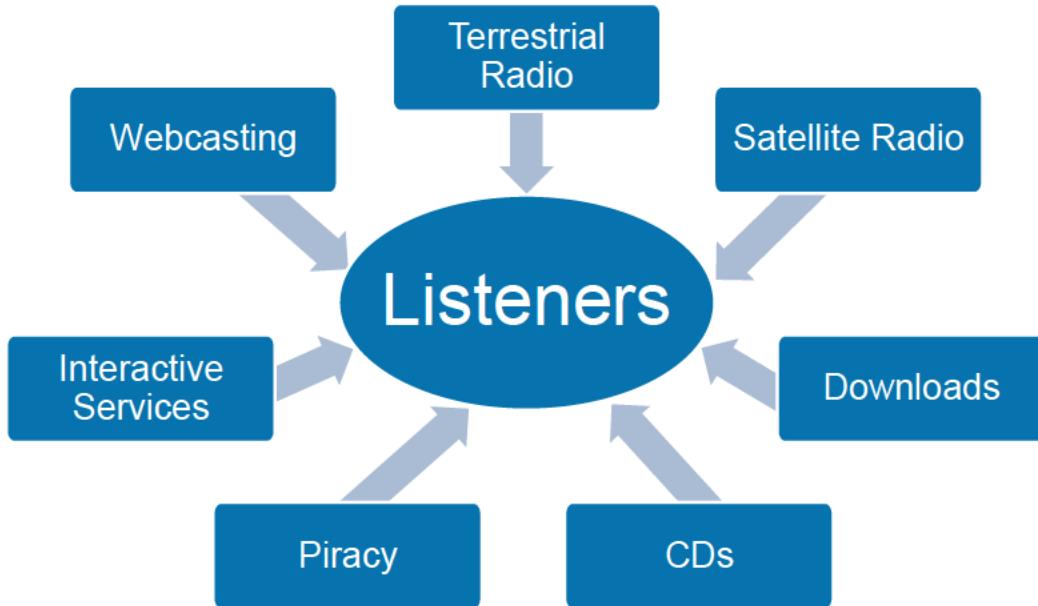
3. The Structure of the Recorded Music Industry

Before detailing the approach I have taken for approximating reasonable royalty rates, I describe the structure of the recorded music industry. This structure is fundamental to understanding how competition occurs in this industry and to the determination of reasonable royalty rates. As detailed below, part of the recorded music industry involves the “downstream” market in which music services compete for music consumers. Another part of the record music industry involves several “upstream” markets in which record companies may or may not compete against each other to license their music to different types of music services.

A. *The Downstream Market to Provide Music to Listeners*

The starting point for any economic analysis of the recorded music industry is understanding the *market to provide music to listeners*. This is a “downstream” market to serve consumers, as distinct from “upstream” markets for the inputs used to make the final products and services that consumers use.

Figure 1 depicts the downstream market to provide music to listeners and shows the primary methods by which consumers receive their music.

Figure 1: The Market to Provide Music to Listeners

Satellite radio is shown in the upper-right, next to terrestrial radio. (For simplicity, I will use the term “satellite radio” to refer to SDARS.) The “lean-back” methods of getting music – webcasting, terrestrial radio, and satellite radio – are arrayed along the top. Internet streaming services are shown on the left, broken into interactive services and webcasting services. Music ownership is on the bottom, including CDs, downloads, and illegal “ownership” via piracy. The “lean-forward” methods of getting music – interactive services, CDs, downloads, and piracy – are arrayed along the bottom.

Figure 2 shows one estimate of the market shares associated with the different methods by which listeners in the United States get their music.

Figure 2: Time Spent Listening to Music by Audio Type

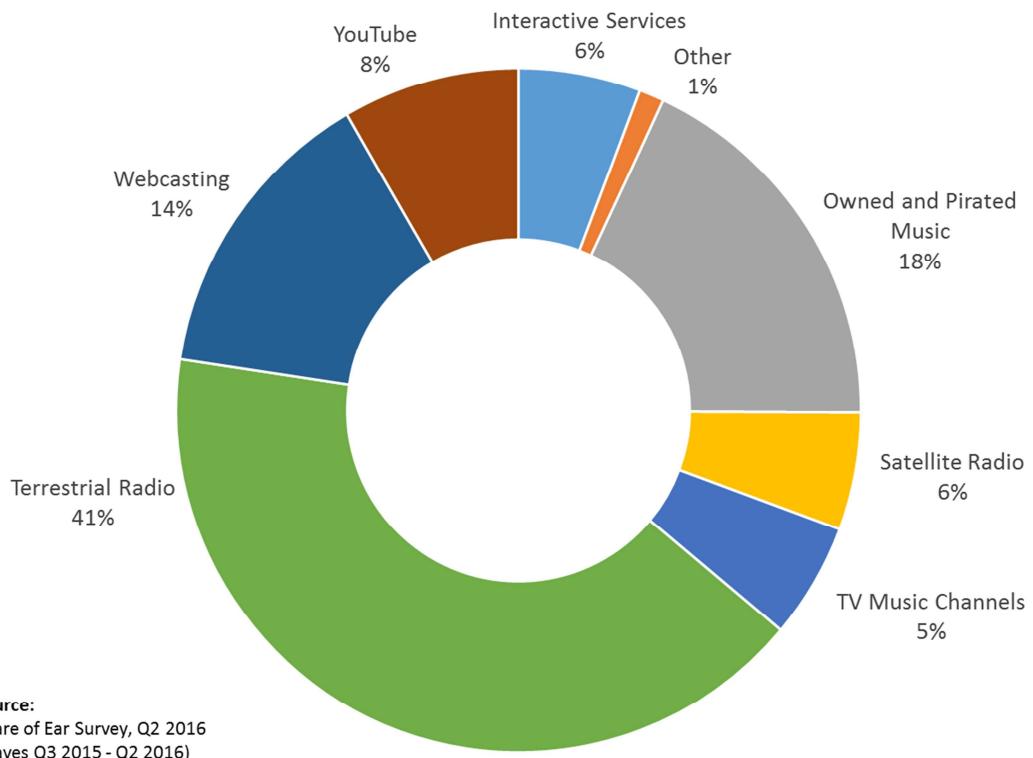
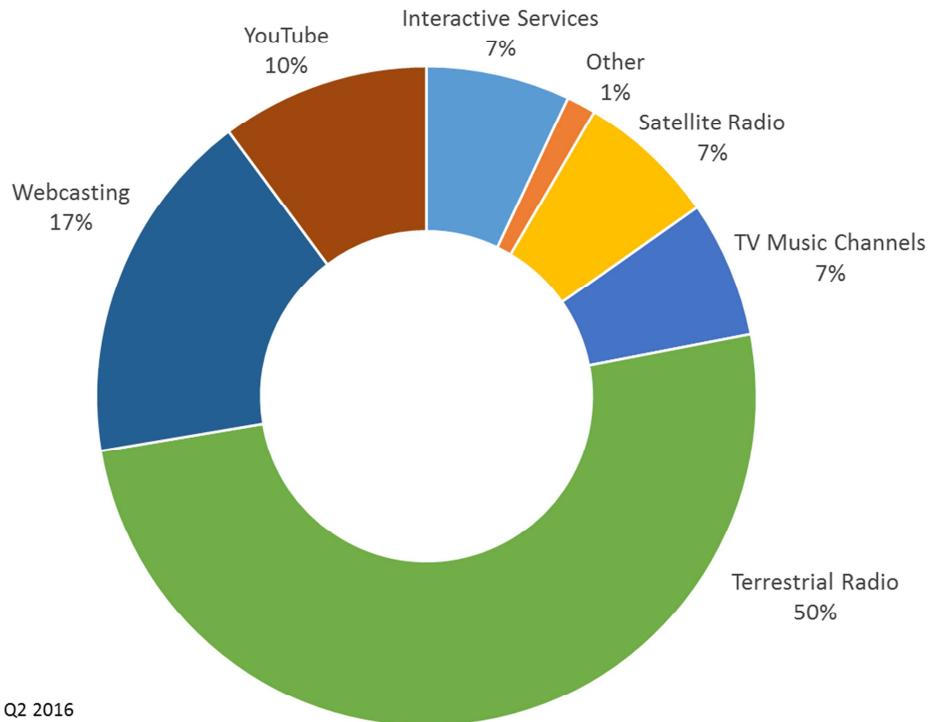


Figure 3 shows the portion of the market that involves access to music, as distinct from the ownership of music.

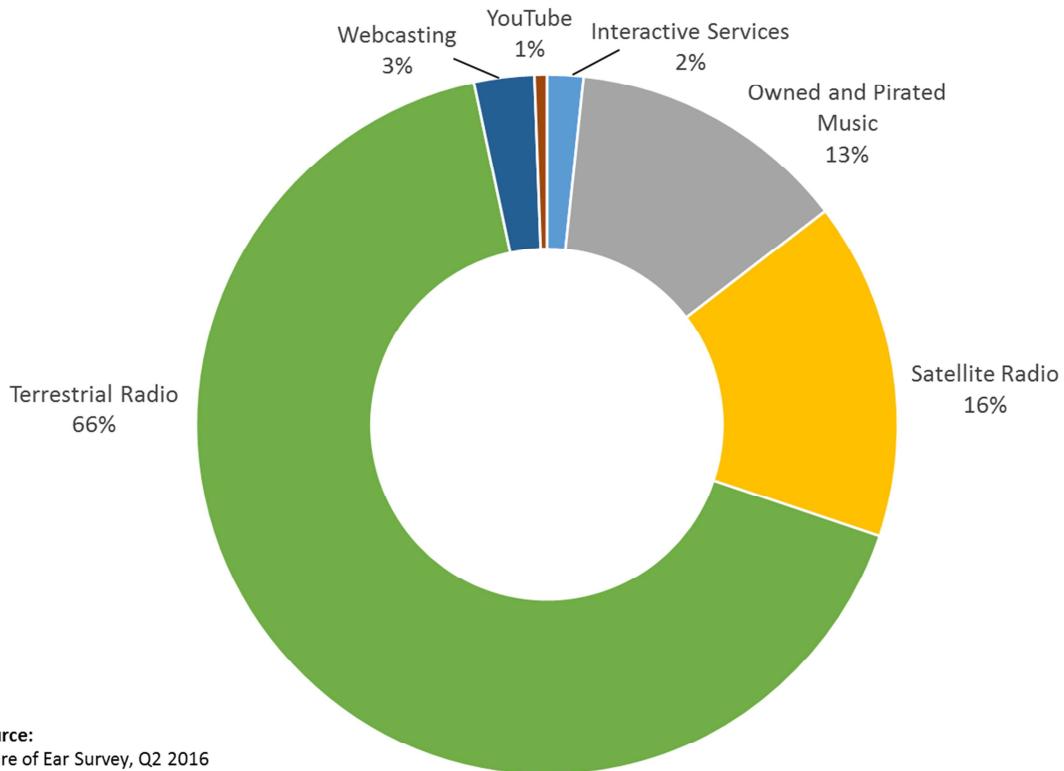
**Figure 3: Time Spent Listening to Music by Audio Type
"Access" Mode**



Source:
Share of Ear Survey, Q2 2016
(waves Q3 2015 - Q2 2016)

Figure 4 shows how consumers allocate the time they spend listening to music while in vehicles.

Figure 4: Time Spent Listening to Music in Car/Truck by Audio Type



As is shown in Figure 4, terrestrial radio continues to dominate time spent listening to music in vehicles – accounting for 66% of such time. Sirius XM is the next most popular audio type – accounting for 16% of music listening while in vehicles. Despite the growth of streaming music, webcasting and interactive services currently account for only 5% of time spent listening to music in vehicles.

An important lesson from Figures 2, 3, and 4 is that terrestrial radio is far and away the most popular source of music, especially in vehicles.

B. The Upstream Markets for the Licensing of Recorded Music

My discussion of the recorded music industry thus far has focused on the downstream market in which listeners get their music. While necessary, studying this market alone is not sufficient for the purpose of estimating reasonable royalty rates. One must also study the

markets in which services acquire the necessary licenses to perform recorded music. These are *upstream* (input) markets, as distinct from the *downstream* (final product) market discussed in the previous section.

For each distinct type of downstream service, one can usefully look at the corresponding upstream market in which record labels supply that type of service with the necessary licenses to perform recorded music. One can think of four separate upstream markets in which “music access” services acquire performance rights, distinguished by the type of downstream service: (i) satellite radio providers; (ii) non-interactive webcasters; (iii) interactive services; and (iv) terrestrial radio operators (if they were required to secure performance rights).

The first of these upstream markets – the market in which satellite radio services secure sound recording performance rights – is the target market for this proceeding. The second upstream market – the market in which non-interactive webcasters, such as Pandora and radio station simulcasters secure sound recording performance rights – was the focus of the *Web IV* proceeding. Some direct licenses have been signed in that market, but the majority of performances are paid for under the statutory license. The third upstream market – the market in which interactive services, such as Spotify and Apple Music, secure sound recording performance rights – was also addressed in the *Web IV* proceeding. In that market, services are not able to avail themselves of a statutory license, requiring them to negotiate direct licenses with record labels. The complete absence of competition between record labels to license services in this upstream market was discussed at length in the *Web IV* decision.³ The final potential upstream market – that for terrestrial radio – does not currently exist, as terrestrial radio operators are not required to secure sound recording performance rights licenses. From an economic perspective, we can think of the price in that upstream market as set by statute at zero.

These various distinct upstream markets are related, because the downstream services compete against each other for listeners. For example, the workably competitive market royalty rate arising in the upstream market for the licensing of recorded music to satellite radio services is affected by the royalty rate in the upstream market for the licensing of recorded music to webcasters, to the extent that satellite radio competes against webcasting. Likewise, the workably competitive market royalty rate in the upstream market for the licensing of recorded

³ *Web IV*, at 26341-44.

music to satellite radio services is affected (lowered) by the fact that record companies cannot charge for the use of their music on terrestrial radio. Downstream competition causes the market rates arising in the various upstream markets to be *related but not equated*. For example, in a workably competitive upstream market, the fact that Sirius XM competes most closely with terrestrial radio, with its zero royalty rate, would pull down the market rate paid by Sirius XM (in comparison with terrestrial radio paying a positive royalty rate) but would not bring the Sirius XM rate all the way down to the terrestrial radio rate of zero.

Appendix D explains in more detail just how the various upstream markets are related to each other. Appendix D derives the equation representing the *full marginal cost* to a record company associated with an additional performance of its music on a given music service. The central idea is that the record company bears an *opportunity cost* when its music is played more on a given service (or type of service) if those performances cause the record company to earn less revenue from *other* services. Appendix D shows how to quantify that opportunity cost, which captures the various promotion and substitution effects arising in this industry. As an example, a record company has an incentive to charge a lower royalty rate to Sirius XM, because Sirius XM competes most closely against terrestrial radio (which generates no revenues for the record company), than to Spotify, a service that competes more closely with digital downloads (which do generate revenue for the record company). I will return to this point in Section 10.B below, where I consider whether certain benchmarks should be adjusted on account of these promotion and substitution effects.

4. The Role of Sirius XM in the Downstream Market

A. *Sirius XM's Service*

Sirius XM offers its customers a bundled package that includes not only music content, but also talk content and a nation-wide delivery platform. Sirius XM's service is differentiated from its competitors in a number of ways. Sirius XM offers a unique bundle of content – both music and non-music – that is extremely easy to access in the car and is available across the country. No other service comes close to offering both the breadth of programming content and ease of accessibility that Sirius XM offers.

With respect to its content, Sirius XM offers considerable non-music programming that is not available on its primary competitor, terrestrial radio. Certain popular talk content, notably Howard Stern, is not available anywhere else: it is exclusive to Sirius XM. Some other talk content, including complete access to all NBA, MLB, NFL, and NHL games, as well as other live coverage of sporting events is quasi-exclusive – no other audio entertainment provider offers the scope of coverage offered by Sirius XM.⁴

On the other hand, much of Sirius XM music content is neither exclusive nor quasi-exclusive.⁵ Other music services, including terrestrial radio, have access to the same sound recordings that are played on Sirius XM. Nonetheless, even Sirius XM’s non-exclusive music offerings can be distinguished from the music played on terrestrial radio. For example, Sirius XM’s satellite service currently has approximately 73 full-time music-format channels, allowing it to offer a far wider range of music than is offered in a typical terrestrial radio market.⁶ In addition, each channel on Sirius XM offers a much broader playlist, curated by industry veterans with deep expertise in their genres of focus, than is typically found on terrestrial radio stations.⁷ In this regard, in the *SDARS II* decision, the Judges stated that they “suspect that much of the value of Sirius XM service as opposed to broadcast terrestrial radio and other competitors is that Sirius XM plays a greater range of music, much of which may be licensed by non-major labels.”⁸

Second, unlike terrestrial radio and some Internet radio services, the vast majority of the Sirius XM music channels do not have any advertising.⁹

Third, Sirius XM differs from other services in the physical infrastructure it uses to deliver content to consumers. Subscribers to Sirius XM’s satellite radio services need to have a

⁴ Local sporting events are, of course, available over terrestrial radio, but generally speaking, out-of-town sports events are not. Certain audio-visual entertainment providers do offer a similar scope of sports content.

⁵ In his Written Direct Testimony, Steven Blatter describes some of the lengths to which Sirius XM goes to acquire exclusive and/or quasi-exclusive music content (including live performances and live coverage of music festivals). He describes how obtaining this exclusive or quasi-exclusive music content comes at considerable expense to Sirius XM.

⁶ Written Direct Testimony of Steven Blatter, at ¶4. As an example, a Sirius XM executive describes the Faction channel (#41) as “our punk/hip-hop/metal channel geared at action sports fans.” Written Direct Testimony of George White, at ¶9.

⁷ Written Direct Testimony of Steven Blatter, at ¶2.

⁸ *SDARS II*, at 23066.

⁹ Some of Sirius XM’s non-music channels, as well as its simulcast of a small number of broadcast radio stations (e.g., New York’s Z100), do contain commercials.

radio equipped to receive Sirius XM's signals. (These radios were developed by Sirius XM and its predecessor companies). These radios are included in the purchase or lease price of new and used vehicles (at considerable expense to Sirius XM) and are available through Sirius XM's website and from retailers throughout the United States. In addition, Sirius XM has deployed an extensive network of satellites and associated infrastructure to deliver content seamlessly throughout the country. It is my understanding that to date Sirius XM and its predecessor companies have invested \$14.8 billion in building its service, including deploying the satellite and terrestrial repeater networks necessary for the delivery of its product.¹⁰

These satellites and related infrastructure need to be replaced from time to time. I understand that, in addition to other infrastructure upgrades, Sirius XM plans to spend approximately [REDACTED] during the upcoming license term to replace two satellites.¹¹

B. Competition Faced by Sirius XM

Sirius XM competes most closely with terrestrial radio. This reason for this is straightforward: the overwhelming majority of Sirius XM listening takes place in the car, where terrestrial radio still dominates, as shown in Figure 4 above. According to Edison's "Share of Ear" survey, of the time that Sirius XM subscribers spend listening to music on the satellite service, 84% took place in the car.¹² The extent of direct competition between Sirius XM and terrestrial radio is further confirmed by survey work conducted by Edison for use in this proceeding. In that survey, Edison asked questions of Sirius XM listeners to ascertain what those listeners had been listening to before they subscribed to Sirius XM (i.e., what the time they currently spend listening to Sirius XM replaced) as well as what alternatives Sirius XM listeners would turn to if Sirius XM were no longer available. This survey provides a good estimate of the services that Sirius XM substitutes for, as well as the degree to which Sirius XM substitutes for these other services. The Edison survey does not provide an estimate of whether, and to what extent, listening on Sirius XM *promotes* other record industry revenue streams, such as additional purchases of CDs and downloads or increased listening to other services, such as

¹⁰ Written Direct Testimony of James E. Meyer, at ¶12.

¹¹ Written Direct Testimony of Bridgette Neville, at ¶20.

¹² Share of Ear Survey, Q2 2016.

Spotify. This later question is addressed in the Written Direct Testimony of Steven Blatter, in which he discusses the promotional impact of Sirius XM on other record label revenue streams.¹³

Turning back to the Edison survey, as is explained by Edison's Joe Lenski, over 62% of survey respondents stated that their Sirius XM listening time had mostly come from terrestrial radio listening. According to this same survey, if Sirius XM were no longer available, over 40% of the time that is spent listening to Sirius XM would shift over to terrestrial radio.¹⁴ There is no alternative source of listening that comes close to these numbers. The next largest category – CDs and digital downloads (including pirated music) – accounted for 23% of the time that Sirius XM listening would shift to if Sirius XM were no longer available.¹⁵

Sirius XM also competes with non-interactive webcasters. The Edison survey results show that 14.3% of Sirius XM listening would shift to listening on non-interactive webcasters if Sirius XM were no longer available.¹⁶ Sirius XM and non-interactive webcasters both offer a lean-back, "radio-like" listening experience.¹⁷ In addition, certain non-interactive webcasters, most notably Pandora, offer a commercial-free music service in exchange for a monthly subscription fee. This is not to say, however, that the two types of service are similar in all respects. In addition to differences in non-music content and delivery platform, Sirius XM is far more prevalent in the car than any webcaster. As shown in Figure 4 above, Sirius XM accounts for more than 5 times as much in-car listening as do webcasters.¹⁸ That being said, the prevalence of webcasters in the car seems likely to increase over the 2018-2022 statutory period. The launch of Apple CarPlay and Android Auto are likely to contribute in this regard, as both are expected to allow for more seamless integration of webcasters into car infotainment systems.¹⁹

¹³ Written Direct Testimony of Steven Blatter, at ¶¶6-54.

¹⁴ Written Direct Testimony of Joe Lenski, at 5-6.

¹⁵ Written Direct Testimony of Joe Lenski, at 6. This time spent listening to CDs and downloads includes both listening to CDs and downloads already owned and new purchases.

¹⁶ Written Direct Testimony of Joe Lenski, at 6.

¹⁷ Some webcasters, including Pandora and iHeart, offer more customization than is available on the Sirius XM satellite service. Others, such as terrestrial radio simulcasters, offer the same level of customization as is available from Sirius XM's satellite service.

¹⁸ Below, I discuss the significance of this difference.

¹⁹ Written Direct Testimony of James E. Meyer, at ¶28-33.

Sirius XM substitutes to a much lesser extent with interactive services, such as Spotify. The Edison survey results show that only 7.8% of Sirius XM listening would shift to listening on interactive services if Sirius XM were no longer available.²⁰ This low figure reflects the fact that Sirius XM offers a purely “lean-back” experience that is very convenient in the car while interactive services primarily offer a “lean-forward” experience in which the listener is able to select particular songs on-demand – a service that may be appealing when at home or work, but less so when driving.

5. Economic Framework for Determining a Reasonable Royalty Rate

With this background in mind, I now turn to the task at hand. My assignment and goal is to use my expertise as an economist to provide the Judges with my best estimate of a reasonable royalty rate (or range of rates) for the Section 114 and 112 statutory licenses at issue in this proceeding. I understand that, unlike the Webcaster proceedings, the standard used in this proceeding is that set forth in 17 U.S.C. § 801(b)(1). This standard calls for the setting of “reasonable” royalty rates, which are calculated to achieve the following objectives:²¹

- (A) To maximize the availability of creative works to the public.
- (B) 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.
- (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

In *SDARS II*, the Judges indicated that, in setting reasonable royalty rates, they would “begin with a consideration and analysis of the [market] benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the [Section 801(b)]

²⁰ Written Direct Testimony of Joe Lenski, at 6.

²¹ 17 U.S.C. §801(b)(1).

statutory objectives to reach [a] decision.”²² I follow that approach here, with the caveat that economists are only one voice informing the Judges regarding what modifications to proposed market benchmarks, if any, they consider appropriate on account of the Section 801(b) objectives. Those policy overlays reflect Congressional policy determinations that are not necessarily bounded by what economists may have to say about them.

The starting point for undertaking my analysis of what constitutes a “reasonable” royalty rate is to identify the rate or range of rates that would be negotiated between willing buyers and willing sellers in a workably competitive market for the rights at issue. In my analysis, I operate under the assumption that the sellers are individual record companies and the buyers are providers of satellite radio services.²³ Currently, the only satellite radio service operating is Sirius XM. The product being offered by the record company is a blanket license conveying the right to perform that record company’s complete repertoire of sound recordings.²⁴ I then consider modifications to the resulting willing buyer/willing seller rates that, at least from an economic perspective, might be warranted to ensure that the Section 801(b) statutory objectives are met.

To begin this analysis, in what immediately follows, I discuss how to interpret and apply the willing buyer/willing seller concept in the market at issue in this proceeding, namely, the market for the rights necessary to perform sound recordings (including the rights to create necessary ephemeral copies in aid of such performances) by satellite radio services.

A. Record Companies are Suppliers of Differentiated Products

Two attributes of recorded music are fundamental to any analysis of negotiations between record companies and satellite radio services.

First, sound recordings are differentiated products. Every song is distinct, and listeners value variety. Right away, this tells us that textbook models of perfect competition cannot be used in the recorded music industry. Those models are not applicable because they assume that

²² SDARS II, at 23055 (citing SDARS I, at 4084).

²³ It is my understanding that this is the approach taken by the Judges in prior proceedings. See, e.g., Web III Remand, at 23104.

²⁴ It is my understanding that this is the approach taken by the Judges in prior proceedings. See, e.g., Web III Remand, at 23104.

many suppliers offer a homogeneous product. In these textbook models of perfect competition, if one seller demands a price that is too high, a buyer can turn to another seller to secure exactly the same product. In such circumstances, competition among the sellers of identical goods is predicted to drive price down to marginal cost – the economic cost of producing and selling one more unit of the product at issue. As a general matter, while substitutes may be available for a particular sound recording, it will not be the case, as is required in perfect competition, that those substitutes will be perfect substitutes (i.e., identical products).

Second, the creation and distribution of sound recordings has a very particular cost structure: high fixed costs and low marginal costs. Put in less abstract terms: the creation of a piece of recorded music involves significant “first-copy” costs, but the record company has very low additional costs associated with increased listening. This is especially true for digital distribution, where the additional costs caused by one more performance are essentially zero.

These two attributes are not unique to recorded music. They apply as well to musical compositions, video programming, video games, and books, among other information goods. My book with Hal Varian, *Information Rules: A Strategy Guide to the Network Economy*, Harvard Business School Press, 1999, contains an extensive discussion of the pricing of differentiated products with high first-copy costs.²⁵

B. Pricing of Differentiated Products

Unlike suppliers for homogeneous products operating in competitive markets, who take price as given, suppliers of differentiated products, even those operating in workably competitive markets, generally set prices above marginal cost. Indeed, for information goods, prices *must* be greater than marginal cost for the industry to be sustainable. Pricing at marginal cost would fail to generate sufficient revenues to cover the first-copy costs.

The most fundamental rule for pricing differentiated products used in the field of industrial organization economics is the Lerner Equation. The Lerner Equation provides a simple formula for the price set by a profit-maximizing firm selling a differentiated product. The Lerner Equation can be found in most if not all intermediate microeconomics and industrial organization textbooks. The Lerner Equation typically appears in textbooks under the heading of

²⁵ See especially Chapter 2, “Pricing Information,” Chapter 3, “Versioning Information,” and Chapter 4, “Rights Management.”

“monopoly pricing,” but it applies to any seller of a unique, differentiated product, so long as that seller is pricing independently of its rivals. The Lerner Equation states that there is an inverse relationship between the firm’s margin (the gap between price and marginal cost) and the firm’s elasticity of demand.²⁶

In the current proceeding, the product being offered is a blanket license for a record label’s complete repertoire of sound recordings. The Lerner Equation tells us that a record label not subject to any compulsory license will set a lower per-performance royalty rate to a music service, the more sensitive is the service’s use of that record company’s music to the royalty rate charged by the record company for its music. That sensitivity is measured by what economists refer to as the *elasticity of input demand*.²⁷ A music service that can easily substitute toward or away from the music of any one record company will have a high firm-specific elasticity of input demand. In particular, a music service that can easily control the songs it plays, with little impact on the behavior of the services’ listeners, will have a high firm-specific elasticity of input demand. Applying the Lerner Equation, this music service will pay a relatively low royalty rate. In contrast, a music service with limited ability to control the songs it plays – for example, an interactive service where the consumer selects the particular sound recordings to be performed – will have a lower elasticity of input demand for any one record company’s repertoire of sound recordings and will face a higher price.

The Lerner Equation also tells us that a record company not subject to any compulsory license will charge a higher price to music users that are more costly for the record company to serve, including the *opportunity cost* to the record company of a performance by that music user.

²⁶ Call P the firm’s price, C the firm’s marginal cost, and E the (absolute value of) the elasticity of demand for the firm’s product. The Lerner Equation states that $(P-C)/P=1/E$. The Lerner Equation applies for an elasticity greater than one. If the elasticity is less than one, i.e., if demand is inelastic, the firm should raise its price until the elasticity is greater than one, i.e., until demand becomes elastic. Throughout my testimony, when referring to any price elasticity of demand, I mean the absolute value of that elasticity, so a larger price elasticity corresponds to greater price sensitivity.

²⁷ More precisely, this is a *firm-specific* elasticity of demand. In general, the firm-specific elasticity of demand measures a buyer’s sensitivity to the price set by a single supplier, such as Safeway’s elasticity of demand for Coke. An example in the current case would be Sirius XM’s elasticity of demand for the recorded music from a specific record company, such as Warner Music Group. Sirius XM’s elasticity of demand for Warner’s music will be greater than Sirius XM’s elasticity of demand for all recorded music, precisely because Sirius XM can substitute music from other record companies for music from Warner in response to a Warner-specific price increase. Likewise, because consumers will substitute from Coke to other soft drinks based on price, Safeway’s elasticity of demand for Coke is higher than Safeway’s elasticity of demand for all soft drinks.

Importantly here, the *full marginal cost* of one more performance on a given music service includes the impact of that performance on other record company revenue streams. For performances that have no impact on other revenues earned by the record company, the full marginal cost is simply the direct marginal cost to the record company of producing and distributing that sound recording, which I understand to be zero or nearly zero for satellite radio services. For performances that *substitute* for other sales by the record company, the full marginal cost includes a positive opportunity cost term reflecting the lost price/cost margins on those other sales. By precisely the same logic, for performances that *promote* other sales or revenue by the record company, the extra price/cost margins on those other sales are an economic *benefit*, causing the full marginal cost to be negative. Appendix D derives the basic equation governing the full marginal cost to a record company of one more performance on a given service.

In this manner, the Lerner Equation can automatically account for the important principle that a service that substitutes for other profitable sales and/or revenue streams by the record company will pay a higher price in a workably competitive market (based on the higher full marginal cost to the record company of performances on this service), while a service that promotes other profitable sales or revenue streams by the record company will pay a lower price in a workably competitive market (based on the lower full marginal cost to the record company of performances by this service). This discussion reflects the power and generality of the Lerner Equation: the marginal cost term in the Lerner Equation captures the key factors on the supply side (here, the opportunity cost to the record company), and the elasticity of demand term in the Lerner Equation captures the key factors on the demand side (here, the flexibility of the satellite radio service in the mix of music it plays; i.e., the ability of Sirius XM to shift the mix of sound recording performances from one record label to another).

Stated more concretely, the key factors governing the royalty rate at issue in this proceeding are: (1) Sirius XM's ability to profitably change the mix of sound recordings it plays in response to pricing, which I refer to as "steering," and (2) the impact that a play on Sirius XM has on other record label revenue streams, which determine the record company's opportunity cost of licensing to Sirius XM. With respect to the first factor, if Sirius XM can easily steer toward performances of lower priced sound recordings, then Sirius XM should, all else being

equal, pay a lower royalty rate. Similarly, with respect to the second factor, if Sirius XM has a net positive impact on record label revenue streams (including, among others, revenues earned from terrestrial radio, webcasters, interactive services, and CD and download sales), then, all else equal, the resulting royalty rate will be lower. If Sirius XM has a net negative impact on these revenue streams, then, all else equal, the resulting royalty rate will be higher.

The Lerner Equation gives a formula for the profit-maximizing price set by the supplier of a differentiated product. The analysis underlying the Lerner Equation assumes that the supplier is in the driver's seat in the sense of dictating the price, which buyers must then take as given when making their music mix decisions. This is indeed how many prices are set in our economy. An alternative formulation would have the *buyer* set the price, which sellers must then take as given when making their supply decisions. While this is a less common way for prices to be set in our economy, some would say that Wal-Mart operates this way, making take-it-or-leave-it offers to many of its suppliers. If the buyer is in the driver's seat, a lower price results than if the seller is in the driver's seat. Neither of these approaches is precisely on point for the task at hand. Here, we are attempting to approximate a *negotiated* price – one that is determined following a back-and-forth process, with neither side dictating the price.

In a negotiation, because neither the buyer nor the seller dictates the price, the resulting price will be below that which the seller would dictate and above that which the buyer would dictate.²⁸ While the ultimate price resulting from a negotiation will be lower than the seller's profit-maximizing price calculated pursuant to the Lerner Equation, the seller's full marginal cost and the buyer's elasticity of demand for the seller's product remain the key factors that determine negotiated prices.

C. Sirius XM is an Aggregator of Recorded Music and Other Content

We are now ready to discuss the factors that determine Sirius XM's elasticity of demand for use of the music in the repertoire of a single record company. This requires that we look more closely at how Sirius XM uses recorded music and its ability to control that usage.

²⁸ The negotiated price will be closer to the price the seller would dictate if the seller has more bargaining skill or bargaining power than the buyer, and vice versa.

Sirius XM is an *aggregator* of content: Sirius XM combines recorded music from a number of record companies, together with non-music content and a nation-wide delivery platform, to create a valuable product for its listeners.

Aggregators are intermediaries that create value by choosing which products to carry and by combining and presenting those products in a way that is appealing to customers. For example, most retailers are aggregators that combine products from a number of manufacturers and offer them to shoppers in an attractive or convenient manner. Likewise, Sirius XM creates value for its listeners by aggregating music from multiple record companies, selecting music that its listeners enjoy, combining that music with non-music content, and making its content available to listeners in a convenient manner.

As a general economic principle, an aggregator that can easily steer its customers toward or away from the products offered by a single supplier will have a high elasticity of input demand for that supplier's products and will pay prices that are relatively closer to marginal cost. The net result in a workably competitive market may well be that relatively little steering actually takes place, yet aggregators with the capability to steer will still pay lower prices.

D. Workable Competition in the Upstream Markets for Recorded Music

So far, I have explained the fundamental forces that would drive negotiations between record companies and music services in the absence of a compulsory license. This is the starting point for understanding the hypothetical negotiation between a willing seller (record company) and a willing buyer (satellite radio service).

I now add in the concept of a workably competitive market.²⁹ In markets for recorded music, price competition among record companies would take the form of price reductions (discounted royalty rates) in an effort to obtain a greater market share (more plays by the music service).³⁰ This increased market share can result from a guarantee by the music service or simply because the music service has an incentive to shift its music mix toward less expensive music. If a music service plays more of a particular record company's music because that music

²⁹ My approach here is consistent with the one taken by the Judges in *Web IV*; see *Web IV* at 26331-34. I use the terms “workably competitive” and “effectively competitive” interchangeably.

³⁰ In *Web IV*, the Judges cited this type of price competition as the sine qua non of market competition. See *Web IV* at 26366 (“steering is synonymous with price competition in this market.”).

is less expensive than the music from other record companies, that music service steers listening *toward* the less expensive record company. Likewise, a music service can steer *away* from a record company whose music is more expensive than the music of other record companies.

1. Workably Competitive Markets: General Principles

A workably competitive market is one that is not subject to the exercise of significant market power. A market is workably competitive if two conditions hold: (1) there are multiple suppliers who are capable of offering buyers meaningful alternatives, so that no single supplier has substantial unilateral market power; and (2) these suppliers do not engage in coordinated interaction. When both of these conditions are met, competition among the sellers in the market generates substantial benefits for buyers in the market and ultimately to downstream consumers.

The hallmark of a workably competitive market is regular, significant competition among suppliers for the patronage of buyers. In practice, to assess whether a market is workably competitive, economists look at market concentration, entry conditions, profits and price/cost margins, and especially more direct evidence regarding how suppliers compete, or refrain from competing, for the patronage of buyers.

A market can be workably competitive even when the products or services offered by different sellers are differentiated, so long as no single supplier has significant unilateral market power. Indeed, this is the norm for information products such as books, video programming, or software applications. Workable competition does not require marginal cost pricing or anything approaching the textbook model of perfect competition.

A market can also be workably competitive even if it is quite concentrated, so long as the suppliers regularly and energetically compete on price to win business from each other. For example, the market for airline service between two cities might be dominated by three airlines yet still be workably competitive, so long as we observe those carriers engaging in regular and significant price competition.

In contrast, a market that is monopolized or controlled by a cartel is *not* workably competitive. If such markets were considered workably competitive, the concept of workable competition would lose all meaning. A market in which one of the sellers is a “must have” supplier for the buyers cannot be workably competitive, since that “must have” supplier will have monopoly power. A market in which *multiple* sellers are “must have” suppliers is also not

workably competitive, and can result in prices even higher than those in a monopolized market. The Judges in *Web IV* referred to such sellers as “complementary oligopolists.”³¹

2. Workable Competition in Upstream Markets for Recorded Music

To date, there does not appear to be robust competition in any of the upstream markets in which record companies license sound recording performance rights to music services. And the upstream market in which interactive services license performance rights appears to be entirely devoid of competition. This lack of competition was discussed in detail in the *Web IV* decision.³²

In the upstream market in which webcasters secure sound recording performance rights, there appears to be some, albeit limited amounts of competition at work. Merlin, a collective that represents thousands of independent labels, and Pandora entered into a license agreement that explicitly embraced steering as the key driver of the agreement. The Merlin/Pandora agreement is the benchmark that I relied on in the *Web IV* proceeding for setting rates for webcasting services. The Judges used the Merlin/Pandora benchmark, together with additional information, to derive the statutory rates for webcasters. In *Web IV*, I concluded that the Merlin/Pandora agreement was an attractive benchmark primarily because it reflected the forces of competition at work. Pandora relied more heavily on sound recordings of the Merlin-represented labels in exchange for a reduced royalty rate. Nothing that I have seen since I testified in the *Web IV* proceeding has led me to question these conclusions. I discuss the significance for this proceeding of the *Web IV* rates and the agreements upon which they rely in Section 10 below.

In the upstream market in which Sirius XM secures sound recording performance rights licenses we have also seen some competition at work. In that market, Sirius XM has entered into several hundred direct licenses with record labels. As described more fully in the testimony of George White and Steven Blatter, the most significant factor motivating the record labels to enter into these licenses has been to encourage Sirius XM to rely more heavily on their sound recordings.³³ I discuss the significance of these direct licenses for setting rates in this proceeding in Section 9 below.

³¹ *Web IV*, at 26343.

³² *Web IV*, at 26341-44.

³³ Written Direct Testimony of George White, at ¶¶15-19; Written Direct Testimony of Steven Blatter, at ¶¶55-60.

6. Approach to Rate Setting

In the remainder of my testimony, I first undertake a “level set” in which I explore whether the current SDARS rates, which reflect the culmination of two prior litigated 801(b) proceedings, warrant upward or downward adjustment for the succeeding license term, due to relevant changed circumstances. I then employ a conventional benchmarking approach using Sirius XM’s direct licenses to calculate reasonable royalty rates. Benchmarking has been the primary method used to estimate reasonable royalty rates in prior CRB proceedings. Benchmarking approaches also are commonly employed to estimate reasonable royalty rates in a variety of settings, particularly when setting royalties for other intellectual property rights, such as in rate proceedings before the ASCAP and BMI rate courts and in patent infringement cases, where a similar “reasonable” royalty construct applies.³⁴ Lastly, I look at the royalties established in the *Web IV* proceeding and how such royalties might be utilized as benchmarks in the present proceeding.

The basic idea behind benchmarking is intuitive and very sensible: to estimate the royalty rate that would be hypothetically negotiated between certain buyers and sellers, we start from royalty rates that have *actually* been negotiated between very similar or identical buyers and sellers for very similar or identical rights under workably competitive conditions. This last attribute of a good benchmark – one that arises under workably competitive conditions – warrants special attention, particularly in the current proceeding, as many of the available marketplace agreements – notably those involving interactive services – fail to meet this requirement. As noted above, there are several hundred agreements in the target market and a handful of agreements in related markets in which the forces of competition actually appear to be at work. The vast majority of other available agreements are infected by the substantial market power of record labels, and, as a result, call for rates at the monopoly level (or even higher).

³⁴ Patent damages often come in the form of “reasonable royalties,” which are defined as the royalties that would have been negotiated between the patent holder and the infringing party prior to the infringement, under the assumption that the patent was valid and infringed. In the ASCAP and BMI rate courts, “reasonable” rates are those that would prevail in a competitive marketplace. *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 576 (2d Cir. 1990) (the Rate Court’s task is to “define a rate or range of rates that approximate the rate that would be set in a competitive market.”); *United States v. ASCAP (In re Applications of RealNetworks, Inc., Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) (“fundamental to the concept of ‘reasonableness’ is a determination of what an applicant would pay in a competitive market”).

The accuracy and reliability of any benchmarking exercise depends on how comparable the benchmark transactions truly are to the hypothetical negotiation under study, including the requirement of workable competition. Benchmark transactions can vary in several respects from the hypothetical transaction: the rights, the buyer, the seller, the market conditions, and the time period. The closer the benchmark transaction is to the hypothetical transaction in all these respects, the better. To the extent that there are differences in any of these respects, the analyst attempts to make one or more adjustments to account for such differences. The reliability of these adjustments affects the reliability of the resulting royalty rate.

Determining appropriate adjustment factors can be an intricate task. Often, there are a number of nuances that must be addressed. Most importantly, one must ask (1) whether the two basic economic factors that determine price – the seller’s full marginal cost and the buyer’s firm-specific elasticity of demand (its ability to steer) – differ from the benchmark contract to the target market, and (2) whether the benchmark contract was negotiated under workably competitive conditions.

Furthermore, in the case at hand, the 801(b) factors may call for making further modifications, as I am told Congress has established that we are not purely looking for willing buyer/willing seller rates in this proceeding.

7. Reasonable Royalty Rate and Structure

For the reasons discussed in detail below, it is my view that a reasonable royalty rate for the statutory license at issue in this proceeding for the years 2018-2022 should be set between 8.1 percent of revenue (on the low end) and 11 percent of revenue (on the high end). This royalty rate is inclusive of 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). The range of rates that I am proposing reflects my conclusion that there is no economically valid reason of which I am aware that would call for an upward adjustment to the 2017 statutory rate (11 percent of revenue), while there are multiple reasons for adjusting that rate downward for the 2018-2022 period.

Keeping with past practice, I am proposing a percent-of-revenue rate structure. This is the same rate structure that the Judges adopted in both the *SDARS I* and *SDARS II* proceedings.

My understanding is that both Sirius XM and Sound Exchange proposed a percentage-of-revenue rate structure in the *SDARS II* proceeding.

Establishing royalties based on a percentage of revenue has several practical advantages. First, the royalties paid will automatically go up with inflation, since revenues increase with inflation. As a result, there is no need to adjust the royalty rate throughout the license period to account for inflation. Second, there are no major difficulties in implementing a percentage-of-revenue formula, since Sirius XM has been paying on a percentage-of-revenue basis for a number of years now. Third, Sirius XM is a mature company, so there is little concern that it will largely forego revenues (resulting in lower royalty payments) in an effort to grow the company and thus temporarily escape paying reasonable royalties.

The remainder of my testimony provides the bases for my proposed range of rates. I start in Section 8 with an evaluation of the current statutory rates, and assess whether there have been changes of significance that warrant a departure from the prevailing rates. In Section 9 I assess in detail one of the significant changes in the marketplace that has taken place since the *SDARS II* proceeding – the enhanced Sirius XM direct license initiative. For reasons I discuss, while probative, these direct licenses do not provide all of the information one would like to have when setting the statutory rate at issue. To complete the picture, in Section 10 I provide a detailed analysis of a second major change that has occurred since the *SDARS II* proceeding – the emergence of competitive market transactions in the related upstream market in which webcasters secure performance rights from record labels. As I discuss in Section 10, the *Web IV* rates, which were derived in part from benchmark agreements that unquestionably reflect the forces of competition at work, provide an excellent benchmark and can easily be adjusted to derive appropriate royalty rates for the license at issue in this proceeding.

8. The Prevailing Statutory Rates as a Starting Point for Analysis

In *SDARS II*, the Judges determined that the “zone of reasonable rates” was between 7 percent of Sirius XM revenue on the low end and likely 12 to 13 percent of revenue at the high end.³⁵ After accounting for the 801(b)(1) objectives, the Judges concluded that the reasonable royalty rate for Sirius XM was 11.0% of revenue.

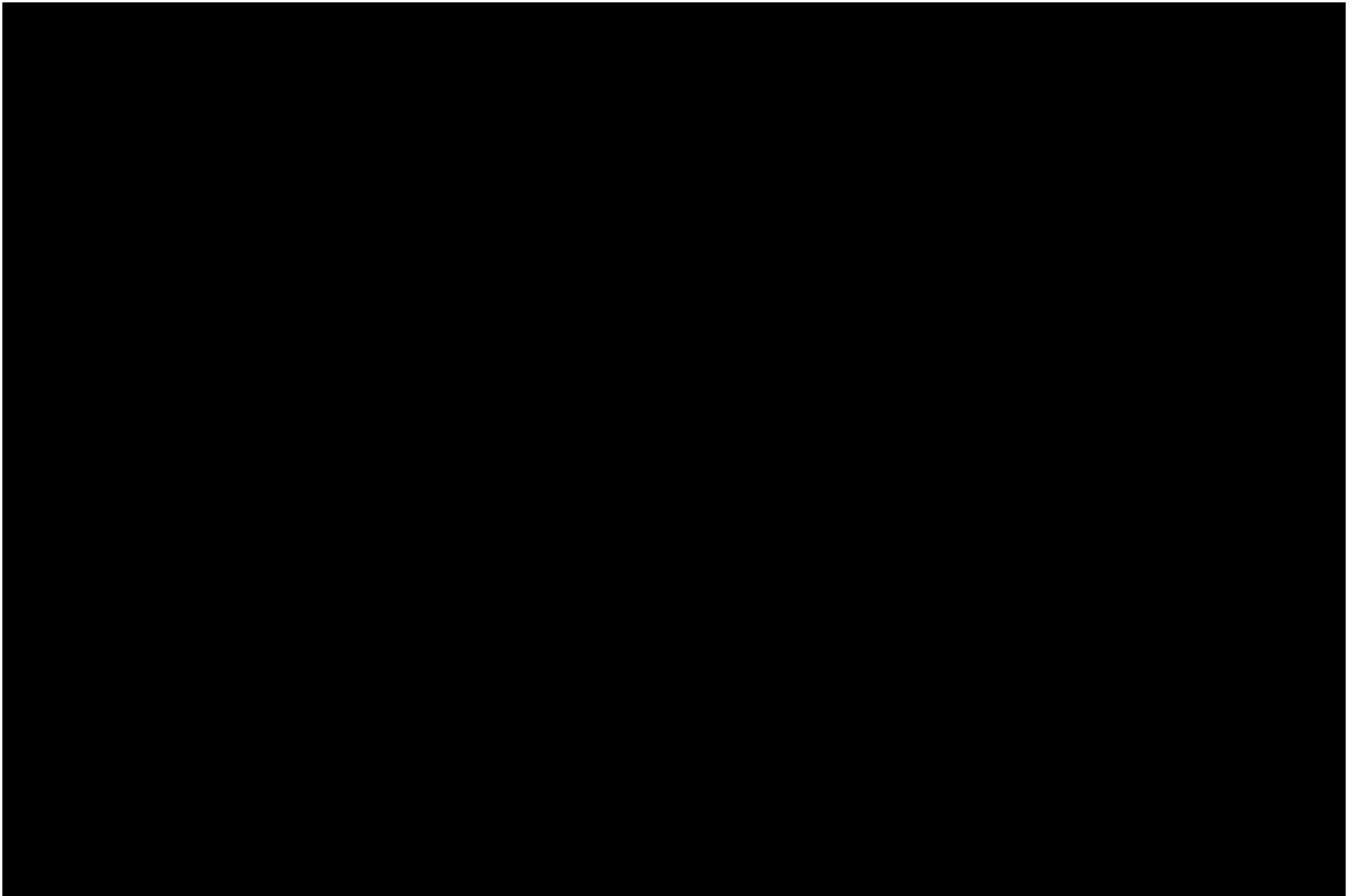
³⁵ *SDARS II*, at 23071.

Since the rate in 2012 was 8.0%, the Judges phased in that 11.0% rate over a five year period, starting at 9.0% in 2013 and ending at 11.0% in 2017. The *SDARS II* decision, of course, was not the first time the Judges (and their predecessors) had occasion to evaluate the marketplace at issue here. In *SDARS I*, the Judges also evaluated this marketplace and, after considering the 801(b)(1) objectives, concluded that the Sirius XM royalty rate should be set at 6% of revenue for 2006 and 2007, and gradually increased the rate up to 8% of revenue by 2012.

Given that the Judges, on two prior occasions, have evaluated the marketplace at issue in this proceeding, a natural starting point is to consider whether there have been any marketplace changes of relevance that warrant a deviation – either upward or downward – from the 11% rate that the Judges concluded was reasonable for 2017 after accounting for the 801(b)(1) objectives. In Sections 8.A, 8.B, and 8.C, I explore this question by evaluating the major marketplace changes of relevance that have taken place since the Judges last had occasion to evaluate this market. For each major marketplace change, I then consider whether that change, *standing alone*, suggests that an adjustment be made to the willing buyer/willing seller rate that Sirius XM would pay to record companies. Following that analysis, in Section 8.D, I consider whether the 801(b)(1) objectives call for an adjustment, either up or down, to the 11 percent of revenue rate that Sirius XM will be paying in 2017.

A. The Growth of Streaming Music

Since the *SDARS II* proceeding, there has been a significant increase in popularity of Internet streaming services – both interactive and non-interactive. As a result of this growth, there has been a change in the mix of record label revenue – with a greater percentage of record label revenue now coming from streaming services than had historically been the case. The growing significance of streaming revenue in the United States is shown in Figure 5 below.



Revenues from streaming services (shown above as subscription & on-demand and webcasting) generated about 12% of record industry revenues in 2012 and has increased to 43% of revenues in the first half of 2016. This growth in streaming, and the resulting shift in the mix of U.S. record industry revenue, is significant and is likely to continue during the statutory license period, 2018-2022.

Notably, as the mix of record industry U.S. revenue has shifted toward streaming services, *total* record industry U.S. revenue was stable at roughly \$7 billion per year from 2012 through 2015, as shown in Figure 5, and then increased during the first half of 2016.³⁶

The shift in record-company revenue toward streaming services does not, in and of itself, warrant any change in the rate currently charged to Sirius XM under the 801(b)(1) objectives. Below, I address in detail the factors that affect the willing buyer/willing seller rates and possible modifications to those rates based on the 801(b)(1) objectives. The share of record company revenue earned from streaming services is not a stand-alone factor in my analysis below.

B. The Growth of Sirius XM

A second change of note is that Sirius XM has enjoyed healthy subscriber growth in recent years. The number of Sirius XM subscribers has grown from 24.9 million in 2013 to 28.3 million in 2015.³⁷ [REDACTED]

[REDACTED]
[REDACTED].³⁸

Sirius XM's subscriber growth has led to a significant increase in Sirius XM's subscriber revenue. Sirius XM's subscriber revenue has grown from [REDACTED] in 2013 to [REDACTED] in 2015. [REDACTED]

[REDACTED]³⁹ Because Sirius XM pays royalties based on a percentage of revenue, subscriber growth has a positive impact on Sirius XM's total royalty payments.

I have considered whether the growth in Sirius XM's subscriber base and revenues, and the general improvement in Sirius XM's financial position, implies that an upward adjustment from the 11 percent of revenue royalty rate for satellite radio services that was established in the *SDARS II* proceeding is warranted. I have concluded that it does not.⁴⁰ The reason is

³⁶ The RIAA release announcing results for the first half of 2016 highlighted an 8.1% year-over-year growth in revenue. See *News and Notes on 2016 Mid-Year RIAA Music Shipment and Revenue Statistics*, available at http://www.riaa.com/wp-content/uploads/2016/09/RIAA_Midyear_2016Final.pdf.

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ At this point, I am asking whether the observed subscriber growth at Sirius XM, *standing alone*, suggests that an upward adjustment is needed. Of course, a great deal of other evidence is relevant when considering the appropriate royalty rates for 2018-2022, most notably any appropriate recent benchmarks. I address that evidence below.

straightforward: the basic service offered by Sirius XM has not changed, and the revenue that record companies receive from Sirius XM grows along with Sirius XM's subscriber base. Put simply: under the percentage-of-revenue rate structure that applies to Sirius XM, record companies *automatically* receive additional royalties when Sirius XM's subscriber base and revenue grow. This is inherent in the percent-of-revenue rate structure. No adjustment to the 11 percent rate is needed simply because Sirius XM's revenue is growing over time.

C. Developments in Upstream Music Licensing Markets

The other developments of significance are those that have taken place in the upstream markets in which music services secure performance rights from record labels. Over the last few years, we have seen more license negotiations in which steering played a role, and in some cases, in which steering was the primary motivation for entering into the license. The emergence of competition between labels for plays on certain services is directly relevant for the rate setting task at hand. Conversely, so far as I am aware, there remains a total lack of price competition between record labels in licensing recorded music to interactive music services.

In the upstream market at issue here, the market in which Sirius XM secures sound recording performance rights from record labels, Sirius XM has continued to enter into a significant number of direct licenses with record labels at rates below the prevailing statutory rates. As of the close of the *SDARS II* proceeding, Sirius XM had entered into 95 such license agreements.⁴¹ Today, Sirius XM has entered into some 498 such licenses.⁴² As I discuss in greater detail in Section 9 below, these direct licenses suggest that, if anything, the prevailing statutory rate should be adjusted downward.

We have also seen developments in a closely related upstream market, namely, the market in which webcasters secure sound recording performance rights from record labels. In that market, license agreements have been entered into in which record labels explicitly offered the webcaster a lower rate in exchange for greater plays. As is discussed in detail in the *Web IV* determination, these agreements plainly are the result of competitive forces at work. This outbreak of competition in a closely related upstream market is highly informative for the current

⁴¹ *SDARS II*, at 23062.

⁴² Written Direct Testimony of George White, at ¶5.

rate-making exercise. As I discuss in Section 10 below, when appropriately adjusted, this *Web IV* benchmark also yields a rate that is below the prevailing Sirius XM statutory rate.

D. The 801(b) Objectives

In addition to the changes discussed above, the 801(b)(1) policy objectives might call for an adjustment to the prevailing statutory rates. While the 11% rate set for 2017 was arrived at after accounting for the 801(b)(1) objectives, that analysis was directed at the 2013-2017 license period. When applied to the 2018-2022 license period, it could be that the 801(b)(1) objectives will lead to a different result. The pertinent question at this point in the analysis, it would seem, is whether there have been any *changes* to the factors that underlie an appropriate 801(b)(1) analysis since the Judges established the 2017 statutory rate of 11 percent of revenue. From an economic perspective, I conclude there have not been any changes that would warrant an upward adjustment to the 2017 statutory rate, while there has been at least one change that would suggest that the 2017 statutory rate should be reduced.

1. The “Availability” Objective

From an economic perspective, the first policy objective – “maximizing the availability of creative works to the public” – has two components: (i) creating the proper incentives for the continued production of sound recordings; and (ii) creating the proper incentives for the continued creation of, and investment in, the means by which the public can access sound recordings. These two components operate, respectively, on the supply side and the demand side of the upstream market for the licensing of recorded music to satellite radio services.

On the supply side, the relevant question is what impact increasing or decreasing the royalty rate received by the record companies from Sirius XM would have on the creation of sound recordings. This inquiry should take into account both the direct effect of the royalty rate on revenues earned from Sirius XM and the indirect effect of a change in the satellite radio royalty rate on other record label revenue streams, as changes in listening on Sirius XM may either substitute for or promote listening in other forms. On the demand side, the relevant question is what impact increasing or decreasing the royalty rate paid by Sirius XM to the record companies would have on the investments made by Sirius XM to increase public access to sound recordings.

For purposes of the present analysis, we are interested in whether the supply-side response by record companies to greater royalty income, relative to the demand-side response by Sirius XM to higher royalty payments, has *changed* since the Judges set the 2017 statutory rate at 11 percent of revenue. And if so, should the royalty rate be adjusted up or down to maximize the availability of creative works to the public under those new conditions? I am not aware of any evidence indicating that such a change has occurred in recent years. Accordingly, viewed through this prism, the availability factor does not suggest the need for a change, either upward or downward, to the prevailing 2017 statutory rate.

2. The “Fair Return / Fair Income” Objective

In *SDARS II*, regarding this objective, the Judges took the position that fair return and fair income were generally consistent with market outcomes, stating: “In the absence of substantial evidence in the record to the contrary, any marketplace benchmark that guides the selection of rates will encompass such a return because it represents the best evidence of reasonable market outcomes.”⁴³

At this point, I am unaware of any new “substantial evidence” that would warrant a modification to marketplace benchmarks based on this 801(b) objective. Thus, for present purposes, I do not propose any modification to the prevailing 11 percent of revenue rate to account for the fair return/fair income objective.

3. The “Relative Contribution” Objective

Copyright holders contribute by creating sound recordings. Record companies cover the cost of creating sound recordings through a wide variety of means, including, but not limited to, Sirius XM license fees, license fees from Internet music services, sales of CDs and digital downloads, and concert touring. While the contributions of record companies certainly should not be ignored, in the present proceeding to determine the reasonable rates Sirius XM would pay to publicly perform sound recordings they must be viewed in the proper context: as contributions that relate to all forms of content distribution, not just satellite radio.

Sirius XM’s primary contribution is the creation and continued operation of a nation-wide content delivery system, including the innovations in satellite distribution and reception

⁴³ *SDARS II*, at 23067.

devices that are necessary to make satellite radio possible, the subsequent investments that are required to bring this new technology to market, the ongoing investments necessary to maintain the distribution network (including the replenishing of satellites and repeaters), the effort put forth by Sirius XM personnel in programming music channels, and the production of non-music content that accounts for approximately half of the content made available to subscribers.

In evaluating this factor in the previous SDARS proceedings, the Judges have taken note of certain very substantial, long-term investments periodically required to be made by Sirius XM in order to sustain its operations. These include, prominently, the costs of launching new satellites. It is my understanding that Sirius XM plans to launch two new satellites during the upcoming license term at a cost of some [REDACTED] – precisely the type of contribution that is pertinent to this 801(b)(1) objective.⁴⁴

Yet again, for purposes of evaluating whether the prevailing statutory rate should be adjusted from the 11 percent of revenue figure that applies in 2017, the relevant consideration is whether the relative contributions of the record labels and Sirius XM are likely to differ in the upcoming license term from those that were anticipated to be made during the *SDARS II* license period. The evidence I have seen from record company financials at this point indicates that there are not likely to be significant differences in record label expenditures on the creation of new sound recordings between the current and upcoming license periods.⁴⁵ There is, however, a significant difference in the contribution that Sirius XM will make during the coming license term as compared to that it made during the current license term. As noted above, Sirius XM plans to launch two new satellites during the upcoming license term, at a cost of approximately [REDACTED]

⁴⁶ Sirius XM had no similar “contribution” of this magnitude during the *SDARS II* license term. As a result, the “relative contribution” objective points in the direction of reducing the 2017 statutory rate, to account for the relatively greater contribution that Sirius XM will be making during the upcoming license term.

⁴⁴ Written Direct Testimony of Bridget Neville, at ¶20.

⁴⁵ For example, [REDACTED]
[REDACTED]
[REDACTED]

⁴⁶ Written Direct Testimony of Bridget Neville, at ¶20.

4. The “Minimization of Disruption” Objective

The final statutory objective – minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices – calls for a forward-looking analysis of how the record industry and Sirius XM are likely to evolve over the license period, and the impact, if any, that any *change* in the royalty rate paid by Sirius XM would have on the record industry and Sirius XM.⁴⁷

Unless market conditions have changed sharply, there can be no disruption associated with a royalty rate that does not change. Below, I conclude that the appropriate statutory royalty for the SDARS for the 2018-2022 period should be set in the lower end of a range between 8.1 and 11 percent of revenue. As part of that analysis, I consider whether the objective of minimizing disruption warrants phasing in rates that are lower than the 2017 statutory rate.

5. Summary

In summary, none of the changes that have occurred since the *SDARS II* proceeding to the record industry, to Sirius XM, and to the relevant upstream licensing markets, provide a basis for making an upward adjustment to the 2017 statutory rate, or suggest that a higher rate is necessary to satisfy the objectives spelled in Section 801(b)(1). The changes that have taken place since *SDARS II* that do suggest that a change is warranted all point in the downward direction. As a result, this analysis indicates that the 11 percent of revenue rate that Sirius XM will pay in 2017 can be viewed as an upper bound on the reasonable royalty level for the 2018-2022 period.

9. Sirius XM’s Direct Licenses as Benchmarks

Since the *SDARS II* proceeding, Sirius XM has entered into some 400 additional direct licenses. This collection of direct licenses is a natural first place to look for benchmarks, as these are agreements between the same buyers and sellers and cover the same rights as are at issue in this proceeding.

A. Record Companies Signing Direct Licenses with Sirius XM

Sirius XM began signing direct licenses with record labels in 2011, and the number of directly licensed labels has increased annually. As of the close of the *SDARS II* proceeding,

⁴⁷ *SDARS II*, at 23069.

Sirius XM had entered into 95 such license agreements. Today, Sirius XM has negotiated and entered into approximately 498 such licenses.⁴⁸ Collectively, these licenses cover approximately 23,000 catalogs, 5 million tracks, and account for approximately 6.4% of the tracks on the Sirius XM playlists across all music channels.⁴⁹

As is discussed in greater detail in the Written Direct Testimony of George White, Senior Vice President, Music Licensing at Sirius XM, the directly licensed labels span the full spectrum of music genres and represent a host of prominent artists and recordings. Some of the more prominent directly licensed labels include: Concord Bicycle Music Group, one of the largest and most successful independent label groups, whose catalog includes more than 10,000 active album recordings and 227 Grammy winners, including, among many others, Allison Krauss, Arturo Sandoval, and jazz legends Miles Davis and Thelonious Monk; Glassnote, the label of a number of Grammy award-winning artists, including, among others, Mumford & Sons and Phoenix; Entertainment One, the self-described #1 Independent Music Brand in North America”; Third Pardee Records, a label owned by the electronic music band Major Lazer, whose 2015 single “Lean On” became the all-time most streamed song on Spotify; Eardrum Records, the label founded by legendary comedian George Carlin; and Naxos Records, a leading producer of classical recordings, with four 2016 Grammy awards and an additional twelve nominations.⁵⁰ In the aggregate, labels signing direct licenses with Sirius XM accounted for eleven 2016 Grammy winners and an additional 26 nominations.⁵¹

B. Terms and Conditions of Sirius XM’s Direct Licenses

The direct licenses grant Sirius XM all the rights necessary to operate its various services, including the right to publicly perform and reproduce sound recordings for use on its satellite service – the precise rights that are at issue in this proceeding. In addition, the licenses relax certain of the restrictions of the Section 112/114 statutory licenses, most significantly the sound

⁴⁸ Written Direct Testimony of George White, at ¶5.

⁴⁹ Written Direct Testimony of George White, at ¶5.

⁵⁰ Written Direct Testimony of George White, at ¶7. Additional details on these, and other prominent directly licensed labels, are contained in the White Testimony.

⁵¹ Written Direct Testimony of George White, at ¶6.

recording performance complement. As a result, Sirius XM is able to rely more heavily on directly licensed works than it otherwise could.

In return, Sirius XM compensates the label directly by paying them their pro rata share of a specified royalty pool. The current direct licenses typically call for a royalty rate of between 7.0% and 9.5% of revenues.⁵² Each licensor's share of the royalty pool is calculated by dividing the number of compensable performances of that record company's tracks in the reporting period by the *total* number of sound recording performances during the period (whether directly licensed or not). Consistent with the *SDARS II* regulations, those performances are measured on the so-called "reference channels," namely, the channels on the Sirius XM Internet webcasting service that match those offered on the satellite radio service. The royalty pool is "gross," that is to say, there is no deduction taken by Sirius XM to account for any administrative fees and expenses like those deducted by SoundExchange, so each licensor receives its share of the entire royalty pool. In addition, and unlike the statutory license, the payments to the labels include both the label and artist share of the royalties.⁵³ As is typical of voluntary licenses between record companies and digital music services, the record company is responsible for paying the artist pursuant to the terms of their recording agreement. The direct licenses typically have a duration of three years, with a provision for automatic renewal. In some cases, the contracts call for a change in the royalty rate at some point during the contract period.

Table 1 shows the annual growth in the number of direct licenses and the average percentage rate across all active licenses from September 2011 through September 2016.

⁵² Written Direct Testimony of George White, at ¶10.

⁵³ Some of the direct licenses include advances, but my understanding is that these advances are of a magnitude that they will almost certainly be recouped.

Table 1: Sirius XM Average Contract Royalty Rate

Direct Licenses, 2011-2016 (rates as of September 1, contracts weighted by plays, market share, or royalty revenue)

	2011	2012	2013	2014	2015	Current
Average Weighted Royalty Rate	6.42%	6.75%	6.79%	7.07%	8.07%	9.42%
Number of Contracts	25	96	108	133	207	498

Sources:

- [1] Sirius XM Negotiation Status Report
- [2] SDAR Play Count Consumption - 2015.xlsx
- [3] DL contracts summary.xlsx
- [4] George White Written Direct Testimony

C. Using the Sirius XM Direct Licenses as Benchmarks

In a number of respects, the direct licenses signed by Sirius XM are ideal benchmarks: they involve the same rights, the same buyers, the same sellers, and they are negotiated under workably competitive conditions.

This last point merits further discussion, given that Sirius XM operates the only satellite radio service in the United States. I have considered whether the absence of satellite radio competitors confers undue market power on Sirius XM in its negotiations with record labels. In the language of antitrust economists, I have considered whether Sirius XM has monopsony power over record labels. The key observation is that it is not Sirius XM's share of a label's revenues from satellite radio that is relevant for assessing monopsony power, but rather Sirius XM's share of the label's *total* revenues from recorded music. If any single music user accounted for a very large share of the direct licensor's revenues from recorded music, then that user potentially could exercise monopsony power in its negotiations with the licensor over royalty rates. However, as shown in Figure 5, record labels generate revenue from many different types of users, and the overall share of record industry revenues attributed to Sirius XM is about █. Hence it is highly unlikely that any record label earns a sufficiently high share of its revenues from Sirius XM to confer undue market power on Sirius XM when negotiating a direct license.

In summary, the direct licenses satisfy many of the criteria of an ideal benchmark. However, because these licenses are negotiated in the “shadow” of the statutory license, the impact of the statutory license must also be considered.

Ultimately, the critical issue in evaluating these direct license benchmark agreements is understanding *why* the rates set in these direct licenses are lower than the statutory rates that would otherwise apply. My central aim in this section is to apply the available evidence to test the following two hypotheses:

Steering: The direct licenses reflect the forces of competition as labels discount below the statutory rate to obtain additional plays on Sirius XM.

Non-Statutory Benefits: The record labels signing direct licenses do so to obtain certain non-statutory benefits unrelated to additional plays on Sirius XM.

These hypotheses are not mutually exclusive: both factors could motivate a record label to sign a direct license with Sirius XM.

To the extent that the lower direct-license rates reflect steering, and hence the forces of competition, these lower rates are informative regarding the willing buyer/willing seller rate, and hence the proper statutory rate, following an analysis along the lines of that done in *Web IV* in evaluating the Merlin/Pandora Agreement.⁵⁴ To the extent that the rates in Sirius XM’s direct licenses are lower than the applicable statutory rates for reasons *other* than steering, they are less informative as benchmarks in this proceeding.

I now assess, based on the evidence available to me at this time, whether the Sirius XM direct licenses are in fact probative of reasonable royalty rates.

1. Sirius XM’s Ability to Steer

As a starting point, Sirius XM appears to have considerable ability to alter the mix of music it plays as among different record companies without having a material impact on the experience of its listeners. Importantly, the music played on Sirius XM is selected entirely by Sirius XM’s programmers, and not by Sirius XM listeners. In this sense, Sirius XM has

⁵⁴ In *SDARS II*, the term “demand diversion” was used to describe situations where Sirius XM shifted its mix toward a record company offering a lower royalty rate. I use the term “steering” to describe the same phenomenon.

complete control over the sound recordings played on its service. In this respect, Sirius XM is the same as terrestrial radio and quite unlike interactive services.

To illustrate how easy or difficult it is for Sirius XM to steer, I performed the following analysis. I requested a listing of all of the tracks played during July of 2016 on “Hits 1,” which is one of Sirius XM’s most popular channels, along with the frequency at which those tracks were played during the month and the label that controls the right to perform the track. For purposes of this analysis, I asked Sirius XM to identify tracks as falling into one of four ownership groups: Universal Music Group; Sony Music Entertainment; Warner Music Group; and “Independent.” As it turns out, there were 202 different tracks played on Hits 1 in July 2016, many of which were played only one or two times, and some of which were played several hundred times during the month. The most frequently played song (“Can’t Stop the Feeling” by Justin Timberlake) was played 497 times during the month.

I then assessed how significant the changes to the “Hits 1” playlist would have to be, were Sirius XM to steer toward Warner by 15%, i.e., to increase Warner’s share during the month by 15%. Prior to the steering, Warner’s share of plays on “Hits 1” was 14.1%. Therefore, steering toward Warner by 15% on “Hits 1” means increasing Warner’s share from 14.1% of all plays on “Hits 1” to 16.2% of all plays on “Hits 1,” since $14.1\% * 1.15 = 16.2\%$.

Increasing Warner’s share by 15% during the month requires only modest changes to the “Hits 1” playlist. The Sirius XM programmers would have to replace a non-Warner track with a Warner track only once every three hours. In Table 2 below, I report the number of spins of the four ownership groups before and after this 15% steering toward Warner. For purposes of this analysis, I decreased the spins of the three non-Warner ownership groups in proportion to their initial shares. As Table 2 demonstrates, the changes necessary to steer toward Warner are relatively modest.

Table 2: Daily Plays on the Hits 1 Channel With and Without Steering to Warner

Label	Plays per Day, No Steering	Plays per Day, 15% Steering	Difference in Daily Plays
Warner Music Group	55	63	8
Sony Music Entertainment	120	117	-3
Universal Music Group	139	136	-3
Independent	75	73	-2
Total	389	389	0

Source:

Sirius XM Usage Report for July 2016

This simple analysis demonstrates that Sirius XM has considerable ability to steer without making major changes to its music programming. While I am not able to state with precision the extent to which Sirius XM can steer without meaningfully impacting the listening experience of its subscribers, such that a non-trivial number would drop their subscriptions, this analysis suggests that Sirius XM can steer considerably without meaningfully impacting the listener experience.

2. Steering Benefits to Labels Signing Direct Licenses

There is clear evidence that the record companies signing direct licenses with Sirius XM seek and receive significant promotional benefits on Sirius XM.

According to Mr. George White, the single most important selling point to prospective direct licensors is the direct relationship with Sirius XM such a license engenders and the benefits that such a relationship entails. As described by Mr. White, chief among those benefits is the opportunity for the record company to obtain greater access to the programmers of the Sirius XM channels in the licensor's genre and the resulting opportunity to have tracks from its catalog, including from new label releases, added to the channel playlist, and other of its tracks performed more often.⁵⁵

Mr. White explains in his Written Direct Testimony how the record labels signing direct licenses with Sirius XM are given opportunities to increase their exposure on Sirius XM. Mr. White's licensing team connects these labels with members of Steven Blatter's music

⁵⁵ Written Direct Testimony of George White, at ¶¶15-19.

programming team, the people who actually select the music to be played on Sirius XM. The labels signing direct licenses thus obtain additional access to the Sirius XM programming team. Mr. White's licensing team also advises labels signing direct licenses on how to most effectively submit information about their music to the Sirius XM programmers as well as guidance regarding which channels are likely to be the best fit for the directly licensed music.⁵⁶ Both Mr. White and Mr. Blatter describe examples in which the direct license relationship has led not only to increased plays on Sirius XM but also additional plays and sales on other media through the promotional effect of Sirius XM.⁵⁷

My understanding is that Sirius XM programmers are continually contacted, one might say bombarded, by record labels seeking to have their music played on Sirius XM.⁵⁸ This strongly suggests to me that having internal Sirius XM personnel – Mr. White's licensing team – advocating with Sirius XM programmers on the behalf of labels who have signed direct licenses is of material value to those labels.

This benefit held out to potential direct licensors is similar to that undergirding the Merlin/Pandora deal, which was an important benchmark in the *Web IV* proceeding. In both cases, record labels have been willing to accept a lower royalty rate in exchange for the prospect of a greater share of spins. In both cases, the labels agreed to facilitate steering by waiving the sound recording performance complement of the statutory license. The main difference is that Pandora promised the Merlin labels that it would increase their share of spins in the aggregate, while Sirius XM does not.

3. Other Differences Between the Direct Licenses and the Statutory License

As was found in 2013 in the *SDARS II* decision, the record labels signing direct licenses with Sirius XM in the past several years have received certain non-statutory benefits, in addition to the steering benefits just discussed.⁵⁹ I now address these non-statutory benefits.⁶⁰

⁵⁶ Written Direct Testimony of George White, at ¶¶17-19.

⁵⁷ Written Direct Testimony of George White, at ¶17; Written Direct Testimony of Steven Blatter, at ¶¶57-60.

⁵⁸ Written Direct Testimony of Steven Blatter, at ¶¶6, 56.

⁵⁹ *SDARS II*, at 23064.

⁶⁰ In *SDARS II*, as regards the direct licenses signed by Sirius XM, the Judges found that “the rights that the parties negotiated in the benchmark market are reasonably comparable to those in the target market.” *SDARS II*, at 23069.

First, under the direct licenses, Sirius XM absorbs certain administrative costs that record companies would otherwise have to pay to SoundExchange. My understanding is that these Sound Exchange administrative fees comprise 4.6% of the royalties paid by Sirius XM to Sound Exchange.⁶¹ Using this reported administrative fee, a statutory rate of 10.5% of revenues corresponds to a direct license rate of 10.5%*95.4% which equals 10.02%. The difference in administrative fees thus accounts for a *portion* – less than half – of the difference between the 2016 statutory rate of 10.5% and the rates we see in Sirius XM’s licenses in 2016.

Second, 100% of the direct license payments are made to the record label, rather than 50% to the label and 50% to artists and unions as required under the statutory license. While the recipient of the initial payment does not change the contractual payment obligations between labels and artists, it may, for example, give the labels some additional flexibility to recoup advance payments to performers.⁶² This does not, however, change the basic fact that the buyer (Sirius XM) has agreed to pay at the stated direct license rate and that the seller (the record label) has agreed to receive the stated direct license rate. As noted above, this form of all-in payment to the label is typical of licensing transactions in markets without statutory licenses.

Third, the methodology used to calculate the record label’s share of total performances differs between that used in the direct licenses and that used by SoundExchange to distribute statutory royalties. For labels compensated under the statutory license, the share of total SoundExchange payments apportioned to each label is based on the label’s share of spins on Sirius XM’s satellite service, as measured across all music channels. SoundExchange does not account for the fact that certain channels are more popular than others. Compensation is the same for one additional spin, whether that spin is on a popular channel with a large number of listeners or on a less popular channel with fewer listeners.

In contrast, a label’s share under the direct licenses is calculated, consistent with the *SDARS II* regulations, based on the share of performances on the Internet reference channels – an

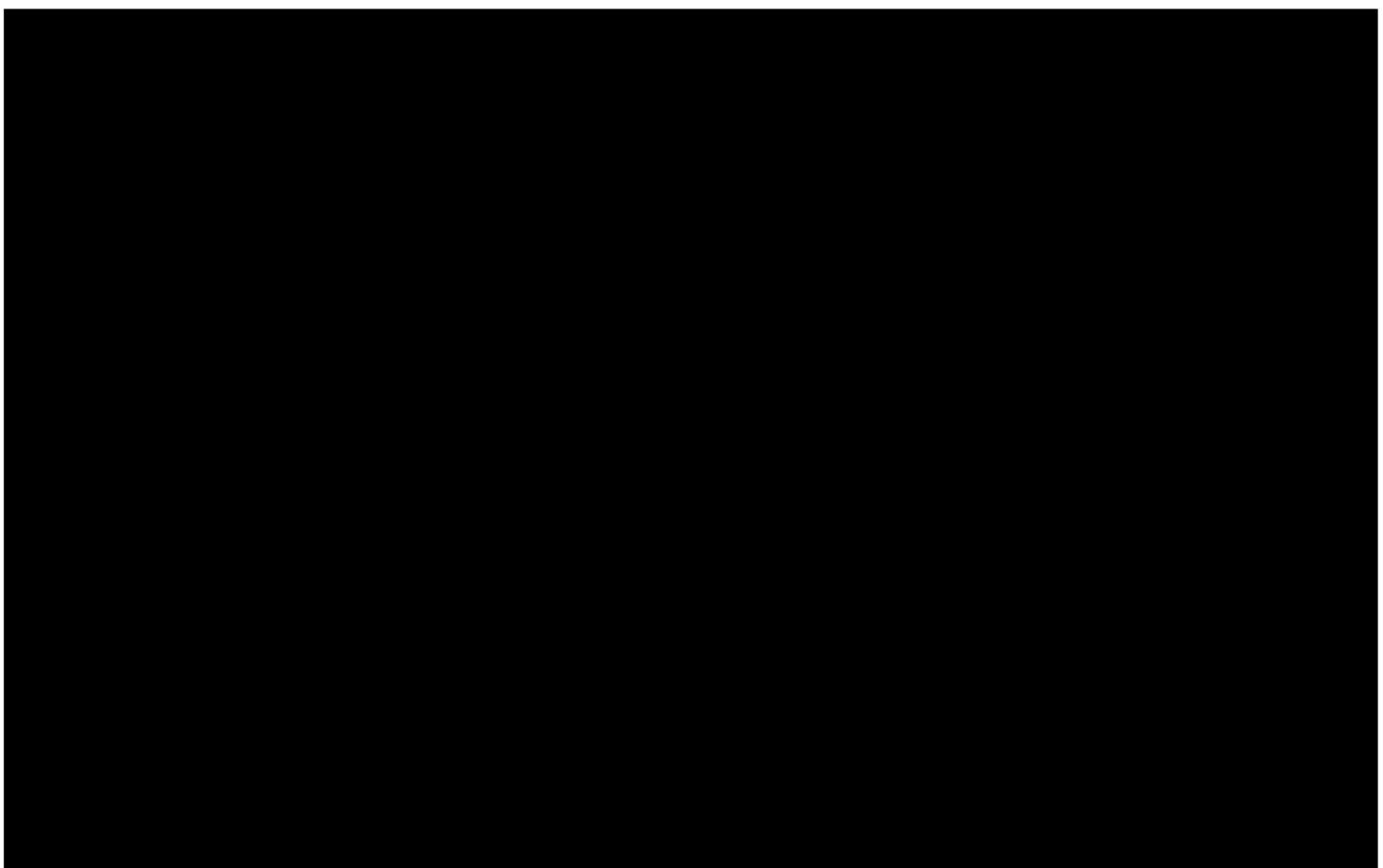
⁶¹ SoundExchange Annual Report for 2015, available at: <http://www.soundexchange.com/wp-content/uploads/2016/03/2015-SoundExchange-Fiscal-Report-Final.pdf>.

⁶² The Judges noted in *SDARS II* that payment directly to labels does not change the obligations to artists. *SDARS II*, at 23068.

approach that *does* account for the relative listenership of these different channels.⁶³ As a result, tracks played on channels that have greater listenership on the reference channels are weighted more heavily than those played on reference channels with less listenership. Consequently, the direct license compensation mechanism is beneficial to a licensor if an additional spin on one satellite channel would attract a higher than average number of listeners on the corresponding Internet reference channel, but disadvantageous for the licensor if the addition spin attracts relatively few listeners on the Internet reference channel.

Given this difference in the methodology used to calculate payments, it is natural to ask whether record labels typically enter into direct licenses only or predominantly when the payment methodology under the direct license is more advantageous for them than under the statutory license. Sirius XM maintains data that speak to this issue directly. Sirius XM tracks the monthly share of performances for directly licensed labels computed using both methodologies. Across all direct licensors, the share of spins on the satellite service (the methodology used by SoundExchange) *exceeds* the share of plays on reference channels (the methodology used in the Sirius XM direct licenses), as shown in Figure 6. While the comparison between the two methodologies differs from label to label, on average the direct licensors are actually *disadvantaged* by the direct license methodology, and would do better under the allocation methodology used by SoundExchange. This suggests that the direct license rates are on average somewhat higher than they would be if there were no difference in methodology. Figure 6 is inconsistent with the hypothesis that labels signing direct licenses do so because the direct-license methodology favors them in comparison with the SoundExchange methodology.

⁶³ SDARS II, at 23073. In older direct licenses, Sirius XM calculated each label's share of the royalty pool using the plays on the satellite service – as SoundExchange currently does. Sirius XM switched its methodology to match the direct license carve-out methodology in the SDARS II regulations. SoundExchange made no similar switch.



Summarizing, based on the evidence currently available to me, a significant portion of the gap between the statutory rate and the direct-license rate is attributable to record labels' belief that signing a direct license will lead to increased performances.

4. The Statutory License Acts as a Magnet

As shown in Table 1, the rates called for in the Sirius XM direct licenses have gradually been increasing over time. These increases have been taking place during a period of time when the statutory rate payable by Sirius XM has been increasing. This movement over time warrants further consideration.

In Appendix E, I analyze in detail the relationship between the direct license rates and the statutory rates. More specifically, I study the rate that Sirius XM and a record company will negotiate in a direct license with steering, where both sides recognize that in the absence of a

direct license, Sirius XM will pay the statutory rate. In this situation, I show that the statutory rate serves as a *magnet*, pulling the direct-license rate up, above the competitive level, toward the statutory rate.

The significance of this magnet effect cannot be overstated. As demonstrated in Appendix E, if steering is a meaningful motivation for labels to enter into direct licenses with Sirius XM, then the reason direct license rates have been creeping up over the last few years is because the *statutory* rate has been increasing, *not* because the workably competitive rate has been rising. Furthermore, Appendix E shows that the magnet effect is very strong for plausible rates of steering. For example, if a direct license boosts the label's plays by 20%, then the magnet effect operates at a rate of at least 80%, meaning that if the statutory rate goes up by one percent of revenue, the direct-license rate will rise by *at least* 0.8 percent of revenue.

In summary, if steering is a meaningful motivation for labels to enter into direct licenses with Sirius XM, then the statutory rate is almost certainly pulling up the rates we observe in Sirius XM's direct licenses above the workably competitive level (at least for those labels that have entered into direct licenses).

5. Majors vs. Indies

I also have considered whether the direct licensors are representative of all record labels, since the statutory rate will be applied across all record labels. In the *SDARS II* Decision, the Judges expressed concerns that that record labels signing direct licenses with Sirius XM were not representative of all record labels, and in particular that none of the major record labels had signed a direct license with Sirius XM.⁶⁴ There, the Judges suggested that “independent labels may have a greater incentive than majors to secure performance of their works on services such as Sirius XM” and hence a greater incentive to offer discounts in exchange for steering.⁶⁵

This concern is lessened in the current proceeding compared with *SDARS II*, because Sirius XM has now entered into direct licenses with 498 record labels, about five times as many as in the *SDARS II* proceeding, and because these direct licenses now account for over 6 percent of the performances on Sirius XM, more than twice the percentage covered by direct licenses at

⁶⁴ *SDARS II*, at 23063-64.

⁶⁵ *SDARS II*, at 23064.

the time of the *SDARS II* proceeding.⁶⁶ Further, since *SDARS II*, several notable independent labels have agreed to direct licenses with Sirius XM. This concern, however, has not gone away entirely, most notably because it remains the case that no major label has signed a direct license with Sirius XM.

The key question for evaluating this issue is *why* the major labels (and to a lesser extent other independent labels), have not entered into direct licenses with Sirius XM. Two broad explanations spring to mind. First, the statutory rate might be below the rate at which these record companies would willingly license their music, so they “just say no” to Sirius XM’s direct license offer at rate below the statutory rate. Second, these record companies might be refraining from signing direct licenses at the rates offered by Sirius XM for fear that doing so would establish a benchmark that would be used to lower (or at least not raise) the statutory rate in a subsequent *SDARS* proceedings.⁶⁷

The evidence currently available to me does not allow me to determine with complete confidence which of these two theories applies to the record labels that have refrained from signing direct licenses with Sirius XM. However, I am aware of evidence indicating that the “fear of precedent” explanation is operative and significant and that the “just say no” explanation is not, at least for some labels. Specifically, I understand that some independent labels have terminated their direct licenses with Sirius XM only after being acquired by a major label. As is detailed in the Written Direct Testimony of George White, when [REDACTED] was contacted about a renewal, [REDACTED] responded that it had been [REDACTED], and that [REDACTED] would not allow [REDACTED] to renew its direct license with Sirius XM.⁶⁸ The same thing happened with [REDACTED]
[REDACTED], which also was recently [REDACTED]. Although [REDACTED] appeared to be pleased with its direct-license relationship (i.e., the relationship apparently was profitable), the company advised Sirius XM shortly after [REDACTED] that it intended to

⁶⁶ Written Direct Testimony of George White, at ¶15.

⁶⁷ This effect was at times called the “forward shadow” in the *Web IV* proceeding. A related possibility is that record labels are coordinating with each other in an effort to pull rates up above competitive levels.

⁶⁸ Written Direct Testimony of George White, at ¶31.

terminate its direct license, a result of the same “directive” that led [REDACTED] to terminate its license.⁶⁹ This evidence fits well with the “fear of precedent” hypothesis.

In addition, it is my understanding that Sirius XM has repeatedly been told during negotiations with a number of potential direct licensors – including, among others, [REDACTED]

[REDACTED] – that a major sticking point from the label’s perspective is that the label does not want to be viewed as the “next Merlin.”⁷⁰ That is to say, the labels are very much concerned about entering into agreements that might be used in future CRB proceedings as benchmarks.

Taken collectively, this body of evidence makes clear that at least part of the reason that labels do not enter into direct licenses with Sirius XM is out of fear of breaking ranks from the rest of the industry and setting a precedent that might be used in future CRB proceedings. This evidence supports the “fear of precedent” hypothesis and is not consistent with the “just say no” hypothesis.

In addition, as is detailed in the Written Direct Testimony of Steven Blatter, record companies, including the major labels, are constantly in contact with Sirius XM programmers in an attempt to have their music played more on Sirius XM.⁷¹ This evidence is quite telling, and further cuts against the “just say no” hypothesis. If the statutory rate really were below the rate that the record labels would voluntarily accept, these record labels would not be going to such efforts to have their works performed on Sirius XM at the statutory rate. While this logic does not demonstrate that the majors would accept rates at the current direct license rates, it does strongly suggest that the current *statutory rate* is above the voluntary willingness-to-accept rate for the major labels.

All things considered, I consider the royalty rates in the Sirius XM direct licenses to be highly informative regarding the willing buyer/willing seller rate for the labels entering into those licenses. Because of the upward pull that the statutory license has on these direct licenses, the current rates can serve as a ceiling on reasonable rates for these labels (as the true competitive rate for these labels is almost certainly below the direct license rate). However, I cannot state with certainty that the major labels (and others that have not entered into direct

⁶⁹ Written Direct Testimony of George White, at ¶31.

⁷⁰ Written Direct Testimony of George White, at ¶30.

⁷¹ Written Direct Testimony of Steven Blatter, at ¶¶6-25, 56.

licenses) would enter into agreements with Sirius XM at or below the direct license rates. That being said, the available evidence strongly suggests that, when faced with effective price competition for performances on Sirius XM's satellite radio service, such that market conditions reflect workable competition outside of the shadow of the statutory license, the record companies that have not yet entered into a direct license would voluntarily accept rates at or below the current statutory rate.

D. Statutory Rates Based on Sirius XM's Direct Licenses

I now proceed to calculate the statutory rate implied by the Sirius XM direct licenses. Because we are dealing with the same sellers, same buyer, and the same rights, there are very few adjustments that are needed – these are very clean benchmarks. In addition, because these rates are set in the “shadow” of an 801(b) proceeding, namely, the *SDARS II* decision, there is no need to make any further adjustment to account for the 801(b) objectives – these objectives are already “baked in” to the agreements.

The starting point for computing a statutory rate using these agreements as a benchmark is to calculate the weighted average percentage-of-revenue rate for 2016 for the Sirius XM direct licenses in force. As shown in Table 1 above, this weighted average rate for 2016 is 9.42% of revenue. Because this is a percentage of revenue rate, there is no need to adjust the rate over time to account for changes in inflation – the royalty payments to SoundExchange will automatically adjust as Sirius XM revenue rises.

There is one adjustment that must be made to this rate – to account for the fact that Sirius XM does not take an administrative fee, whereas SoundExchange, when administering the statutory license, does. As discussed above, SoundExchange currently takes an administrative fee of 4.6%. Accounting for this difference leads to an appropriately adjusted rate derived from the Sirius XM direct licenses of 9.87% of revenue.⁷²

For the reasons discussed above, there is good reason to believe that, for those labels that entered into these direct licenses, this 9.87% is an upper bound on the competitive rate. Because of the magnet effect of the statutory license (see Appendix E), there is good reason to believe that this 9.87% rate is pulled up above competitive levels, and is therefore too high. Based on

⁷² The arithmetic is as follows: $9.87\% = 9.42\%/(1-4.6\%)$.

the information currently available to me, I cannot say with certainty that this rate would be accepted by the major labels (and other independent labels) in a workably competitive market. I simply do not have sufficient information to answer this question with confidence one way or the other.

To fill this void, I now turn to a related upstream market – the one evaluated in the *Web IV* proceeding. After carefully evaluating that market, including reviewing marketplace agreements entered into by independent labels and major labels and making the necessary adjustments, the Judges arrived at a per-play rate for subscription services of \$0.0022 that applies to all labels – both majors and independents. As I discuss in the following section, appropriate evaluation of the *Web IV* rate yields an industry-wide rate for satellite radio that is below the rate implied by Sirius XM’s direct license agreements.

10. The *Web IV* Rates and Underlying Licenses as Benchmarks

In the *Web IV* Decision, the Judges relied on a number of market benchmarks to establish rates for subscription non-interactive services.⁷³ One of these market benchmarks was the June 2014 agreement between the Music and Entertainment Rights Licensing Independent Network (“Merlin”) and Pandora Media, Inc. (“Pandora”), the “Merlin/Pandora Agreement.”⁷⁴ As discussed in the *Web IV* Decision, the Merlin/Pandora Agreement reflected the forces of competition at work – as the central feature of that agreement was Pandora agreeing to steer toward Merlin in exchange for a lower royalty rate.⁷⁵ The Judges accepted the Merlin/Pandora Agreement as a good benchmark for setting rates for non-interactive subscription music services, adopting the adjustments of that benchmark that I proposed.⁷⁶ In addition, in arriving at a royalty rate for non-interactive subscription webcasters, the Judges relied on a set of agreements between major record labels and interactive services. The rates derived from these agreements were adjusted by the Judges in several ways – including to account for the fact that those agreements did not embody the forces of competition at work. The Judges made an adjustment to convert the supra-competitive rates found in the interactive service benchmark agreements into

⁷³ *Web IV*, at 26404-05.

⁷⁴ *Web IV*, at 26405.

⁷⁵ *Web IV*, at 26366-67.

⁷⁶ *Web IV*, at 26405.

effectively competitive rates.⁷⁷ Using these agreements, the Judges arrived at a statutory royalty per-play rate of \$0.0022 per performance on subscription non-interactive services.⁷⁸ This rate is paid for performances of both major label and independent label sound recordings. As a result, the lingering question with the Sirius XM direct license benchmark agreements discussed above – whether the rates derived from those agreements should apply to major labels as well as independent labels – is not a concern when using the *Web IV* benchmark.

In what follows, I start with the *Web IV* subscription service rate – a rate based on marketplace agreements between multiple services and both major and independent labels – and derive an appropriate percentage-of-revenue royalty rate for Sirius XM.⁷⁹

Before turning to the mechanics of the calculations, I address one important issue in using the webcaster rate as a benchmark for calculating the satellite radio royalty rate. One might be concerned that satellite radio and webcasters are simply too different from each other for webcaster rates to serve as a good benchmark for satellite radio rates. As discussed in detail above, the two key factors to consider in using the *Web IV* benchmark rate are: (1) possible differences between a record company’s full marginal cost of a performance on Sirius XM and a performance on a webcasting service (reflecting differences in promotional and substitution effects); and (2) possible differences in ability to steer between Sirius XM and webcasters.

In Section 10.B, I compare Sirius XM to webcasters along these two dimensions. The upshot of that analysis is that Sirius XM and webcasters are quite comparable along both dimensions. When this result is combined with the fact that the sellers in both markets are the same, the rights at issue are the same, and that the *Web IV* benchmark accounts for the forces of competition, it becomes clear that the *Web IV* benchmark is a very good benchmark for rate setting in this proceeding.

⁷⁷ *Web IV*, at 26404-05.

⁷⁸ *Web IV*, at 26404-05.

⁷⁹ In the analysis that follows, I use the subscription rate derived by the Judges in *Web IV*. If information becomes available to me suggesting that the lower ad-supported rate arrived at by the Judges in *Web IV* is a more appropriate rate for some or all of Sirius XM’s plays, I may modify my analysis accordingly.

A. Calculating a Percentage-of-Revenue Rate

The starting point for converting the *Web IV* rate into an appropriate Sirius XM rate is to translate the *Web IV* rate, which is a per-play rate, into a percentage-of-revenue rate that will give record labels the same effective payment per play for satellite radio as would the *Web IV* rate. This calculation involves four steps:

1. Compute the average number of sound recording performances (“plays”) per subscription per month on Sirius XM.
2. Multiply the resulting number of plays by the 2016 *Web IV* per-play rate, to arrive at the Sirius XM payment to record labels per subscription per month, if the record labels were compensated by Sirius XM at the 2016 *Web IV* per-play rate.
3. Calculate the average Sirius XM revenue per subscription per month for 2016.
4. Divide the Sirius XM payment to record labels per subscription per month by the average Sirius XM revenue per subscription per month to obtain the appropriate percentage of revenue rate.

1. Average Number of Plays of Music per Subscription per Month

As noted above, it is not currently possible for Sirius XM to directly track the size of the audience listening to its satellite service. As a result, to determine the number of plays per subscription per month, we must rely on an estimate. The most reliable estimate of which I am aware is the “Share of Ear” study conducted by Edison Research. “Share of Ear” is a survey of a representative national sample of thousands of Americans aged 13 and over. This survey was first conducted in the spring of 2014 and has been repeated quarterly since. The survey uses a diary methodology, in which respondents over the course of a day record their listening to all audio sources, including Sirius XM. The Edison “Share of Ear” study provides an estimate of the time that Sirius XM subscribers listen to the service in a week. This study also provides estimates of how much of that time is spent listening to music, as opposed to non-music content. In addition, the “Share of Ear” study captures listening done by individuals who are not subscribers. This additional information is necessary, as some individuals have access to a Sirius XM radio but are not subscribers, and we are looking to calculate the number of performances per subscription, not per subscriber. For example, there may be two individuals that share a car in which Sirius XM can be listened to, but only one subscription fee is paid. Because we are

looking for the amount of time spent listening to music per Sirius XM subscription, we need to capture the listening time of both the subscriber and the second individual that uses that car.⁸⁰

According to the “Share of Ear” survey, Sirius XM subscribers listen to 52.9 minutes of music on Sirius XM radios every day.⁸¹ Meanwhile, non-subscribers listen to an average of 1.7 minutes of music per day on Sirius XM (this average accounts for the many non-subscribers that never listen to Sirius XM and the relatively few non-subscribers that do listen to Sirius XM). When both sources of listening are accounted for, the “Share of Ear” survey reveals that there are 7.1 hours of listening to music content per Sirius XM subscription per week.⁸² I then proportionately scale the amount of listening per week to account for performances of sound recordings on comedy channels.⁸³ The result is 7.2 hours of performances of sound recordings per week per subscription, which implies 31.3 hours of performances of sound recordings per month per subscription.

To compute the number of sound recording *plays* per subscription per month, we need to know how many plays of recorded music Sirius XM makes per hour. In the regular course of business, Sirius XM keeps a count of the number of spins of recordings on each channel in a quarter. The number of spins per hour on each channel varies somewhat from channel to channel, given the average length of recordings for different genres of music and the amount of time when music is not playing on each channel.

The average number of plays per month also depends on the amount of listening across channels. That is something that Sirius XM cannot observe directly and which the company

⁸⁰ We need not capture the time spent listening by the second individual if that second individual is listening along with the subscriber, as the per-play rates used in this analysis are rates paid per stream, without accounting for the number of people listening to a particular stream. As a result, the approach I am taking will tend to overstate compensable listening, since I am double counting the performances heard simultaneously by the subscriber and the second listener.

⁸¹ Listening on the Sirius XM Internet service is not included because those performances are compensated under the *Web IV* statutory license.

⁸² The share of non-subscribers among respondents is 81.6% (with an additional 0.6% not identifying whether or not they were Sirius XM subscribers.). Thus, there are $60.7 = 52.9 + (81.6/17.8)*1.7$ minutes of listening to music per day to each Sirius XM subscription, which is equal to 7.1 hours per week.

⁸³ Based on the Internet reference channels, comedy channels account for 1.7% of listening to music and comedy channels combined. Thus the number of hours per week for both music and comedy channels can be estimated as $7.1 / (1 - 1.7\%) = 7.2$ hours per week.

does not measure through surveys. That being said, an estimate of the number of plays per channel can be obtained from two different sources.

The first approach is to use data from a survey conducted by Sirius XM that asked subscribers how frequently they listen to each music channel (that is, whether they listen to each channel once a day, once a week, etc.).⁸⁴ This survey can be used to compare the relative popularity of channels on the service.⁸⁵ Using these survey results to appropriately combine and weight the listening on the different channels yields a result of 15.26 plays of sound recordings per hour on music and comedy channels.

The second approach is to use data from Sirius XM's Internet service to estimate the relative popularity of the satellite channels.⁸⁶ Using these data to combine and weight the listening on the various music and comedy channels on the Sirius XM satellite service yields 14.67 plays per hour. The difference between the two estimates is based entirely on the different data sources used to weight the various Sirius XM satellite channels.⁸⁷

It is not clear which methodology gives a more accurate picture of average tracks per hour on the Sirius satellite service. The first approach – using the survey – will be biased upward to the extent that listening sessions are on average of shorter duration on channels that play a relatively high number of tracks per hour. Meanwhile, the second approach – using the Internet service – will be biased downward to the extent that listening on the Internet channels is skewed toward channels that perform relatively few tracks per hour, as compared to actual listening on the satellite service.

The midpoint of these two estimates is 14.97 plays per hour. This is the number I use in the computations that follow. Multiplying this average number of plays per hour by the

⁸⁴ Music Passion Study, May 2016.

⁸⁵ The survey did not ask about the length of each listening session. Lacking better information , I make the natural assumption that that all listening sessions are of the same length.

⁸⁶ This is the same approach used to calculate the share of each Sirius XM direct licensor.

⁸⁷ For example, 50s on 5, 60s on 6, Willie's Roadhouse (classic country) and Prime Country (80s/90s country) are all popular channels that play a relatively high number of tracks per hour (an average of 20.5 tracks per hour across the four channels). The estimated listening share for those four channels using the survey methodology is [REDACTED] but only [REDACTED] using the Internet methodology. Conversely, Symphony Hall (classical), Shade 45 (Eminem's hip-hop channel) and Spa (new age) play relatively few tracks per hour (7.4 on average). Those three channels have a combined listening share of [REDACTED] using the Internet methodology, but only [REDACTED] using the survey methodology.

estimated hours of listening to music and comedy per subscription per month gives a total number of sound recording performances per subscription per month of 469.

Note that this measure of performances per subscription per month includes both compensable and non-compensable sound recordings. At some point in the process of determining payments to SoundExchange, an adjustment must be made to account for the performance of non-compensable sound recordings, which includes pre-1972 recordings and recordings that are separately licensed through Sirius XM's direct license program. One approach would be to exclude those plays at this stage (i.e., before deriving a percentage of revenue rate). However, my understanding is that in the current regulations, non-compensable performances are accounted for not by reducing the applicable percentage rate, but by reducing the royalty obligation. Either approach would yield the same total payment to SoundExchange (although the percentage of revenue royalty rate would be different under the two approaches.) In anticipation that the Judges will use the same methodology this time, I have not made an adjustment here for the performance of non-compensable sound recordings. Doing this avoids double counting the deduction for those recordings.

2. Total Royalty Payment per Subscription per Month

As described above, the effective per-play rate for subscription services derived from market benchmarks in the *Web IV* proceeding is \$0.0022.

Multiplying the \$0.0022 per play rate by the 469 number of plays per subscription per month yields a royalty payment of \$1.032 per subscription per month.

3. Average Revenues per Subscription per Month

To estimate the Sirius XM revenues per subscription per month, I rely on a Sirius XM financial document created in the ordinary course of business that is used to forecast, among other things, Sirius XM's average revenue per user ("ARPU") over the next five years. As is detailed in this document, ARPU includes all subscription related revenues (including the separate subscriber invoice line item for U.S. Music Royalty Fees), but excludes other revenue sources, such as those earned from the sale of radios. As such, it is the appropriate measure of

revenue to use for calculating the satellite radio royalty rate. “Users” in the ARPU definition includes both paid and trial subscribers. The average ARPU forecast for 2016 is \$12.80.⁸⁸

4. Calculated Percentage-of-Revenue Rate

The final step in converting the *Web IV* subscription per-play rate into a Sirius XM percentage of revenue rate is to divide the royalty payments per subscriber per month – the \$1.032 calculated above – by Sirius XM’s monthly ARPU for 2016 of \$12.80. This analysis yields a percentage-of-revenue royalty rate of \$1.032/\$12.80 or 8.1 percent of revenue.

B. Potential Willing Buyer/Willing Seller Adjustments

The *Web IV* subscription rate serves as a good benchmark for a number of reasons. First, it is derived from agreements that either directly reflect the forces of competition (the Merlin/Pandora Agreement) or from agreements that were adjusted by the Judges to account for the lack of workable competition (the major label/interactive service agreements). Second, the agreements on which the *Web IV* subscription rates are based were between the same sellers – record labels – as are at issue here, and included agreements with both major and independent labels. Third, the rights at issue in *Web IV* are the same rights as are at issue here – the right to perform (and make copies of) sound recordings on a statutorily compliant non-interactive service. The only potential area of concern is that the buyer in the target market (Sirius XM) is not identical to the buyers in the benchmark market (webcasters). As I now discuss, this difference suggests that, if anything, the rate derived from the *Web IV* benchmark should be adjusted downward.

1. Differences in Promotion and Substitution

The first potential difference between Sirius XM and webcasters that is of relevance to rate setting is whether Sirius XM has a different impact on other record label revenue streams than do webcasters. The details of my analysis in this regard are set forth in Appendix D.

As explained in Appendix D, in a workably competitive market, a record label would agree to a lower royalty rate with Sirius XM than it would agree to provide to a webcaster if Sirius XM is either more promotional than webcasters (i.e., listening to Sirius XM generates

⁸⁸ Note that the Merlin/Pandora benchmark gives a rate for 2016, which the Judges determined would be adjusted for inflation in succeeding years. Hence the appropriate revenue measure for this computation is 2016 revenues, rather than forecast revenues over the next five years, which have a built-in inflation adjustment.

more additional revenues for record labels than does listening to a webcaster) or is less substitutional of other record label revenue streams than are webcasters (i.e., listening to Sirius XM takes away less from other record label revenue streams than does listening to webcasters).

On the promotion side of the equation, I am not aware of any evidence that suggests that Sirius XM is less promotional than webcasters. As is detailed in the Written Direct Testimony of Steven Blatter, there is good reason to believe that when a label's track is performed on Sirius XM's satellite service, that play promotes additional sales of CDs and downloads, as well as further listening on other services, such as Spotify.⁸⁹

On the substitution side, we have good empirical evidence – the survey conducted by Joe Lenski of Edison Research – that demonstrates that Sirius XM listening cannibalizes other record label revenue streams to a lesser extent than does listening to webcasters. The details of this analysis are set forth in detail in Appendix D. The main empirical point there is that Sirius XM is substituting to a far greater extent for terrestrial radio – where no royalty payments are made – than are webcasters. By the same token, webcasters are substituting more for interactive services – where relatively high royalty rates are paid – than is Sirius XM. Together, these two observations strongly suggest that a record label would offer a *lower* rate to Sirius XM in a workably competitive market than it would offer to a webcaster. I am not able to precisely quantify just how much lower the royalty rate would be, so I make no downward adjustment to the rate paid by webcasters. For this reason, the rate I calculate for Sirius XM may be too high.

2. Steering Ability

The second potential difference between Sirius XM and webcasters that must be explored is the difference in ability to steer. Unfortunately, we do not have any way to empirically test the relevant metric – the impact that steering on Sirius XM would have on its subscriber base, as measured by the percentage loss of revenue the service would suffer in response to a given amount of steering. We do know from the *Web IV* proceeding that Pandora has a significant ability to steer. We do not know if that is true for other webcasters.

There are some reasons to believe that Sirius XM can steer to a greater degree than webcasters, since Sirius XM's programmers have complete control over the sound recordings played on Sirius XM whereas many webcasters (including Pandora) rely on algorithms to select

⁸⁹ Written Direct Testimony of Steven Blatter, at ¶¶6-54.

sound recordings that account for user preferences. Sirius XM's programmers have a great deal of flexibility to modify playlists, should they want to steer toward or away from a given label. As is demonstrated in Table 2 and the accompanying text, steering on Sirius XM is straightforward. Relatively minor adjustments would be needed, for example, to steer toward Warner by 15%. On the other hand, there are some reasons to believe that at least certain webcasters, such as Pandora, can steer to a greater degree than can Sirius XM. Because Pandora creates individualized stations, it can steer heavily on stations where Pandora believes that the listener would not be particularly sensitive to the tracks being played, and not steer at all for a particular listener that Pandora expects would react negatively to steering.

Because I do not have empirical data to quantify the difference (if any) in steering ability between webcasters and Sirius XM, I assume that Sirius XM and webcasters can steer to the same degree.⁹⁰ As a result, I make no adjustment for this potential difference between webcasters and Sirius XM as buyers of sound recording performance rights, leaving the Sirius XM royalty rate at the 8.1 percent of revenue calculated above.

C. Modifications to Account for the 801(b) Factors

The rate just derived above is my best estimate of the willing buyer/willing seller rate that Sirius XM would pay to record companies in a workably competitive market. This rate is derived from the *Web IV* subscription rate (which itself is derived from marketplace agreements). The final step in my analysis is to determine whether, from an economics perspective, this willing buyer/willing seller rate needs to be modified to account for the 801(b)(1) policy objectives. I address each objective in turn.

The Availability Objective: As is detailed above, from an economic perspective, this first policy objective has two components: (i) creating the proper incentives for the continued production of sound recordings; and (ii) creating the proper incentives for the continued creation of, and investment in, means by which the public can access sound recordings.

⁹⁰ In the Merlin/Pandora Agreement, Pandora received a 12% discount associated with steering. If Sirius XM is found to have a lesser ability to steer than webcasters, this 12% figure could be used as a practical upper bound to the upward adjustment to be applied to Sirius XM's rates due to that lesser ability. For example, if steering were found to be twice as costly to Sirius XM as to webcasters, a 6% upward adjustment to the *Web IV* rate might be applied, raising the rate from 8.1 percent of revenue to 8.6 percent of revenue. However, importantly, if Sirius XM's assumed lesser ability to steer would make the target market fail to be workably competitive, no upward adjustment should be made.

As discussed previously, one element of this tradeoff is the extent to which performances of sound recordings on Sirius XM promote or substitute for other record label revenue streams. The analysis in Appendix D shows that Sirius XM is less substitutional for other record label revenue streams than are webcasters. This suggests a downward modification to the willing buyer/willing seller rate derived from a webcaster benchmark is warranted, if no adjustment has already been made to account for such differences. Due to difficulties in measuring its magnitude, I am not proposing any such adjustment.

The Fair Return/Fair Income Objective: I am unaware of any substantial evidence that the *Web IV* benchmark and the marketplace agreements on which it is based, suitably transformed into a percentage of revenue rate for Sirius XM, fail to give a fair return to copyright holders and a fair income to Sirius XM. Accordingly, I am not proposing any adjustment based on this 801(b)(1) policy objective.

The Relative Contribution Objective: For purposes of adjusting a willing buyer/willing seller rate, some comparison of the “relative contributions” of the record labels and Sirius XM is necessary. When properly adjusted to account for the wide variety of means that record labels have to recover the cost of their contributions – the creation of sound recordings – the contribution of the record labels is almost certainly significantly less than the contribution that Sirius XM plans to make over the 2018-2022 license period, including the launching of two new satellites and improving its repeater network.⁹¹

The nature of the balancing called for by this policy factor does not readily lend itself to quantifying the degree to which the 8.1 percent rate derived above warrants downward adjustment. I am left, at least based on the information currently available to me, to conclude simply that a proper accounting of this factor suggests that the rate generated by the foregoing benchmark approach overstates the rate implied by this 801(b)(1) objective.

⁹¹ The record label financials cited above (*supra* note 45) indicate that record label expenditures on artists and repertoire will be no more than [REDACTED] of revenue during the next license period. As shown in Figure 5, record label revenue is expected to reach about \$7.4 billion in 2016, of which satellite radio accounts for about [REDACTED]. Thus, if expenditures on the creation of new sound recordings are [REDACTED] of \$7.4 billion, or roughly [REDACTED] million, then revenue from satellite radio royalties accounts for about [REDACTED] of that total, or [REDACTED]. Meanwhile, Sirius XM’s expenditures on new satellites alone is forecast to be [REDACTED] over the next license period, or [REDACTED] per year.

The Minimization of Disruption Objective: As is discussed above, I am not aware of any evidence that suggests that either Sirius XM or the record industry would be “disrupted” should the Judges set rates in the range that I recommend.

From the record label perspective, Sirius XM simply accounts for too small of a percentage of overall record industry revenue for any lowering of the prevailing rates to have a disruptive impact on record companies – even considering that the rate I derive from the *Web IV* benchmark is below the rate currently paid Sirius XM. Sirius XM currently accounts for about [REDACTED] of overall record company revenue from recorded music, as shown in Figure 5. Therefore, a decline in the rate paid by Sirius XM from 11 percent of revenue to 8.1 percent of revenue would cause record company revenue to decline by about [REDACTED]⁹² From Sirius XM’s perspective, the lower rate I derive from the *Web IV* benchmark would obviously be a favorable development, not disruptive.

As a result, I do not recommend modifying the willing buyer/willing seller rate that I derive from the *Web IV* benchmark to account for the minimization of disruption objective.

D. Conclusions Based on the Web IV Benchmark

To summarize, the *Web IV* benchmark – which is derived from a variety of marketplace agreements – serves as a very strong basis for setting satellite radio royalty rates. The sellers and the rights are the same and the agreements on which the *Web IV* subscription rate is derived account for both major and independent labels and either directly reflect, or have been adjusted to reflect, the forces of competition at work. The only issues that potentially call for adjustment are (1) differences in the buyer between the target and benchmark market, and (2) accounting for the 801(b)(1) factors. While it is possible that the rate I calculated is slightly too low, because it is at least conceivable that Sirius XM has a lesser ability to steer than webcasters, the possibility that I have understated rates in this regard is more than offset by a number of assumptions I have made elsewhere in my analysis that tend to cause my proposed rates to be above the level of reasonable rates, including (a) not making a downward adjustment to account for the difference in substitution patterns as between Sirius XM and webcasters, and (b) not making any downward modifications to account for the 801(b)(1) objectives.

⁹² [REDACTED]

11. Conclusion

For the reasons set forth above, it is my opinion that reasonable royalty rates for Sirius XM, after accounting for the 801(b)(1) policy objectives, should be set in the range of 8.1 percent of revenue and 11 percent of revenue. Because the analysis that leads to the rate at the low end of this range is the most robust, I recommend setting rates towards the lower end of the range that I propose. Furthermore, as noted above, because this is a percentage-of-revenue rate, there is no need to adjust the rate over time. The royalty fees paid by Sirius XM will automatically grow along with Sirius XM's revenue.

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF CARL SHAPIRO

I, Carl Shapiro, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 19th day of October, 2016 in Berkeley, California.



Carl Shapiro

Appendix A: Curriculum Vitae of Carl Shapiro

April 2016

CARL SHAPIRO

Curriculum Vitae

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Professional Positions

Transamerica Professor of Business Strategy

Haas School of Business
University of California at Berkeley, 1994 - present

Professor of Business and Economics

Haas School of Business and Department of Economics
University of California at Berkeley, 1990 - present

Member of the President's Council of Economic Advisers

Executive Office of the President, The White House, 2011-12

Deputy Assistant Attorney General for Economics

Antitrust Division, U.S. Department of Justice, 2009 - 2011

Director of the Institute of Business and Economic Research

University of California at Berkeley, 1998 - 2008

Deputy Assistant Attorney General for Economics

Antitrust Division, U.S. Department of Justice, 1995 - 1996

Chair, Economic Analysis and Policy Group

Haas School of Business
University of California at Berkeley, 1991 - 1993

Professor of Economics and Public Affairs

Woodrow Wilson School of Public and International Affairs and
Department of Economics, Princeton University, 1987 - 1990

Research Fellow

Center for Advanced Study in the Behavioral Sciences
Stanford University, 1989 - 1990

Visiting Scholar

Stanford Law School, Stanford University, 1989 - 1990

Assistant Professor of Economics and Public Affairs

Woodrow Wilson School of Public and International Affairs and
Department of Economics, Princeton University, 1980 - 1987

Visiting Fellow

Institute for International Economic Studies, University of Stockholm, 1986

Visiting Assistant Professor of Economics and Public Policy

Graduate School of Business, Stanford University, 1982 - 1983.

Economist

Bureau of Economics, Federal Trade Commission, Summer 1980

Education

Ph.D. Economics, M.I.T., 1981

M.A. Mathematics, University of California at Berkeley, 1977

B.S. Economics, M.I.T., 1976

B.S. Mathematics, M.I.T., 1976

Publications

[Patent Remedies](#), *American Economic Review Papers & Proceedings*, forthcoming, 2016.

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[Unilateral Effects Analysis After Oracle](#), Roundtable Discussion (multiple participants), *Antitrust Magazine*, Spring 2005.

[The Role of Innovation in Competitive Analysis](#), Chair's Showcase Program (multiple participants), *Antitrust Source*, July 2005.

[Linux Adoption in the Public Sector: An Economic Analysis](#), 2003, with Hal R. Varian.

[Competition Policy and Innovation](#), Prepared for the Directorate for Science, Technology, and Industry, OECD, STI Working Paper No. 2002/11, April 2002, www.oecd.org/sti.

U.S. Government Information Policy, with Hal R. Varian, prepared for the Office of the Assistant Secretary of Defense (Command, Control, Communications and Intelligence), U.S. Department of Defense, August 1997.

Economic Models of Counterfeiting, with Gene M. Grossman, Report to the U.S. Department of Labor, International Labor Affairs Bureau, January 1988.

Book Reviews

Review of *Bandwagon Effects in High-Technology Industries* by Jeffrey H. Rohlfs, in the *Journal of Economics*, 2003.

Review of *Will E-Commerce Erode Liberty? Review of Code and Other Laws of Cyberspace*, by Lawrence Lessig, in the *Harvard Business Review*, May/June 2000.

Review of *Sunk Costs and Market Structure: Price Competition, Advertising, and the Evolution of Concentration*, by John Sutton, in the Journal of Economic Literature, 1993.

Review of *Controlling Industrial Pollution: The Economics and Politics of Clean Air*, by Robert W. Crandall, in the Journal of Economic Literature, June 1984, pp. 625-627.

Other Professional Activities

Member, Long Range Planning Committee, Antitrust Sectionm, American Bar Association, 2015-2016.

Member, Foreign Investment, Sectoral Review, and Trade Policy Task Force, Antitrust Section, American Bar Association, 2013- 2015.

Member, Academic Research Council, Housing Finance Center, Urban Institute, 2013 - present

Member, Budget and Interdepartmental Relations Committee, Berkeley Division of the Academic Senate, University of California, 2004-2007.

Member, University of California, Committee on Academic Personnel, 2006-2008.

Member, Economic Evidence Task Force, Antitrust Section, American Bar Association, 2005-2006.

Member, Program Committee, American Economic Association Annual Meetings, 2006.

Member, Market Surveillance Committee, California Independent System Operator, 1997-2000, see <http://www.caiso.com/>.

Member, Advisory Board, *Journal of Economic Perspectives*, 1999-2002.

Member, Advisory Board, *Antitrust and Regulation Abstracts*, 1998-2002.

Member, Advisory Board, *Journal of Network Industries*, 1999-2001.

Vice-Chair, Economics Committee, Antitrust Section, American Bar Association, 1995 - 1998.

Editor, *Journal of Economic Perspectives*, 1993 - 1995.

President, Industrial Organization Society, 1995 - 1996.

Member, Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation, U.S. Department of Defense, 1993 - 1994.

Co-Editor, *Journal of Economic Perspectives*, 1986 - 1993.

Associate Editor, *Quarterly Journal of Economics*, 1984 - 1987.

Associate Editor *Rand Journal of Economics*, 1984 - 1986.

Director, John M. Olin Program for the Study of Economic Organization and Public Policy, Princeton University, 1988 - 1989

Associate Director, John M. Olin Program for the Study of Economic Organization and Public Policy, Princeton University, 1987 - 1988.

Honors, Fellowships, and Research Grants

Susan Bies Lecture on Economics and Public Policy, Northwestern University, 2015.

Distinguished Fellow, Industrial Organization Society, 2013.

National Science Foundation Graduate Research Fellowship Program, 60th Anniversary Awardee (one of 60 Awardees selected from over 45,000 Fellows)

Runner-Up, Teaching Prize, MBA Program, Haas School of Business, U.C. Berkeley, 1999-2000.

National Science Foundation Research Grant #SES-9209509, Technology Transitions with Network Externalities, 1992-1994, (with Joseph Farrell).

National Science Foundation Research Grant #SES-8821529, The Evolution of Network Industries, 1989-1991, (with Joseph Farrell).

Center for Advanced Study in the Behavioral Sciences, Stanford California, Research Fellowship, 1989-1990.

National Science Foundation Research Grant #SES-8606336, Issues of Industrial Organization in International Trade, 1986-1988, (with Gene M. Grossman).

Alfred P. Sloan Foundation Research Fellowship, 1985-1987.

National Science Foundation Research Grant #SES-8408622, Technological Competition and International Trade, 1984-1986, (with Gene M. Grossman).

National Science Foundation Research Grant #SES-8207337, Signals of Product Quality, 1982-1984.

National Science Foundation Graduate Fellowship, 1977-1980.

University of California Fellowship, 1976-1977.

Phi Beta Kappa and Sigma Xi, M.I.T., 1976.

Affiliations

American Economic Association

American Bar Association

Consulting Activities

Senior Consultant, Charles River Associates, 1998 – 2009 and 2012 – present

Principal and Co-Founder, The Tilden Group, LLC, 1996 - 1998.

Extensive experience working with private parties and government agencies on matters involving antitrust, regulation, and intellectual property.

Appendix B: Testimony of Carl Shapiro During the Past Four Years

October 2016

1. Intellectual Ventures I LLC et al. v. Altera Corporation et al.

Civil Action No. 10-1065-LPS

District of Delaware

Testified in deposition on behalf of Altera Corporation and Xilinx, Inc., 2013

2. United States of America v. Bazaarvoice Inc.

Civil Action No. 13-cv-00133-WHO

Northern District of California

Testified in deposition and at trial on behalf of the United States of America, 2013.

3. Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV)

Case No. 14-CRB-0001-WR (2016-2020)

United States Copyright Royalty Judges, The Library of Congress, Washington, D.C.

Testified in deposition and at trial on behalf of Pandora Media, Inc., 2015.

4. Federal Trade Commission, et. al. v. Staples, Inc. and Home Depot, Inc.

Civil Action No. 15-2115-EGS

District of Columbia

Testified in deposition and at trial on behalf of the Federal Trade Commission, 2016.

Appendix C: Documents Considered

CRB Hearing and Case Law Documents

ASCAP v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 576 (2d Cir. 1990)

SDARS I.pdf

SDARS II.pdf

SDARS II Modification.pdf

United States v. ASCAP (In re Applications of RealNetworks, Inc., Yahoo! Inc.), 627 F.3d 64, 76 (2d Cir. 2010)

Web I.pdf

Web II.pdf

Web III.pdf

Web III Remand.pdf

Web IV.pdf

Written Direct Testimony of Carl Shapiro, Web IV

Written Rebuttal Testimony of Carl Shapiro, Web IV

Revised Amended Written Direct Testimony of Roger G. Noll, Sat II

Revised Written Rebuttal Testimony of Roger G. Noll, Sat II

Academic Articles & Books

Mark Armstrong, Chris Doyle, and John Vickers (1996), "The Access Pricing Problem: A Synthesis," 44 *Journal of Industrial Economics* 131

William Baumol and Gregory Sidak (1994), "The Pricing of Inputs Sold to Competitors," 11 *Yale Journal on Regulation* 170

Horizontal Merger Guidelines (August 2010).pdf

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Jean-Jacques Laffont and Jean Tirole (2000), *Competition in Telecommunications*. The MIT Press, Cambridge, MA

Carl Shapiro and Hal Varian (1999), *Information Rules: A Strategic Guide to the Network Economy*. Harvard Business School Press, Harvard, MA

Hon. David R. Strickler (2015), "Royalty Rate Setting For Sound Recordings By The United States Copyright Royalty Board: The Judicial Need For Independent Scholarly Economic Analysis," 12 *Review of Economic Research on Copyright Issues* 1

Richard Watt (2010), "Fair Copyright Remuneration: The Case of Music Radio," 7 *Review of Economic Research on Copyright Issues* 21

Richard Watt (2011), "Revenue Sharing as Compensation For Copyright Holders," 8 *Review of Economic Research on Copyright Issues* 51

Gregory Werden (1998), "Demand Elasticities in Antitrust Analysis," 66 *Antitrust Law Journal* 363

Studies & Reports

2015-SoundExchange-Fiscal-Report-Final.pdf

Music Passion Study.pptx

Music Passion Survey (May 2016), file "Main Report.xlsx"

RIAA 2012 and 2013 End of Year Revenue Data, file "RIAA 2012 and 2013 End of Year Revenue Data"

RIAA 2013 and 2014 End of Year Revenue Data, file "2013-2014_RIAA_YearEndShipmentData.pdf"

RIAA 2013 and 2014 Mid-Year Revenue Data, file "RIAA 2013 and 2014 Mid-Year Revenue Data"

RIAA 2014 and 2015 End of Year Revenue Data, file "RIAA 2014 and 2015 End of Year Revenue Data"
RIAA 2014 and 2015 Mid-Year Revenue Data, file "RIAA 2014 and 2015 Mid-Year Revenue Data"
RIAA 2015 and 2016 Mid-Year Revenue Data, file "RIAA 2015 and 2016 Mid-Year Revenue Data"
Share of Ear Survey - Q2 2016, file "Share of Ear Q2 weil.sav"
Edison_Research_Arbitron_Infinite_Dial_2014.pdf

Other

Sony Summary Management P&L, file "SoundX_000107585_RESTRICTED.xlsm"
SX Collections by Year 2012-2016 SOUNDX_000028618.xls
UMG Strategic Plan, file "SOUNDX_000045704.pdf"

Billboard article, "Streaming Helps Drive 8.1 Percent Growth in Revenue for U.S.", last accessed 18th October 2016.
<http://www.billboard.com/articles/business/7517904/streaming-8-percent-growth-recording-revenue-riaa-2016-half-year>
Spotify article, "Spotify Explained", last accessed 18th October 2016. <https://www.spotifyartists.com/spotify-explained/>

Written Direct Testimonies

Written Direct Testimony of Steven Blatter
Written Direct Testimony of Joe Lenski
Written Direct Testimony of James E. Meyer
Written Direct Testimony of Bridget Neville
Written Direct Testimony of Terrence Smith
Written Direct Testimony of George White

Sirius XM Documents

SDARS Play Count Consumption - 2015.xlsx
SDARS Play Count Consumption - 2016.xlsx
Sirius XM Usage Report for July 2016
Sirius XM Plays, file "DL contracts summary (2).xlsx"
Sirius XM Forecast - 2016 LRS plan, file "Consolidated Outputs - 2016 LRS Extract.xlsx"
Sirius XM Negotiation Status Report, file "RESTRICTED_SXM_DIR_00024467.xls"
Sirius XM Royalty Payments 2015, file "DL contracts summary.xlsx"
23046 Weil SXM - satellite share by channel - 9.7.2016.xlsx
Various direct license contracts

Appendix D

The Licensing of Recorded Music: Accounting for Promotion and Substitution Effects

In this Appendix, I show how to analyze promotion and substitution effects for a record company licensing its music to several downstream music services or sales channels that compete against each other to attract listeners using the basic economic concept of *opportunity cost*.

Full Marginal Cost

Consider a record company that licenses its music to a number of music services that in turn make music available to listeners. Let there be N music services indexed by $i = 1, 2, \dots, N$.

We denote the outputs of the various services by X_1, \dots, X_N . For ease of exposition, we define one unit of output as one performance of this record company's music for one listener. We denote the per-play royalty rates paid by the various services to the record company by r_1, \dots, r_N .

We are interested in the *full marginal cost* to the record company associated with one additional performance on music service #1. For this purpose, we take as given the royalty rates that this record company charges to the other music services, i.e., r_2, \dots, r_N . Some of these royalty rates may be set by statute, such as the zero rate that record companies charge to terrestrial radio. Some of these royalty rates may be set by regulation, such as the *Web IV* rate for webcasters.

As I now explain, the full marginal cost to the record company associated with one more performance on service #1 has two components: a *direct marginal cost* and an *opportunity cost*.

The *direct marginal cost* to the record company of one additional performance on a given service is what economists normally call the marginal cost associated with that service. We denote the direct marginal cost to the record company of an additional performance on service i by MC_i . For some services, e.g., satellite radio services and webcasting, this marginal cost is zero.

The record company's profits from all N services are given by:¹

$$\pi = \sum_{i=1}^N (r_i - MC_i)X_i$$

Differentiating this with respect to X_1 , the number of performances on service #1, gives

$$\frac{d\pi}{dX_1} = (r_1 - MC_1) + X_1 \frac{dr_1}{dX_1} + \sum_{i=2}^N (r_i - MC_i) \frac{dX_i}{dX_1}$$

Collecting terms, we can write this as

¹ More precisely, we are measuring the record company's total gross margin that is available to cover its fixed costs, including the costs it incurs to develop new music.

$$\frac{d\pi}{dX_1} = \left[r_1 + X_1 \frac{dr_1}{dX_1} \right] - [MC_1 + \sum_{i=2}^N (r_i - MC_i)D_{1i}] \quad (D.1)$$

where $D_{1i} \equiv -\frac{dx_i}{dx_1}$ is the *diversion ratio* from service #1 to service i , meaning the number of units *lost* on service i if one more unit is sold on service #1.² The diversion ratio is positive if service #1 *substitutes* for service i . Alternatively, the diversion ratio is negative if service #1 *promotes* service i .³

Using the standard notation for marginal revenue, $MR_1 \equiv r_1 + X_1 \frac{dr_1}{dX_1}$, where the record company's revenue from service #1 is given by $R_1 = r_1 X_1$, we can write equation (D.1) as

$$\frac{d\pi}{dX_1} = MR_1 - [MC_1 + \sum_{i=2}^N (r_i - MC_i)D_{1i}] \quad (D.2)$$

Equation (D.2) is a variation on the classic textbook expression, $d\pi/dX = MR - MC$.

The term in brackets on the right-hand side of equation (D.2) is the *full marginal cost* to the record company of one additional performance on service #1.

$$Full\ MC_1 = MC_1 + \sum_{i=2}^N (r_i - MC_i)D_{1i} \quad (D.3)$$

Interpretation of Full Marginal Cost Expression

We now discuss the interpretation of equation (D.3) and its implications.

The first term on the right-hand side of equation (D.3) is the *direct marginal cost* to the record company of one additional performance on service #1. The second term on the right-hand side of equation (D.3), the summation, is the *opportunity cost* to the record company of one additional performance on service #1. The *full marginal cost* to the record company of one additional performance on service #1 is the sum of the direct marginal cost and the opportunity cost.

The opportunity cost measures how an additional performance of the record company's music on service #1 affects that record company's profits from the *other* services. The record company has a positive opportunity cost when an incremental performance on service #1 *substitutes* for profitable performances on other services. The seller has a negative opportunity cost when an incremental performance on service #1 *promotes* profitable performances on other services.

² If one thinks of the record company setting the royalty rate charged to service #1, the diversion ratio can equally be written as $D_{1i} \equiv -(\frac{dx_i}{dp_1})/(\frac{dx_1}{dp_1})$. This diversion ratio is a simple transformation of the traditional cross-elasticity of demand. See, for example, Gregory Werden, "Demand Elasticities in Antitrust Analysis," 66 *Antitrust Law Journal* 363 at 405 (1998).

³ These diversion ratios include "direct diversion," when a user switches some of her listening of this record company's music from one service to another. They also include "indirect diversion," such as when a user shifts her listening to terrestrial radio and that listening in turn promotes (say) other listening that generates record-company revenue.

We can understand equation (D.3) better by looking at the term in the summation corresponding to service i , namely $(r_i - MC_i)D_{1i}$. This expression is the product of two terms: (1) the gross margin that the record company earns from performances of its music on the service i , which is $(r_i - MC_i)$, and (2) the diversion ratio from performance of the record company's music on service #1 to performance of this record company's music on service i , which is D_{1i} .

Adding up these $(r_i - MC_i)D_{1i}$ terms across all other services gives the opportunity cost incurred by the record company when its music is played one more time on service #1. A given service i contributes more to opportunity cost, the more profitable are the performances on that service to the record label, i.e., the larger is $r_i - MC_i$, and the more that service #1 substitutes for the other service, i.e., the larger is D_{1i} .

What about promotional effects? If service #1 *promotes* service i , then an additional performance on service #1 causes more performances on service i . This corresponds to $D_{1i} < 0$, which implies that the term $(r_i - MC_i)D_{1i}$ is negative as well. This captures the notion that the promotional effect is a benefit to the record company, which appears here as a negative opportunity cost.

Relationship to the Literature

Equation (D.2) is well-known and well-understood in the economics literature. The fact that a supplier bears an opportunity cost when selling more of a given product reduces the profits it earns on other products is the basis for the textbook rule regarding multi-product monopoly pricing. Equation (D.2) also is closely related to the classic Ramsey Pricing rule, as applied to situations in which the demands presented by the various products or services interact. Furthermore, the notion of opportunity cost emphasized here has been extensively developed in the literature on regulated access pricing, especially the literature of the “Efficient Component Pricing Rule,” or ECPR.⁴

Setting Equation (D.2) equal to zero gives the textbook multi-product pricing equation. This equation, in one form or another, can be found in a number of places in the literature on multi-product pricing, network access pricing, and Ramsey pricing. Laffont and Tirole (1994, pp. 1676-1679) derive one version of this pricing rule in the context of Ramsey Pricing. They introduce “price superelasticities” to capture the opportunity cost terms shown above. Laffont and Tirole (2000, pp. 102-104) provide a simplified treatment of this analysis. Armstrong, Doyle and Vickers (1996, p. 139) offer a similar development, emphasizing the opportunity cost interpretation and the diversion ratio, which they call the “displacement ratio.”

Much of this literature focuses on a regulated monopolist that controls an input that is essential for a related service. The canonical example is a monopolist controlling local telephone service (“the last mile”), which is an essential input into long-distance telephone service. In that context,

⁴ See, for example: Jean-Jacques Laffont and Jean Tirole (1994), “Access Pricing and Competition,” *European Economic Review*, 38:1673-1710; William Baumol and Gregory Sidak (1994), “The Pricing of Inputs Sold to Competitors,” *Yale Journal on Regulation*, 11:170-202; Mark Armstrong, Chris Doyle, and John Vickers (1996), “The Access Pricing Problem: A Synthesis,” *Journal of Industrial Economics*, 44:131-150; and Jean-Jacques Laffont and Jean Tirole (2000), *Competition in Telecommunications*, MIT Press (especially Chapter 3.2.2, “Efficient Access Pricing: A Level Playing Field,” and Chapter 3.2.5, “Relationship to the Efficient Component Pricing Rule”).

one can ask what price the profit-maximizing monopolist would charge to long-distance rivals for access to the local telephone service, if the monopolist over local service also competes in the long-distance market. One also can ask about the price at which the monopolist over local service should be required by regulators to provide access to its long-distance rivals. The ECPR offers one answer to this question, based on opportunity cost.

That setting may appear different from the one studied above, in which a record company sets prices to a number of downstream music services, since the monopolist over local telephone service is *vertically integrated* into the downstream product (long distance service), while the record company does not compete in the downstream market. However, the model developed here is general enough to apply whether or not the upstream input supplier is integrated into the downstream market.

The model developed above can easily handle the vertically integrated firm: one simply defines one of the downstream services to be the input supplier's own downstream offering. With that definition, the opportunity cost of selling the input to a downstream rival is equal to the margin earned by the integrated firm on its own downstream service multiplied by the diversion ratio between the rival's downstream service and the integrated firm's own downstream service.

Put simply: the basic economic point involving opportunity cost developed above applies whether the input supplier offers its own downstream service or sells its input to others who provide that service, or both. Indeed, the theory also can easily accommodate hybrid cases, such as when the input supplier has a partial equity stake in a downstream service. This fact pattern arises when a record company has an partial ownership stake in a downstream music service.

For the purposes of this proceeding, the key point is that, other things equal, a record company will offer a lower royalty rate to a service that promotes other forms of listening that generate profits for that record company, and a higher royalty rate to a service that is a substitute for those forms of listening. Moreover, the royalty rate that the record company will offer to a given service will tend to increase if the profit rate earned by the record company on substitute services is higher. Equation (D.3) shows how to quantify these differences using margins and diversion ratios, which together determine opportunity cost.

Application to the Current Proceeding

We now apply this analysis to show that the full marginal cost to a record company of an additional performance on Pandora is greater than the full marginal cost to that record company of an additional performance on Sirius XM.

Difference in Full Marginal Cost

Represent Pandora with the label $i = P$ and Sirius XM with the label $i = X$. The direct marginal cost for the record company is zero on Pandora and Sirius XM, so $MC_P = MC_X = 0$. We then have

$$\text{Full } MC_P - \text{Full } MC_X = \sum_{i \neq X, P} (r_i - MC_i)[D_{Pi} - D_{Xi}] + (r_X D_{PX} - r_P D_{XP}) \quad (\text{D.4})$$

We have obtained survey data that can be used to quantify the difference in full marginal costs between Sirius XM and Pandora using this formula.

Edison Research conducted a phone survey of users of Sirius XM and Pandora.⁵ Users of each service were asked, if that service were no longer available, how much of their listening time on that service would be reallocated to various alternative sources of audio media. The survey results are shown in Table D.1:

Table D.1: Reallocation of Listening Time to Alternative Audio Media

Allocation to Medium	Allocation of Time From:	
	Pandora	Sirius XM
AM/FM radio	24.4%	40.8%
Interactive streaming	16.6%	7.8%
Non-interactive streaming	11.7%	14.3%
Sirius XM	5.3%	---
Podcasts	2.5%	2.4%
CDs and downloads	26.3%	23.1%
Other	4.4%	1.7%
Total allocation to alternative media	91.2%	90.0%

Table D.1 show the reallocations of listening time from Pandora and Sirius XM, respectively, to alternative media, as measured by the Edison survey. Looking at the first row of the table for AM/FM radio, Pandora listeners reported that 24.4% of their listening time would shift to AM/FM radio if Pandora were no longer available. For Sirius XM listeners, AM/FM radio would get 40.8% of their lost Sirius XM listening time. In this sense, over-the-air radio is a much closer substitute for Sirius XM than it is for Pandora. Meanwhile, interactive streaming is a closer substitute for Pandora (16.6% of lost listening time) than for Sirius XM (7.8%). The reallocations from Pandora and Sirius XM to other alternative media are fairly similar. Note that the combined reallocation to all alternatives listed (including a catch-all category, “Other”) sums to less than 100% because some listeners stated that they would listen to less audio in total if Pandora or Sirius XM were unavailable.

This survey question is informative regarding the diversion ratios D_{Pi} and D_{Xi} between Pandora and Sirius XM respectively, and the various other forms of audio listening as indexed by i .⁶ The survey elicited information about substitution patterns, but not about promotional patterns. In

⁵ Written Direct Testimony of Joe Lenski, at 2.

⁶ The survey results do not directly correspond to diversion ratios associated with substitution between music services, because the “marginal” customers who would drop a subscription service in response to a price increase might differ from the average customer responding to the survey when it comes to how they would reallocate their listening time if they were no longer using a service. Evidence of switching behavior not induced by price is often used as a proxy for diversion ratios.

my analysis here I assume that Sirius XM is equally promotional to Pandora and focus on comparing Sirius XM and Pandora in terms of their substitutional effects.

The allocations reported in Table D.1 measure diversion ratios from *overall* Pandora and Sirius XM listening to alternative media, but we are interested in diversion ratios from Pandora and Sirius XM listening of music from a specific record company to alternative media. The latter are smaller than the former, because some of the lost listening to Sony music on Pandora (for example) when Pandora steers away from Sony comes at the expense of listening on Pandora to music from other record companies, with no change in total listening on Pandora.

We can define the “expansion factor,” E_P to be the share of additional listening on Pandora to music from the record company in question that reflects additional listening on Pandora overall, and not just a shift in the mix of Pandora listening toward that record company. With this definition, the diversion ratios from Pandora to the other music services are equal to the reallocation shares shown in Table D.1 multiplied by E_P . The same logic applies to Sirius XM with the factor E_X . Assuming that Pandora and Sirius XM have comparable expansion factors implies that $E_P = E_X$, which I simply write as E . The diversion ratios in equation (D.3) are equal to the reallocation shares shown in Table D.1 multiplied by the expansion factor E .

We are now ready to compare a record company’s full marginal cost at Pandora vs. Sirius XM. Note that $Full\ MC_P$ and $Full\ MC_X$ are both smaller than measured here due to promotional effects we are not measuring, but we are properly evaluating the difference between the two, $Full\ MC_P - Full\ MC_X$, under our working assumption that the two services are equally promotional.

Turning to the data in Table D.1, we see that apart from over-the-air radio and interactive streaming, the differences in reallocation shares between Pandora and Sirius XM are small. This implies that the $r_i[D_{Pi} - D_{Xi}]$ term for each of these alternative forms of media is relatively small. Moreover, for CDs and downloads, Podcasts, and Other, the diversion ratio for Pandora users is larger than for Sirius XM users, so (to the extent that Podcasts and Other generate some incremental revenue for record labels) dropping these terms will underestimate the extent to which the full marginal cost for Pandora exceeds that for Sirius XM.

The same is true for non-interactive streaming and Sirius XM when viewed together. The contribution these services make to a record company’s full marginal cost of licensing to Pandora is equal to $E * (r_P * 11.7 + r_X * 5.3)$. The contribution these services make to a record company’s full marginal cost of licensing to Sirius XM is equal to $E * r_P * 14.3$. The Pandora term is at least as large as the Sirius XM term if $r_X > 0.49 * r_P$, i.e., if the equivalent per-play rate for Sirius XM is at least half as large as the *Web IV* rate. This condition is satisfied for the rates that Sirius XM has been paying and for the rates that I am proposing (and for any higher rates).

The largest driver of the difference between the full marginal cost for Pandora and Sirius XM is diversion to interactive streaming services.⁷ The reallocation of listening from Pandora to

⁷ The difference in terrestrial diversion between Sirius XM and Pandora does not enter directly into our calculations, since listening on terrestrial radio earns no revenues for record companies. But this difference is reflected (in part) in the higher diversion from Pandora to interactive streaming services. Since the diversion from Sirius XM to all other forms of audio media, at 90.0%, is very close to the comparable number of Pandora, at 91.2%, the greater

interactive streaming services is 16.6%, while for Sirius XM it is 7.8%; the difference is 8.8%. Following equation (D-4), this difference needs to be multiplied by the per-play rate for interactive services. The blended per play rate for all interactive streaming media can be computed by combining revenue information from RIAA with play counts from Nielsen.⁸ The resulting per play rate for the first half of 2016 is about \$0.0058 per-play. This rate can be corroborated by two alternative sources. One is the discussion of the interactive services benchmark used by SoundExchange in *Web IV*, which involves a comparable rate of \$0.0052 per play.⁹ The other is the royalty rate range reported by Spotify, by far the largest interactive streaming service.¹⁰

Multiplying the \$0.0058 per-play rate by the difference in allocation shares from Table D-1 of 8.8% gives a difference between Pandora and Sirius XM of \$0.00051 per play.¹¹ This corresponds to 23% of the per-play rate of \$0.0022 that Pandora pays in 2016 for listening by Pandora subscribers.

This figure must be multiplied by the expansion factor E to obtain a difference in the full marginal cost between Pandora and Sirius XM. I lack data on the expansion factor E , but the calculations reported above imply that regardless of the expansion factor, the full marginal cost to a record company of a performance on Sirius XM is less than on Pandora. I am unable to further quantify this effect but it does point in direction of a *downward* adjustment from the Pandora rate to the Sirius XM rate.

diversion from Sirius XM to terrestrial radio (40.8% vs. 24.4%) necessarily means a greater diversion from Pandora to *some* other forms of audio media, just as a matter of arithmetic. The majority of that difference of 16.4% shows up in the greater diversion from Pandora to interactive listening, where we see a difference of 8.8% (16.6% - 7.8%).

⁸ See <http://www.billboard.com/articles/business/7517904/streaming-8-percent-growth-recording-revenue-riaa-2016-half-year>.

⁹ The SoundExchange proposed per-play rate based on an interactive service benchmark was \$.002376. This rate followed from three adjustments: (1) an interactivity adjustment, which divided the rate by 2; (2) an adjustment for compensable plays, which divided the rate by 1.1; and (3) an adjustment to get a blended rate for major and independent labels. Starting from the proposed \$.002376 rate and working backwards, the blended major/indie benchmark interactive services per-play rate is \$.002376 x 1.1 x 2 = \$.0052. *Web IV*, 26337-26339.

¹⁰ The “Spotify Explained” page on the Spotify website states that the effective payout rate per play to rights holders is between \$0.0060 and \$0.0084, where the range apparently depends on country and possibly other factors. Note that this rate combines payments for musical works and sound recordings. <https://www.spotifyartists.com/spotify-explained/>.

¹¹ The Pandora respondents to the survey were drawn from people who listen to both the subscription and ad-supported services. To the extent that subscription listeners have relatively higher diversion to interactive streaming services and relatively lower diversion to AM/FM radio, using the blended diversion ratios for both groups of customers will tend to underestimate the promotional adjustment for Sirius XM from the benchmark Pandora subscription rate.

Appendix E

The Magnet Effect of the Statutory License

In this Appendix, I show how the statutory rate acts like a “magnet,” pulling up the rates observed in direct licenses, if the statutory rate is set above the competitive level.

Basic Model

The model developed here involves a single record company, R , licensing its music to Sirius XM, but the principles developed here apply to any music service that has some control over the mix of music that it plays.

I assume for simplicity that Sirius XM is paying the statutory rate, t , to all other record companies, but the analysis here extends easily to situations in which some other record companies have entered into direct licenses with Sirius XM. Royalty rates are expressed as a pro-rated percentage of revenue.

We are considering an offer by Sirius XM to enter into a direct license with R . The direct license would compensate R at a royalty rate $r < t$. In return for this discounted rate, Sirius XM agrees to provide R with better access to programmers and more opportunities to promote new recordings, shifting the mix of music played on Sirius XM toward R .

Suppose that, in the absence of a direct license, the share of plays for record company R on Sirius XM would be s^* , which I call the *natural performance rate* for R . At the natural performance rate for R , Sirius XM would have N subscribers, each paying a subscription fee P , so Sirius XM’s revenues would be NP . Denote the number of performances per subscriber by X .

Under a direct license, Sirius XM steers in the direction of R . This means that Sirius XM increases R ’s share of plays on Sirius XM from s^* to $s^*(1 + \theta)$.

We allow for the possibility that steering toward R has an adverse impact on Sirius XM’s revenue. The revenue for Sirius XM if Sirius XM steers toward R is denoted by $NP(1 - \beta s^*)$. The parameter β measures the impact of steering on Sirius XM’s revenue. The impact of steering on the number of subscribers is proportional to the record company’s natural performance rate s^* because the magnitude of steering is proportional to that rate.

In general, Sirius XM’s revenues could decline due to steering because some customers cancel their service due to the change in programming or because Sirius XM lowers its subscription price to compensate customers for the change in music mix. I assume Sirius XM holds its price constant, so the decline in Sirius XM revenue results from the number of Sirius XM subscribers falling to $N(1 - \beta s^*)$. I also assume that the number of performances per subscriber is unaffected by steering. Neither of these assumptions is critical to my results.¹

¹ In particular, the magnet effect derived below is unchanged if Sirius XM compensates customers for the effect of steering by cutting its subscription price just enough to preserve the number of subscribers.

Steering impacts R both through an increase in R 's share of plays on Sirius XM and from any loss in Sirius XM subscribers resulting from steering. The overall “boost factor” that the direct license has on R 's plays on Sirius XM is denoted by k , where $1 + k = (1 - \beta s^*)(1 + \theta)$.

Let cP be the full marginal cost to the record company of X performances on Sirius XM, where full marginal cost is as defined in Appendix D, and let aP be the incremental cost to Sirius XM of one more subscriber, apart from the license fees Sirius XM pays for recorded music. We assume an incremental subscriber on Sirius XM is mutually profitable, so $1 - a - c > 0$.

Impact of a Direct License on the Record Company

We now look at how the direct license affects the record company's net profits.

If R is compensated under the statutory license, it earns royalties of NPs^*t . Sirius XM subscribers listen to Ns^*X performances of R 's music, which causes R to bear opportunity costs of NPs^*c . The record company's net profits associated with Sirius XM are thus equal to

$$\pi_{RT} = NPs^*(t - c).$$

If R signs a direct license, it earns royalties of $(1 + k)NPs^*r$, while its opportunity costs are $(1 + k)NPs^*c$. The record company's net profits from signing the direct license are equal to

$$\pi_{RD} = NPs^*(1 + k)(r - c).$$

The record company benefits from signing a direct license if and only if $\pi_{RD} \geq \pi_{RT}$, which simplifies to

$$(1 + k)(r - c) \geq t - c.$$

The record company will find it attractive to sign a direct license at a rate below the statutory rate if, but only if, the boost in plays it gets as a result of signing the direct license is large enough relative to the discount it accepts below the statutory rate. This inequality describes the relationship between the necessary boost and the direct-license rate. Solving for the direct-license rate gives

$$r \geq \frac{1}{1+k}t + \frac{k}{1+k}c. \quad (E.1)$$

For a direct license to be profitable for the record company, the direct-license rate must be at least as large as a weighted average of the statutory rate t and the record company's full marginal cost c , with the weights depending on the boost factor k .

Impact of a Direct License on Sirius XM

We now look at how the direct license affects Sirius XM's net profits.

If this record company operates under the statutory license, then Sirius XM's revenues are NP , its non-music incremental costs are NPa , and its music licensing payments are NPt , so Sirius XM's net profits are

$$\pi_{XT} = NP(1 - a - t).$$

Alternatively, if Sirius XM signs a direct license with R , then the number of Sirius XM subscribers falls to $N(1 - \beta s^*)$. Sirius XM's revenues fall to $NP(1 - \beta s^*)$, and Sirius XM's

non-music incremental costs fall to $NP(1 - \beta s^*)a$. Sirius XM's total royalties for recorded music if R signs a direct license are given by

$$NP(1 - \beta s^*)t - NPs^*(1 + k)(t - r)$$

where the second term reflects that Sirius XM pays r rather than t for the music licensed from R . Sirius XM's net profits are thus given by

$$\pi_{XD} = NP(1 - \beta s^*)(1 - a - t) + NPs^*(1 + k)(t - r).$$

Sirius XM finds the direct license profitable if, but only if, $\pi_{XD} \geq \pi_{XT}$ which simplifies to

$$(1 + k)(t - r) \geq \beta(1 - a - t).$$

Solving once again for r , net profits for Sirius XM increase as long as

$$r \leq t - \frac{\beta(1 - a - t)}{1 + k}. \quad (E.2)$$

Royalty Rate

Suppose that Sirius XM sets the royalty rate under the direct license, which R can then accept or decline. So long as the direct license is profitable to Sirius XM, the royalty rate it will offer to the record company \hat{r} , is the rate that R will just be willing to accept, which is the r that satisfies (E.1) with equality:

$$\hat{r} = \frac{1}{1 + k}t + \frac{k}{1 + k}c. \quad (E.3)$$

To see how this equation works, suppose that a direct license increases the number of performances of R 's sound recordings on Sirius XM by 25%, after accounting for any loss of subscribers, so $k = 0.25$. Then $\hat{r} = 0.8t + 0.2c$. If steering toward R on Sirius XM has no net impact on listening to R 's music on other services, then $c = 0$ and this becomes $\hat{r} = 0.8t$.² So, for example, if the statutory rate were 10% of revenue, $t = 0.1$, then the rate that Sirius XM would offer to the record company would be 8% of revenue.

Gains from Trade

Sirius XM and the record company will find it mutually attractive to enter into a direct license if, but only if, signing a direct license at royalty rate \hat{r} is attractive to Sirius XM. (Because of how we have defined \hat{r} , we know that the record label will find it attractive to enter into a direct license at this royalty rate). Substituting (E.3) into (E.2), the two parties will find a direct license to be mutually profitable so long as

$$\frac{1}{1 + k}t + \frac{k}{1 + k}c \leq t - \frac{\beta(1 - a - t)}{1 + k}$$

which simplifies to

² The full marginal cost is zero if the promotional and substitutional effects on R of Sirius XM subscribers hearing more of R 's music on Sirius XM just cancel each other out.

$$t \geq \frac{\beta(1 - a) + kc}{\beta + k} \quad (E.4)$$

Equation (E.4) tells us that signing a direct license will be in the mutual interest of Sirius XM and record label R so long as the statutory rate is sufficiently high – at least a weighted average of $1 - a$ and c , where the weights are β and k .

If there is no cost to Sirius XM from steering toward R , i.e., if $\beta = 0$, then there will be gains from trade as long as $t > c$. In other words, with costless steering, so long as the statutory rate exceeds R 's full marginal cost, Sirius XM and R will find it mutually beneficial to sign a direct license contract at a rate below the statutory rate. This result does not account for any precedential impact the direct license may have on the level at which the statutory rate will be set in the future. Such a “forward shadow” could deter the record company from entering into a direct license that would otherwise be mutually profitable.

If steering causes some loss of subscribers, $\beta > 0$, then Sirius XM and R will only agree to sign a direct license if the statutory rate is sufficiently above R 's full marginal cost. We can rewrite equation (E.4) as

$$t - c \geq \frac{\beta}{\beta + k}(1 - a - c)$$

This tells us that Sirius XM and R will agree to sign a direct license only if the statutory rate exceeds R 's full marginal cost by an amount that is proportional to $1 - a - c$, which reflects the combined loss in value when Sirius XM loses a subscriber. Moreover, as the cost of steering to Sirius XM increases, the gap between the statutory rate and the record company's full marginal cost that is sufficient to make a direct license profitable increases.

Magnet Effect with Sirius XM Making Offers

We now ask how the royalty rate offered by Sirius XM in a mutually profitable direct license changes when the statutory rate changes. This relationship follows directly from Equation (E.3):

$$\frac{d\hat{r}}{dt} = \frac{1}{1 + k}.$$

This implies that $d\hat{r}/dt > 1 - k$. This in turn tells us that the magnet effect is very strong: for plausible parameters, an increase in the statutory rate leads to nearly a one-for-one increase in the direct-license rate. For example, suppose that the direct license boosts the plays of the record label by 10% (after accounting for any drop in subscribers). This corresponds to $k = 0.10$. This means that the magnet effects operates at the level of at least 90%, so if the statutory rate increases by 1%, it will pull up the direct license rate by at least 0.9%. With a 20% boost, the magnet effect is at least 80%.

Magnet Effect with Bargaining

The magnet effect is even stronger in a bargaining model.

Equation (E.3) and the discussion just above tells us that the rate that the record company is willing to accept rises with the statutory rate at a rate of $1/(1 + k)$, which is at least $1 - k$.

Equation (E.2) tells us that the rate that Sirius XM is willing to pay rises with the statutory rate at a rate of $1 + \beta/(1 + k)$, which is *larger* than one. Thus if one assumes that R proposes a direct royalty rate, which Sirius XM can then accept or decline, an increase in the statutory rate would lead to a more than one-for-one increase in the direct license rate.

Under the Nash Bargaining solution, if Sirius XM's bargaining skill is such that Sirius XM gets a share γ of the gains from trade, then the magnet effect is a weighted average of these two rates:

$$\frac{dr}{dt} = \gamma \frac{1}{1+k} + (1-\gamma)(1 + \frac{\beta}{1+k})$$

Regardless of the relative bargaining skills of R and Sirius XM, the increase in the direct license rate will be somewhere between $1/(1+k)$ and $1 + \beta/(1+k)$.

This proves that for plausible parameter values the magnet effect is very strong, regardless of the relative bargaining skill of Sirius XM and the record company.

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

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND “PREEEXISTING”)
SUBSCRIPTION SERVICES (SDARS III))

WRITTEN DIRECT TESTIMONY OF JOE LENSKI
(On behalf of Sirius XM Radio Inc.)

1. Qualifications and Assignment

A. Qualifications

My name is Joe Lenski. I am the co-founder and Executive Vice President of Edison Research.

At Edison, we perform a variety of survey research, market research, and polling services for clients all over the world. Edison has a particular specialization in media research, including research concerning the radio and music industries. We have been retained by a broad array of prominent music, broadcast and Internet industry entities, among others, to perform timely market research and analysis. Clients have included: recording companies Atlantic Records, Columbia House, EMI, Epic Records, Island Records, London Records, Disney/Lyric Street, Maverick Records, Sony Records, Time Life Music and Warner Music; broadcast radio entities spanning the globe, including Global Radio UK, SCA in Australia, and Clear Channel (now iHeartMedia) and ESPN Radio in the United States; and Internet-based music services such as Pandora, Spotify, and TuneIn Radio. We also provide music research and strategic information to the United States government's international broadcasting services in a number of countries.

In the media research sector, Edison conducts a well-known annual survey entitled "The Infinite Dial" which, to my knowledge, is the largest and longest running study of consumer behaviors around media and technology in the U.S. The Infinite Dial is prepared by conducting a national telephone survey using best-in-class sampling and data-collection techniques. This survey, which we have been conducting at least annually since 1998, is widely quoted and provides insights into changes in the audio industry over the years.

In 2014, Edison pioneered a new research initiative called "Share of EarTM." This survey, conducted twice in 2014, four times in 2015 (and to be conducted four times in 2016), measures listening across the spectrum of audio platforms using a diary method of data collection that provides the most accurate way of measuring and reporting a respondent's time spent listening to specific types of audio. Share of EarTM allows subscribers to the survey to understand the absolute and relative size of audio listening on different platforms (for example, a subscriber can look at the time spent listening on any number of audio platforms such as AM/FM Radio, Owned Music, Streaming Audio, Sirius XM, TV Music Channels, and Podcasts or

compare listening across these audio platforms). The Share of Ear™ information has been utilized broadly by participants in the audio market, is quoted regularly by a wide variety of publications, and is considered to be the best available measurement of its kind.

Edison is also known for being the company that performs the Exit Polls on Election Day. Under my supervision, Edison Research currently conducts all exit polls for the six major news organizations comprising the National Election Pool (NEP) – ABC, CBS, CNN, Fox, NBC and the Associated Press. Edison Research has conducted all state and national exit polling for the NEP since 2003 to assist these major news organizations in projecting the winners of elections and otherwise analyzing the results. Edison Research has also conducted exit polls for national elections in Iraq, Venezuela and the Republic of Georgia.

I have served on the Executive Council of the American Association for Public Opinion Research (AAPOR) for four years including two years as Secretary-Treasurer and two years as Councilor-At-Large. I have also served as President of the New York Chapter of AAPOR. My curriculum vitae is attached as **Appendix A**.

B. Assignment

I have been asked by Sirius XM to conduct a survey to provide information about what current Sirius XM listeners listened to before they began listening to Sirius XM and what they would listen to if Sirius XM were no longer available, and about what current Pandora listeners listened to before they began listening to Pandora and what they would listen to if Pandora were no longer available.

At my direction and under my supervision, Edison performed a survey in connection with this assignment in August 2016 (the “2016 National Telephone Survey”). The survey methodology that we used for the 2016 National Telephone Survey is described in Section 2 below.

Our firm was paid \$235,000 to design and conduct the 2016 National Telephone Survey. I will be compensated at the rate of \$500 per hour for the preparation of this written direct testimony and for any additional time spent in connection with this testimony. Neither form of compensation is contingent in any way on the survey results, my interpretation of them (or any other opinions I express), or the outcome of this proceeding.

2. Survey Methodology

The 2016 National Telephone Survey was a national random digit dial (RDD) telephone survey of Americans ages 13 years and older. The survey was designed to represent the national population using a random probability sample in which every member of the population has a known, non-zero chance of being selected to participate in the survey. This survey methodology is widely recognized as the most reliable form of survey research¹ and is used by most major polling organizations for their national surveys. Edison Research also uses this survey methodology for its national telephone surveys of absentee and early voters provided for the National Election Pool (consisting of ABC, CBS, CNN, FOX, NBC and the Associated Press), as well as for Edison's "Infinite Dial" surveys, conducted annually since 1998.

A total of 3,764 respondents were interviewed on the telephone. Of these, 2,188 interviews were conducted via a landline telephone and 1,576 interviews were conducted via a cell phone. The survey included 983 respondents who qualified as a Sirius XM listener by saying "yes" to "Do you currently ever listen to Sirius XM Satellite Radio?" In addition, to qualify as a Sirius XM listener, respondents either had to report having a paid or free trial subscription to Sirius XM or to answer "yes" to the question "Are you a primary user of a Sirius XM Satellite Radio account?" 1,323 respondents qualified as a Pandora listener by saying "yes" to "Have you listened to Pandora in the last month?" A total of 350 respondents within these Sirius and Pandora samples qualified as listeners of both services. This national sample of 3,764 respondents is about three times the size of a typical national telephone survey, including those conducted by Gallup and Pew.

The landline and cell phone sample of phone numbers were provided by Survey Sampling International (SSI), one of the leading providers of telephone samples for market research in the United States. The telephone interviews were conducted by Interviewing Services of America and Precision Opinion, two of the leading telephone interviewing companies in the United States.

During the telephone interviews, respondents were asked up to 29 questions. The average length of the telephone interviews was nine minutes. The questionnaire was administered in English or in Spanish depending upon the preference of the respondent. The

¹ See, e.g., <http://www.pewresearch.org/methodology/u-s-survey-research/our-survey-methodology-in-detail/>

survey questionnaire script with the exact wording of each question in English and in Spanish is attached as **Appendix B**. The telephone interviews were conducted from August 10th to September 6th, 2016.

Within each household contacted, a single respondent was selected. In order to randomly select a member of the household we asked to speak with the person whose birthday was the most recent. Up to six attempts were made to complete an interview for each phone number in the sample. In cases where the selected respondent was not home or not available to complete the interview, a callback was scheduled to complete the interview.

For the 2016 National Telephone Survey, and for all survey results that Edison Research publicly distributes, Edison Research follows the American Association for Public Opinion Research's (AAPOR) Standards and Code of Ethics. The response rate for this telephone survey was 9%. This is within the range of 5% to 10% which is standard for most random digit dialing (RDD) telephone surveys,² and it is comfortably within the range I consider reasonable. The response rate was computed using the AAPOR Response Rate 3 (RR3) method, which can be obtained from the AAPOR web site, and AAPOR's Standard Definitions.

The data were weighted to match the most recent United States population estimates from the U.S. Census Bureau for age, gender, race and region of the country. In addition, the data were weighted to match the most recent U.S. government estimates (2015 National Health Interview Survey estimates January-June 2014) for the proportion of “cell phone only” population by age group.³

Once identified as a Sirius XM listener and/or as a Pandora listener, each respondent was asked a separate series of questions about the relevant service. Those who listened to both Sirius XM and Pandora were asked both sets of questions. Our survey included 983 Sirius XM listeners and 1,323 Pandora listeners. With a sample size of 983 Sirius XM listeners, the margin of error with a 95% confidence interval for results among Sirius XM listeners would be +/- 3%. Among the 1,323 Pandora listeners, the calculated margin of error would be +/- 2%.

² See, e.g., <http://www.pewresearch.org/methodology/u-s-survey-research/our-survey-methodology-in-detail/>.

³ See <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf>.

3. Analysis of 2016 National Telephone Survey Results

A. Sirius XM Listeners

The Sirius XM survey questions were designed to establish where the bulk of each respondent's current Sirius XM listening had come from, and to quantify where that listening would go if Sirius XM were no longer available.

We asked respondents to "think about what you used to do before you ever started listening to Sirius XM. Which ONE of the following is Sirius XM mostly replacing?" Traditional, over-the-air AM/FM radio was the dominant answer to this question, with 62% saying that their Sirius XM listening had mostly come from this source. Following AM/FM radio was "CDs or your own music downloads" at 20%, and non-Interactive online radio (other "Online streaming radio services such as Pandora, iHeartRadio, or the online streams of AM/FM radio stations") at 5%. All other sources of audio accounted for only 3%: "Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody" accounted for 2%, Podcasts accounted for 1%, and non-specified online music services accounted for less than 1%. In addition, 7% of Sirius XM listeners indicated that their Sirius XM listening is mostly "new listening time that is not time taken from other sources of audio listening."

We then asked respondents to "imagine that Sirius XM were no longer available" and to report what they would do instead of listening to Sirius XM. To ensure that the responses we obtained were reliable, we used a two-step process. We first determined which audio sources would get any of their Sirius XM listening, and then asked the respondents to think of those specific audio sources and report what percentage of their listening would go to each source.

The survey took respondents through a list of different types of audio, and asked whether or not each of those sources of audio would get any of their Sirius XM listening. Traditional, over-the-air AM/FM radio was the audio source most often cited as a replacement for Sirius XM listening (74%). This was followed by CDs or music downloads (65%), Online streaming radio services such as Pandora, iHeartRadio or the online streams of AM/FM radio stations (49%), Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody (32%), and Podcasts (14%). The survey also showed that 28% of Sirius XM users would listen to less audio overall if Sirius XM were no longer available.

Having established what audio sources would get at least some of their listening time if Sirius XM was no longer available, we then asked respondents to report how they would distribute their current listening time among each of those sources. The survey asked: “If Sirius XM were no longer available, how would you divide your listening to the other types of audio you just mentioned? I’m going to read you each of the (INSERT #) types of audio you said you would listen to instead of Sirius XM. I’d like you to tell me what percent out of a total of 100% would go to each.” The survey showed that, by a wide margin, traditional, over-the-air AM/FM radio would be the largest replacement for time currently spent listening to Sirius XM. Among all time spent listening to Sirius XM, 40.8% of those listening hours would go to AM/FM radio. This AM/FM radio percentage was almost double the amount of listening hours that would go to listening to CDs and music downloads (23.1%), and almost three times the amount that would go to non-interactive online radio such as Pandora and iHeartRadio (14.3%).⁴ Interactive online radio such as Spotify would draw 7.8% of Sirius XM listening, Podcasts 2.4%, and other audio sources 1.7%. In addition, 10% of Sirius XM listening time would not go to any other audio source.

B. Pandora Listeners

The Pandora questions in the survey followed the exact format as those that were asked of Sirius XM listeners. Pandora listeners were asked where their current Pandora listening had come from, and where that listening would go if Pandora were no longer available.

We asked respondents to “think about what you used to do before you ever started listening to Pandora. Which ONE of the following is Pandora mostly replacing?” While traditional, over-the-air AM/FM radio had been the clear choice among Sirius XM listeners, Pandora listeners cited “CDs or your own music” (35%) ahead of over-the-air AM/FM radio (33%) as the audio source that their Pandora listening had mostly come from. Following these audio sources were other “Online streaming radio services such as iHeartRadio, or the online streams of AM/FM radio stations” at 4%, and “Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody” at 4%, Sirius XM at 2%, Podcasts at 1%, and non-specified online music services at 1%. 16% of respondents reported that their Pandora

⁴ The survey did not distinguish between CDs and downloads that the survey respondent already owned as opposed to those the respondent might purchase in the future.

listening had mostly come as “new listening time that is not time taken from other sources of audio listening.”

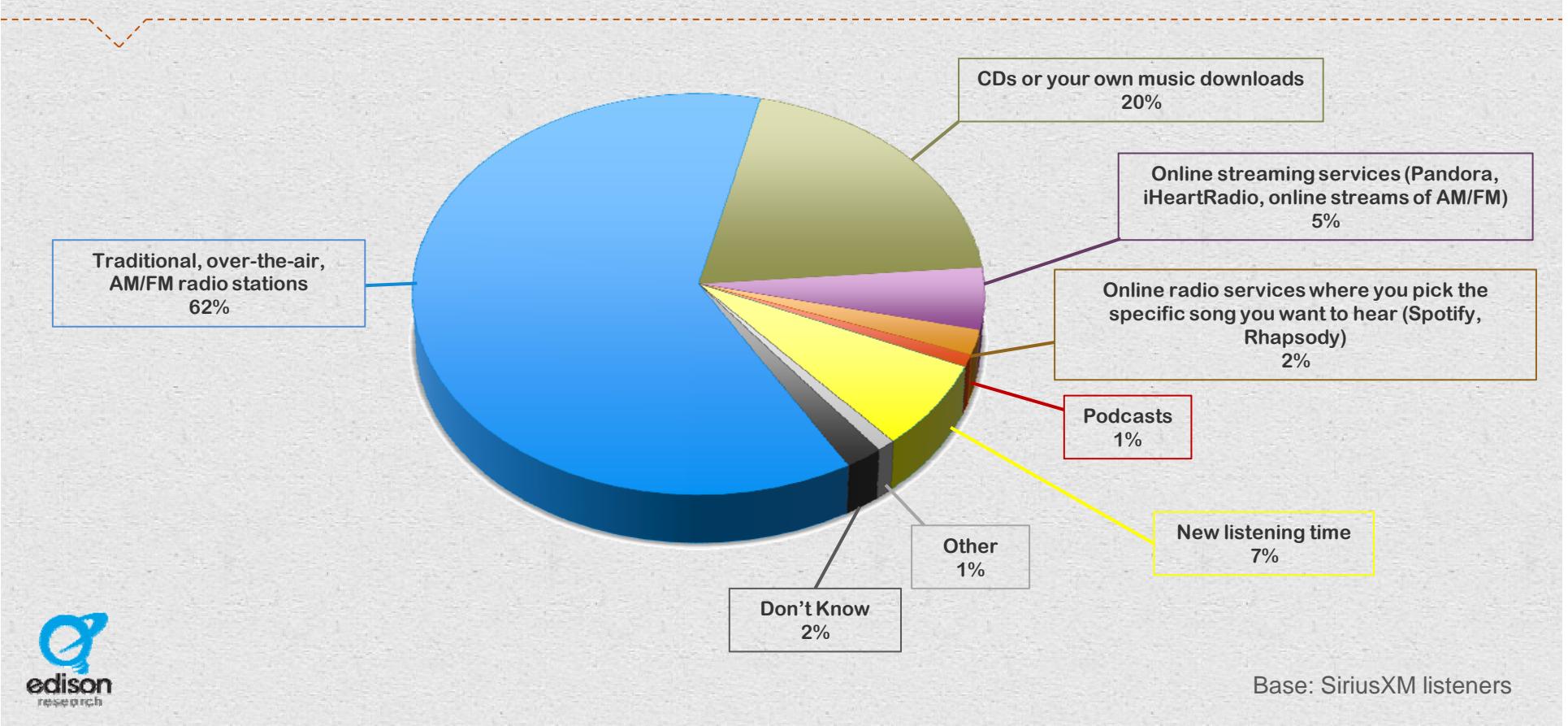
Pandora listeners were then asked to “imagine that Pandora were no longer available” and to report what they would do instead of listening to Pandora. The survey first asked Pandora listeners which audio sources would get *any* of their Pandora listening, followed by a question asking them what percentage of their Pandora listening would go to each of those sources.

The audio source most often cited as a replacement for Pandora listening was CDs or music downloads (67%). Traditional, over-the-air AM/FM radio was the second highest at 59%, with “Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody” at 47%. This was followed by “Online streaming radio services such as iHeartRadio or the online streams of AM/FM radio stations” at 46%, Sirius XM at 23%, and Podcasts at 18%. Among Pandora listeners, 27% reported that they would listen to less audio overall.

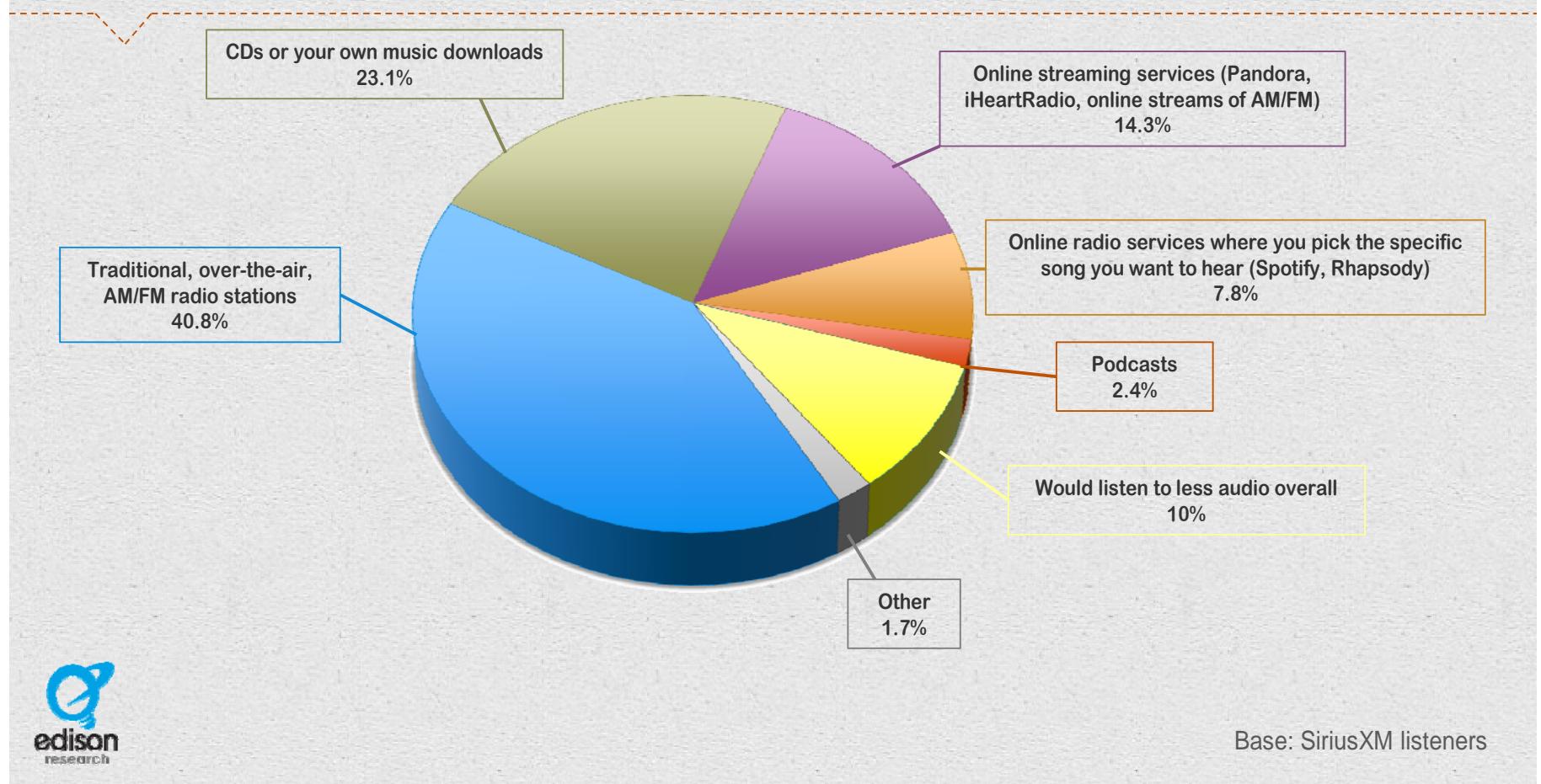
Pandora listeners in our survey were then asked: “If Pandora were no longer available, how would you divide your listening to the other types of audio you just mentioned? I’m going to read you each of the (**INSERT #**) types of audio you said you would listen to instead of Pandora. I’d like you to tell me what percent out of a total of 100% would go to each.” Pandora listeners cited their own CDs or music downloads as the audio source that would get the largest part of their Pandora listening hours (26.3%). Traditional, over-the-air AM/FM radio would receive 24.4% of the Pandora listening hours, 16.6% would go to “Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody,” and (non-Pandora) online streaming radio services such as iHeartRadio or the online streams of AM/FM radio stations would receive 11.7%. If Pandora was no longer available, 5.3% of the time that had been spent listening to Pandora would go to Sirius XM and 2.5% of that time would go to Podcasts. In addition, 8.8% of Pandora listening hours would not go to any other audio source.

The key survey results are displayed in the following four figures.

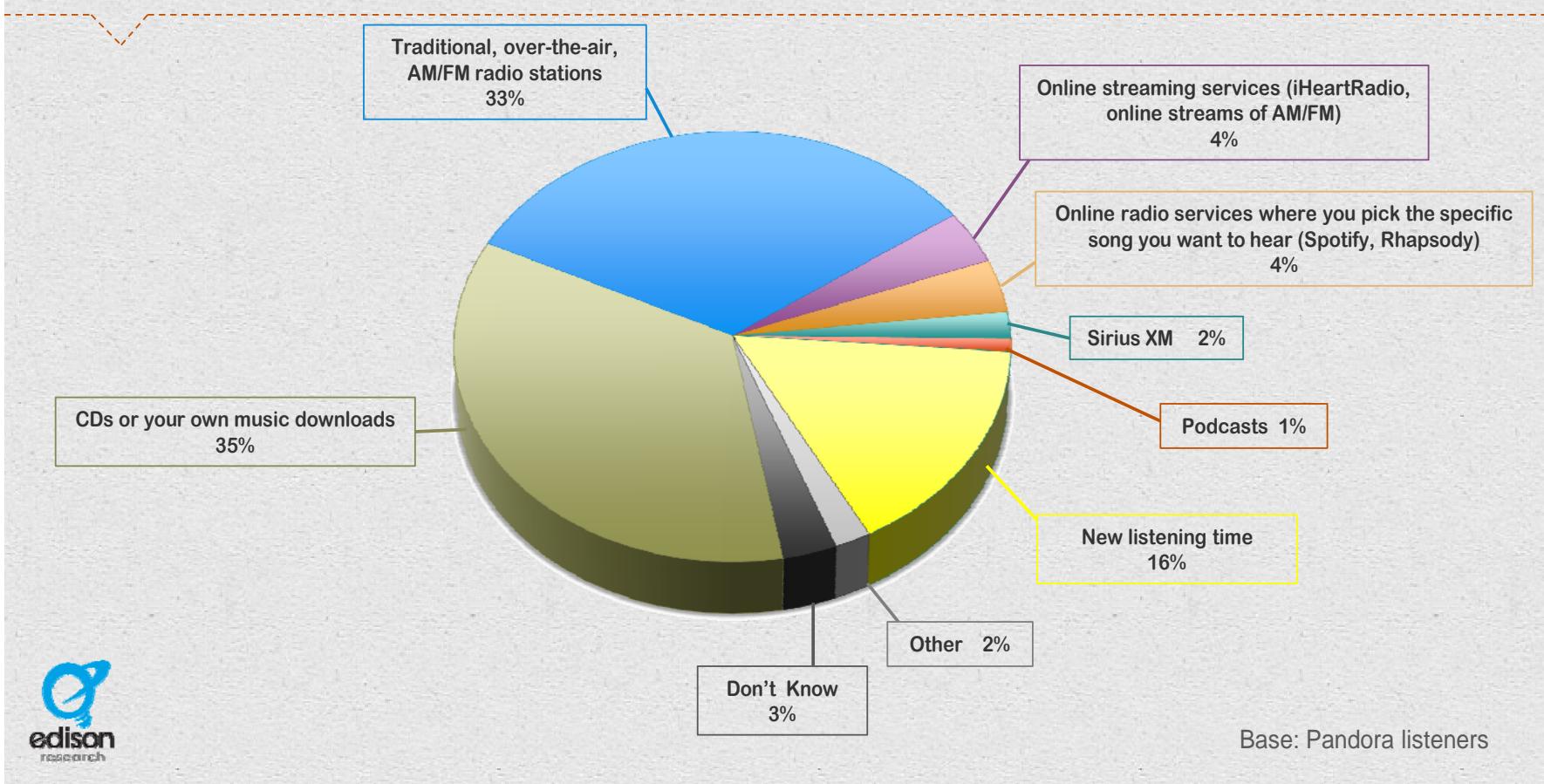
Think about what you used to do before you ever started listening to SiriusXM. Which one of the following is SiriusXM mostly replacing?



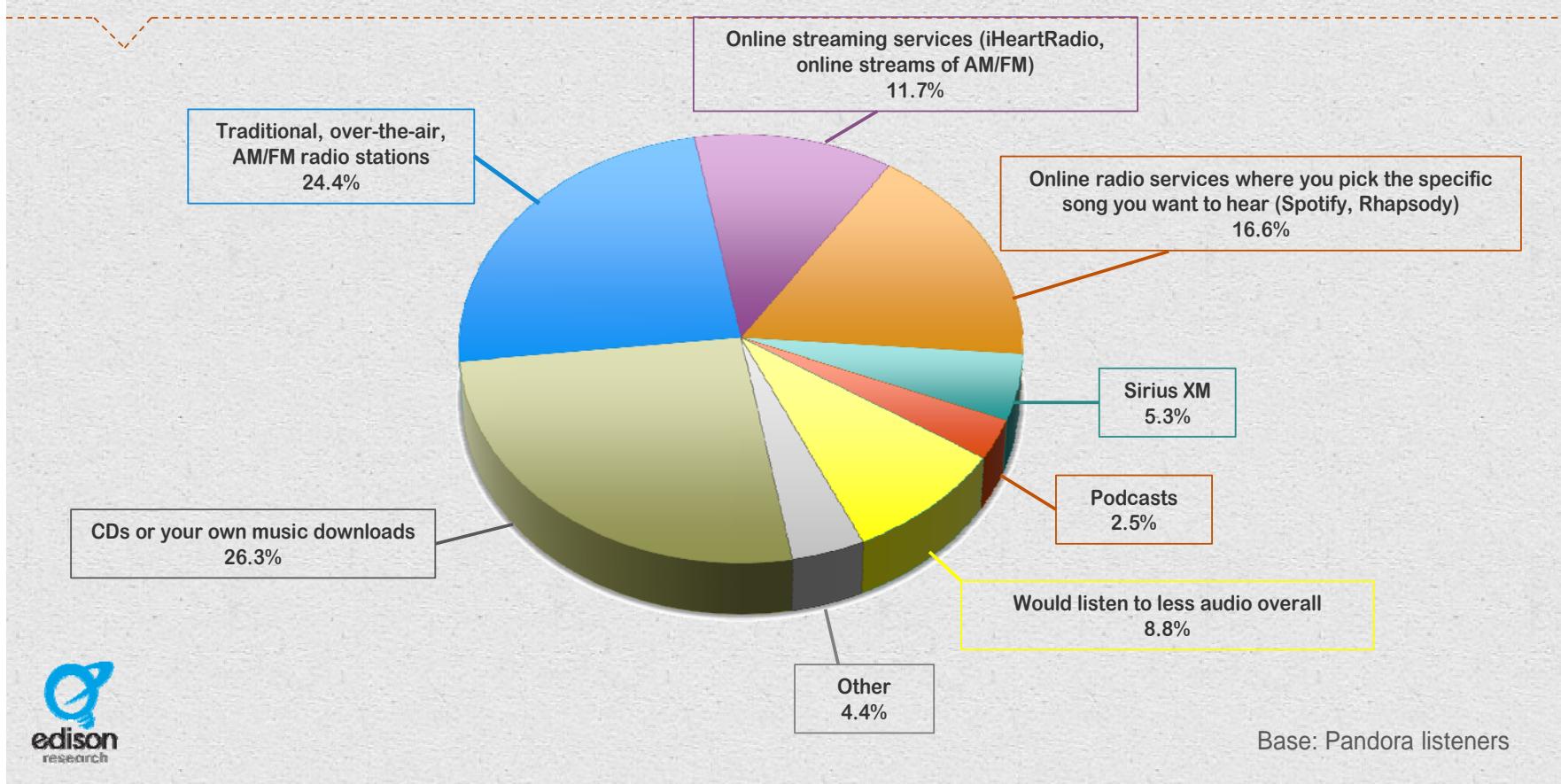
If SiriusXM were no longer available, how would you divide your listening to the other types of audio just mentioned? What percent of the time would go to listening to each?



Think about what you used to do before you ever started listening to Pandora. Which one of the following is Pandora mostly replacing?



If Pandora were no longer available, how would you divide your listening to the other types of audio just mentioned? What percent of the time would go to listening to each?



4. Conclusion

The most commonly stated source of where most Sirius XM listening time came from is, by a wide margin, traditional over-the-air AM/FM radio (62%). If Sirius XM was no longer available, the largest portion of current Sirius XM listening time would go back to traditional, over-the-air AM/FM radio stations (40.8%).

The same is not true for Pandora listening. The most commonly stated source of where most Pandora listening time came from is CDs or downloads (35%), with traditional over-the-air radio second at 33%, or slightly more than half the portion Sirius XM drew from AM/FM radio. If Pandora was no longer available, about one-quarter of listening time would go back to traditional, over-the-air AM/FM radio stations (24.4%).

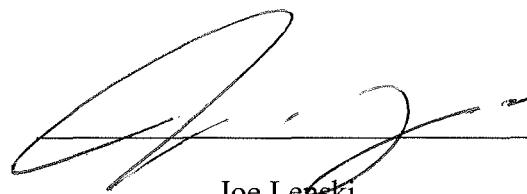
Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In re)
DETERMINATION OF ROYALTY RATES) Docket No. 16-CRB-0001-SR/PSSR
AND TERMS FOR TRANSMISSION OF) (2018-2022)
SOUND RECORDINGS BY SATELLITE)
RADIO AND "PREEEXISTING")
SUBSCRIPTION SERVICES (SDARS III))

DECLARATION OF JOE LENSKI

I, Joe Lenski, declare under penalty of perjury that the statements contained in my Written Direct Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed this 17 th day of October, 2016 in Somerville, New Jersey.



Joe Lenski

APPENDIX A

JOE LENSKI

6 W. Cliff St.
Somerville, NJ 08876
(908) 707-4707
jlenSKI@edisonresearch.com

Joe Lenski is co-founder and Executive Vice President of Edison Research. Since founding Edison Research in 1994, he has overseen the consistent and rapid growth of the company. With Edison Research, Joe oversees hundreds of research projects each year for some of the world's largest media companies, conducting survey research and providing strategic information to radio stations, television stations, newspapers, cable networks, record labels, Internet companies and other media organizations. Joe has been involved in every major election exit poll conducted in the United States for the past twenty eight years.

EDUCATION

Graduate Studies at Annenberg School for Communication, University of Pennsylvania (Philadelphia, PA) 1989-1991

BSE Mechanical Engineering, Princeton University (Princeton, NJ), 1987

EMPLOYMENT

Executive Vice President, Edison Research (Somerville, NJ) 1994-present

Under his supervision, Edison Research currently conducts all exit polls and election projections in the United States for the six major news organizations - ABC, CBS, CNN, Fox, NBC and the Associated Press. Each election year Edison hires and trains over 1,000 interviewers around the country and collects and processes more than 100,000 surveys on a single day to support reporting by dozens of news organizations around the world.

Prior to 2004, Edison Research conducted exit polling for the Kentucky and Mississippi Governors' races in 2003, California Recall Election in 2003, the Washington, DC Mayor's race in 2002, the New York City Mayor's race and the New Jersey Governor's race in 2001, the Virginia Governor's race in 1997 and the New Hampshire Presidential Primary in 1996. In addition to U.S. exit polls, Joe organized an extensive exit poll of 125 parliamentary districts in the Azerbaijan election in 2005. Joe also oversaw the 2010 exit poll for the mayoral election in Tbilisi, Georgia, the 2014 exit poll for the parliamentary elections in Georgia, the 2014 exit poll for the presidential election in Venezuela and the 2014 exit poll for the parliamentary election in Iraq, the first exit poll ever conducted in Iraq.

Joe oversaw the design and operation of CNN RealVote, the vote gathering and election projections for CNN and appeared as an on-air analyst during CNN's election night coverage in 2002 to discuss the CNN election projection process. Joe was part of the joint CNN/CBS Decision Team responsible for projecting all elections for broadcast from 1996 to 2000. Joe has presented research both on Capitol Hill and the White House and has been a speaker at many

APPENDIX A

conventions including the R&R Talk Radio Seminar, the R&R Convention, the Country Radio Seminar, NextMedia 2001, the New Jersey Broadcasters Association Convention, the Vermont Broadcasters Association Convention, and the 2006, 2008, 2010, 2012 and 2014 post-election conferences at the Dole Institute of Politics at the University of Kansas.

Joe has lectured on exit polling and survey research at numerous universities including Harvard University, Marist College, Rutgers University, Monmouth University, Fairleigh Dickinson University, George Washington University, Johns Hopkins University and the University of Maryland. He has also been a featured speaker at many conferences and panels including Canadian Music Week and for the Committee on National Statistics. He currently serves on the Professional Advisory Board for the School of Journalism and Mass Communications at the University of Iowa.

Through its history, Edison Research has conducted many groundbreaking surveys. Edison Research conducted a first-of-its-kind national survey of full-time and part-time workers and their use of media at work for the National Association of Broadcasters in September 1998. The results of this study were featured in USA Today, Radio & Records and Broadcasting & Cable.

In addition, Edison has conducted an annual series of "Infinite Dial" surveys since 1998 on the role of the Internet in today's media world. These studies shed new light on the impact of the Internet on traditional media and have become the standard guide to the growth in usage of streaming media. Edison Research has replicated these surveys of Internet usage in Canada, Finland, Ireland and the United Kingdom. The results of these studies are quoted frequently in Business Week, The Wall Street Journal and The New York Times.

Edison Research works with many of the largest Radio Ownership Groups in the United States including Entercom, CBS Radio, Radio One and Entravision. Edison Research also conducts research for successful radio stations in Argentina, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Ireland, Switzerland, Ukraine and the United Kingdom. Edison Research conducts research for the U.S. Government's broadcasting ventures in the Middle East including "Radio Sawa" and "Radio Farda". This research is currently conducted weekly in Abu Dhabi, Egypt, Iraq, Jordan, Lebanon and Morocco.

Consultant, Voter News Service (VNS) (New York) 1994

Served as election night decision team consultant for projection and analysis of all statewide elections for the November 1994 United States election. Oversaw the development and testing of exit polling and election projection programming systems.

Research Director, Bolton Research Corporation (Bryn Mawr, PA) 1993-1994

Oversaw dozens of survey research projects for radio stations throughout the United States to measure audience demographics and music preferences.

Decision Team Consultant, Voter Research & Surveys (New York) 1990-1992

Served as election night decision team consultant for projection and analysis of all statewide elections for the November 1990 and 1992 United States election. Also served as programming consultant for the development of a system to deliver exit poll and election projection data to dozens of television stations and newspapers around the country.

APPENDIX A

Statistical Associate, CBS News Election & Survey Unit (New York) 1987-1989

Conducted statistical analysis of exit polling and vote return projections for CBS News Decision Team for 1988 Presidential Primary and General Election. Developed and programmed back-up election projection system. Selected sample and processed results for the CBS News/New York Times Poll.

ORGANIZATIONS

American Association for Public Opinion Research

Councilor-at-Large	2014-2016
Secretary-Treasurer	2011-2012
Associate Secretary-Treasurer	2010-2011

American Association for Public Opinion Research, New York City Chapter (NYAAPOR)

Past President	2010-2011
President	2009-2010
Vice President	2008-2009
Program Chair	2005-2006
Associate Program Chair	2004-2005

APPENDIX B

EMR 23057

FINAL DRAFT – CONFIDENTIAL
Edison Research
Weil SiriusXM Survey
July 2016

“Hello, my name is _____ and I’m calling from Edison Research. Today we are conducting a brief national opinion survey. This is NOT a contest, sales pitch or promotion. We are only asking your opinions, and your answers will be held strictly confidential. Can I please speak to the person at this phone number, who is 13 years of age or older, and had the most recent birthday? Is that you?”

Yes 1 **(CONTINUE)**
No 2 **(ASK IF THAT PERSON IS AVAILABLE OR SET UP CALL BACK TIME)**

If cell phone sample, read: “If you are driving or involved in an activity that requires your full attention, I’ll need to call you back.” SCHEDULE CALLBACK IF NECESSARY

1A. First, it is important for this survey to represent people of all age groups. For that reason, may I please have your age? **(RECORD EXACT AGE)**

Refused 99

1B. **(IF EXACT AGE REFUSED, ASK)** I just need an age range. Are you...? **(READ LIST)**

Under 13	1	THANK AND TERMINATE
13-17	2	
18-20	3	
21-24	4	
25-34	5	
35-44	6	
45-54	7	
55-64	8	
65-74	9	
75+	10	
Refused	99	(DO NOT READ) (If person still refuses, thank the person for their time and end interview)

2. **(DO NOT ASK RESPONDENT THIS QUESTION. DETERMINE BY VOICE)**

Male	1
Female	2

APPENDIX B

3. Thinking about all of the different ways you might listen to music, approximately how much time in hours or minutes do you spend listening to music in a typical day? If you don't listen to music in a typical day, just say so. (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE**)

_____ hours _____ minutes (**MAXIMUM HOURS=24**)

DK/NA X None 99

4. How important is it to you to keep up-to-date with music? Is it... (**READ LIST**)

OR	Very important	1
	Somewhat important	2
	Not at all important	3
	DK/NA	9

- 5A. Do you currently ever listen to SiriusXM Satellite Radio?

Yes	1	CONTINUE
No	2	SKIP TO NOTE ABOVE Q.7
DK/NA	9	SKIP TO NOTE ABOVE Q.7

- 5B. Do you have a paid subscription to SiriusXM or do you have a free trial? (**CODE RESPONSE**)

Paid subscription	1	SKIP TO NOTE ABOVE Q.7
Free trial	2	SKIP TO NOTE ABOVE Q.7
DK/NA	9	CONTINUE

6. Are you a primary user of a SiriusXM Satellite Radio account?

Yes	1
No	2
DK/NA	9

IF Q.5B CODED “1” (PAID SUBSCRIBER) OR “2” (FREE TRIAL) OR Q.6 CODED “1” (YES/PRIMARY USER), CLASSIFY RESPONDENT AS A SIRIUSXM SUBSCRIBER.

7. Now I'd like you to think about Internet Radio, specifically the Internet Radio service called Pandora. Have you listened to Pandora in the last month?

YES	1
NO	2
DK/NA	9

IF Q.7 CODED “1” (YES/LISTEN TO PANDORA IN LAST MONTH), CLASSIFY AS A PANDORA LISTENER.

**IF RESPONDENT IS CODED AS EITHER A SIRIUSXM SUBSCRIBER OR A PANDORA LISTENER,
CONTINUE. OTHERWISE SKIP TO STATEMENT ABOVE Q.12**

APPENDIX B

IF RESPONDENT IS CODED AS A SIRIUSXM SUBSCRIBER, CONTINUE. OTHERWISE, SKIP TO NOTE ABOVE Q.9

- 8A. Now I'd like you to think about your current listening to SiriusXM Satellite Radio. How much total time, in hours or minutes, would you say you spend listening to SiriusXM in a typical WEEK? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS "DON'T KNOW", PROBE FOR BEST ESTIMATE.**)

_____ hours _____ minutes (**MAXIMUM HOURS=168**)
DK/NA X None 99

IF CODED "DK/NA" OR "NONE" IN Q.8A, SKIP TO NOTE ABOVE Q.9. OTHERWISE CONTINUE.

- 8B. Now think about what you used to do before you ever started listening to SiriusXM. Which ONE of the following is SiriusXM **mostly replacing?**

(READ LIST; ACCEPT ONLY ONE RESPONSE; SHUFFLE CODES 1, 2, 3, AND 4)

Traditional, over-the-air AM/FM radio stations	1
CDs or your own music downloads	2
Online radio services such as Pandora, Spotify, Rhapsody, iHeartRadio, or streamed AM/FM stations	3
Podcasts	4
OR Is it new listening time that is not time taken from other sources of audio listening?	5
Other (volunteered) _____ (specify)	8
DK/NA (volunteered)	9

IF CODED "3" (ONLINE RADIO), CONTINUE. OTHERWISE SKIP TO Q.8D

- 8C. And which type of online service did SiriusXM mostly replace? (**READ LIST; ROTATE ORDER**)

Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody	1
OR Online streaming radio services such as Pandora, iHeartRadio, or the online streams of AM/FM radio stations	2
DK/NA	9

APPENDIX B

- 8D. Now imagine that SiriusXM were no longer available. What would you do instead of listening to SiriusXM?

Would you replace any of your SiriusXM listening to...? (**READ LIST. SHUFFLE ORDER. REPEAT STATEMENT FOR THE FIRST 3 ITEMS ONLY.**)

		<u>YES</u>	<u>NO</u>	<u>DK/NA</u>
8D.1	Traditional, over-the-air AM/FM radio	1	2	9
8D.2	CDs or your own music downloads	1	2	9
8D.3	Online radio services where <u>you</u> pick specific songs you want to hear, such as Spotify or Rhapsody	1	2	9
8D.4	Online <u>streaming</u> radio services such as Pandora, iHeartRadio or the online streams of AM/FM radio stations	1	2	9
8D.5	Podcasts	1	2	9
**ALWAYS ASK Q.8D.6 AND Q.8D.7 LAST AND IN THIS ORDER				
8D.6	Other types of audio that I have not already mentioned	1	2	9
8D.7	And if SiriusXM were no longer available, would you listen to less audio overall or not?	1	2	9

**IF Q.8D.7 CODED “1” (YES/LISTEN TO LESS AUDIO OVERALL), CONTINUE.
OTHERWISE SKIP TO NOTE ABOVE Q.8F**

- 8E. In hours or minutes, how much less time would you listen in a typical week? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS “DON’T KNOW”, PROBE FOR BEST ESTIMATE.**)

_____ hours _____ minutes (**MAXIMUM HOURS=168**)

DK/NA X

ASK Q.8F ONLY OF ITEMS CODED “1” (YES) IN Q.8D.1-8D.6. IF ONLY ONE ITEM CODED YES, MARK THAT ITEM AS “100” IN Q.8F. IF NO ITEMS CODED YES, SKIP TO NOTE ABOVE Q.9

- 8F. If SiriusXM were no longer available, how would you divide your listening to the other types of audio you just mentioned? I’m going to read you each of the (**INSERT #**) types of audio you said you would listen to instead of SiriusXM. I’d like you to tell me what percent out of a total of 100% would go to each. If your numbers don’t add up to 100% I will let you know.

Among the (**INSERT #**) types of audio, what percent of the time, out of 100%, would go to listening to each? Here’s the first one...”

APPENDIX B

(IF RESPONDENT CANNOT GIVE AN EXACT PERCENTAGE, PROBE FOR BEST ESTIMATE. PERCENTAGES MUST TOTAL 100)

- 8F.1 Traditional, over the air, AM/FM radio stations Percent _____
8F.2 CDs or your own music downloads Percent _____
8F.3 Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody Percent _____
8F.4 Online streaming radio services, such as Pandora, iHeartRadio or the online streams of AM/FM radio stations Percent _____
8F.5 Podcasts Percent _____

****ALWAYS ASK Q.8F.6 LAST**

- 8F.6 Other types of audio Percent _____

IF RESPONDENT IS CODED AS A PANDORA LISTENER, CONTINUE. OTHERWISE, SKIP TO Q.11A

9. In addition to the free Pandora service, Pandora also offers a paid subscriber service called Pandora One that does not include any advertisements. Again, this is a paid service that has a subscription fee that is charged to you each month. Do you currently pay this monthly fee to subscribe to Pandora One?

Yes	1
No	2
DK/NA	9

- 10A. Now I'd like you to think about your current listening to Pandora. How much total time, in hours or minutes, would you say you spend listening to Pandora in a typical WEEK? **(IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS "DON'T KNOW", PROBE FOR BEST ESTIMATE.)**

_____ hours _____ minutes **(MAXIMUM HOURS=168)**
DK/NA X None 99

IF CODED "DK/NA" OR "NONE" IN Q.10A, SKIP TO 11A. OTHERWISE CONTINUE.

- 10B. Now think about what you used to do before you ever started listening to Pandora. Which ONE of the following is Pandora **mostly replacing?** **(READ LIST; ACCEPT ONLY ONE RESPONSE; SHUFFLE CODES 1, 2, 3, 4 AND 5)**

Traditional, over-the-air AM/FM radio stations	1
CDs or your own music downloads	2
OTHER online radio services such as Spotify, Rhapsody, iHeartRadio, or streamed AM/FM stations	3
Podcasts	4
SiriusXM satellite radio	5

APPENDIX B

OR Is it new listening time that is not time taken from other sources of audio listening? 6

Other (**volunteered**) _____(specify) 7
DK/NA (**volunteered**) 9

IF CODED “3” (ONLINE RADIO) IN Q.10B, CONTINUE. OTHERWISE SKIP TO Q.10D

10C. And which type of online service did Pandora mostly replace? (**READ LIST; ROTATE ORDER**)

Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody 1

OR Online streaming radio services such as iHeartRadio, or the online streams of AM/FM radio stations 2

DK/NA 9

10D. Now imagine that Pandora were no longer available. What would you do instead of listening to Pandora?

Would you replace any of your Pandora listening to...? (**READ LIST. SHUFFLE ORDER. REPEAT STATEMENT FOR THE FIRST 3 ITEMS ONLY.**)

	<u>YES</u>	<u>NO</u>	<u>DK/NA</u>
10D.1 Traditional, over-the-air AM/FM radio	1	2	9
10D.2 CDs or your own music downloads	1	2	9
10D.3 Online radio services where <u>you</u> pick specific songs you want to hear, such as Spotify or Rhapsody	1	2	9
10D.4 OTHER online <u>streaming</u> radio services such as iHeartRadio or the online streams of AM/FM radio stations	1	2	9
10D.5 Podcasts	1	2	9
10D.6 SiriusXM	1	2	9

****ALWAYS ASK Q.10D.7 AND Q.10D.8 LAST AND IN THIS ORDER**

10D.7 Other types of audio that I have not already mentioned 1 2 9

10D.8 And if Pandora were no longer available, would you listen to less audio overall? 1 2 9

**IF Q.10D.8 CODED “1” (YES/LISTEN TO LESS AUDIO OVERALL), CONTINUE.
OTHERWISE SKIP TO NOTE ABOVE Q.10F**

APPENDIX B

- 10E. In hours or minutes, how much less time would you listen in a typical week? (IF
**RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST
ESTIMATE. IF RESPONDENT SAYS “DON’T KNOW”, PROBE FOR BEST
ESTIMATE.)**

_____ hours _____ minutes (**MAXIMUM HOURS=168**)

DK/NA X

ASK Q.10F ONLY OF ITEMS CODED “1” (YES) IN Q.10D.1-10D.7. IF ONLY ONE ITEM CODED YES, MARK THAT ITEM AS “100” IN Q.10F. IF NO ITEMS CODED YES, SKIP TO Q.11A

- 10F. If Pandora were no longer available, how would you divide your listening to the other types of audio you just mentioned? I'm going to read you each of the (**INSERT #**) types of audio you said you would listen to instead of Pandora. I'd like you to tell me what percent out of a total of 100% would go to each. If your numbers don't add up to 100% I will let you know.

Among the **(INSERT #)** types of audio, what percent of the time, out of 100%, would go to listening to each? Here's the first one..."

(IF RESPONDENT CANNOT GIVE AN EXACT PERCENTAGE, PROBE FOR BEST ESTIMATE. PERCENTAGES MUST TOTAL 100)

10F.1 Traditional, over the air, AM/FM radio stations Percent

10F.2 CDs or your own music downloads

10F.3 Online radio services where you pick specific songs you want to hear, such as Spotify or Rhapsody

10F.4 OTHER online streaming radio services, such as iHeartRadio or the online streams of AM/FM radio stations

10F.5 Podcasts
Percent

10F.6 SiriusXM Percent

****ALWAYS ASK O.10F.6 LAST**

11A. In the past 12 months, approximately how much money have you spent purchasing physical C

- or digital songs and albums? (RECORD EXACT NUMBER. DO NOT ACCEPT A RANGE,
IF RESPONDENT CANNOT GIVE EXACT AMOUNT, ENCOURAGE BEST
ESTIMATE)**

_____ (RECORD #)

DK/NA X

APPENDIX B

- 11B. Now think about how much money you expect to spend purchasing physical CDs or digital songs and albums in the next 12 months. Do you expect to spend more on music, less on music, or about the same amount as you did in the past 12 months?

More	1
Less	2
About the same	3
DK/NA	9

“These last few questions are for classification purposes only”

12. Think about the telephone service you can be reached on at home. What type of telephone service can you be reached on in your home? (**READ LIST. NOTE: IF RESPONDENT MENTIONS THEY HAVE PHONE SERVICE THROUGH THE INTERNET, SUCH AS VONAGE OR THROUGH THEIR CABLE TELEVISION PROVIDER, USE APPLICABLE “REGULAR LAND-LINE SERVICE” CODE**)

Only cell phone service	1
Both regular land-line AND cell phone service	2
OR Only regular land-line service	3
Don't know/refused	9

- 13A. Are you of Hispanic or Latino descent?

Yes	1	SKIP TO Q.14
No	2	CONTINUE
Refused/No Answer	9	CONTINUE

- 13B. Which of the following best describes you? Are you...? (**READ LIST.**)

White	1
African-American	2
Asian	3
OR Are you of some other background?	4
Refused	8
No Answer	9

14. And lastly can you please tell me your zip code. _____ (**RECORD**)

“Thank you very much for your time and cooperation. Good-bye!”

15. Phone number: _____ (**RECORD**)

16. TIME: (MINUTES): _____ (**RECORD**)

APPENDIX B
EMR 23057
FINAL DRAFT – CONFIDENTIAL
Edison Research
Weil SiriusXM Survey
July 2016

“Hola, mi nombre es _____ y le estoy llamando de Edison Research. El día de hoy estamos realizando una pequeña encuesta nacional. Esto NO es un concurso, argumento de venta o promoción. Solamente queremos conocer sus opiniones, y sus respuestas se manejarán de forma estrictamente confidencial. ¿Puedo hablar con alguna persona en este número que tenga 13 años de edad o más y que haya tenido el cumpleaños más reciente? ¿Es usted?

Sí 1 **(CONTINUE)**
No 2 **(ASK IF THAT PERSON IS AVAILABLE OR SET UP CALL BACK TIME)**

If cell phone sample, read: “Si se encuentra manejando o está involucrado (a) en alguna actividad que requiere su completa atención, necesitaré llamarlo (a) nuevamente”. **SCHEDULE CALLBACK IF NECESSARY**

- 1A. Primero, es importante que esta encuesta represente a personas de todos los grupos de edad. Por esa razón, ¿podría decirme su edad por favor? **(RECORD EXACT AGE)**

Refused 99

- 1B. **(IF EXACT AGE REFUSED, ASK)** Solamente necesito un rango de edad. ¿Tiene usted...? **(READ LIST)**

Under 13	1	THANK AND TERMINATE
13-17	2	
18-20	3	
21-24	4	
25-34	5	
35-44	6	
45-54	7	
55-64	8	
65-74	9	
75+	10	
Refused	99	(DO NOT READ) (If person still refuses, thank the person for their time and end interview)

2. **(DO NOT ASK RESPONDENT THIS QUESTION. DETERMINE BY VOICE)**

Male 1
Female 2

APPENDIX B

3. Pensando en todas las diferentes formas en las que podría escuchar música, aproximadamente, ¿cuánto tiempo en horas o minutos pasa al día escuchando música en un día normal? Si no escucha música en un día normal, sólo menciónelo. (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE**)

_____ hours _____ minutes (**MAXIMUM HOURS=24**)

DK/NA X None 99

4. ¿Qué tan importante es para usted mantenerse al día con la música? ¿Es...? (**READ LIST**)

O	Muy importante	1
	Algo importante	2
	Nada importante	3
	DK/NA	9

- 5A. ¿Actualmente escucha alguna vez el SiriusXM Satellite Radio?

Sí	1	CONTINUE
No	2	SKIP TO NOTE ABOVE Q.7
DK/NA	9	SKIP TO NOTE ABOVE Q.7

- 5B. ¿Cuenta con una suscripción de paga a SiriusXM, o tiene una prueba gratuita? (**CODE RESPONSE**)

Suscripción de paga	1	SKIP TO NOTE ABOVE Q.7
Prueba gratuita	2	SKIP TO NOTE ABOVE Q.7
DK/NA	9	CONTINUE

6. ¿Es usted el (la) principal usuario (a) de una cuenta de SiriusXM Satellite Radio?

Sí	1
No	2
DK/NA	9

IF Q.5B CODED “1” (PAID SUBSCRIBER) OR “2” (FREE TRIAL) OR Q.6 CODED “1” (YES/PRIMARY USER), CLASSIFY RESPONDENT AS A SIRIUSXM SUBSCRIBER.

7. Ahora me gustaría que piense sobre el radio por internet, específicamente el servicio de radio por internet llamado Pandora. ¿Ha escuchado Pandora en el último mes?

Sí	1
No	2
DK/NA	9

IF Q.7 CODED “1” (YES/LISTEN TO PANDORA IN LAST MONTH), CLASSIFY AS A PANDORA LISTENER.

IF RESPONDENT IS CODED AS EITHER A SIRIUSXM SUBSCRIBER OR A PANDORA LISTENER, CONTINUE. OTHERWISE SKIP TO STATEMENT ABOVE Q.12

APPENDIX B

IF RESPONDENT IS CODED AS A SIRIUSXM SUBSCRIBER, CONTINUE. OTHERWISE, SKIP TO NOTE ABOVE Q.9

- 8A. Ahora quiero que piense sobre su escucha actual de SiriusXM Satellite Radio. ¿Cuánto tiempo en total, en horas o minutos, diría que pasa escuchando SiriusXM en una SEMANA normal? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS "DON'T KNOW", PROBE FOR BEST ESTIMATE.**)

_____ horas _____ minutos (**MAXIMUM HOURS=168**)
DK/NA X None 99

IF CODED "DK/NA" OR "NONE" IN Q.8A, SKIP TO NOTE ABOVE Q.9. OTHERWISE CONTINUE.

- 8B. Ahora, piense en lo que solía hacer antes de empezar a escuchar SiriusXM. ¿CUÁL de las siguientes está reemplazando SiriusXM en su mayoría?

(READ LIST; ACCEPT ONLY ONE RESPONSE; SHUFFLE CODES 1, 2, 3, AND 4)

Radio tradicional al aire, estaciones de AM/FM	1
CDs o sus propias descargas de música	2
Servicios de música en línea, tales como Pandora, Spotify, Rhapsody, iHeartRadio, o estaciones AM/FM transmitidas en línea	3
Podcasts	4
O, BIEN, su nuevo tiempo de escuchar música no lo tomó de otras fuentes para oír música	5
Other (volunteered) _____ (specify)	8
DK/NA (volunteered)	9

IF CODED "3" (ONLINE RADIO), CONTINUE. OTHERWISE SKIP TO Q.8D

- 8C. Y, ¿qué tipo de servicio en línea reemplazó en su mayoría SiriusXM? (**READ LIST; ROTATE ORDER**)

Servicios de radio en línea donde usted elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody 1

O Servicios de transmisión de radio en línea, tales como Pandora, iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio 2

DK/NA 9

APPENDIX B

- 8D. Ahora imagínese que SiriusXM ya no estuviera disponible. ¿Qué haría en lugar de escuchar SiriusXM? ¿Reemplazaría su tiempo de escuchar SiriusXM con...? (**READ LIST. SHUFFLE ORDER. REPEAT STATEMENT FOR THE FIRST 3 ITEMS ONLY.**)

		<u>YES</u>	<u>NO</u>	<u>DK/NA</u>
8D.1	Radio tradicional al aire, estaciones de AM/FM	1	2	9
8D.2	CDs o sus propias descargas de música	1	2	9
8D.3	Servicios de radio en línea donde <u>usted</u> elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody	1	2	9
8D.4	Servicios de <u>transmisión</u> de radio en línea, tales como Pandora, iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio	1	2	9
8D.5	Podcasts	1	2	9
**ALWAYS ASK Q.8D.6 AND Q.8D.7 LAST AND IN THIS ORDER				
8D.6	Otros tipos de audio que no haya mencionado ya	1	2	9
8D.7	Y, si Sirius XM ya no estuviera disponible, ¿escucharía menos audio en general o no?	1	2	9

IF Q.8D.7 CODED "1" (YES/LISTEN TO LESS AUDIO OVERALL), CONTINUE. OTHERWISE SKIP TO NOTE ABOVE Q.8F

- 8E. En horas o minutos, ¿cuánto tiempo menos escucharía usted en una semana normal? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS "DON'T KNOW", PROBE FOR BEST ESTIMATE.**)

_____ horas _____ minutos (**MAXIMUM HOURS=168**)
DK/NA X

ASK Q.8F ONLY OF ITEMS CODED "1" (YES) IN Q.8D.1-8D.6. IF ONLY ONE ITEM CODED YES, MARK THAT ITEM AS "100" IN Q.8F; IF NO ITEMS CODED YES, SKIP TO NOTE ABOVE Q.9

- 8F. Si SiriusXM ya no estuviera disponible, ¿cómo dividiría su escucha entre los otros tipos de audio que mencionó? Le voy a leer cada uno de los (**INSERT #**) tipos de audio que dijo que escucharía en lugar de escuchar SiriusXM. Me gustaría que me dijera qué porcentaje de 100 escucharía cada uno. Si sus números no suman 100%, le avisaré.

Entre los (**INSERT #**) tipos de audio, ¿qué porcentaje de tiempo, de un 100%, escucharía cada uno? Aquí está el primero...

**(IF RESPONDENT CANNOT GIVE AN EXACT PERCENTAGE, PROBE FOR BEST ESTIMATE.
PERCENTAGES MUST TOTAL 100)**

8F.1 Radio tradicional al aire, estaciones de AM/FM Percent _____
8F.2 CDs o sus propias descargas de música Percent _____
8F.3 Servicios de radio en línea donde usted elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody Percent _____
8F.4 Servicios de transmisión de radio en línea, tales como Pandora, iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio Percent _____
8F.5 Podcasts Percent _____

****ALWAYS ASK Q.8F.6 LAST**

- 8F.6 Otros tipos de audio Percent

APPENDIX B

IF RESPONDENT IS CODED AS A PANDORA LISTENER, CONTINUE. OTHERWISE, SKIP TO Q.11A

9. Además del servicio gratuito de Pandora, ésta ofrece un servicio de suscripción de paga llamado Pandora One, el cual no incluye anuncios. De nuevo, este es un servicio de paga que tiene un costo por suscripción que se le cobra mensualmente. ¿Actualmente paga esta cuota por suscribirse a Pandora One?

Sí	1
No	2
DK/NA	9

- 10A. Ahora, me gustaría que pensara sobre su escucha actual de Pandora. ¿Cuánto tiempo en total, en horas o minutos, diría que pasa escuchando SiriusXM en una SEMANA normal? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS “DON’T KNOW”, PROBE FOR BEST ESTIMATE.**)

_____ horas _____ minutos (**MAXIMUM HOURS=168**)

DK/NA X None 99

IF CODED “DK/NA” OR “NONE” IN Q.10A, SKIP TO 11A. OTHERWISE CONTINUE.

- 10B. Ahora, piense en lo que solía hacer antes de empezar a escuchar Pandora. ¿CUÁL de las siguientes está **reemplazando** Pandora **en su mayoría**? (**READ LIST; ACCEPT ONLY ONE RESPONSE; SHUFFLE CODES 1, 2, 3, 4 AND 5**)

Radio tradicional al aire, estaciones de AM/FM	1
CDs o sus propias descargas de música	2
OTROS servicios de música en línea, tales como Spotify, Rhapsody, iHeartRadio, o estaciones AM/FM transmitidas en línea	3
Podcasts	4
SiriusXM satellite radio	5
O BIEN, su nuevo tiempo de escuchar música no lo tomó de otras fuentes para oír música	6
Otros (volunteered) _____ (specify)	7
DK/NA (volunteered)	9

APPENDIX B
IF CODED “3” (ONLINE RADIO) IN Q.10B, CONTINUE. OTHERWISE SKIP TO Q.10D

10C. Y, ¿qué tipo de servicio en línea reemplazó en su mayoría Pandora? (**READ LIST; ROTATE ORDER**)

Servicios de radio en línea donde usted elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody 1

O Servicios de transmisión de radio en línea, tales como iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio 2

DK/NA 9

10D. Ahora imagínese que Pandora ya no estuviera disponible. ¿Qué haría en lugar de escuchar Pandora?

¿Reemplazaría su tiempo de escuchar Pandora con...? (**READ LIST. SHUFFLE ORDER. REPEAT STATEMENT FOR THE FIRST 3 ITEMS ONLY.**)

		YES	NO	DK/NA
10D.1	Radio tradicional al aire, estaciones de AM/FM	1	2	9
10D.2	CDs o sus propias descargas de música	1	2	9
10D.3	Servicios de radio en línea donde <u>usted</u> elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody	1	2	9
10D.4	OTROS servicios de <u>transmisión</u> de radio en línea, tales como iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio	1	2	9
10D.5	Podcasts	1	2	9
10D.6	SiriusXM	1	2	9

****ALWAYS ASK Q.10D.7 AND Q.10D.8 LAST AND IN THIS ORDER**

10D.7 Otros tipos de audio que no haya mencionado ya 1 2 9

10D.8 Y, si Pandora ya no estuviera disponible, ¿escucharía menos audio en general o no?

1 2 9

IF Q.10D.8 CODED “1” (YES/LISTEN TO LESS AUDIO OVERALL), CONTINUE. OTHERWISE SKIP TO NOTE ABOVE Q.10F

10E. En horas o minutos, ¿cuánto tiempo menos escucharía usted en una semana normal? (**IF RESPONDENT CANNOT GIVE AN EXACT AMOUNT OF TIME, ENCOURAGE BEST ESTIMATE. IF RESPONDENT SAYS “DON’T KNOW”, PROBE FOR BEST ESTIMATE.**)

_____ horas _____ minutos (**MAXIMUM HOURS=168**)

DK/NA X

APPENDIX B

ASK Q.10F ONLY OF ITEMS CODED “1” (YES) IN Q.10D.1-10D.7. IF ONLY ONE ITEM CODED YES, MARK THAT ITEM AS “100” IN Q.10F. IF NO ITEMS CODED YES, SKIP TO Q.11A

- 10F. Si Pandora ya no estuviera disponible, ¿cómo dividiría su escucha entre los otros tipos de audio que mencionó? Le voy a leer cada uno de los (**INSERT #**) tipos de audio que dijo que escucharía en lugar de escuchar Pandora. Me gustaría que me dijera qué porcentaje de 100 escucharía cada uno. Si sus números no suman 100%, le avisaré.

Entre los (**INSERT #**) tipos de audio, ¿qué porcentaje de tiempo, de un 100%, escucharía cada uno? Aquí está el primero...

Among the (**INSERT #**) types of audio, what percent of the time, out of 100%, would go to listening to each? Here's the first one..."

**(IF RESPONDENT CANNOT GIVE AN EXACT PERCENTAGE, PROBE FOR BEST ESTIMATE.
PERCENTAGES MUST TOTAL 100)**

- | | | |
|-------|--------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 10F.1 | Radio tradicional al aire, estaciones de AM/FM | Percent _____ |
| 10F.2 | CDs o sus propias descargas de música | Percent _____ |
| 10F.3 | Servicios de radio en línea donde <u>usted</u> elige las canciones en específico que quiere escuchar, tales como Spotify o Rhapsody | Percent _____ |
| 10F.4 | OTROS servicios de <u>transmisión</u> de radio en línea, tales como iHeartRadio, o las transmisiones en línea de estaciones AM/FM de radio | Percent _____ |
| 10F.5 | Podcasts | Percent _____ |
| 10F.6 | SiriusXM | Percent _____ |

****ALWAYS ASK Q.10F.6 LAST**

- | | | |
|-------|----------------------|---------------|
| 10F.6 | Otros tipos de audio | Percent _____ |
|-------|----------------------|---------------|

- 11A. En los últimos 12 meses, aproximadamente, ¿cuánto dinero ha gastado en comprar CD's físicamente o canciones y álbumes digitales? (**RECORD EXACT NUMBER. DO NOT ACCEPT A RANGE, IF RESPONDENT CANNOT GIVE EXACT AMOUNT, ENCOURAGE BEST ESTIMATE**)

_____ (**RECORD #**)

DK/NA X

- 11B. Ahora, piense en cuánto dinero espera gastar en comprar CDs físicamente o canciones y álbumes digitales durante los siguientes 12 meses. ¿Espera gastar más en música, menos en música o alrededor de lo mismo que gastó en los últimos 12 meses?

- | | |
|-----------------------|---|
| Más | 1 |
| Menos | 2 |
| Alrededor de lo mismo | 3 |
| DK/NA | 9 |

APPENDIX B

“Estas últimas preguntas son únicamente con fines de clasificación”.

12. Piense en el servicio telefónico en el que puede ser localizado(a). ¿En qué tipo de servicio telefónico se le puede localizar en su casa? (**READ LIST. NOTE: IF RESPONDENT MENTIONS THEY HAVE PHONE SERVICE THROUGH THE INTERNET, SUCH AS VONAGE OR THROUGH THEIR CABLE TELEVISION PROVIDER, USE APPLICABLE “REGULAR LAND-LINE SERVICE” CODE**)

	Solamente servicio de telefonía celular	1
	Tanto teléfono fijo como teléfono celular	2
OR	Solamente servicio de telefonía fija	3
	Don't know/refused	9

- 13A. ¿Es usted de ascendencia latina o hispana?

Sí	1	SKIP TO Q.14
No	2	CONTINUE
Refused/No Answer	9	CONTINUE

- 13B. ¿Cuál de las siguientes lo(a) describe mejor? ¿Es usted...? (**READ LIST.**)

	Blanco(a)	1
	Afroamericano(a)	2
	Asiático(a)	3
OR	O, ¿es de otra ascendencia?	4
	Refused	8
	No Answer	9

14. Por último, por favor dígame cuál es su código postal. _____ (**RECORD**)

“Thank you very much for your time and cooperation. Good-bye!”

15. Phone number: _____ (**RECORD**)

16. TIME: (MINUTES): _____ (**RECORD**)



ROAD HAPPY

SiriusXM® Package Lineup

Your subscription package will determine actual channel lineup.

POP

02		Today's Pop Hits
03		Pop Music You Can Move to
04		Worldwide Rhythmic Hits
05		Pop Hits
06		Pop Hits with Cousin Brucie
07		Pop Hits with American Top 40
08		Pop Hits with Original MTV VJs
09		Pop Hits with Downtown Julie Brown
10		2000s Pop Hits
13		Today's Pop Vocalists
14		Acoustic/Singer-Songwriters
15		Adult Pop Hits
16		Bright Pop Hits
17		Love Songs
18		Exclusive Limited-Run Channels
158		Tropical Latin Music
300		'80s – 2000s Pop Music
301		Music to Drive to!
302		24/7 Cover Songs

ROCK

19		Elvis 24/7 Live from Graceland
20		Bruce Springsteen 24/7
21		Little Steven's Garage Rock
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		New Rock Meets Classic Rock
29		Jam Bands
30		Eclectic Rock

XL May include frequent explicit language or mature programming. Call SiriusXM Listener Care at 1-800-967-2346 and ask about Family Friendly packages. All programming subject to change. Satellite and streaming lineups vary slightly.
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 Effective Date: 9/29/16

COMMERCIAL-FREE MUSIC

31		Music Curated by Tom Petty
32		Mellow Classic Rock
33		'80s Alternative/New Wave
34		'90s Alternative/Grunge
35		New Indie Rock
36		New Alternative Rock
37		New Hard Rock
38		Ozzy's Classic Hard Rock
39		'80s Hair Bands
40		Heavy Metal XL
41		Punk & Beats with Jason Ellis XL
42		Reggae
310		Rock Hall Inducted Artists
311		'70s/'80s Smooth-Sailing Soft Rock
313		Rock & Roll Jukebox Songs
314		Hard Rock from the '90s & 2000s
316		Live Classic Rock

HIP-HOP

43		Classic Hip-Hop XL
44		Today's Hip-Hop Hits XL
45		Eminem's Hip-Hop Channel XL

R&B

46		Today's R&B Hits
47		Hip-Hop/R&B from the '90s & 2000s
48		Adult R&B Hits
49		Classic Soul/Motown
50		'70s/'80s R&B
330		Smooth R&B Love Songs

DANCE & ELECTRONIC

52		Electronic Dance Music Hits
53		EDM DJ Mix Shows
54		Downtempo/Deep House

54 '70s – 2000s Dance Hits

340 Tiësto's EDM Channel

341 '90s/2000s Dance Hits

COUNTRY

55		Garth's Own Channel, 24/7
56		Today's Country Hits
57		Kenny Chesney's Music Channel
58		'80s/'90s Country Hits
59		Willie's Classic Country
60		Rockin' Country Rebels
61		2000s Country Hits
62		Bluegrass
350		Country Bar Songs

CHRISTIAN

63		Christian Pop & Rock
64		Kirk Franklin's Gospel Channel
65		Southern Gospel

JAZZ/STANDARDS

66		Smooth/Contemporary Jazz
67		Classic Jazz
68		New Age
69		Easy Listening
70		B.B. King's Blues Channel
71		Standards by Sinatra & More
72		Show Tunes
73		'40s Pop Hits/Big Band

CLASSICAL

74		Opera/Classical Vocals
76		Classical Music

KIDS

77		Pop Hits Sung by Kids for Kids
78		Kids' Music
79		Pop Hits for the Entire Family

SPORTS

225- 234 ▲		Live NFL Play-by-Play Online Ch. 800-831
88 ▲		24/7 NFL Talk & Play-by-Play
176- 189 ▲		Live MLB® Play-by-Play Online Ch. 840-869
159 ▲		MLB® News & Games Online Ch. 157
89 ▲		24/7 MLB® Talk & Play-by-Play
90 ▲		24/7 NASCAR® Talk & Races
209 ▲		Verizon IndyCar®, Other Play-by-Play
212- 217 ▲		Live NBA Play-by-Play Online Ch. 880-909, 960-969
86 ▲		24/7 NBA Talk & Play-by-Play

EVERY MAJOR SPORT

219- 223 ▲		Live NHL® Play-by-Play Online Ch. 920-949, 960-969
91 ▲		24/7 NHL® Talk & Play-by-Play
92 ▲		24/7 Golf Talk & Play-by-Play
190- 200 ▲		Your Home for NCAA Sports
84 ▲		College Sports Talk/Play-by-Play
80 ▲		Mike & Mike/Sports Talk
81 ▲		SportsCenter/Finebaum/PTI
157 ▲		Latino Sports Talk & Play-by-Play

370 ▲		Latest Sports News from ESPN
87 ▲		Fantasy Sports Talk
82 ▲		Mad Dog Russo/Stephen A. Smith
83 ▲		Sports Talk by Bleacher Report
85 ▲		Soccer Talk & Play-by-Play
93 ▲		Covino & Rich/Combat Sports

SPORTS PLAYBYPLAY

For live sports schedules, visit siriusxm.com/sports

HOWARD STERN

100 ▲		The Howard Stern Show XL
101 ▲		The World of Howard Stern XL

COMEDY

94 ▲		All-Time Greatest Comedians XL
95 ▲		Comedy Central Uncensored XL
96 ▲		Comedy & More with Jamie Foxx XL
97 ▲		Produced by Foxworthy/Larry the Cable Guy XL
98 ▲		Comedy for the Entire Family
99 ▲		The Best Uncensored Comedy XL
400 ▲		One and Only George Carlin XL

CANADIAN

162 ▲		Canadian Indie Music First
163 ▲		Francophone Pop
166 ▲		Francophone Country Folk
167 ▲		Canadian Current Affairs
168 ▲		Canadian Comedy Uncensored XL
170 ▲		Radio-Canada News & Info
171 ▲		New Canadian Country
172 ▲		News/Weather by AMI-Audio
173 ▲		New & Emerging Indie/Alt-Rock
174 ▲		The New Indie Pop Alternative

RELIGION

129 ▲		Talk for Saints and Sinners
130 ▲		Solid Catholic Talk
131 ▲		Christian Talk

ENTERTAINMENT

102 ▲		Andy Cohen/Pop Culture/More XL
103 ▲		Opie and Jim Norton XL
105 ▲		Entertainment Talk & News
106 ▲		Music Talk That Rocks
108 ▲		The TODAY Show — All Day
109 ▲		Jenny McCarthy/Dr. Laura/More XL
110 ▲		Real Doctors, Real People
111 ▲		Business Powered by Wharton
128 ▲		Positive Inspiration for Life
146 ▲		Talk for Truckers
148 ▲		Classic Radio Shows

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
144 ▲		Korean Music and News
152 ▲		Modern English & Spanish Hits
154 ▲		American Latino Talk Radio
470 ▲		Your Latino Variety Channel

TRAFFIC & WEATHER

132- 138 ▲		Boston Philadelphia Atlanta Pittsburgh New York Washington, DC Baltimore Miami Orlando Chicago Detroit Dallas/Ft. Worth Houston St. Louis Minneapolis San Francisco Seattle Phoenix Tampa-St. Petersburg Los Angeles San Diego
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NEWS/PUBLIC RADIO

112 ▲		CNBC Simulcast
113 ▲		FOX Business Simulcast
114 ▲		FOX News Simulcast
115 ▲		FOX News Headlines 24/7
116 ▲		CNN Simulcast
117 ▲		HLN Simulcast
118 ▲		MSNBC Simulcast
119 ▲		Business News
120 ▲		World News
121 ▲		Entertaining Informative Talk
122 ▲		NPR News & Conversation
123 ▲		Independent Public Radio
147 ▲		Agriculture/Western Lifestyle
155 ▲		CNN's 24-Hour Spanish-language News
169 ▲		Canada's #1 Radio News Source

POLITICS/ISSUES

124 ▲		Non-Partisan Political Talk
125 ▲		Conservative Talk
126 ▲		African-American Talk feat. Joe Madison
127 ▲		Progressive Talk
450 ▲		Talk Radio from FOX News
455 ▲		C-SPAN Live Simulcast

▲ Available only with the All Access package
▲ Preemptive for Play-by-Play sports
▲ Not available on the app/online

▲ Requires All Access package for Satellite; standard on the app/online
+ XTRA CHANNELS Included in all SiriusXM packages

ADDITIONAL CHANNELS ON THE APP/ONLINE

MUSIC

700	 NEIL DIAMOND RADIO	Neil Diamond 24/7
701	 ONE-HIT WONDERS	One-Hit Wonders, 24/7
702	 elevations	Reimagined Pop & Rock Classics
703	 OLDIES PARTY	Party Songs from the '50s & '60s
704	 '70s & '80s POP	'70s & '80s Super Party Hits
705	 '80s & '90s POP	'80s & '90s Party Hits
712	 TOM PETTY'S BURIED TREASURE	Tom Petty's Buried Treasure 24/7
713	 JASON ELLIS	Jason Ellis Show Nonstop XL
715	 NON-STOP CLASSIC ROCK	Non-Stop Classic Rock
720	 SWAY'S UNIVERSE	Sway's Lifestyle Channel XL
741	 VILLAGE	Folk
750	 CINEMAGIC	Movie Soundtracks & More
751	 KRISHNA DAS YOGA RADIO	Chant/Sacred/Spiritual Music
755	 SIRIUSXM POP	Classical Pops

758	 ICEBERG	The New Rock Alternative
759	 attitude FRANCO	The New Rock Alternative
761	 ACUÑA	Regional Mexican Music
762	 CARICIA	Ballads in Spanish & English
763	 VIVA	Modern Latin Pop & Ballads
764	 Latidos	Latin Love Songs
765	 FLOW NACIÓN	Latin Urban Music
766	 LUNA	Latin Jazz
767	 RUMBÓN	Classic Salsa
768	 LA HUELA	Latin Rock



Home for Limited-Run Channels
716, 717, 721 (**XL**), 726,
730, 742, 745, 752, 756

NEWS, TALK & ENTERTAINMENT

790	 SIRIUSXM LIMITED EDITION	Home for Limited-Run Channels
791	 VIVID RADIO	Superstars, Celebs, Hot Sex XL
795	 FRANCE 24	Live Feed from France 24
796	 THE BLAZE RADIO NETWORK	TheBlaze Radio Network

COMEDY

769	 QUE FUNNY	Dos Languages, Todo Comedy! XL
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SPORTS

800-831	 NFL	Live NFL Play-by-Play
840-869	 MLB	Live MLB® Play-by-Play
880-909	 NBA	Live NBA Play-by-Play
920-949	 NHL	Live NHL® Play-by-Play
953-994	 SPORTS PLAYBYPLAY	College Sports Play-by-Play & More

▲ Available only with the All Access package

▲ Preemptable for Play-by-Play sports

▲ Not available on the app/online

▲ Requires All Access package for Satellite; standard on the app/online

+ XTRA CHANNELS Included in all SiriusXM packages

Entertainment tuned to you.

Tell us what you like to hear so we can send you updates and information on cool opportunities we think you'd be interested in hearing about. Head to siriusxm.com/whatilike and let us know.



From: [REDACTED]
Sent: Monday, June 20, 2016 4:43 PM
To: [REDACTED]; Ryan, Jim; [REDACTED]
Subject: Thank you from the bottom of our hearts

Guys --- Back in September, as we all know, The Pulse started playing Ben Rector's 'Brand New'...The first station in America.....

Fast forward and today we hit Top 10 on both Adult Top 40 charts, with no end in sight...and with Pop coming into the game.

Thank you for The Blend's airplay as well! We sit at 12* on the AC mainstream chart also and the multi-format airplay this song is getting is proving it to be a hit.

Thank you does not begin to express how much we appreciate you believing in Ben....

From the bottom of my heart and on behalf of everyone here.....THANK YOU.

[REDACTED]

[REDACTED]

[REDACTED]

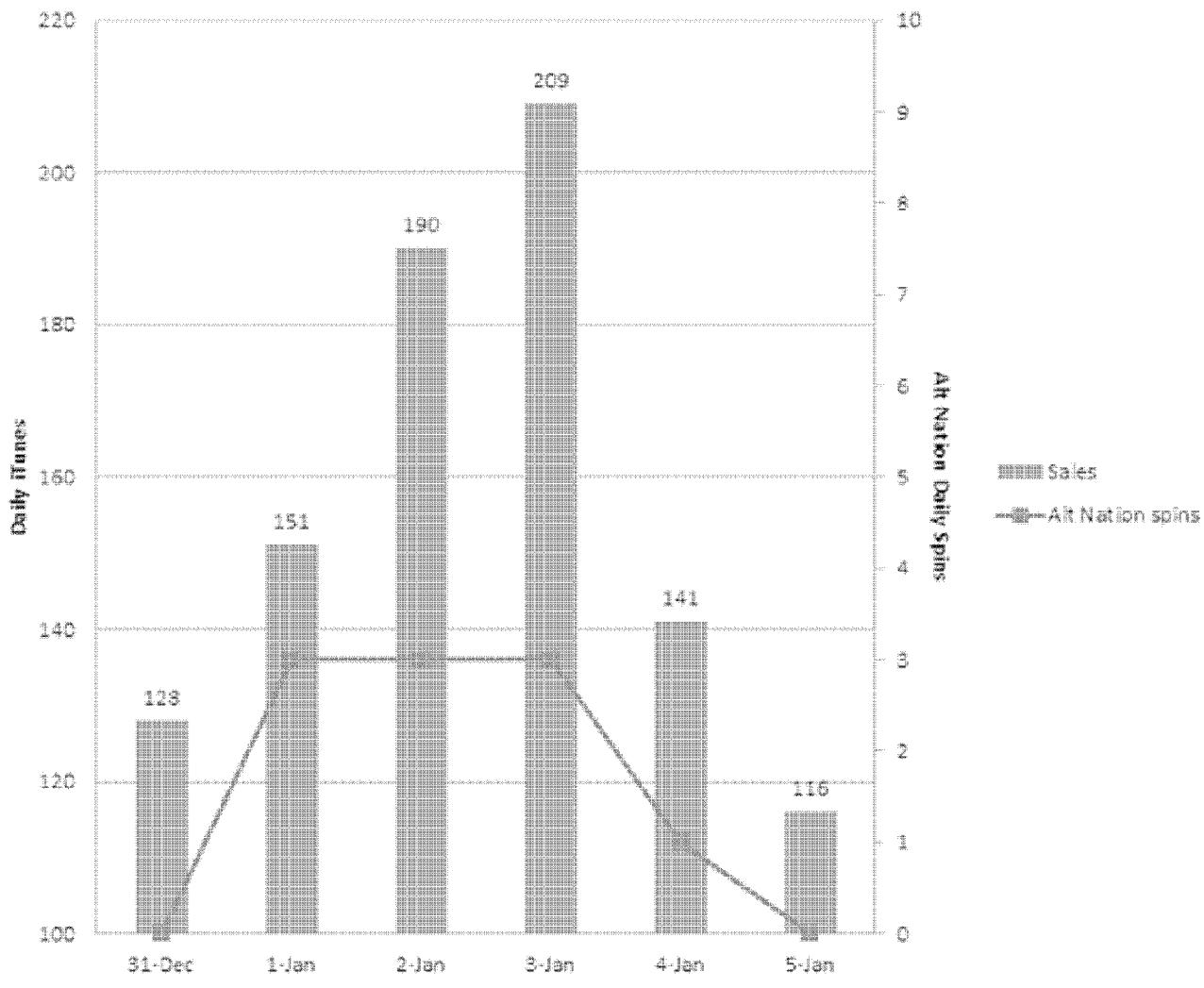
From: Regan, Jeff [REDACTED]
Sent: Monday, January 11, 2016 4:38 PM
To: Blatter, Steve
Subject: FW: Oh Wonder "Lose It" @ Alt Nation

From: [REDACTED]
Sent: Monday, January 11, 2016 3:50 PM
To: Regan, Jeff
Subject: FW: Oh Wonder "Lose It" @ Alt Nation

Lovely graphs.

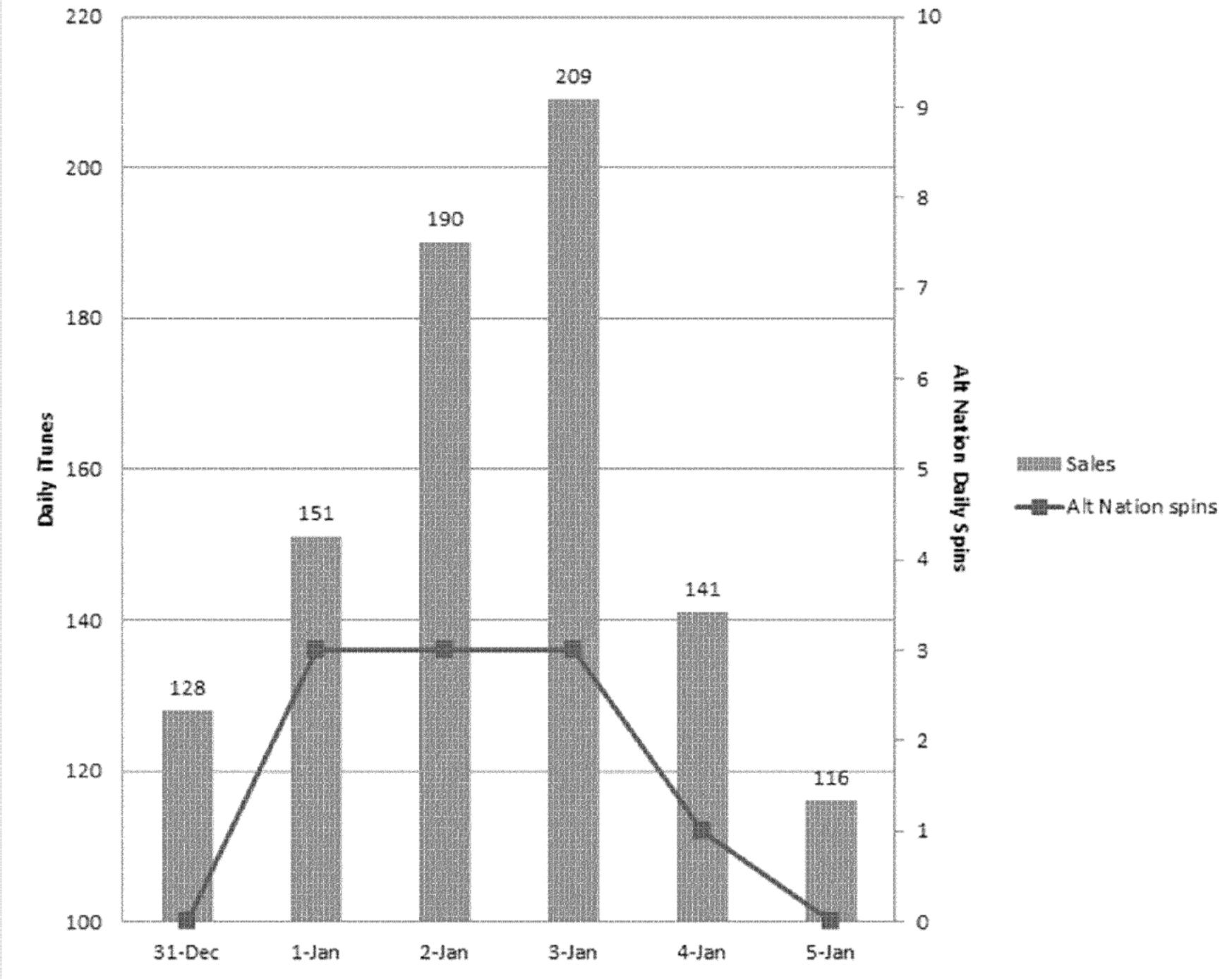
From: Lipman, Avery
Sent: Monday, January 11, 2016 3:35 PM
To: [REDACTED]
Subject: Oh Wonder "Lose It" @ Alt Nation

OH WONDER @ ALT NATION - DAILY SALES & SPINS



OH WONDER @ ALT NATION - DAILY SALES & SPINS

PUBLIC VERSION



From: Geronimo [REDACTED]
Sent: Thursday, November 12, 2015 4:42 PM
To: Blatter, Steve
Subject: FW: Consumption // 6-Day Trend

From: [REDACTED]
Sent: Thursday, November 12, 2015 4:15 PM
To: Geronimo
Subject: FW: Consumption // 6-Day Trend

This is what's going on with Oliver Heldens "Shades Of Grey"

100% from BPM airplay.



From: [REDACTED]
Date: Thursday, November 12, 2015 at 2:07 PM
To: [REDACTED]
Subject: RE: Consumption // 6-Day Trend

Republic Daily Consumption Chart iTunes Track Downloads

Artist	Title	TW 6 Day Trend	Wkly % Var	TW Wednesday
OLIVER HELDENS	SHADES OF GREY	651	▲ 95%	99

Republic Daily Consumption Chart Spotify Streams

Artist	Title	TW 6 Day Trend	Wkly % Var	TW Wednesday
OLIVER HELDENS	SHADES OF GREY	51,419	▲ 20%	10,037

Republic Daily Consumption Chart

Apple Music Streams

Artist	Title	TW 6 Day Trend	Wkly % Var	TW Wednesday
OLIVER HELDENS	SHADES OF GREY	15,559	▲ 101%	3,400

From: [REDACTED]
Sent: Thursday, November 12, 2015 2:03 PM
To: [REDACTED]
Subject: FW: Consumption // 6-Day Trend

What's the split on the increase for Oliver Heldens streams vs downloads?

Thanks!



From: [REDACTED]
Date: Thursday, November 12, 2015 at 12:49 PM
To: ** [REDACTED]
Subject: Consumption // 6-Day Trend

artist	tw 6d	chg	tw wed	chg
drake	136,285	-11%	19,950	-11%
shawn	80,220	-5%	12,028	-15%
drake/future	59,375	-5%	9,976	6%
ariana	45,247	-57%	7,205	-34%
post	42,740	2%	7,343	7%
demi	36,787	-18%	5,867	-19%
zbb	17,200	10%	2,261	-73%
jamesbay	15,873	63%	2,653	44%
dnce	15,835	12%	2,579	-2%
dawin?	10,636	28%	1,730	25%
weeknd	6,335	29%	1,402	64%
tovelo	5,568	25%	911	17%
post(too)	4,582	3%	882	9%
hudson	2,401	-14%	336	-21%
vamps	1,494	-10%	238	-13%
marian	1,409	1%	240	6%
posner	1,249	5%	208	3%

simons?	1,149	16%	203	13%
heldens?	1,000	69%	169	66%
banners	792	22%	126	-2%
thescore	668	10%	137	16%
jacquees	585	new	102	new
grace?	411	4%	77	12%
adrian	400	51%	77	1%



From: Geronimo [REDACTED]
Sent: Wednesday, May 06, 2015 10:26 AM
To: Blatter, Steve
Subject: Fw: Body Talk soundscan

From: [REDACTED]
Sent: Wednesday, May 06, 2015 10:22 AM
To: Geronimo
Cc: [REDACTED]
Subject: Body Talk soundscan

TW 831 +123%
LW 372

Catalyst: 100% BPM airplay

iTunes 1-day trend has the single **+218%**, partially due to the Hot Tracks slider on the Dance store that the BPM airplay helped us to secure for this week.



From: Harvey, Ben [REDACTED]
Sent: Thursday, April 23, 2015 1:49 PM
To: Blatter, Steve
Subject: FW: Alina Baraz on SiriusXM Chill

Steve – thanks for the intro to [REDACTED] at Coachella. I'm headed to the Ultra office to hear some new music later on today.

Meanwhile, I got a great note about Alina Baraz (she's on Ultra now) from her management. "Fantasy" has sold 80k copies and gotten 10 million streams! Chill is the only outlet playing it (beyond a few spins from KCRW). Will update you more after my Ultra visit.

Ben

From: [REDACTED]
Sent: Tuesday, April 21, 2015 1:30 PM
To: Harvey, Ben
Subject: Re: Alina Baraz on SiriusXM Chill

Hey Ben, want to talk tmw at some point - you guys have had a MASSIVE impact. We are over 80,000 sold and now over 10 million streams and you are the station that has really raised its profile to get it there. No way would be here without you guys.



From: Usuriello, Vincent [REDACTED]
Sent: Tuesday, April 21, 2015 11:19 AM
To: Blatter, Steve
Cc: Steele, Gregg
Subject: FW: Good sales week

This is an older email, but [REDACTED] recognizes the impact Octane has on their records.

Starset, who I added a 3rd track today, was unsigned before we started to play them. [REDACTED] picked them up because of our airplay.

Let There Be Rock!

VINCENT USURIELLO
PROGRAM DIRECTOR
SIRIUS XM SATELLITE RADIO
OCTANE / E STREET RADIO
[REDACTED]
[REDACTED]
[REDACTED]
@VINCENTROCKWELL
@SXM_OCTANE

From: [REDACTED]
Sent: Wednesday, March 11, 2015 11:59 AM
To: Usuriello, Vincent; Steele, Gregg
Subject: Good sales week

Hey guys – wanted to share some sales #'s from Sons of Texas this week. For a baby band that really hasn't ventured far out of state yet they put up some very solid first week #'s.

2273 first week total
#143 on the Billboard Top 200 Current
#5 Heatseekers
#71 Digital
#10 Hard
#36 Rock

We also saw some big upticks on The Pretty Reckless – Follow Me Down was up 19%, the album up 17%. Also, saw you moved up Starset, that was up in sales 11% this week and up in units in 70% of the top 100 markets. [REDACTED]

[REDACTED]
Thanks for everything!!!!

From: Marks, John [REDACTED]
Sent: Wednesday, November 05, 2014 7:04 PM
To: Blatter, Steve
Subject: FW: "500 Miles" sales
Attachments: 500.pdf

FYI.

John Marks
SiriusXM
Sr. Director of Country Programming
[REDACTED]

From: [REDACTED]
Sent: Wednesday, November 05, 2014 7:02 PM
To: Marks, John
Subject: "500 Miles" sales

John,

I'm sure you're enjoying the CMA festivities right about now. Wanted to make sure to let you know that thanks to your support, "500 Miles" is up 12% on Soundscan from the previous week, and has sold just shy of 5,000 downloads in 2 weeks. Sales this week are already trending up an additional 11% again, and the song is outpacing the sales of the first single "Just Another Love Song" by about 30%.

Thanks again for all your support!

Best,
[REDACTED]

PUBLIC VERSION**Track Title Report: DMA Sales**

Title: 500 MILES		Release To Date			
Artist: HALEY & MICHAELS		Sales			
Format: Tracks	2014 YTD:	4,850	Total	4,850	% TOT
Label:	Weeks Top 200	Period TW	Rank	Digital	4,850 100
ISRC: QMFJ91400008	2W	LW			

B U S I N E S S C O N D I T I O N S				
Track (000)	This Week	% CHG	Last Week	YTD
Total:	17,286	0	17,223	935,368
Chain:	N/A	N/A	N/A	N/A
Independent:	N/A	N/A	N/A	N/A
Mass Merch:	N/A	N/A	N/A	N/A
Digital:	17,286	0	17,223	935,368

Week Ending: 11/02/2014

Config: Digital

Weeks: 4

Display: %CHG

Format: Tracks	Config: Digital	WK End DMA	% CHG	WK End 10/26/14	% CHG	WK End 10/19/14	% CHG	WK End 10/12/14	% CHG	92 TD Total
Total		2,558	12	2,292		0		0		4,850
New York, NY		145	20	121		0		0		266
Los Angeles, CA		75	-7	81		0		0		156
Chicago, IL		91	42	64		0		0		155
Philadelphia, PA		51	4	49		0		0		100
SF-Oakland-San Jose		24	-84	146		0		0		170
Boston, MA		51	11	46		0		0		97
Dallas-Ft. Worth, TX		63	12	56		0		0		119
Detroit, MI		29	26	23		0		0		52
Washington, DC		56	8	52		0		0		108
Houston, TX		63	26	50		0		0		113
Cleveland, OH		28	75	16		0		0		44
Atlanta, GA		45	29	35		0		0		80
Minneapolis-St. Paul, MN		35	13	31		0		0		66
Tampa-St. Petersburg, FL		21	-12	24		0		0		45
Seattle-Tacoma, WA		21	-12	24		0		0		45
Miami, FL		19	58	12		0		0		31
Pittsburgh, PA		25	32	19		0		0		44
St. Louis, MO		31	11	28		0		0		59
Denver, CO		50	-38	81		0		0		131
Phoenix, AZ		34	6	32		0		0		66
Sacramento-Stockton, CA		22	0	22		0		0		44
Baltimore, MD		18	12	16		0		0		34
Hartford-New Haven, CT		28	65	17		0		0		45
San Diego, CA		25	0	25		0		0		50
Orlando-Daytona Bch-Mbrne		21	75	12		0		0		33
Indianapolis, IN		22	10	20		0		0		42
Portland, OR		7	-46	13		0		0		20
Milwaukee, WI		15	25	12		0		0		27
Kansas City, KS-MO		28	56	18		0		0		46
Cincinnati, OH		16	0	16		0		0		32
Charlotte, NC		23	64	14		0		0		37
Nashville, TN		28	47	19		0		0		47
Raleigh-Durham, NC		27	42	19		0		0		46
Columbus, OH		21	31	16		0		0		37
Greenville-Sprtnbrg-Ashvll		9	-10	10		0		0		19
New Orleans, LA		6	20	5		0		0		11
Grnd Rpdz-Klmzo-Bttle Crk		14	75	8		0		0		22
Buffalo, NY		26	271	7		0		0		33
Memphis, TN		16	14	14		0		0		30
Oklahoma City, OK		32	-11	36		0		0		68
Salt Lake City, UT		34	6	32		0		0		66
Nrlfk-Prlsmth-Nwpnlnws-Hmp		14	75	8		0		0		22
San Antonio, TX		23	10	21		0		0		44
Providence-New Bedford, RI		14	56	9		0		0		23
Harrsbrg-Yrk-Lncstr-Lbnon		29	190	10		0		0		39
Louisville, KY		12	200	4		0		0		16
Birmingham, AL		8	-27	11		0		0		19
Charleston et al, WV		16	433	3		0		0		19
Greensbro-WhtnSalm-HiPnt		9	29	7		0		0		16
WstPlmBch-FrtPrc-VeroBch		22	340	5		0		0		27
Albuquerque, NM		15	-6	16		0		0		31
Dayton, OH		10	233	3		0		0		13

PUBLIC VERSION

Albany-Schenectady-Troy, NY	16	220	5	0	0	21
Wilkes-Barre-Scranton, PA	28	133	12	0	0	40
Mobile-Pensacola, AL-FL	9	12	8	0	0	17
Jacksonville, FL	14	75	8	0	0	22
Little Rock, AR	20	82	11	0	0	31
Tulsa, OK	15	88	8	0	0	23
Flint-Saginaw-BayCity, MI	17	112	8	0	0	25
Richmond, VA	23	130	10	0	0	33
Wichita-Hutchison, KS	19	90	10	0	0	29
Fresno-Visalia, CA	6	-45	11	0	0	17
Toledo, OH	19	111	9	0	0	28
Knoxville, TN	4	-33	6	0	0	10
Shreveport-Bossier City, LA-TX	8	-27	11	0	0	19
Des Moines, IA	23	109	11	0	0	34
Green Bay-Appleton, WI	4	-33	6	0	0	10
Syracuse, NY	8	0	8	0	0	16
Roanoke-Lynchburg, VA	7	40	5	0	0	12
Lexington, KY	8	0	8	0	0	16
Austin, TX	23	92	12	0	0	35
Rochester, NY	7	17	6	0	0	13
Omaha, NE	12	-33	18	0	0	30
Portland-PolandSpring, ME	7	133	3	0	0	10
Champaign et al., IL	13	18	11	0	0	24
Pdch-CpGrdu-Hrsbg-Mrion, KY-IL	8	-53	17	0	0	25
Spokane, WA	11	22	9	0	0	20
Davnprt-RcklsInd-Molin, IL	10	-9	11	0	0	21
Tucson, AZ	6	-25	8	0	0	14
Huntsville-Decatur-Flomor, AL	13	18	11	0	0	24
CedarRpd-Btrloo-Dubuqu, IA	12	50	8	0	0	20
Columbia, SC	12	9	11	0	0	23
Springfield, MO	13	30	10	0	0	23
Chattanooga, TN	4	-43	7	0	0	11
Southbend-Elkhart, IN	5	-17	6	0	0	11
Jackson, MS	6	200	2	0	0	8
Tri-Cities, TN-VA	6	500	1	0	0	7
Johnstown-Altoona, PA	12	0	12	0	0	24
Youngstown, OH	7	250	2	0	0	9
Madison, WI	7	-22	9	0	0	16
Las Vegas, NV	7	-30	10	0	0	17
Brlngtn-Plattsbrgh, VT-NY	15	114	7	0	0	22
Evansville, IN	9	80	5	0	0	14
Baton Rouge, LA	9	125	4	0	0	13
Lincoln-Hastings-Kearney	13	30	10	0	0	23
Ft. Myers-Naples, FL	9	125	4	0	0	13
Waco-Temple-Bryan, TX	12	-14	14	0	0	26
Springfield, MA	4	0	4	0	0	8
Colorado Springs-Pueblo, CO	10	-17	12	0	0	22
Honolulu, HI	0	-100	2	0	0	2
Puerto Rico & VI	0	0	0	0	0	0
Other	461	2	453	0	0	914



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From: Marks, John [REDACTED]
Sent: Friday, July 11, 2014 11:09 AM
To: Blatter, Steve
Subject: FW: Diaz in Top 10 because of you/ Premiere op?

Note Johnny Diaz sales since moving to regular rotation.

John Marks
SiriusXM
Sr. Director of Country Programming
[REDACTED]

From: Skop, Al
Sent: Friday, July 11, 2014 11:06 AM
To: Marks, John
Subject: FW: Diaz in Top 10 because of you/ Premiere op?

I can get this up once it's finished. Ok? Video's pretty cool...

From: [REDACTED] On Behalf Of [REDACTED]
Sent: Thursday, July 10, 2014 3:18 PM
To: Skop, Al
Subject: Diaz in Top 10 because of you/ Premiere op?

The power of the highway is HUGE. Thank God I Got Her is top ten on the i-tunes chart solely on the strength of The Highway. A million thank yous sir.

We have a new Acoustic video of him doing that song, would the highway be interested in premiering it?

This is the unfinished video. There are a couple editing things and we'll clean up the sound before we put it on youtube. <https://www.dropbox.com/s/a9u86ivlwwe7chf/TGIGH%20V1.mp4>

--
[REDACTED]
[REDACTED]
[REDACTED]

From: Marks, John [REDACTED]
Sent: Thursday, June 05, 2014 1:12 PM
To: Blatter, Steve
Subject: FW: FGL - I'm in a Hurry

FYI – FGL, I'm in A Hurry.

John Marks
SiriusXM
Sr. Director of Country Programming
[REDACTED]

From: [REDACTED]
Sent: Thursday, June 05, 2014 12:49 PM
To: Marks, John
Cc: Mark Wright; [REDACTED]
Subject: FGL - I'm in a Hurry

Hey John,

THANK YOU VERY MUCH for spinning I'm In a Hurry by FGL off our Alabama & Friends project the past few days.
Just this week alone we've sold over 2,200 downloads in only 3 days!
The track has jumped up on the top 75 Country songs on iTunes.
FGL is hot and this song obviously has immediate impact – a summer hit!

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] |

From: [REDACTED]
Sent: Wednesday, January 29, 2014 11:14 AM
To: Regan, Jeff [REDACTED]
Cc: [REDACTED]
Subject: YTG Album
Attachments: SoundScan_DMA_YTG.pdf

Jeff

Hi we are thrilled with the start of the YTG Album. And I feel you guys had a real big part in our strong 1st week.

In my opinion the show we did with you guys really helped and obviously worked. They sounded so good and the playbacks got people excited about the project.

Our sales dept. had this at early projections of 22k. Well we blew that away selling 33,250 Debut 7* Single is about to go Top 5 at the format.

Thanks for all the support.

[REDACTED]

[REDACTED]


[HOME](#) | [TITLE](#) | [SUMMARY](#) | [CHARTS](#) | [MARKETING](#) | [PICKUP](#) | [SETS](#)

Title Report: DMA Sales

ADD TO SET NBDisco ▾

Title: MIND OVER MATTER Artist: YOUNG THE GIANT Format: Album				Release To Date Sales			
Label: FUER	Tracks	TW	-25,179	Total:	Units	% TOT	
Release Date: 01/21/14		RTD	72,429	L.P.:	33,579	2	
Catalog CAT: 40918		YTD	27,441	Cassette:	0	0	
2014 YTD		Weeks	Period	CD:	4,239	13	
2014 YTD Digital.		Top 200	Rank	DVD:	0	0	
		TW	7	Digital:	28,600	85	
		LW	---				
		2W	---				

Week Ending: 01/26/2014 ▾

Strata: All ▾

Config: All ▾

Weeks: 4 ▾

WK End

01/26/14

%

CHG

RK

WK End

01/19/14

%

CHG

RK

WK End

01/12/14

DBA	WK End 01/26/14	% CHG	RK	WK End 01/19/14	% CHG	RK	WK End 01/12/14
Total	33,520	999	56				
New York, NY	2,439	999	6	14			
Los Angeles, CA	2,921	999	5	15			
Chicago, IL	1,237		6	0			
Philadelphia, PA	1,309	999	6	15			
SF-Oakland-San Jose	982		6	0			
Boston, MA	930		7	0			
Dallas-Ft. Worth, TX	995	999	5	3			
Detroit, MI	466		7	0			
Washington, DC	895	999	8	1			
Houston, TX	815		5	0			
Cleveland, OH	414		8	0			
Atlanta, GA	822		4	0			
Minneapolis-St. Paul, MN	371		14	0			
Tampa-St. Petersburg, FL	428		6	0			
Seattle-Tacoma, WA	667		7	0			
Miami, FL	303		7	0			
Pittsburgh, PA	383	999	9	2			
St. Louis, MO	354	999	8	1			
Denver, CO	511		6	0			
Phoenix, AZ	591		5	0			
Sacramento-Stockton, CA	409		6	0			
Baltimore, MD	430		6	0			
Hartford-New Haven, CT	309		7	0			
San Diego, CA	441		6	0			
Orlando-Daytona Beach-Melbourne	250		9	0			
Indianapolis, IN	343		7	0			
Portland, OR	442		5	0			
Milwaukee, WI	328	999	4	1			
Kansas City, KS-MO	353		4	0			
Cincinnati, OH	298		5	0			
Charlotte, NC	369		5	0			
Nashville, TN	350	999	6	1			
Raleigh-Durham, NC	245		7	0			
Columbus, OH	390	999	4	1			

From: Marks, John [REDACTED]
Sent: Tuesday, October 22, 2013 8:56 AM
To: Blatter, Steve
Subject: FW: Brandy Clark

Brandy Clark has been playing On The Horizon. We moved her to regular light rotation last week.

John Marks
SiriusXM
Sr. Director of Country Programming
[REDACTED]

From: [REDACTED]
Sent: Tuesday, October 22, 2013 7:24 AM
To: Marks, John
Subject: Brandy Clark

John,

Brandy is at #4 on iTunes Country chart this morning. Thank you so much for promoting her like you have. This would have been impossible without your help. I can't wait to see where this leads her!

Very Truly Yours,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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From: Marks, John [REDACTED]
Sent: Wednesday, October 16, 2013 12:52 PM
To: Blatter, Steve
Subject: Fw: Thank you!

FYI. This is Seth's guy.

----- Original Message -----

From: [REDACTED]
Sent: Wednesday, October 16, 2013 12:46 PM Eastern Standard Time
To: Marks, John
Subject: Thank you!

Hey John,

[REDACTED] has now been by far my highest debut at retail in Canada.
We did 2600+ singles 1st week without any radio push. That's all word of mouth and The Highway spins.
Thank you very much!

Hope you're doing great

[REDACTED]

Sent from my iPhone

From: [REDACTED]
Sent: Wednesday, April 24, 2013 11:39 AM
To: [REDACTED] Kelly, Kid
Subject: everyone off cc: Honestly have never seen anything like this

This song should be the centerpiece of SiriusXM

Please consider POWER at Hits1 and watch. It is that strong.

Nothing else has done this that I know of

Honest

From: [REDACTED]
Sent: Wednesday, April 24, 2013 11:35 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: URGENT You mite not believe this But evidence is there IMPORTANT

WE ARE LIVING PROOF OF THE POWER OF SiriusXM HITS 1!

Most of the pop markets are tiny on Sail (less than 400x nationally). The only national driver is HITS 1. I literally felt it from the moment KID decided to give us spins on 20 on 20. Then when we crossed to Hits 1, we exploded into 50k per week status...we will cross 3 Million single soon!

THANK YOU KID KELLY!

From: [REDACTED]
Sent: Wednesday, April 24, 2013 11:18 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: URGENT You mite not believe this But evidence is there IMPORTANT
Importance: High

AWOLNATION "Sail" has great synchs (History Channel, BMW, etc)
AWOLNATION "Sail" has great Alternative Radio support
AWOLNATION has great touring...3 songs deep etc.
Album almost Gold..

READ THIS URGENT:

AWOLNATION "SAIL" was selling 15,000 tracks a week (huge)....till one thing changed that:

Sirius Hits 1

AWOLNATION "SAIL" sold 51,946 THIS WEEK.

SELLS OVER 50,000 - 60,000 TRACKS EVERY WEEK SINCE SIRIUS HITs1 STARTED PLAYING THIS

I work for a company that "see's it all"...RED has many labels.

I put [REDACTED] on cc because they can verify this is FACT

Sirius Hits 1 SELLING 50,000+ TRACKS A WEEK ON AWOL.

This is the biggest PROOF of SiriusXM power I have ever seen. Seriously.

Make "Sail" a POWER @ Hits 1 and watch what happens.

Market Sirius with Sail as the bed of promos and all else.

This is yours guys. Seriously Amazing

Thank you,
[REDACTED]



-----Original Message-----

From: [REDACTED]
Sent: Wednesday, April 24, 2013 10:08 AM
To: [REDACTED]
Subject: I am going to BLOW YOUR MINDS.

Paydirt. For Sirius. For Hits1

U guys are gonna freak at what I send you next.

No hype.



From: Leeds, Steve [REDACTED]
Sent: Monday, April 22, 2013 11:20 AM
To: Blatter, Steve [REDACTED]
Subject: FW: FYI on Chubby downloads on i-tunes

fyi

From: [REDACTED]
Sent: Monday, April 22, 2013 10:28 AM
To: Kelly, Kid; [REDACTED] McKay, Pat; Leeds, Steve
Subject: FYI on Chubby downloads on i-tunes

Kid,

Last weekend, Chubby's "Changes" was somewhere around # 130 or so of his best selling Songs - keep in mind he has a few Dozen Hit Records & there are duplicates, triplicates & more of the Twist, Pony, Limbo etc. - on ABKCO, K-tel & our label at RED.

Last night he had jumped to # 29. I just checked now & "Changes" is # 12. It's outselling all his songs except for the Twist & Ponymore but I'm sure we'll eclipse that very soon.

When you played Charlie Gracie we out sold his Million Seller, "Butterfly,' which had been his # 1 seller for 55 years. Chubby's sales of "Changes" has to be due to the Sirius XM play, because I've had terrestrial play at some Gospel AM stations for a month. He's finally getting heard because of Sirius XM - Thank You!

From: Tewlow, Rob [REDACTED]
Sent: Wednesday, February 20, 2013 5:42 PM
To: Blatter, Steve; Paul Rosenberg; [REDACTED]
Subject: FW: Thank You Shade45

See below re/Kid Ink song "Bad Ass" that premiered on Shade 45.

Rob "REEF" Tewlow
Music Director/Sr. Producer Specialty Programming
SHADE 45/Sirius XM Satellite Radio



From: [REDACTED]
Sent: Wednesday, February 20, 2013 5:05 PM
To: Tewlow, Rob
Subject: Thank You Shade45

Reef
Thanks again for the Kid Ink support...you guys were of course the 1st station to add the record and we sold 47k 1st week! Top 10 on iTunesHipHop. I'll try to stop by next week so we can catch up... Holllllla



From: [REDACTED]
Sent: Thursday, January 03, 2013 2:43 PM
To: Regan, Jeff; [REDACTED]
Subject: Happy New Year!!

Hi guys. I hope you had a great Holiday.

I wanted to let you that since you started playing ALT J on Alt Nation our sales have gone way up. Check it out album selling 6,000 a week and single 4,499. The tour dates are selling out 4 months in advance in NYC, Seattle, San Fran, KC, Boston, and more

We sold another 6,040 albums this week. Ranking #135 on the Top 200 album chart at Soundscan. That is up from 163 rank last week

Past 4 weeks of sales

6,040 this week

6,084 last week

4,530 2 weeks ago

3,312 3 weeks ago

"Fitzpleasure" sold 4,499 this week up 36% from last week at 3,311

Thanks you for your help. I hope you are feeling it too.

We appreciate it

BTW new Joy Formidable album will be out 1/22. Thanks for your help there too.

Here's to a great 2013!!

[REDACTED]



From: Marks, John [REDACTED]
Sent: Friday, August 01, 2014 1:12 PM
To: Blatter, Steve
Subject: Re: OD + Spotify

Old dominion.

From: Blatter, Steve
Sent: Friday, August 01, 2014 12:33 PM
To: Marks, John
Subject: Re: OD + Spotify

What artist is this in reference to?

Sent from my iPhone

On Aug 1, 2014, at 9:24 AM, "Marks, John" [REDACTED] wrote:

FYI.

John Marks
SiriusXM
Sr. Director of Country Programming
[REDACTED]

From: [REDACTED]
Sent: Wednesday, July 30, 2014 5:51 PM
To: Marks, John
Subject: OD + Spotify

Just wanted to let you know that the guys single Shut Me Up has crossed the one million streams mark on Spotify, all thanks to you guys and The Highway airplay, and in only 6 weeks! Thank you all so damn much! We love you guys and appreciate the support. Looking forward to coming on the 8th for a hang with Buzz.

[REDACTED]

To: Blatter, Steve [REDACTED]
From: Regan, Jeff
Sent: Tue 6/14/2016 1:31:28 PM
Importance: Normal
Subject: FW: Whoop!! 'Strangers' is officially released through Dualtone Records!!
Received: Tue 6/14/2016 1:31:29 PM

From: [REDACTED]
Sent: Tuesday, June 14, 2016 1:26 PM
To: Regan, Jeff [REDACTED]
Subject: Whoop!! 'Strangers' is officially released through Dualtone Records!!

How awesome does this look eh??! Such a HUGE moment for our little dream!!

Your support has now officially helped us sign with 2 record labels in 6 months!! The power of Regan & Alt Nation!

Honestly we talk about you and what you have done for us everyday and how grateful we are for your continued support. None of this would have been possible without and we cant thank you enough for literally being the person that launched The Rebel Light's career.

Think 2016 is going to be a really incredible year for us and its all thanks to you.

Will keep you posted!

Cheers

[REDACTED]

Music > Alternative > The Rebel Light



Strangers - Single

The Rebel Light >

Songs Ratings and Reviews

▲ NAME

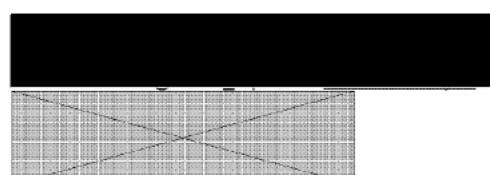
1. Strangers

\$1.29 Buy



Released Jun 10, 2016

© 2016 Dualtone Music Group



From: Cross, Robert [REDACTED]
Sent: Thursday, December 11, 2014 8:27 AM
To: Blatter, Steve
Subject: FW: look what you did (FKA Twigs)

Sales up again this week BTW.

From: [REDACTED]
Sent: Wednesday, December 10, 2014 1:28 PM
To: Regan, Jeff; Cross, Robert
Subject: look what you did

ALL YOUR SPINS got her MTV artist to watch program for 2015
now she's going mainstream. LOL

no seriously, thank you, for the crazy support from both of you...its truly wonderful!!!!

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: Monday, October 14, 2013 4:58 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Bastille is #1- Thank you!

Hi Jeff,

I was driving back from a Capital Cities show in DC on Saturday, May 4 when I heard Bastille's "Pompeii" on Alt Nation. Since you were silly enough years ago to give me your mobile number, I called you on a Saturday night to tell you it sounded awesome. It turned out that was only the second or third time you had spun the song, you were just getting a feel for it on the air and you didn't even know who was putting it out, you just heard it as a special record.

You put the record in that week, you told us a few weeks later that you knew it was going to be a big record and blazed the trail for us to have a massive hit and build the foundation for an excellent band. Well, here we are, 6 months later and "Pompeii" is #1 on the Alternative radio chart and Bastille has a bright future in the States. It started at Alt Nation and, on behalf of the band, management and all of us at the label, thank you very much. We appreciate everything you do for our artists and here's to many more years of great music and fun!





NEWS RELEASE

The Billy Joel Channel to Return to SiriusXM on January 15

1/8/2016

- Joel to host four exclusive weekly shows on limited-run channel
- The Billy Joel Channel will air via satellite on channel 18
- Garth Brooks, Don Henley and others to host "Billy Joel Top Ten"--special guest DJ sessions showcasing Joel's friends' top ten favorite Billy Joel songs

NEW YORK, Jan. 8, 2016 /PRNewswire/ -- SiriusXM announced today that The Billy Joel Channel, an exclusive channel featuring the works of iconic entertainer, Billy Joel, will return to SiriusXM.

Billy Joel's exclusive SiriusXM channel, The Billy Joel Channel, will feature music spanning the Rock & Roll Hall of Famer's career, including songs from each of his live and studio albums. Additionally, SiriusXM listeners will hear Joel introducing songs each hour, offering insight into their significance, meaning, composition and recording.

The Billy Joel Channel will also feature four exclusive weekly shows hosted by Billy Joel. The show will feature Joel playing recordings that influenced his own work including songs by The Beatles, The Four Seasons, Beethoven, Procol Harum, plus doo wop hits, movie themes and more. Joel, hosting the show while sitting behind the piano, will also perform snippets of the songs that impacted his repertoire. The show will premiere on Saturday, January 16 at 6:00 pm ET.

The SiriusXM channel will also include special guest DJ sessions, "Billy Joel Top Ten", hosted by Joel's friends, including Garth Brooks and Don Henley playing their favorite Billy Joel songs.

"Throughout my life, I love to listen to the radio and discover music that impacts my life. I look forward to sharing the musical adventures I had creating my songs with the SiriusXM audience," said Billy Joel.

"The response to Billy's SiriusXM channel from 2014 was outstanding. We are excited to work with Billy again on creating and recording new, exclusive content for the channel offering our listeners a truly comprehensive listening experience courtesy of Billy's unique and eclectic tastes," said Scott Greenstein, President and Chief Content Officer, SiriusXM.

The limited-run channel will launch on Friday, January 15 at 5:00 pm ET and will air through Sunday, February 14, via satellite on channel 18. The Billy Joel Channel will also be available online and through the SiriusXM app.

The Billy Joel Channel is an example of SiriusXM channels created with iconic and prominent artists, including Bruce Springsteen's E Street Radio, Jimmy Buffett's Radio Margaritaville, Willie Nelson's Willie's Roadhouse, The Pink Floyd Channel, B.B. King's Bluesville, Elvis Radio, Siriusly Sinatra, Ozzy Osbourne's Ozzy's Boneyard, Pearl Jam Radio, Eminem's Shade 45, Tiësto's Club Life Radio and Neil Diamond Radio.

For more information on Billy Joel, please visit www.billyjoel.com

For more information on SiriusXM, please visit www.siriusxm.com

About SiriusXM

Sirius XM Holdings Inc. (NASDAQ: SIRI) is the world's largest radio broadcaster measured by revenue and has 29.6 million subscribers. SiriusXM creates and broadcasts commercial-free music; premier sports talk and live events; comedy; news; exclusive talk and entertainment, and a wide-range of Latin music, sports and talk programming. SiriusXM is available in vehicles from every major car company in the U.S. and on smartphones and other connected devices as well as online at siriusxm.com. SiriusXM radios and accessories are available from retailers nationwide and online at SiriusXM. SiriusXM also provides premium traffic, weather, data and information services for subscribers in cars, trucks, and RVs through SiriusXM Traffic™, SiriusXM Travel Link, NavTraffic®, NavWeather™. SiriusXM delivers critical weather, data and information services to aircraft and boats through SiriusXM Aviation, SiriusXM Marine™, Sirius Marine Weather, XMWX Aviation™, XMWX Weather, and XMWX Marine™. In addition, SiriusXM Music for Business provides commercial-free music to a variety of businesses. SiriusXM holds a minority interest in SiriusXM Canada which has more than 2.7 million subscribers. SiriusXM is also a leading provider of connected vehicles services to major automakers, giving customers access to a suite of safety, security, and convenience services including automatic crash notification, stolen vehicle recovery assistance, enhanced roadside assistance and turn-by-turn navigation.

To download SiriusXM logos and artwork, visit <http://www.siriusxm.com/LogosAndPhotos>.

This communication contains "forward-looking statements" within the meaning of the Private Securities Litigation

Reform Act of 1995. Such statements include, but are not limited to, statements about future financial and operating results, our plans, objectives, expectations and intentions with respect to future operations, products and services; and other statements identified by words such as "will likely result," "are expected to," "will continue," "is anticipated," "estimated," "believe," "intend," "plan," "projection," "outlook" or words of similar meaning. Such forward-looking statements are based upon the current beliefs and expectations of our management and are inherently subject to significant business, economic and competitive uncertainties and contingencies, many of which are difficult to predict and generally beyond our control. Actual results may differ materially from the results anticipated in these forward-looking statements.

The following factors, among others, could cause actual results to differ materially from the anticipated results or other expectations expressed in the forward-looking statements: our competitive position versus other radio and audio service providers; our ability to attract and retain subscribers, which is uncertain; our dependence upon the auto industry; general economic conditions; changes in consumer protection laws and their enforcement; the security of the personal information about our customers; other existing or future government laws and regulations could harm our business; failure of our satellites would significantly damage our business; the interruption or failure of our information technology and communications systems; royalties we pay for music rights, which increase over time; the unfavorable outcome of pending or future litigation; our failure to realize benefits of acquisitions or other strategic initiatives; rapid technological and industry changes; failure of third parties to perform; failure to comply with FCC requirements; modifications to our business plans; our indebtedness; and our principal stockholder has significant influence over our management and over actions requiring stockholder approval and its interests may differ from interests of other holders of our common stock. Additional factors that could cause our results to differ materially from those described in the forward-looking statements can be found in our Annual Report on Form 10-K for the year ended December 31, 2014, which is filed with the Securities and Exchange Commission (the "SEC") and available at the SEC's Internet site (<http://www.sec.gov>). The information set forth herein speaks only as of the date hereof, and we disclaim any intention or obligation to update any forward looking statements as a result of developments occurring after the date of this communication.

Source: SiriusXM

Contact for SiriusXM:

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212 901 6644
samantha.bowman@siriusxm.com

To view the original version on PR Newswire, visit:<http://www.prnewswire.com/news-releases/the-billy-joe-channel-to-return-to-siriusxm-on-january-15-300201670.html>

SOURCE Sirius XM Holdings Inc.

SiriusXM Blog (<http://blog.siriusxm.com/>)



 (<http://blog.siriusxm.com/2016/09/30/the-billy-joel-channel-returns-october-4/?share=facebook&nb=1>)
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 (<http://blog.siriusxm.com/2016/09/30/the-billy-joel-channel-returns-october-4/?share=google-plus-1&nb=1>)

 (mailto://blog.siriusxm.com/2016/09/30/the-billy-joel-channel-returns-october-4/?share=email&nb=1)

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The Billy Joel Channel is back with more stories and songs (<http://blog.siriusxm.com/2016/09/30/the-billy-joel-channel-returns-october-4/>)



Doric Sam (<http://blog.siriusxm.com/author/dsam83/>)

September 30, 2016

 4.8K people like this. Be the first of your friends.

What song did Billy Joel write with Tony Bennett in mind? How does touring affect pet ownership? What's the link between Casablanca and meeting super models? Hear those new-to-SiriusXM stories, plus music spanning his entire career and songs from his favorite artists when The Billy Joel Channel returns to Channel 18 on October 4 at 5 pm ET.

You'll also hear rare live versions of Joel's tunes, those insights into the significance, meaning, composition, and recording of his songs on the limited-run channel. The Billy Joel Channel will also be available online and through the SiriusXM app (<https://player.siriusxm.com/#/login>).

Here's taste of some new stories that Billy will share on his channel for the first time starting October 4.

For a free 30-day trial, check out <http://www.siriusxm.com/freeTrial> (<http://www.siriusxm.com/freeTrial>).

 (<http://blog.siriusxm.com/2016/09/30/the-billy-joe-channel-returns-october-4/?share=facebook&nb=1>)
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Tags: [billy joel](http://blog.siriusxm.com/tag/billy-joe/) (<http://blog.siriusxm.com/tag/billy-joe/>), [the billy joel channel](http://blog.siriusxm.com/tag/the-billy-joe-channel/) (<http://blog.siriusxm.com/tag/the-billy-joe-channel/>)

On the Charts: James Taylor Scores First Number One

'Before This World' ends singer-songwriter's 47-year wait for a chart-topping album



James Taylor has finally scored his first Number One record on the Billboard 200. Cindy Ord/Getty

By [Daniel Kreps](#)

June 24, 2015

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[On the Charts: Muse, Rolling Stones Continue British Reign](#)
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Forty-seven years after his debut album, [James Taylor](#) has finally scored his first Number One record on the Billboard 200. The singer's latest, [Before This World](#), sold 97,000 copies in its debut week, giving the Rock and Roll Hall of Fame inductee his first ever chart-topping

album. In addition to being Taylor's first collection of new music in 13 years, the surprise Number One was also aided by a vigorous promotional campaign by SiriusXM, who dedicated a channel to the singer and hosted a Town Hall with Taylor prior to *Before This World*'s arrival.

RELATED



James Taylor's Mellow Rebirth: Inside 'Before This World'

Read our report from James Taylor's studio sessions for his first all-new album since 2002.

Taylor had previously flirted with the Top Ten with nearly a dozen of his LPs, most notably 1970's *Sweet Baby James* (Number Three) and, more recently, 2002's *October Road* and 2008's *Covers* (both reached Number Four). However, *Before This World* hitting the top spot marks the second-longest wait between a Billboard 200 debut and a chart-topping album, [Billboard reports](#). Only Tony Bennett, who waited 54 years – from 1957's *Tony* to the Number One album *Duets II* in 2011 – experienced a longer Number One holdout than Taylor.

(*Billboard* doesn't acknowledge Taylor's 1968 self-titled debut in the equation since it never charted.)

According to *Billboard*, with his newly minted Number One, Taylor also exits an exclusive, but unfortunate, club of artists who have over 10 Top Ten albums yet never netted a Number One. The "Never Number One" crew includes Sting, the Who and Rush, who waited nearly as long for a *Rolling Stone* cover as Taylor waited for a chart-topping LP.

It was a Taylor-Taylor one-two punch on the charts as, despite briefly declaring war against Apple, Taylor Swift's *1989* once again finished the week at Number Two on the strength of her "Bad Blood" single and reluctance to stream her smash album. Former *American Idol* runner-up Adam Lambert's *The Original High* debuted at Number Three while Ed Sheeran's *X* was bumped back into the Top Five at Number Four. Hilary Duff's *Breathe In. Breathe Out.*, the pop singer's first album in eight years, entered at Number Five with 39,000 total albums sold.

Last week's Number One, Muse's *Drones*, dropped out of the Top Ten.

SiriusXM Pop-Up Channels

Date	Pop-up Channel
3/11/11 - 3/18/11	Neil Diamond Radio
3/4/11 - 3/19/11	Simon & Garfunkel Radio
4/16/11 - 4/30/11	Metallica Presents: Big 4 Radio
4/20/11 - 4/28/11	Tim McGraw Radio
4/29/11 - 5/1/11	Dave Brubeck Radio
9/22/11 - 9/26/11	John Coltrane Radio
9/23/11 - 9/28/11	Nevermind Radio (Nirvana)
10/24/11 - 10/28/11	Coldplay Radio
12/19/11 - 12/26/11	Bing Crosby Christmas Radio
2/12/12 - 2/13/12, 2/18/12	The Whitney Houston Tribute Channel
4/20/12 - 4/23/12	Luther Radio (Vandross)
4/27/12 - 4/30/12	Herbie Hancock Radio
5/25/12 - 5/28/12	Beach Boys Endless Summer Weekend
5/25/12 - 5/28/12, 6/27/12 - 7/7/12	Pink Floyd Radio
9/1/12 - 10/30/12	Dave Matthews Band Radio
10/26/12 - 10/29/12	Scare Nation with Kiss
12/19/12 - 12/26/12	Bing Crosby Christmas Radio
3/22/13 - 4/22/13	Bon Jovi Radio
5/17/13 - 5/20/13	Chick Corea Radio
5/17/13 - 6/14/13	Tom Petty Radio
9/13/13 - 10/7/13	Mandatory Metallica
10/30/13 - 11/4/13	The David Bowie Channel
12/13/13 - 12/16/13	The Nelson Mandela Music Tribute Channel
12/20/13 - 12/26/13	Bing Crosby Christmas Radio
1/17/14 - 1/19/14	Tiesto's Club Life Radio
1/24/14 - 1/27/14	Neil Diamond Radio
1/31/14 - 2/3/14	Motley Radio
2/7/14 - 2/10/14	Pink Floyd Radio
3/26/14 - 3/31/14	The Billy Joel Channel
5/12/14 - 5/27/14	The Michael Jackson Channel
7/25/14 - 8/4/14	Tom Petty Radio
8/1/14 - 8/3/14	Lollapalooza Channel
9/12/14 - 10/11/14	The Barbra Streisand Channel
10/11/14 - 11/11/14	Neil Diamond Radio
5/22/15 - 6/22/15	The James Taylor Channel
8/20/15-8/23/15	Bunny Radio (Phish)
9/1/15 - 9/8/15	Iron Maiden Radio
1/12/16 - 1/19/16	The David Bowie Channel
1/15/16 - 3/16/16	The Billy Joel Channel
4/21/16 - 5/14/16	The Prince Tribute Channel
9/6/16 - 10/3/16	The Barbra Streisand Channel
10/4/16 - 11/2/16	The Billy Joel Channel
Partial Takeovers/Pop Ups	
2/3/14 (3 hours)	Bruno Radio (Bruno Mars)
8/29/14 - 9/2/14	Brad Paisley Radio
9/16/14 - 9/21/14	Sundown Heaven Town Radio (Tim McGraw)
9/22/14- 10/21/14	Big Revival Radio (Kenny Chesney)
11/7/14 - 11/17/14	Foo Fighters Radio
11/26/14 - 12/7/14	AC/DC Radio
5/4 /15 - 5/9/15	Mumford and Sons Radio
9/19/15 - 9/20/15	Maná Radio
6/15/16 - 6/21/16	Red Hot Chili Peppers Radio



NEWS RELEASE

Garth Brooks to Launch His Own Exclusive SiriusXM Channel

7/7/2016

The Garth Channel marks the first time Brooks' music will be available 24/7 in one place, via satellite and online
NEW YORK, July 7, 2016 /PRNewswire/ -- SiriusXM announced today that America's best-selling solo artist of all time, Garth Brooks, will launch his own SiriusXM channel on September 8.

The Garth Channel, the new, 24/7, exclusive channel, will be curated and presented by Brooks. The channel will feature music from Brooks spanning four decades, along with songs from the artists that influenced his iconic career. This is the first time Garth's music is being presented 24/7 in one place, on radio or online.

SiriusXM's The Garth Channel will also include regularly hosted shows and behind-the-scenes commentary from Brooks, guest DJ specials hosted by Brooks' fans and friends, live concert recordings and other rarities from Brooks' treasured archives.

"It's rare to be handed an opportunity that can grow as big as you can dream. That is exactly what SiriusXM has just done," said Garth Brooks. "I speak for myself and the entire team when I say we are very grateful for this opportunity and very excited about its potential."

"In music, there are few groundbreaking artists, but there's only one Garth Brooks. We are thrilled to have him running his own full time channel at SiriusXM," said Scott Greenstein, President and Chief Content Officer, SiriusXM. "And we are so excited that our subscribers will now get Garth in their cars 24/7 and have a place to get Garth on their phones and online—something that has not been available in the past. Garth's addition to SiriusXM makes our country music offering second to none."

Garth Brooks is certified by the RIAA as the #1-selling solo artist in U.S. history with over 136 million albums. He has received every accolade the recording industry can bestow on an artist. Garth has been inducted into the International Songwriters Hall of Fame in New York, the Nashville Songwriters Hall of Fame, Country Music Hall of Fame and most recently, the Musicians Hall of Fame.

Garth is currently on the three year Garth Brooks World Tour with Trisha Yearwood. The tour began with 11 sold out shows at the Allstate Arena in Chicago. The tour is smashing records previously held by such acts as The Beatles, The Rolling Stones, and even Garth Brooks. In just over a year and a half, the tour is approaching 5 MILLION tickets sold making it the biggest tour in the world.

The Garth Channel will debut on September 8 on satellite and will also be available online and through the SiriusXM app.

For more information on SiriusXM, please visit www.siriusxm.com.

About SiriusXM

Sirius XM Holdings Inc. (NASDAQ: SIRI) is the world's largest radio company measured by revenue and has more than 30 million subscribers. SiriusXM creates and offers commercial-free music; premier sports talk and live events; comedy; news; exclusive talk and entertainment, and a wide-range of Latin music, sports and talk programming. SiriusXM is available in vehicles from every major car company in the U.S. and on smartphones and other connected devices as well as online at siriusxm.com. SiriusXM radios and accessories are available from retailers nationwide and online at SiriusXM. SiriusXM also provides premium traffic, weather, data and information services for subscribers through SiriusXM Traffic™, SiriusXM Travel Link, NavTraffic®, NavWeather™. SiriusXM delivers weather, data and information services to aircraft and boats through SiriusXM Aviation, SiriusXM Marine™, Sirius Marine Weather, XMWX Aviation™, XMWX Weather, and XMWX Marine™. In addition, SiriusXM Music for Business provides commercial-free music to a variety of businesses. SiriusXM holds a minority interest in SiriusXM Canada which has approximately 2.7 million subscribers. SiriusXM is also a leading provider of connected vehicles services to major automakers, giving customers access to a suite of safety, security, and convenience services including automatic crash notification, stolen vehicle recovery assistance, enhanced roadside assistance and turn-by-turn navigation.

To download SiriusXM logos and artwork, visit <http://www.siriusxm.com/LogosAndPhotos>.

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Source: SiriusXM

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Samantha Bowman

212 901 6644

samantha.bowman@siriusxm.com

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Nancy Seltzer, Nancy Seltzer & Associates, Inc.

323 938 3562

nseltzer@nsapr.com

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SOURCE Sirius XM Holdings Inc.

John Newman's "Love Me Again" Achieves Gold Status

SiriusXM Hits 1 THE FIRST MAJOR OUTLET IN NORTH AMERICA TO SUPPORT "LOVE ME AGAIN"

FULL-LENGTH ALBUM "TRIBUTE" IN STORES

Jan 31, 2014, 12:35 ET from Republic Records (<http://www.prnewswire.com/news/republic+records>)



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NEW YORK, Jan. 31, 2014 /PRNewswire/ -- **JOHN NEWMAN**'s breakout smash "**Love Me Again**" has just achieved gold certification by the RIAA for digital sales in excess of 500,000. Moreover, early stateside champion **SiriusXM Hits 1**, which played the song before any major radio outlet, has officially spun the song over 1,000 times since first adding it into regular rotation late last summer. The value and reach of the satellite radio juggernaut has proven a major catalyst for breaking the UK singer, songwriter, and producer, consistently exposing him to a massive American audience before anyone. They also continue playing the single non-stop, fueling his fire even further.

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NEWMAN's debut full-length, **Tribute [Republic Records]**, recently hit shelves in the U.S., and the rising soul pop impresario enjoyed a triumphant release week highlighted by a much talked (and tweeted) about performance on NBC's *Late Night With Jimmy Fallon*. Meanwhile, the record peaked at #2 on the iTunes Pop Albums Chart and #5 on the Overall Albums Chart. He also recently enchanted *The Ellen DeGeneres Show* with another astounding live turn.

About the success of "**Love Me Again**", **Republic Records** Executive Vice President **Charlie Walk** comments, "**SiriusXM Hits 1**, the nation's most listened to Pop radio platform led the way back in August 2013 with the first spin. 1000 plays later, we thank Kid Kelly and team for believing when no one else did."

SXM Dir. Ex. 26

Acclaim continues to accumulate for the album. *The New York Times* (<http://universalrepublic.us5.list-manage1.com/track/click?u=3051269687d98ad95ab882a80&id=0992ec6389&e=56e748b5a7>) penned a rave review of *Tribute* writing, "He may truly be the inheritor of the flamboyant piano-soul-man tradition, in the vein of Mr. Joel and Elton John (even if piano isn't really his instrument)," while *USA Today* profiled him in a comprehensive *On The Verge* (<http://universalrepublic.us5.list-manage1.com/track/click?u=3051269687d98ad95ab882a80&id=3c6900284d&e=56e748b5a7>) feature.

NEWMAN returns to the states for a full headline tour this Spring, performing at theaters and clubs across the country. The run commences on March 27 at 9:30 Club in Washington, D.C., and it'll allow audiences the chance to feel that same energy in a close setting. The run coincides with his first appearance at *Coachella*—April 13 and 20, respectively—where he'll play in front of his biggest North American audience to date.

"**Love Me Again**" (<http://universalrepublic.us5.list-manage1.com/track/click?u=3051269687d98ad95ab882a80&id=8fba302bae&e=56e748b5a7>) is a bona fide international smash already. It's accumulated over 74 million YouTube/VEVO views to date, and it's gotten the Internet buzzing in a big way as well as gaining steam at Top 40 radio. The track swings from bombastic orchestration to shimmering keys and a resounding horn section. Above the theatrical bounce, his striking voice takes flight. The entire record flaunts a similar swagger and soul, emanating genuine charisma and charm.

In the UK, the song stormed to #1 and remained in the Top 10 for a total of six weeks. Gold certification followed there as well as in eight other territories—Australia, Belgium, Germany, Ireland, Switzerland, Norway, The Netherlands, Sweden, and New Zealand. Meanwhile, it's gone platinum in the Czech Republic, Norway, and Switzerland and double-platinum in Australia, Italy, and Norway. The track has now topped the iTunes charts not only in the UK but an impressive nineteen other counties, selling over 1,500,000 copies to date. It seems that everybody is succumbing to the sounds of **NEWMAN**.

Even before the success of "**Love Me Again**", he had won a legion of fans far and wide having co-written and sang Rudimental's 2012 hit "Feel The Love". This #1 summer smash has now been certified platinum and moved over 800,000 digital downloads in the UK alone.

Get the album here (<http://universalrepublic.us5.list-manage.com/track/click?u=3051269687d98ad95ab882a80&id=a612f75ae3&e=56e748b5a7>)!

TOUR DATES:

- 3/27/14 Washington, D.C. – 9:30 Club
- 3/28/14 Philadelphia, PA – Underground Arts
- 3/29/14 Boston, MA – Paradise Rock Club
- 4/2/14 New York, NY – Webster Hall
- 4/3/14 Montreal, QC – Virgin Mobile Corona Theatre
- 4/5/14 Toronto, ON – Danforth Music Hall
- 4/7/14 Chicago, IL – Metro
- 4/8/14 Minneapolis, MN – Varsity Theater
- 4/10/14 Dallas, TX – Granada Theater
- 4/14/14 San Francisco, CA – The Independent

4/16/14 Seattle, WA – The Crocodile

4/17/14 Vancouver, BC – Venue

4/18/14 Portland, OR – Doug Fir Lounge

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(/)



ABOUT REPUBLIC RECORDS

A division of Universal Music Group, the world's leading music company, Republic is home to an all-star roster of multi-platinum, award-winning legends and superstar artists such as Amy Winehouse, Ariana Grande, Black Sabbath, Colbie Caillat, Enrique Iglesias, Florence + the Machine, Godsmack, Gotye, Kelly Rowland, Of Monsters & Men, Owl City, among many others.

It is comprised of innovative imprints and digital business ventures including Brushfire (Jack Johnson, G. Love), Cash Money (Lil Wayne, Drake, Nicki Minaj), Lava Records (Jessie J, Lorde), Loma Vista (Soundgarden, Damian Marley), Monkeywrench (Pearl Jam), NBC's The Voice (Cassadee Pope, Danielle Bradbery), Republic Nashville (The Band Perry, Florida Georgia Line, The Eli Young Band), XO (The Weeknd), among others.

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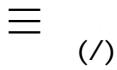
A black and white portrait of young man with dark hair and glasses, smiling and looking upwards. The word "JORDAN" is printed in large, bold, capital letters above his head, and "SMITH" is below it. At the bottom, the words "SOMETHING BEAUTIFUL" are printed in a smaller, sans-serif font.

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Charlie Walk Promoted To President Of Newly Formed Republic Group

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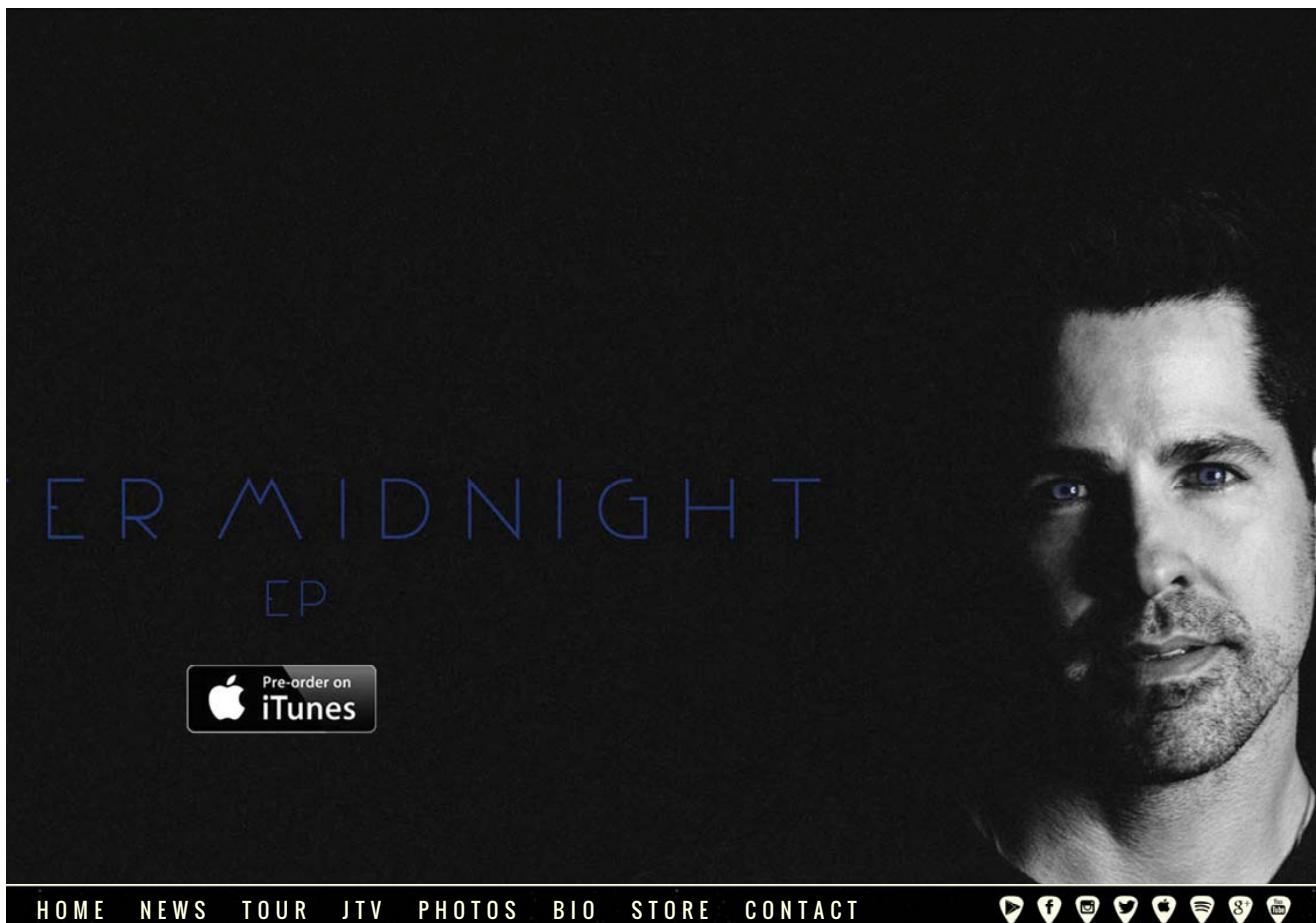
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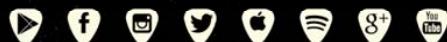
JT HODGES IS #1 TWO WEEKS IN A ROW

Mar 15 | Posted by: Bombplates

JT HODGES IS #1 TWO WEEKS IN A ROW Holds number one spot on Sirius XM for second week with "Sleepy Little Town" Nashville, TN March 14, 2013 - Show Dog – Universal Music's JT Hodges celebrates his second week at #1 on Sirius XMs, The Highway, with his song "Sleepy Little Town". "In a small community, everybody knows everybody's business." says Hodges. "They know the secrets, the behind the scenes drama that sometimes goes down in a sleepy little town. I truly felt that anyone could relate to this song. I'm so thankful for John Marks and Sirius XM for giving this song a life and outlet for it to connect with people like I knew it could." Bill Kennedy, Vice President, Sales, Marketing and Digital adds, "Sirius XM listeners and young country fans have embraced the music of JT Hodges. He continues to have a strong download pattern of sales driven by their active listeners. With the unwavering support of Sirius – XM and social media JT Hodges is carving out a new model of success." "Sleepy Little Town" is from his highly acclaimed debut album. Here are few things people are saying about JT Hodges. Hodges smolders; he's got real-deal swagger to spare...Hodges is a newcomer to watch, that's for sure. -Dallas Morning News JT Hodges' self-titled debut heralds the blazing arrival of a distinctive new talent with a vibrant voice and mesmerizing songwriting skills. -- Billboard Texas newcomer finds a sweet spot between country cool and power pop on this cut from his self-titled debut. USA Today The man has talent, and he's different, and country music needs him.-- Toledo Blade JT Hodges immediately finds itself amongst the contenders for best mainstream big label release of 2012. It's that good, y'all. -- Roughstock

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Rolling Stone Country POWERED BY



How Satellite Radio Is Breaking Country's Next Big Stars

From bona fide superstars Florida Georgia Line to upstart guitarslinger Clare Dunn, SiriusXM's the Highway is shaping country music's future



Florida Georgia Line's Brian Kelley (left) and Tyler Hubbard flank SiriusXM's John Marks. Marks was essential in breaking the country duo by playing their song "Cruise" on the Highway. Charley Gallay/Getty Images

By Jewly Hight

January 5, 2015

SXM Dir. Ex. 28

Every day, plenty of tourists in Nashville pass by the gleaming Bridgestone Arena Tower without so much as an inkling that its upper floors house SiriusXM's Music City studios. Right next to Lower Broadway's strip of honky-tonks, the nerve center of popular satellite radio stations like Outlaw Country and the Highway is hiding in plain sight. And you could say the same thing about the influence the Highway wields in the country music industry — it's possible to miss it if you don't know what you're looking for.

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For a good, long while, there was pretty much one path to country radio airplay — airplay that remains essential to gaining any kind of foothold in mainstream country music. An act had to be signed by a major label (or a heavyweight indie like Big Machine Label Group), sealed in the most commercially savvy packaging possible and delivered to terrestrial stations with a pricy radio-promotion push. For an unsigned act, it was a prohibitively expensive proposition. But it's no longer the only option.

After migrating from a program director post at terrestrial country radio to Senior Director, Country Music Programming, at SiriusXM in 2010, John Marks slowly but surely began steering contemporary country satellite radio channel the Highway toward a mixture of current hits — the same Luke Bryan, Blake Shelton and Jason Aldean tunes you'd hear on any station — and unknown quantities that he deemed promising. Thanks to Marks, acts with no label backing whatsoever have gotten a taste of national airplay. The Highway's audience of SiriusXM subscribers may be dwarfed by the number of listeners who tune in to FM country, but its reach stretches from Albuquerque to Anchorage.

Kevin Neal, a booking agent whose clients [Florida Georgia Line](#) benefited mightily from satellite play, puts it this way: "You get on the national stage immediately, as opposed to getting your song tested in Bossier City."

After FGL's debut single "Cruise" got airplay on the Highway in May 2012, the duo not only circumnavigated Bossier City, Louisiana — they went on to sell a slew of downloads on iTunes, sign with Republic Nashville, part of Big Machine Label Group, and dominate terrestrial country radio for nearly half of the next year.

"Trying to find acts to break nationally" is part of Marks' stated mission at the Highway. A weekend show called *On the Horizon* introduces new music, and throughout the week, select new songs are repeatedly spotlighted as "Highway Finds." "[The listeners] want to hear the hits, yes, of course, and we play the hits," Marks tells *Rolling Stone Country* with the crisp, even-toned affability of a guy who has spent a good chunk of time around commercial radio. "But a large reason of why they're tuning in to SiriusXM is for the curation of new music, us helping them understand what new music is out there and suggesting songs they may want to hear."

A program director at a terrestrial station probably wouldn't be tossing around a term like "curation" or touting the appeal of music discovery. The opposite of novelty reigns at FM, the idea being that listeners are less likely to start channel surfing when songs they already know come on.

"I'm hardly an expert, because I haven't been there for a long time," Marks notes diplomatically. "But the [Portable] People Meter ratings methodology [of terrestrial radio] punishes unfamiliar music, by and large. That's my understanding. So radio used to be an active medium, and now it's turned into more of a passive medium."

The Highway relies on more direct feedback. Its DJs — or hosts, as they're sometimes referred to at SiriusXM — monitor Twitter and Facebook, where listeners post a steady stream of comments and requests. Like, "Hey, I'm on my way to roller-derby practice, could you play an upbeat Trace Adkins song, pretty please?" And "'Afterparty' by Sandra Lynn is my latest fave song! So catchy, can't get it out of my head! Please keep it playing!" Or "For the love of all that is holy please stop playing Walk 500 Miles!!!"

Those who have signed up to be part of the channel's Highway Patrol complete an online survey each week, and data analysts look at that and social media, along with factors like how many streams and downloads a song is racking up. Depending on the response it's getting, a Highway Find could wind up making it onto the Highway's Hot 45 chart or getting bumped off the playlist altogether after a trial run of four or five weeks.

"Once the song is out of my hands and into the pool with the listeners," Marks points out, "the only opinion that matters at that

point in time is what the listener thinks. My perspective on the song is totally removed. And that makes it very easy, because there's no politics. There's no agendas other than, 'Hey, is the song working or not?'"

There's a growing number of Highway Finds alumni — Green River Ordinance being the first example, and Florida Georgia Line being the most famous — whose songs worked and whose careers gained some momentum as a result. Those who landed record deals in 2014 alone include Chase Rice, Brandy Clark, Logan Mize, Ryan Kinder, Clare Dunn and breakout act **Sam Hunt**. That's not to say that getting spins on the Highway was the sole reason for their success, but it definitely had a quantifiable impact.



Sam Hunt, whose debut single "Raised On It" was a SiriusXM standout, performs on 'Good Morning America.' Fred Lee/DisneyABC Television Group

"It was available for download on iTunes. We had shot a \$500 music video and put it on YouTube. But I mean, nobody would've gone and

looked for it unless they heard it on XM," Hunt's manager Brad Belanger says of his client's first single, "Raised on It." "There was no promotion behind it — no money, no label. So it was on XM and it was living on YouTube and iTunes and that was it. They were the first gas."

Marks put Dunn's debut single "[Get Out](#)" into rotation when she was a hard-touring, unsigned songwriter-guitarist hauling her band from one date to the next in a Ford F-150 pickup with no money for radio promotion. "The Highway gave validation that my music was connecting with people," Dunn tells *Rolling Stone Country*. "They were playin' it, and then people were showing up [to shows]. In this day and age, you have to prove yourself a little bit more so on the front end than maybe you had to 10 years ago, or maybe even five years ago. [The song's] gotta work, I guess. That's what the Highway helped give me — [confirmation] that this music was gonna connect."

It also gave Dunn instant status in her hometown, the tiny ranching community of Two Buttes, Colorado. "Because there's so much land to cover out there, a farmer or a rancher can easily drive in and out of radio range all day long. So SiriusXM is a big deal out where we're from, because you can have it with you everywhere," she says. "When I started getting played on the Highway, people were like, 'Oh my God! She's made it!'"

Having access to a mover and shaker like Marks is a big deal for a striving artist. He actually accepts direct submissions from performers, as well as from the informal network of booking agent, manager, producer, publisher and label contacts he's cultivated in Nashville. Dunn made her umpteenth friendly visit to the Highway to officially announce her recent signing to Universal Music Group Nashville on the air and thank the channel. Annie Bosko, whose "[Crooked Halo](#)" is currently a Highway Find, posted a YouTube video documenting her nervous drive to meet with Marks for the first time — and the cartwheels she turned when she finally heard her song premiere. After making a couple attempts to deliver her press kit to what turned out to be bad addresses, her "friend's husband's boss," who had business dealings with SiriusXM, contacted Marks on her behalf. Already Bosko's seen an uptick in "booking opportunities" and "girls who are posting pictures on Instagram with the hashtag #[CrookedHalo](#)."

When Neal, the powerful booking agent, called Marks about a new client who "sounds like nothing you've ever heard," Marks told him to bring her over for a meeting. On the appointed afternoon, 19-year-old Haley Georgia waltzed into the small conference room with

her guitar, Neal and her publisher, Arturo Buenahora Jr., who set a bottle of red wine on the table for later. Marks prompted Georgia to tell her story, which involved scaring off a bunch of risk-averse Music Row types before she found the intrepid souls who were there in the room with her. She handed Marks a CD, apparently fresh from mastering, and he popped it in the player. The first track grabbed his attention — along with that of all the staffers in adjacent offices — the attitude of the lyrics and inflections of the sung-spoken delivery frank, flip and razor pop-smart, like country in the key of Kesha.

When it was finished, Marks pronounced with a grin, "I will tell you this — that will get *something* going." Whether it would be a smash hit or a polarizing conversation-starter he couldn't predict, but the implication was either was better than a song failing to register with an audience at all.

There were more songs to hear, one on the CD and a couple on guitar, a toast with that very good wine in some very plastic Solo cups and the discussion of a tentative timeline to develop Georgia's web presence and get her slyly provocative song on air. They'd come to Marks now, rather than shopping her to labels right away, because they hoped to put at least a track's worth of her undiluted musical personality out there before anybody else got involved in shaping her.

For all of the overlap between the Highway's Hot 45 chart and the *Billboard* Country Airplay chart, which keeps up with the hits at FM, Marks has tried out a lot of songs from a lot of acts that wouldn't have much of a chance with terrestrial programmers ever — or at least not until their mainstream viability's been proven — from rougher-edged, rural-rooted, country-rap like **Colt Ford**, the Lacs and some of their indie label mates to the atmospheric folk-rock duo First Aid Kit.



Marks chose the latter for a campaign called Fresh Female Voices. For one week this past August, the Highway doubled down on playing new and emerging female acts as a practical response to the dearth of solo women on either satellite or terrestrial country radio.

"We presented the widest possible variety, type and style of music we could within the time limits that we had for a week," he explains. "And really, the one who we already knew was resonating with the audience was Clare Dunn. She just continued to bubble up. And the rest were good, but nothing that sparked that, 'Oh, wow, we have something here' kind of hope that we were looking for when we embarked on that idea. So it didn't work in that respect, in finding somebody brand new on the Highway. But what it has done is it's let people know that the Highway is interested in finding fresh female talent to expose on the radio."

Dunn landed on the cover of *USA Today* after that, and the Highway's overall industry impact was reported on in *Wall Street Journal* and *Billboard* articles at other points in the year. Even in his powerful programming position, Marks will tell you there are some things that he can only do so much about; he can sprinkle the playlist with acts that don't incorporate hip-hop-style production and songs that don't mention drinking and partying — both of them powerfully popular elements of current country that appeared early and often on the Highway — but he can't independently swing the pendulum toward an entirely different aesthetic.

"We've only been living with this for a couple of years, if that much, as a phenomenon, as a thing," Marks reasons. "I think like with all elements of music, it all adjusts and corrects. And I don't fear that. . .Whatever I think about it isn't relevant so much. It's what I need to provide to our subscribers and customers. And if that's what they're looking for right now, it's my job to give it to 'em. But it's also my job, uniquely speaking, to say, 'OK, we're giving you a lot of this. Why not try some of that?'"

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MUSIC

Star-Making Machinery's New Player

By JAMES C. MCKINLEY Jr. JAN. 15, 2013

Jeff Regan took a break from announcing his top 18 alternative-rock songs on SiriusXM's Alt Nation, lifted off his headphones and summed up the conundrum facing most radio programmers who want to introduce new bands.

"Radio has traditionally been that game where you say: 'What's on the charts? That's what we play,' " he said. "And: 'What do you play? What's on the charts!'"

But Sirius is satellite radio, which relies on subscriptions rather than advertising, and that gives programmers like Mr. Regan more freedom to take chances on obscure bands than their counterparts in FM radio. SiriusXM has [redacted]ored in recent years to position itself as a leader in presenting new music.

"We can try things," Mr. Regan said. "We swing and miss, and that's fine. At least we were given the opportunity to swing."

These days Mr. Regan's batting average is pretty high, several label executives and band managers said. He has played a critical role in the rise of alt-rock success stories like Foster the People and Grouplove; more recently, he jump-started the careers of several groups, among them Atlas Genius, Blondfire and Capital Cities.

"Jeff Regan has had an incredible knack of picking talent and songs and bands for the last few years," Daniel Glass, the founder of Glassnote Records, said.

SXM Dir. Ex. 29

As SiriusXM approaches 24 million subscribers, this once-minor player in promoting songs has become a proving ground for new bands, a steppingstone between the Internet and breaking into the rotation at big FM radio stations.

Broadcast radio is still king when it comes to creating stars who can fill arenas and sell 500,000 records or more. Alternative-rock stations like KROQ in Los Angeles and WRFF in Philadelphia continue to have immense sway. There are also a few influential noncommercial stations, like WFUV in New York, with the power to anoint bands.

Some radio analysts say it remains to be seen if Sirius, even with its expanding audience, will ever rival FM radio's ability to drive music sales.

"It's not really about how many bands you break," Fred Jacobs, a media consultant, said. "There are a lot of broadcast stations in small markets that break a lot of bands too, but they don't reach lots of listeners. You have to look at it in terms of overall reach and impact."

Still, Sirius appears to be staking a claim to being a tastemaker, especially on channels like Alt Nation and XMU that try to offer the programming of a small noncommercial or college station to a national audience. Some bands say airplay on those channels leads to significantly increased sales and can attract interest from major labels.

Programmers at FM stations have become more conservative about playing familiar bands or new tunes over the last five years, as the tracking systems that determine ratings have become more sensitive, recording, for instance, when a listener switches channels midsong.

At the same time, SiriusXM is becoming more adventurous. "I tell my programmers if they are finding out and discovering music only through record label promotion people, then they are not doing their jobs," Steve Blatter, Sirius's senior vice president for music programming, said. "We very strategically are more aggressive than terrestrial radio in the way we identify songs and push them."

That strategy over the past two years has led to many successful bands'

receiving their first broad exposure. Sirius's country channel was the first to play Florida Georgia Line's "Cruise," which has topped the Billboard Country Songs chart for four weeks. After that early airplay on Sirius, the duo signed a recording contract with Republic Nashville.

Mr. Regan's Alt Nation channel has also led the pack of FM alt-rock stations in several instances, band managers said. Foster the People's hit "Pumped Up Kicks" played on SiriusXM's Alt Nation three months before climbing the rock radio charts. Grouplove, a Los Angeles band on Atlantic Records, enjoyed heavy airplay with its first single, "Colours," on Alt Nation in March 2011, five months before it broke through on broadcast radio.

"It's kind of like the biggest alternative station in the country and it's definitely a test bed for things," said David Wolter, an executive for artists and repertory at RCA Records. "I certainly keep an eye on their playlist."

Mr. Regan seems to relish plucking artists from obscurity. One example is Atlas Genius, from Adelaide, Australia, whose song "Trojans" ended up at No. 5 on Billboard's 2012 year-end alternative-songs chart.

Mr. Regan said he first heard "Trojans" on the Neon Gold blog in August 2011. Not only did the band have no record contact, but its members were also going to college and had never even toured. The song had been recorded in a home studio and posted as a free download online.

Still, Mr. Regan championed the track, and by the end of October the group's single had sold 7,000 copies online. A bidding war between several major labels followed, and Warner Brothers won, signing Atlas Genius last February.

Mr. Regan, 37, is a wiry and energetic man who speaks in bursts, evoking a fast-talking fan boy you might meet at a party who cannot wait to tip you off to a new band. "I'm still that guy who likes to play songs for my wife when I come home," he said. "I say, 'Oh, hear this, you have to hear this.' "

The son of two teachers, Mr. Regan grew up in Ridgefield Park, N.J., and fell in love with radio while a D.J. at his college station at Seton Hall. He spent a few years

at Z100 in New York before migrating to Sirius in 2002, when satellite radio was in its infancy.

Mr. Regan said he spent much of his day trolling music blogs and Web sites, listening to original songs on platforms like SoundCloud and Bandcamp. “You put your hand up and catch a couple of the right ones,” he said. “It’s just clicking, clicking, clicking.” He also scours British and Australian charts and relies on a network of musicians with whom he has forged ties to recommend other bands.

If he likes a track by an obscure group, Mr. Regan will put it into heavy rotation for two weeks in what he calls “new music radar” spots. He usually gives the song at least 40 plays a week and introduces the band each time, before and after the track. “You have to be real and commit and play it and introduce it and grab the hand of the listener and walk them up to the song,” he said.

Last week one of Mr. Regan’s radar songs was “Believer,” by American Authors, a Brooklyn band he heard about through a Sirius employee who moonlights as a musician. He was also spinning an anthem another colleague had found on a music blog: “Dust and Bones” by an unsigned Los Angeles duo called Night Terrors of 1927.

“Hook up with them now,” he told his listeners as he announced the track. “They are going to get popular quick, and you knew about them early.”

A version of this article appears in print on January 16, 2013, on page C1 of the New York edition with the headline: Star-Making Machinery’s New Player.



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- o **10 Questions with ... Logan Mize**

April 12, 2015

[Have an opinion? Add your comment below.](#)

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BRIEF CAREER SYNOPSIS:

Facebook: www.facebook.com/LoganMize

Twitter: www.twitter.com/LoganMize

Logan Mize was raised in small-town Kansas, where his father was a butcher and his mother was a teacher. His working-class upbringing taught him to value success and challenge himself, and also instilled in him a love for music that tells a story. With influences ranging from Alan Jackson to Elton

John and Aerosmith to Enya, Mize is a well-rounded musician with a gift for connecting through lyrics. Mize and his wife have two children and have made a home in Nashville, where he has worked his way up from a regular player in the club scenes to an opener for artists such as Dierks Bentley, Eric Church, Lady Antebellum, and more. His rugged good looks have also landed him work as a featured artist in a Cotton commercial starring Hayden Panettiere and on the CW-TV show "Hart Of Dixie." He was recently signed to Arista Nashville and is making an impact at radio with his current single, "Can't Get Away From A Good Time," which had already earned sales in excess of 100,000 copies and had been streamed more than 1,000,000 times before ever hitting terrestrial radio thanks in part to a boost from SiriusXM's "The Highway."

1. Logan, thank you for taking time from your radio tour to speak with All Access. Growing up in a small town in Kansas, there couldn't have been much in the way of songwriters' camps or studio time for a young, budding musician. How did you find your talent, and when did you know music was the right career path for you?

I was always into music, and I took piano lessons. I was really into Elton John records, and I got an Alan Jackson CD for my ninth birthday and wore it out. I was just always really into music, but I never thought I'd be a performer, because I was always terrified at piano recitals. I was probably 15 or 16, and I got to see my first concert. My first concert was a Kenny Chesney concert, and just seeing all the semis and buses roll into town, and going up to the Kansas Coliseum that night and see him play, it was just clear. It was like, "Okay, now I know what I'm going to do." I think that was the moment! I have not met Kenny yet, but I hope that happens soon.

2. You've cited musical influences ranging from Elton John and Aerosmith to Waylon Jennings and the Dixie Chicks. And, you may be the first Country artist I've ever seen give a nod to Enya when mentioning inspirations. How have these varied artists influenced your sound and songwriting?

My parents always listened to music. My Dad got really into Celtic music and had a lot of Enya playing around the house. And as a piano player, I liked how she played. Her base hand on the piano was always really easy for me to pick up on, and I loved the melodies, because they were just simple. It was a really pretty layering of her vocals, so I picked up on Enya from my folks. The Country stuff was really me. For my Dad, the most Country he listened to was the Nitty Gritty Dirt Band. I got into Country on my own, because it matched my surroundings growing up. I was in a town of 2,000 people with dirt roads in the middle of it. All my friends grew up on farms; my Dad was a butcher, so Country music just really fit lyrically into my life. But all the other stuff - the Rock, Tom Petty and the Heartbreakers, Aerosmith - all the other stuff is stuff my parents were listening to.

3. You recently shared some Throwback Thursday photos on your social media sites showing your pre-music careers in what look to be construction and trucking - complete with

long, flowing locks and cut-off shirt sleeves. If music had never worked out for you, which of those pre-music careers do you think you would have been able to pursue the longest?

Well, I always really enjoyed doing excavating. It was fun and was always fun to show up and do something new and different. The thing I like about being in the music industry is that I get to do something different every day, whether it's writing or producing or going into the studio. I'm in a new town all the time. I liked excavating, because some days you were digging a ditch, and some days you were hauling heavy equipment down the interstate with those "Oversized Load" stickers on it. There was just something cool about it, and I really enjoyed doing that.

4. After moving to Nashville, you landed some small-screen cameos, playing yourself in an episode of the CW-TV show "Hart of Dixie" and in a commercial for Cotton starring Hayden Panettiere. Did you actively pursue these roles, or were you just in the right place at the right time?

It was definitely all right-place-at-the-right-time. I've always been interested in doing that sort of thing, but I never knew how to get into it. That may have been one of those things where I just put it out into the universe, and it just kind of happened. But, my bass player asked me if I wanted to be on a Cotton commercial, and I said, "Sure." So, we went and auditioned for it. There were tons of bands down there auditioning, and they all seemed really nervous like they were trying to get the gig. But I walked in thinking we already had it, so I didn't really care, I just showed up and played a song. Next thing I knew, they were putting me in a commercial with Hayden Panettiere! So that just kind of happened. Then the "Hart of Dixie" thing really kind of happened the same way. They called me and asked me to come out and be on the show, and they wrote me into the script. I got to win a "Battle Of The Bands" on the show, so it was pretty cool! I really hope I get to do more of that in the future. Right now, my main focus is Country radio and breaking through there, but eventually, I'd love to do more of that.

5. You worked the Nashville scene and opened for some heavy hitters - including Lady Antebellum, Eric Church, LeAnn Rimes, and more - before signing with Sony Nashville/Arista. How did this partnership with Arista come about?

I'd been talking to [Sony Music Nashville VP/A&R] Jim Catino for probably three or four years, and he has been a fan of the independent stuff I released. He was always very open with me, and any time I wanted to talk to him and ask him questions, he would always give me the time of day, take me to lunch, and he was always very positive and encouraging. And he was always very honest! He would say, "Right now, there's just not room. We don't have room at radio." But he's always been very cool, and it has always been an open conversation. But he also always said that if the right time comes along, that he wanted the opportunity to work with me. He also said, though, that if it happened with someone else he would be happy for me. I never thought it would take four years from the time he really started talking to me until the time my song hit Country radio, but it was about

a full three or four years before anything materialized. It has been really cool, because I feel like I've been signed over there for longer than a few months, because I've been in a relationship with them for a while.

6. You have a knack for story-telling in your songs, as is evident in "Can't Get Away From A Good Time." Just a regular guy and his neighborhood buddies finding good times in the simple life. Another song you shared with us recently was "Welcome To Prairievile." It has a similar story-song feel, but with a completely different vibe. Can you share a little bit about that song and what makes it special?

It's really reminiscent of how I grew up in Kansas. Kind of a sheltered, small-town upbringing where you don't really realize everything that is out there until you leave. Then you look back at it, and you realize the beauty in that. Prairievile is a town that I made up, but it's very similar to my upbringing in Clearwater, Kansas. It's just special to me, because I never thought anyone would latch onto that - I wrote that one for me. All the songs I write about Prairievile are really for me, so the fact that other people are starting to like that is really cool. It kind of gives me the satisfaction to feel like my true creative side is being accepted by people in the industry. I would really like for "Welcome To Prairievile" to be the album title, but we might end up moving in a different direction, and it might be geared a little bit more toward some other potential singles that have come about in the eleventh hour - some stuff that I've written. Prairievile is definitely going to happen at some point. I'm not sure if it'll be the title of this one or not, but I'm still pulling for it.

7. You are out on radio tour right now, but you had to take a brief break from your scheduled appearances when your wife gave birth to your second child. Congratulations! Were you at all nervous about postponing your scheduled appearances during this early part of your career?

I was very nervous - anxiety ridden! I feel like my whole life has been that way...I either can't get jack-squat going on, or everything is going on at once. I'm sure that's how everybody's life is, though. My wife sent me a picture recently of me from six years ago on St. Patrick's Day. It was when I had a guitar that I had traded a set of golf clubs for, because at the time I didn't have a guitar - I had had to pawn it to pay for something else. I was playing at Paradise Park [on Broadway in Nashville] for \$30. I would go down there and play a four hour set acoustic in the middle of the day for \$30. And she sent me the picture, and she said "Six years ago today!" And now here I am on a radio tour. So, I didn't have jack-squat going on, and now here I have two kids at home and a single on Country radio, and I'm on a radio tour. So I was very nervous about how the scheduling was going to go, because I really like to be present for the kids. My son is getting to the age where it really affects him if I'm gone, so I try to limit the amount of days I'm gone in a row at a time. But with the radio tour, it's just very important right now. This could mean longevity within the format. But it has been a lot easier than I thought it was going to be once I got out here. There's FaceTime, and technology so it hasn't been too bad.

8. For anyone who hasn't had the opportunity to meet you yet on radio tour or see you perform live, how would you sum up the Logan Mize sound? What makes you different, and what unique life experiences do you bring to "three chords and the truth?"

It's a very Midwestern feel. I try to keep things - as far as the sound goes - pretty stripped down. I don't like big walls of sound and tons of layering of instruments. I like more of a simplistic approach with good atmosphere and big choruses. Lyrically, everything is pretty simple. I'm a simple Midwestern guy, so I try to make the songs as well-written and creative as I can while at the same time being very relatable to the listeners who are going to be tuning in to Country radio.

9. You have a full lineup of performances with festival appearances and headlining dates moving through Spring and Summer. When can we expect a full album of new music, and what can you share about the project so far?

I'm sure a lot of that will depend on how the single performs at radio, but I would hope for an album by the end of the year. That's still all up in the air, I'm sure. As far as the album goes, I've released two independent albums before this that kind of flew under the radar a bit. One hit 49 on Billboard its first week, but compared to the two things I've previously released, this project is light-years beyond anything I've done so far. As far as the songwriting goes and the production goes, this will be the truest sound to who I really am as far as songs go and the sound of the record. It'll be the most accurate portrayal of who I am and what I sound like, so I'm really excited about it.

10. We love hearing about the first time you heard your single on the radio. Where were you the first time you heard "Can't Get Away From A Good Time" on air, and can you share with us the story about how you felt and what you thought at that moment?

I have to give [SiriusXM Sr. Dir./Music Programming] John Marks a shout out, because the first time I heard it was on SiriusXM's The Highway. He has been so good to me. I remember when it came on the radio thinking, "Is it really going to play?" Because he said, "Yeah, we're going to put it on for such-and-such date!" So you're listening, but in the back of your mind, you're thinking, "This can't be real. Am I really going to hear this on a station that I've known of for years?" And then sure enough, there it is! And it came on, and I thought, "Holy crap! That's me on there!" It was crazy. Just such a rush! I'm very thankful to him for giving me a shot, because I wouldn't be doing this interview if it wasn't for John Marks.

Bonus Questions

1. This is a big year for you, Logan! You just celebrated the birth of your second child, you're working on your first major-label project, and you are turning thirty! What are some of the goals you have set personally and professionally for this banner year of 2015?

Well, I definitely want "Can't Get Away From A Good Time" to reach #1 on MediaBase! That would be awesome! I would like to - well, one goal I had since I'm turning 30 is that I thought it would be cool to try to run 30 miles and drink 30 beers on my 30th Birthday, but I'm going to be on a flight down to Key West that day. So, I might have to scratch that plan...and just drink the 30 beers! I just

want to continue to be a rooted family guy. I want to be a good dad and be there for my kids, but I also want to be out on the road and tear it up as much as I can and play as many shows as I can for the people who want to hear me. If "Can't Get Away From A Good Time" does well, I'll definitely be a happy guy.

2. When I ran in to you at CRS on the Sony Boat, I told you we were interested in sitting down with you for this 10 Questions interview because we thought you were cool and interesting when you stopped by to introduce yourself. You quickly told me that may be the first time anyone described you as "cool and interesting." I stand by my statement, but if you had to describe yourself, which words would you pick?

If I had to describe myself, I guess I'm just a goofy guy. Most of the time, I'm doing all I can to keep it together and look like a professional! I kind of want to cut up and goof most of the time. I'm just a simple person. That's a hard question to answer - I'm not good at describing myself, apparently! If you're going to say "cool and interesting," I'll stick with your answer, because it sounds a lot better than mine. That can't come from me though. You can describe me as that, though!

3. Speaking of cool and interesting, when you were in your early 20s, you discovered you had a family connection to the Country music industry. Can you tell us a little about Billy Mize, what he did, and how you found out about him?

When I was in my early 20s, I was driving down the road in Bellevue, Tennessee, and I got a call from this guy named Ray Erhardt. He was one of Billy Mize's good friends. He said, "Hey, Billy Mize is turning 80 years old. He's your relative. We know that you're in Nashville as a songwriter, and we'd really like it if you came out and performed at his 80th Birthday celebration at Buck Owens' Crystal Palace." So, of course, right away I'm on the phone to my dad and grandpa. And my grandpa is one of those guys that you just can't get a story out of him - you can't even prod it out of him! The guy was a Nazi prison guard during WWII, and I still haven't gotten a single war story out of him! I finally just had to ask him, "Why didn't I ever know about this?" And he just responded with, "Oh, well, I guess I just never thought to tell you that you had a relative in the music industry." My grandfather had gone out to California and lived with Billy Mize for a few weeks in the 1950s on his way out there for something. It was really interesting to find out that my family knew about Billy Mize, but I really just never knew. He was kind of a behind-the-scenes type of guy. I knew who Buck Owens and Merle Haggard and all those guys were growing up, but I didn't know I had a relative that was behind their careers. It was really a cool discovery! I went out and played for the party. I got there and was picked up by Merle Haggard's son, Benny, who now plays in Haggard's band. I got picked up in his truck and taken to The Crystal Palace, and Merle's band showed up, and they were playing this filmstrip. There were all these people talking about Billy Mize - kind of like a montage video - and Merle Haggard came on the screen and said, "I've gotta say, I think my favorite song, maybe of all time, is 'Who Will Buy The Wine' by Billy Mize." And then the video cut off, and they

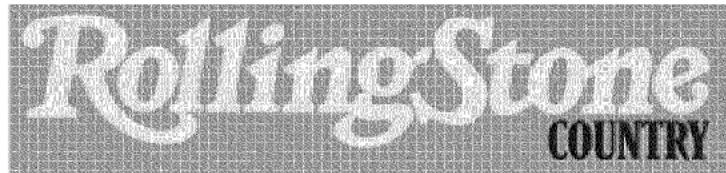
welcomed me up on the stage. I was crapping my pants, because the song I had to sing was "Who Will Buy The Wine," and Merle Haggard was sitting in the front row! It was a house band, and we hadn't even rehearsed, so I had to walk up and grab a guitar from somebody and just tell the house band, "'Who Will Buy The Wine' in the key of E," and we just had to run with it. So it was pretty crazy. I've kept in touch with Billy's grandson, Joe, because he made the documentary film on him called "Billy Mize And The Bakersfield Sound." I've kept in touch with Joe quite a bit, and his brother Buddy, who was one of the founders of the NSAI, who lives in Nashville. I don't have a number to reach Billy, though. He's about 85 now, and I haven't talked to him since I played at his 80th Birthday party, but I keep in touch with some of the others. I may very well have embarrassed myself, and they're just being nice to me, but there's nothing more nerve wracking than trying to play a song for that crowd in front of those people. It was crazy, but it was so much fun!

- See more at: <http://www.allaccess.com/country/10-questions/archive/21546/10-questions-with-logan-mize#sthash.JNP0xRqs.dpuf>

From: Reilly, Patrick [REDACTED]
Sent: Tuesday, September 30, 2014 10:40 AM
To: Greenstein, Scott; Blatter, Steve; [REDACTED]
Cc: Marks, John; Bowman, Samantha; Meyer, Jim
Subject: RAY SCOTT POPS A COLD ONE IN 'DRINKIN' BEER' — VIDEO PREMIERE / Rolling Stone Country

Nice shout out for SiriusXM by this newly re-emerging Country artist; *Rolling Stone Country*, new to the field, but a fresh target for us.

Rolling Stone:
<http://www.rollingstone.com/music/videos/ray-scott-pops-a-cold-one-in-drinkin-beer-video-premiere-20140929>



RAY SCOTT POPS A COLD ONE IN 'DRINKIN' BEER' — VIDEO PREMIERE

The baritone singer extols the virtues of a brew in a humorous new single and video from his upcoming album

Ray Scott - Drinkin' Beer - Official Music Video



BY MARISSA R. MOSS | September 29, 2014

It takes a lot of confidence to rock a miniskirt — male or female, really — but Ray Scott has no problem showing off his lovely gams in the new video for "Drinkin' Beer," premiering exclusively on *Rolling Stone Country*.

"That wasn't my idea," Scott tells us about about a particular scene where he sports a nice denim number, "but someone brought it up and I said, 'Hell yeah, I'll take one for the team.' You probably wont see a pair of legs anywhere that look any better than that."

"Drinkin' Beer," the first single from the North Carolina-bred artist with a mahogany voice, signature black hat and traditional tendencies, is an anthem to, you guessed it, the casual art of sipping PBR. Filmed on a lake near Lynchburg, Tennessee, the video's all about the good times — and the selective vision (a.k.a. beer goggles) — that a healthy pint or six can induce.

"A lot of people know me for fun songs, for songs that can be a little bit polarizing," Scott says. But his upcoming self-titled record, due October 7th, won't be all-lighthearted, brew-sipping, lake-cruising fun. "It's a good, fun thing to lead off with a song like that. But I kind of consider it the top layer of the onion, and once you get into the record, there are some deeper parts."

Certainly Scott is known for those upbeat, boot-stompin' tunes — after all, his biggest Top 40 hit, "My Kind of Music," is a honky-tonker with a Johnny Cash locomotion that bids "adieu" to a gal who doesn't know her George Jones from her Glen Campbell. But while "Drinkin' Beer" doesn't exactly hit on the darker struggles in life, there are songs on *Ray Scott* that deal in crime sprees (the old-school murder narrative "Papa and Mama"), cheating lovers and steel-guitar ode to trailer park living, written with Brandy Clark ("Wheels on the House"). Produced by Dave Brainard, who recently put his touch on Clark's *12 Stories*, the collection balances Scott's adulation for the country greats while incorporating lyrics that are both stirring and funny. Take this line

PUBLIC VERSION

from "It Ain't Gonna Be You": "you say you don't know what got into you," he sing-talks in the lowest of lows octaves, "but if my memory serves me right, I think his name was Bruce."

It hasn't always been an easy road for Scott, who was once singed to Warner Bros. but saw a dissolution of his record deal when it became apparent that his style wasn't exactly in sync with what was currently flying up the charts. "It's been feast or famine," he says. So he and Brainard partnered up to start their own label, and he's been independent ever since. He credits a lot of his success to the support of SiriusXM, who consistently played his songs and spurred his digital resurgence. But while he's a fan of the satellite station, he's less than enamored with the current radio trends. Bro-country, for one.

"What they're doing on mainstream radio is different from what I'm doing," he says. "It's very formulaic, especially the male artists, and has been for a while. I'm not really a bro country kind of guy. The depth of lyrics in country music from 20 or 30 years ago is what attracted me to the format in the first place. I love good storytelling."

He loves a good beer, too. So what's his libation of choice?

"This is my favorite beer to drink," he says, without missing a beat. "Free beer."

The Top 25 Rock Radio Programmers

5/11/2016 by [Billboard Staff](#)

[FACI](#) [TWiT](#) [EMA](#)



Meg Vogel/NPR

Bob Boilen, Creator/host, All Songs Considered, Tiny Desk Concerts; NPR Music

SXM Dir. Ex. 32

Who is shaping the future of rock? Rising stars, certainly, such as [Cold War Kids](#), [The Strumbellas](#) and [The Lumineers](#), each a current top 10 act on Billboard's Rock Airplay chart. But the programmers at alternative, adult alternative and active/mainstream radio outlets choose the songs that propel artists like these up the airplay charts. The 25 rock programmers here, at 20

different outlets, are identified by label executives surveyed by *Billboard* as among the most influential in getting exposure for new rock repertoire. They are ranked by the size of their markets and their industry impact.

And they share one common goal, stated simply by alternative-radio leader **Kevin Weatherly** of KROQ Los Angeles: "We're always looking for hits."

1



JESS BESACK, 33

Director of music programming,
The Spectrum



JEFF REGAN, 40

Senior director of music programming,
discovery initiatives; host, Alt Nation



VINCENT USURIELLO, 29

Program director,
Octane, SiriusXM

Ask record executives to name the most influential rock programmers at satellite radio service SiriusXM and they won't give you a single answer -- they'll give you three. **Jess Besack**, adult - alternative programmer at The Spectrum; **Jeff Regan**, host of alternative channel Alt Nation; and **Vincent Usuriello**, choosing new hard-rock acts at Octane, together have contributed to the growth of SiriusXM's national subscriber base of more than 30 million. "We're encouraged to move fast and take chances," says Besack, a Park Slope, Brooklyn, resident, who has given The Spectrum's support to The Record Company and Barns Courtney, among other acts. Regan, a father of two boys under 6, got behind **Twenty One Pilots'** "Ride" before its release as a single, helping the track's rise to No. 1 on the Alternative airplay chart. And Brooklyn-born Usuriello has seen his support for the band From Ashes to New propel its album *Day One* to No. 2 on Hard Rock Albums. "Our audience is so engaged," says Usuriello, "we can see a song go from 100 downloads a week to over 1,000 just from our airplay alone."

2



BOB BOILEN, 63

Creator/host, All Songs Considered, Tiny
Desk Concerts; NPR Music

To stay on music's cutting edge, **Bob Boilen** attended some 500 concerts in 2015. "That was down from 660 the year before," he says with a laugh, "only because I was writing a book [*Your Song Changed My Life*, HarperCollins]. The Washington, D.C., resident spent 18 years directing NPR's All Things Considered until 2000, when he created All Songs Considered and, subsequently, Tiny Desk Concerts, which has featured up to 100 performances every year. Both programs are in-demand showcases for acts across the adult alternative format and beyond. Artists "trust NPR as a place [with] integrity," he says. An estimated 20 million-plus fans flock to NPR Music. "We play what we have a passion for and make decisions from the heart."

3



KEVIN WEATHERLY*

Senior vp programming, CBS Radio; vp programming, CBS Radio/Los Angeles; program director, KROQ/KAMP/KCBS Los Angeles



LISA WORDEN-FAULK*

Assistant program director/music director, KROQ Los Angeles

Los Angeles' alternative mainstay KROQ (106.7 KROQ) regained its market-leading status at No. 1 among men 18-to-49 (up from No. 3 in 2015), according to Nielsen Audio, playing breakout acts like [Lukas Graham](#), [Cold War Kids](#) and [Elle King](#). **Kevin Weatherly**, who credits seeing U2 at age 19 for his career path, holds multiple senior roles at CBS Radio and collaborates with **Lisa Worden-Faulk**, a self-described Cure fanatic and mother of 6-month-old twins, to program KROQ. "For the long-term health of the music business, not just our format," says Weatherly, "we need artists who can sell not just singles but concert tickets, and who can have a long career."

4



RITA HOUSTON, 54

Program director, WFUV New York, Fordham University

For 22 years, **Rita Houston** has guided noncommercial adult alternative WFUV (90.7 FM) from the Bronx campus of Fordham University (the station's licensee). As commercial New York outlets - abandoned new rock formats, she has become a leading on-air champion for rising artists, such

as [Alabama Shakes](#) and [Courtney Barnett](#), both 2016 Grammy Award nominees. WFUV also has gained a high profile because Houston appears at events like the BRIC Celebrate Brooklyn! Festival. "It's not enough to be a DJ anymore and play records," says the Nyack, N.Y., resident of her job's evolution. "You've got to be a great writer. You've got to know how to present yourself on social media. You've got to be able to communicate about music and connect with listeners."

5

**WALT FLAKUS, 49**

Assistant program director/music director/afternoon personality, WKQX Chicago

**TROY HANSON, 43**

Vp programming for rock, Cumulus Media; program director, WKQX Chicago

In the nation's third-largest media market, alternative WKQX (101 WKQX) benefits from the programming partnership of **Walt Flakus**, a working musician off the air, and Hanson, a native of St. Paul, Minn., who also helps guide rock playlists for the Cumulus Media chain. The station ranks No. 2 among men 18-to-24, its strongest audience segment, according to Nielsen.

But **Troy Hanson** says his "secret sauce" of mixing guitar-driven rock with more melodic fare "can bring females along" and, for WKQX's business goals, "that pays off big." Flakus picks songs that will build careers. "We don't need disposable artists," he says.

6

**ANDY HARMS, 36**

Music director/assistant program director/afternoon drive host

**MIKE KAPLAN, 53**

Mike Kaplan, 53
Program director, KYSR Los Angeles,
iHeartMedia

"We're in the center lane of pop alternative," says **Mike Kaplan**, a North Hollywood resident, aptly - choosing a highway metaphor to describe Los Angeles' KYSR (ALT 98.7), whose music mix ranks it No. 2 among women 18-to-34, according to Nielsen. Kaplan adds: "Alternative is always at its greatest

when it's agnostic to gender -- never too heavy or too light." **Andy Harms**, who joined KYSR in 2015, concurs. "We cater to 50 percent male, 50 percent female, and our playlist absolutely reflects that," he says. I'm proud that our station doesn't treat female artists or listeners as a niche."

7



SKY DANIELS, 62

GM/program director/afternoon drive host, KCSN Los Angeles, California State University, Northridge

"You'll typically find that KCSN [88.9 FM] is one of the first five stations in the country to play the hits on the adult alternative charts," says **Sky Daniels** (real name: Daniel Rudolf), an Ohio native who joined this rising noncommercial Los Angeles outlet in 2011 after a career path through esteemed rock outlets including KFOG San Francisco, WLUP Chicago and KISW Seattle. Guiding his station's mix of new and veteran artists (singer-songwriter [Lissie](#) to [Counting Crows](#) in a recent morning segue), Daniels says KCSN's greatest achievement this past year was the launch of a high-profile - performance stage and remote studio at the upscale Village at Westfield Topanga mall in Canoga Park, exposing the KCSN brand to some 100,000 visitors weekly.

8



BILL WESTON, 60

Program director, WMMR/WMGK
Philadelphia, Greater Media

While spinning new tunes in its active rock format from such legacy acts as [Cheap Trick](#) or [Tom Petty's Mudcrutch](#), WMMR (93.3) under**Bill Weston** also sticks its neck out for alternative-leaning songs from the likes of British quintet [Foals](#) and Iceland's [Kaleo](#). "It's great if a song rocks in a new way," says the western New York native and father of two grown children, who has consistently led WMMR to a No. 1 ranking in Philadelphia among men 18-to-49, according to Nielsen. "We have the autonomy to select music based on our market knowledge."

9



JAMES HOWARD, 37

National rock brand coordinator, iHeartMedia; program director, The Elliot in the Morning Radio Network/WWDC/WBIG Washington, D.C.

When British rockers [The Struts](#) hit No. 12 on Alternative Albums with *Everybody Wants* in March, the act could thank **James Howard**, who learned of the group from its manager, Ben Berkman, and then "sent their music to everyone I could possibly think of in the iHeartMedia team." The Miami-raised - programmer, who lives in D.C.'s Adams Morgan neighborhood, guides alternative WWDC (DC101), classic rock WBIG (BIG 100.3) and DJ Elliot Segal's syndicated morning show. Choosing music and balancing the interests of listeners, advertisers and record labels, "it's hard to manage and find success," he says. "But when it happens, it's pretty sweet."

10



JOHN ALLERS, 47

National alternative brand coordinator, iHeartMedia; program director/morning host, WRFF Philadelphia

How can local radio compete with global streaming services? "Personalities, events and interaction with our community," says **John Allers**, a long-distance runner who plays a national alternative music role with iHeartMedia but emphasizes the Philadelphia presence of WRFF (Radio 104.5). The station is No. 1 among men 18-to-24, according to Nielsen, and Allers witnessed local listener loyalty when fans snapped up 25,000 tickets for a [Twenty One Pilots](#) concert on June 11 that will celebrate WRFF's ninth birthday. "We have events here in Philadelphia that support the new music we play."

11



RYAN CASTLE, 38

Operations coordinator, Entercom/Seattle; assistant program director/music director, KISW Seattle

In a city whose rock history boasts acts from [Jimi Hendrix](#) to [Nirvana](#), Castle at KISW (99.9 The Rock) has embraced radio's future. "We're a multiplatform media outlet," says **Ryan Castle**, a Washington state native who lives in Seattle's Greenwood neighborhood. He notes that KISW, like many stations,

now reaches listeners "online, through social media, on our website and through texts and mobile apps," all valuable tools "for the right artists." On air, KISW has led its market among men 18-to-49 for more than a year, according to Nielsen. "My job," quips Castle, "is to not mess that up."

12



BRUCE WARREN, 58

Executive producer, World Cafe; assistant station manager, WXPN Philadelphia, University of Pennsylvania

Bruce Warren wields his influence locally and nationally, overseeing broadcast and digital content for WXPN (88.5 XPN), one of the industry's most respected noncommercial adult alternative stations, and as executive producer of World Cafe, syndicated by NPR and hosted by David Dye. A Temple University graduate (who once planned to be an elementary school teacher), Warren has guided WXPN's "Artists to Watch" campaigns for such rising performers as [George Ezra](#), [Leon Bridges](#), [The Record Company](#) and [Margo Price](#), while World Cafe Next has given early national exposure to acts like roots-rock band Quiet Life and country singer [Aubrie Sellers](#). "I love getting people excited about music and ideas," says Warren, the father of two teenage boys. "That's a big part of my role."

13



DEREK MADDEN, 40

Program director, KXXR Minneapolis, Cumulus Media

"We've taken some chances to redefine [the tastes] for rock for this market, which got a little too narrow," says **Derek Madden**, who has been taking risks since college. While at the Cornell University School of Industrial Labor Relations, he did a shift on the college radio station and hasn't looked back. For KXXR (93X), he's looking ahead, past "a very hard-rock-aligned" audience, to expose more alternative acts like [Cage the Elephant](#) and [Awolnation](#). The result? KXXR ranks No. 1 in Minneapolis among men 18-to-34, according to Nielsen. "It's just looking at rock and how it needs to move forward."

14



NERF, 41

Regional vp events and strategic partnerships/afternoon drive personality, iHeartMedia/Denver; program director, KTCL Denver

"The policy here is, we listen to everything," says **Nerf** (real name: Jeb Gudas Freedman) at KTCL (Channel 93.3), who picked up his nickname at California's Whittier College, where he studied - philosophy. "Everything" means local bands, unsigned bands and indie bands -- which is how KTCL launched Denver's [Nathaniel Rateliff & The Night Sweats](#) onto iHeartMedia's national On the Verge showcase program. As a "very pop-leaning alternative station," KTCL ranks No. 1 among women 18-to-49, according to Nielsen. Nerf, the father of three children under 8, recently was named vp events and strategic partnerships for all 26 iHeartMedia stations in the Denver region.

15



MARK HAMILTON, 52

Program director, KNRK Portland, Ore., Entercom

Mark Hamilton, who grew up in southwest London, credits British TV's *Top of the Pops* and the late John Peel, BBC Radio 1's DJ, for inspiring his rock radio career. At KNRK (94.7 fm), he helped launch the weekly New Music Heaven show -- which gave some of the first major-market radio exposure in the United States to such acts as [Mumford & Sons](#), Fun and [Neon Trees](#). KNRK ranks No. 2 in men 18-to-24 in Portland, up from No. 7 a year ago, according to Nielsen. What's ahead for alternative stations? "We're going to see a return to hard-edged rock bands," he predicts.

16



HALEY JONES, 46

Program director, KGSR Austin, Emmis Communications

Austin has a "famously voracious musical appetite," says **Haley Jones** at KGSR (93.3 KGSR) and the adult alternative station mixes veteran acts like [U2](#) and Tom Petty with such newcomers as Lukas

Graham and Leon Bridges. Under Jones (whose husband, Bryan Shock, is program director of KFOG/KSAN San Francisco), KGSR leads the Austin market among men 18-to-24; it was tied in eighth place in that audience segment in 2015, according to Nielsen. Live broadcasts from the Austin City Limits and South by Southwest music festivals, and the Blues on the Green concert series, help expose artists. "When we find something we love, we're not afraid to play it," she says, "whether a label is working it to our format or not."

17



JIM FOX, 51

Vp programming, Entercom/Sacramento, California.

"Rock can be very broadly defined, so we are always looking for new textures with KKDO [Radio 94.7]," says **Jim Fox**, whose oversight of the Sacramento alternative station led it to No. 1 among men 18-to-24, up from second place in that audience segment in 2015, according to Nielsen. Fox, a Las Vegas native and father of two, says KKDO has "taken risks" with its music mix but cautions that listeners will tune out too much novelty. "New music is now 10 percent of the playlist," he says. "I can play new songs all day long, but the audience just doesn't want it."

18



LAZLO, 44

Program director, KRBZ Kansas City, Mo., Entercom

KRBZ (96.5 The Buzz) leverages live shows by artists in and around Kansas City to drive demand among its listeners for new music, says **Lazlo** (real name: Scott Geiger), who recalls that his first concert, at age 13, was a Violent Femmes show. "We work with record labels to bring bands to town and hopefully sell concert tickets [to] break new music in the city," says the Detroit native and father of two, whose alternative station ranks No. 1 among men 18-to-34, according to Nielsen. "That's an important part of what alternative radio is," adds Lazlo. Among the features of KRBZ's website is an online playlist that allows quick access to the concert listings for artists featured on its airwaves. The combination of music and events, he says, is key "to get people engaged."

19



GARY KRAEN, 44

Director of programming and operations,
WRLT Nashville, TunedIn

In the capital of country music, WRLT (Lightning 100) champions local rock'n'roll. "That's a big part of our mission," says **Gary Kraen**, a Montana native who lives in Nashville's hip 12 South neighborhood. "Close to 40 percent of our programming at Lightning 100 is local music," he adds. While WRLT is not a subscriber to Nielsen Audio ratings and does not publish its financial results, Kraen says its revenue has quadrupled in the past five years. His station's adult alternative format allows a broad definition of rock, he says, citing WRLT's support for singer-songwriter Andra Day, "one of those artists who's going to be a cross-genre success."

20



ROSS FORD, 43

Program director, KILO Colorado Springs,
Colo., Bahakel Communications

At KILO (94.3 KILO), **Ross Ford** carries on the legacy of the late Richard Hawk, whose 27 years - programming the station made it a nationally recognized pioneer in the active rock format. (Hawk retired in 2006 and died in 2013.) Ford, a Denver native, finds new acts for KILO's playlist with help from a "pure rock panel" driven by online listener input. That's how acts like **Volbeat** and **Sick Puppies** aired on KILO. "Our job," he says, "is to find songs that KILO's audience will love and become 'power gold' for the rest of time."

* Declined to reveal age

CONTRIBUTORS: Rich Appel, Gary Graff, Melinda Newman, Cathy Applefeld Olson, Mitchell Peters, Craig Rosen, Kevin Rutherford, Chuck Taylor

NOTE: Audience rankings from Nielsen Audio are based on the Metro Portable People Meter data for Monday to Sunday, 6 a.m. to midnight, for March 15 and 16, and represent the strongest audience segment for each station during that period, as reported by Nielsen.

This article first appeared in [the May 14 issue of Billboard](#).

From: [REDACTED]
Sent: Monday, July 13, 2015 7:20 PM
To: [REDACTED]
Cc: Besack, Jessica
Subject: Nathaniel Rateliff & The Nightsweats & SiriusXM

Importance: High

Steve:

I wanted to thank you and Jess Besack for the support SiriusXM is giving Nathaniel Rateliff and The Night Sweats "S.O.B" single.

We're pretty excited that due to the amazing airplay from Spectrum channel, "S.O.B" single sales have completely blown up... we went from 7 downloads to over 1,600 this week.

This song is performing like a hit – instant and undeniable - and it's ALL SIRIUSXM.

PS -

We have Conan and Fallon booked next month as a result of the same showcase Jess saw. Our LA showcase brought an offer from Colbert, too. So much fun you guys started...

Best,

[REDACTED]

Nathaniel Rateliff & the Night Sweats. A band to believe in.

Dear Steve,
 Just making sure you
 saw this advertisement
 we did for Nathaniel
 in Billboard.
 Note your very big
 shout out. Thanks for
 all you do.

My best,

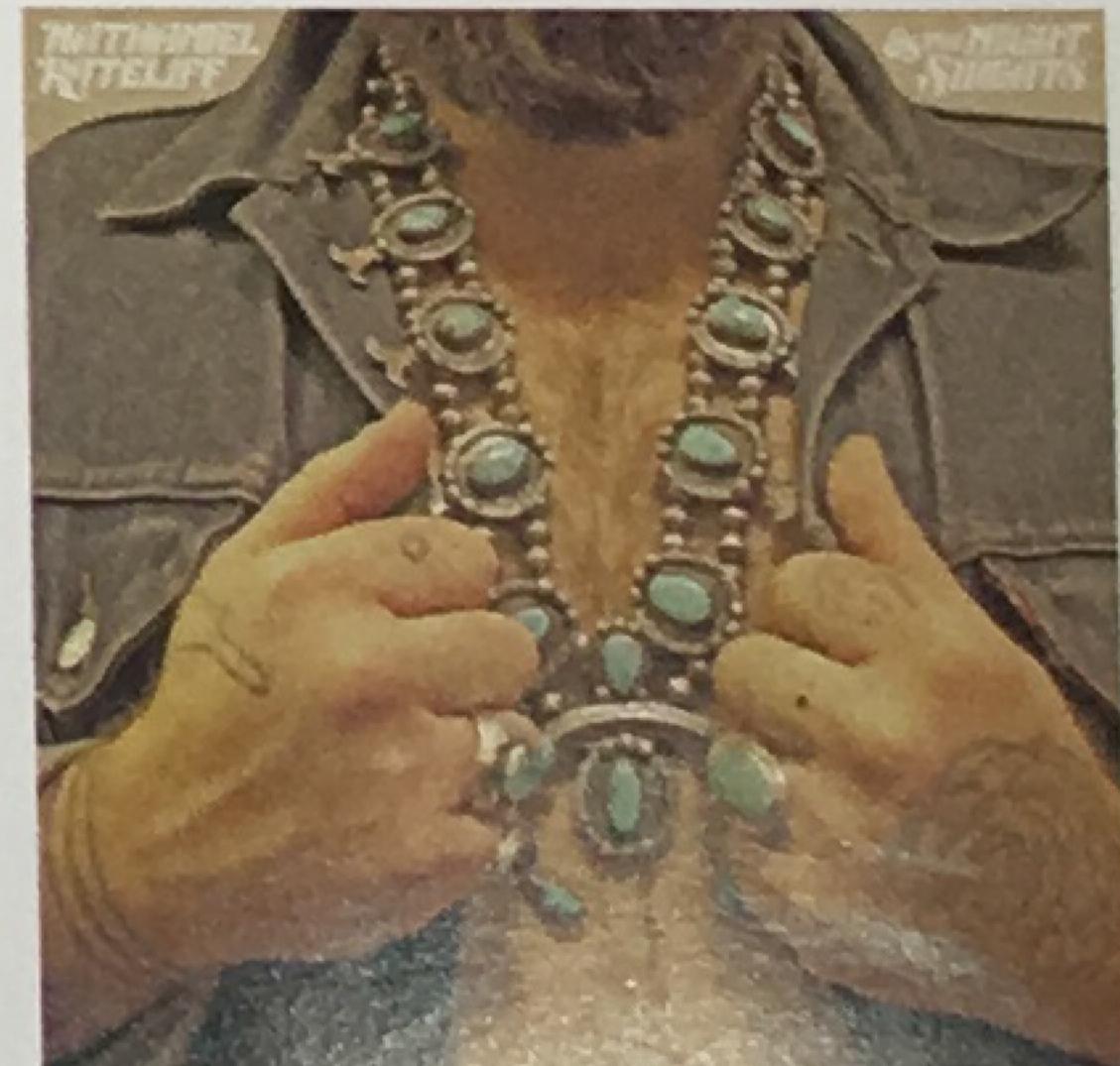


He's the man with the band and a plan.
 A sound that shook the roof off of late-night TV.
 He's got a soulful voice, full of heartache and longing.
 SiriusXM launched "S.O.B.," and it became a foot-stompin' classic.
 An album in the Top 200 since it debuted over a year ago.
 He's got Gold and Platinum records in multiple countries.
 They're the band playing sold-out shows around the globe.
 "Wasting Time" is up next, and it's a hum-along heartbreaker.

This is Nathaniel Rateliff & the Night Sweats,
 and they're on Stax Records.

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**NATHANIEL
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& THE NIGHT
SWEATS**

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MusicRowPics: Old Dominion

SXM Dir. Ex. 35

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Kelsey Grady • January 22, 2015



Old Dominion visit

Nashville quintet **Old Dominion**, which includes **Matt Ramsey**, **Trevor Rosen**, **Whit Sellers**, **Geoff Sprung**, and **Brad Tursi**, has seen some of its members' names on the country radio charts as songwriters with hits recorded by **Kenny Chesney**, **Keith Urban**, **The Band Perry** ("Chainsaw"), **Dierks Bentley** ("Say You Do"), **Tyler Farr** ("A Guy Walks Into A Bar"), and others.

Now, with their independently released, self-titled EP, the members are getting a taste of working the radio charts as an artist. The EP, released in 2014, boasted production from top-shelf songwriter-producer **Shane McAnally**. McAnally earned a Grammy honor last year, alongside **Luke Laird** and **Kacey Musgraves**, for his work on Musgraves' *Same Trailer, Different Park* project.

The quintet stopped by *MusicRow*'s office to showcase three songs, including "Roll Around With You," "Shut Me Up," and current single "Break Up With Him." All members of the group had a hand in writing "Break Up With Him." "I think that makes it even a little more special for us, to have this song as the first single," says Rosen.

Thanks to early airplay on SiriusXM, "Break Up With Him" piqued the interest of radio programmers across the nation, and several stations began airing the album cut late last year. Responding to demand for the song, the band's management is rushing out the radio single, with an official impact date of Feb. 9.

The quintet has landed an opening slot on Chesney's upcoming *The Big Revival Tour* this summer. The gig makes them the first independent act to ever be part of a stadium tour.

"For months we kept joking about going on the road with him, and then they said, 'Well now that the Kenny tour is happening...' and we couldn't believe it," said Ramsey. Thus far, the band has primarily played smaller venues, including opening for **Chase Rice**'s *Ignite The Night Tour*. "There's no way to really prepare for something like stadium dates. We are just excited to get out there and play our music."

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Comments

0 comments

From: Greenstein, Scott [REDACTED]
Sent: Thursday, April 02, 2015 8:33 AM
To: Blatter, Steve
Cc: Meyer, Jim
Subject: Re: Big Data turns breakthrough hit 'Dangerous' into first headlining tour | cleveland.com

Great. Keep a 2015 list.
Sent from my iPhone

On Apr 2, 2015, at 8:31 AM, Blatter, Steve [REDACTED] wrote:

From article below about Big Data, unsigned artist first played on Alt Nation and then signed to Warner Music Group...

"The moment I knew my life was really changing was in December. That's when SiriusXM started putting the song into rotation. That sort of blew the lid off of everything"

http://www.cleveland.com/entertainment/index.ssf/2015/04/big_data_turns_breakthrough_hi.htm
1

Big Data turns breakthrough hit 'Dangerous' into first headlining tour

CLEVELAND, Ohio -- When Alan Wilkis, the man behind Brooklyn, N.Y. electronic music project Big Data, began plotting his first headlining tour, some problem solving was required.

Since Big Data's inception two years ago, the project has been made up of just Wilkis. Duplicating Big Data's sound on stage would take some work.

"When I started Big Data I thought of it mainly as a recording project," says Wilkis, who studied at Harvard before getting into music. "I would work as a producer and bring in different vocalists. Suddenly these tour dates started to appear and it was like, 'I guess I gotta figure this out.'"

PUBLIC VERSION

Wilkins is bringing a drummer, guitarist, bassist and a female singer on tour with him to bring songs like "Dangerous" to life. The single, which Wilkins recorded with indie-pop band Joywave, reached No. 1 on the alternative charts last fall.

Big Data released its debut album, "2.0," last month after a series of well received EPs. We caught up with Wilkins ahead of his show at the [Grog Shop on April 3.](#)

"Dangerous" has been all over the radio. Have you gotten sick of the song yet?

Remarkably, I'm not sick of it, believe it or not. I definitely couldn't have imagined it going even remotely this far. I still feel pretty grateful and surprised. It's hard to get sick of that feeling.

How did the song come about?

When I started Big Data I was just working with Dan Armbruster from Joywave. The way I always record is I write each instrumental piece first and then I get together with a vocalist and we start to hash out melodies and lyrics. That's sort of how it came together with Dan. It was one of the first instrumentals I wrote. At the time, his band was coming down to New York every couple of weeks to perform. We would plan a lot of writing and recording around his touring.

Was there a point where you realized the song's popularity was taking on a life of its own?

There was all kinds of craziness on the Internet. The promotion on Hype Machine was a big thing. The moment I knew my life was really changing was in December. That's when SiriusXM started putting the song into rotation. That sort of blew the lid off of everything.

"Dangerous" is a song about sharing too much information on the Internet. Do you find yourself battling with technology?

It's a mix. It's not a battle for me. If it were a battle, I wouldn't use technology. I use a lot of Google products. I have an iPhone. I'm not trying to preach or rebel against

PUBLIC VERSION

anything. I think I'm just trying to be satirical and just make you think a little a bit the next time you hit accept on the nefarious types of services we sign up for.

Your new song "Snowed In" features Rivers Cuomo from Weezer. That must have been cool to record with him.

It was really surreal and incredible. I've been a huge Weezer fan forever. I remember seeing Weezer in Central Park in New York when I was in seventh grade. I still love those songs. I was really star-struck when I met him. He was very nice and disarming. It was a once in a lifetime, amazing thing. Well, hopefully it's not a once in a lifetime.

You played a festival or two with Weezer last year. Is that how the song came about?

Not exactly. We played three festivals in row with them and that definitely helped, because we got to meet the guys. I think the genesis of the song was the initial emails we sent out to him that were like, "Alan is a huge fan of Weezer."

You went to Harvard the same time as Mark Zuckerberg. Did you know each other?

No. I was a junior when Facebook started. The ones that I knew were the Winklevoss twins. I knew their partner in crime, Divya Narendra, too. He didn't get the same spotlight. But I think they all made a lot of money.

Facebook has come a long way since then.

When it started, you could flirt with people online. That was cool. Or you could figure out that cute girl's name at the library. That's about as far as it went. I never imagined it would be this global thing. It's where your personality lives on the Internet.



- **10 Questions with ... Cole Swindell**

February 8, 2015

[Have an opinion? Add your comment below.](#)

- 14

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BRIEF CAREER SYNOPSIS:

Facebook: <https://www.facebook.com/ColeSwindellMusic>

Twitter: www.twitter.com/ColeSwindell

Singer-songwriter Cole Swindell has been hard at work on his career for many years. Growing up in Georgia, Swindell opened shows with Luke Bryan during his early days and then went out as Bryan's

merchandise man. After moving to Nashville, Swindell inked a staff writers' deal at Sony/ATV and began cranking out hits for other artists and performing at showcases in and around the Nashville area. Now, with a debut album and a follow up EP out, Swindell is earning his own buzz and becoming a household name in his own right. He was named to this year's Country Radio Seminar (CRS) New Faces Showcase, where he will perform for Country radio professionals from across the nation, displaying why he is fast becoming a staple at the top of the charts.

"Cole Swindell" is his self-titled debut album, and he currently has an EP out entitled "The Down Home Sessions"

1. Cole, thank you so much for taking time to talk with All Access. There seem to be a pretty great group of musicians coming out of Georgia in recent years - what do you think it is about Georgia that has made it a breeding ground for recently successful Country artists?

I don't know if you can point out one thing that has brought success to Georgia Country artists. I know we all come from hard working backgrounds, and I can't help but think that work ethic has something to do with the success of the Georgia crowd. I know I'm proud of where I grew up because it made me the man and artist that I am today.

2. Growing up in Georgia, did you know you wanted to pursue Country music as a career? We know you graduated from Georgia Southern University; what was your major, and how did it prepare you for your current career?

I knew as soon as I started performing in bars and at parties in college that singing was what I wanted to do the rest of my life. College life brings about so many learning experiences in and out of the classroom from study and organizational habits, to making friends and reading people, to learning to play in front of crowds and how to perform in my case. Georgia Southern gave me that opportunity, and that's why I wear this hat - to show where it all started.

3. The word on the street is that you never sang in public until you started college. Where did you hone your skill growing up? Did you write from an early age, or did that come when you began performing?

That's right. I never really sang much at all or wrote anything until I got to college. There, we started doing shows and parties, and everything started coming together.

4. Speaking of your alma mater, you're known as a ball cap wearer. Your debut album features a photo of you wearing a Georgia Southern cap, but you've also released your own "CS" hat. These caps share some similarities...did you pattern your own merchandise after your favorite cap from your alma mater, or was it a coincidence?

We didn't intentionally pattern my merch after the GA Southern hat, but obviously I'm drawn to the layouts and colors that are similar to my favorite hat.

5. There has been an urban legend of sorts circulating about how "Chillin' It" came to be on the air. We've heard there were unmastered copies sent to radio, and we've heard you got a big running start in SiriusXM's The Highway. Can you clear it all up and tell us the story of how the song - and your career as an artist - started to take off?

When me and my buddy Shane Minor wrote "Chillin' It," I knew right then I wanted to keep the song for myself. At the time, there was really no label interest, so I took it to my manager. We mastered the demo, and she got the song to John Marks with SiriusXM, and he gave me a shot. After being #1 for several weeks and selling a noticeable amount of downloads, labels began to take interest, and I signed with Warner Bros. Records. They immediately took it to country radio, who really embraced me, and the rest is history. In this industry where it's all about the song, it's great to have been able to keep this one to kick-start my career.

6. You have written hit songs for Luke Bryan, Florida Georgia Line, and many others, leading to a total of four #1 singles in 2014 - two for yourself as an artist and two that you wrote for other artists. When you're writing, how do you decide if you should shop the song to other artists or keep it for yourself?

In the beginning, I was a songwriter with dreams of becoming an artist. My main goal was to write the best songs I could, keep getting better, and hope that I could get my songs out there for everybody to hear. When you have the opportunity for great artists to cut your songs and put them out, that's hard to pass up, especially when they're your buddies. I can only put out so many songs on an album. I'm just blessed that they loved these songs like I did and people got to hear them. But rest assured, now that I'm in a position to cut my own songs and have the support of a great label and country radio, I'm keeping all the good ones I can.

7. You've gone from playing small bars and club gigs, to opening stadiums and filling farms with Luke Bryan, to headlining your own tour revisiting those smaller venues that gave you a start in the industry. Do you prefer small, medium, or large venues - and why? And is there any particular venue that you've not yet visited that you would like to play?

I love them all for different reasons. There's something about stadiums, with that many people in one place - just a sea of people - and the energy that creates. But then there's a different type of energy within the intimacy of a club that you can't explain. Having the fans right there in front of you responding to everything and seeing immediate fruits of your labors on stage, there's nothing else like it. I hope I can play all sized venues for as long as I can.

8. Coming off of a stellar 2014, you have been named to the "New Faces" show at CRS. That's quite an honor, and is only the beginning of what is sure to be a huge year for you as your

current single "Ain't Worth The Whiskey" continues to climb the charts. What can you tell us about your plans for 2015? Will we be getting any additional new music from you this year?

I'll be going out with Jason Aldean as direct support, who I've always been a huge fan of, and then we're doing some stadium dates with Kenny Chesney, which has always been a dream since I saw Luke opening for him when, years ago, I was still doing merch. As you know, I'm always writing and in the studio working on new music. Like we did this year, we plan to put out the "Down Home Sessions EP" to give new music to the fans in between studio albums.

9. A big part of your 2015 is sure to be the touring aspect with Jason Aldean and Kenny Chesney. What are you most looking forward to about being out on the road with those guys, and what dynamic do you think you bring to the show?

When I was out selling merch for Luke, he opened a few stadium dates for Kenny. So between that experience and just always being a fan, he's definitely someone I've always dreamed of being on the road with. As far as touring with Jason, I was a fan of his music before he even put out his first album, and becoming friends with him and seeing the energy his live shows have, I can't wait to be a part of his show. These guys have been in this business a long time and are Country music superstars, so I'm going to work my tail off to get the crowds warmed up for them and will be taking notes and learning from two very successful men in this genre.

10. You've been "the young guy" on several tours now, as we mentioned before opening for Luke Bryan and now preparing to go out with Jason Aldean and Kenny Chesney. Looking at other "New Faces" in the industry, who are the guys and gals that are up-and-coming who are impressing you? If you were to go out on a headlining tour this year with support acts, what "New Faces" would you like to bring with you on the road and why?

Sam Hunt is one of the new artists who I really like. It's impressive to see what he's done since being introduced to Country music. I've also got a good buddy, Adam Sanders, who I've always written with and I'd love to take him on the road with me at some point.

- See more at: http://www.allaccess.com/country/10-questions/archive/21042/10-questions-with-cole-swindell?ref=mail_eweekly#sthash.RYcS50ch.dpuf

MAKIN' TRACKS TOM ROLAND tom.roland@billboard.com

Cole Swindell's 'Chillin' It' Cruises With Satellite-Enabled Guidance



If its record-setting run at No. 1 on Hot Country Songs wasn't enough, the impact of **Florida Georgia Line's** "Cruise" can now be measured by another proven method: its influence on the sound and the marketing effort of subsequent releases by other artists.

Singer-songwriter **Cole Swindell's** "Chillin' It," currently No. 42 on Hot Country Songs, owes a debt to "Cruise" in both areas. The cadence in the verses of "Chillin'" sounds notably similar to "Cruise," and the use of SiriusXM's Highway Find feature to introduce it to the public—and, in turn, land a major-label recording contract—closely resembles the way FGL made its initial mark.

"Since 'Cruise' has come out, I think it lets everybody be able to try new things like the synths and drum-loop things on records," "Chillin'" producer **Jody Stevens** says. "That's what's going on right now."

But while "Chillin' It" has a sonic link to Florida Georgia Line, it also benefits from personal connections with the Academy of Country Music's reigning entertainer of the year, **Luke Bryan**. Swindell formed many of his key relationships while selling tour merchandise for Bryan. He began co-writing with Bryan's guitarist, **Michael Carter**, and with Stevens, who was then a member of a Republic Nashville duo, **Fast Ryde**, that was opening for Bryan. Swindell eventually enlisted Bryan's manager, Red Light Management's **Kerri Edwards**, as his own manager. And much of "Chillin' It" was produced in the Music Row office/studio of **Jeff Stevens**, Bryan's producer.

"I like him," Jody Stevens proclaims with a laugh. "He's my dad."

Swindell left Bryan's employ in the fall of 2010 when he signed a publishing deal with Sony/ATV. He authored "Beer in the Headlights" for Bryan's album *Crash My Party* (due Aug. 13), **Scotty McCreery's** "Water Tower Town" (which hit No. 38 on Hot Country Songs in 2012) and **Craig Campbell's** current "Outta My Head" (No. 35).

"Chillin' It" emerged during a songwriting session this spring at the Firehall, one of Sony/ATV's buildings in the heart of Music Row. Swindell had the two-word title in mind and originally planned to work on it with Carter on the road, but they never had time to write. So he still had the title when he and songwriter **Shane Minor** ("Beautiful Mess," "International Harvester") broke out guitars days later.

"I started playing a groove, that melody," Minor recalls, "and Cole goes, 'Man, I got this idea. I'm gonna throw it out there.' He said, 'Chillin' It.' I was like, 'That's freaking great.' We started writing in the pocket of the melody we were singing, bopping around, sound-boarding each other. It was pretty simple really."

The lyrics came with surprising ease—no complicated, multisyllabic words, just everyday language couched in clever, internal rhymes.

"As I was playing the music, he starting going, 'Shades on, top back/Rollin' with the music jacked,'" Minor says. "We started talking about when you're sitting there, proud as punch, one arm on the wheel, one arm 'round the girl, and he goes, 'One on the wheel, one around you, baby.' That's where it kind of wrote itself."

Second verses are invariably a challenge—the writers need to match the established rhyme scheme with another set of words that holds up to the original inspiration. With "Chillin' It," they hooked that verse when Swindell found a way to highlight

the protagonist's girlfriend as a distraction from driving—"Hard lookin' left when my world is on the right"—and they figured they had it finished.

"When we got done, I hadn't been so excited about a song, probably ever," Swindell says.

The two writers later convened on the telephone to write a two-line bridge, and they enlisted Jody Stevens to produce a demo. Stevens played all the instruments (bass, electric and acoustic guitar, banjo), programmed most of the drum sounds on computer and added a winding synth line in the background that echoes '90s hip-hop.

He brought Swindell into Jeff Stevens' studio, a converted two-story condo, and had him lay down an easy-going lead part in the same tiny vocal booth where Bryan has done most, if not all, his recorded vocals. Minor threw in background harmony, and they purposely left those human voices just a little ragged on the finished product.

"When you do add some of that programming, synthesized-type stuff, there has to be an organic element to balance it out," Jody Stevens explains. "That's the one thing about Cole: He sounds believable and real."

When Bryan heard that demo, he was anxious to cut it, but Swindell held out. He thought it could be a career-changing song, and he convinced Sony/ATV Nashville president/CEO **Troy Tomlinson** that he should keep it for himself. "All the pluggers were ready to pitch it," Swindell says.

But Swindell had SiriusXM in his sites. Bryan had some special programming lined up with SiriusXM channel the Highway during the first weekend in March to support his *Spring Break... Here to Party* album, and the company aired the demo of "Chillin' It" a couple times as a courtesy to Edwards.

A few weeks later, SiriusXM senior director of country programming **John Marks** and Edwards re-examined "Chillin' It," and Marks decided it was an ideal Highway Find, which provides 35-40 spins a week for songs that are being mostly overlooked at mainstream country radio.

"It has a production value much in the line of Florida Georgia Line and other contemporary artists," Marks says. "I thought it would work well sonically and also lyrically with the channel and where country music, I think, continues to go. So it was something I saw was really a strong fit for the channel."

Like "Cruise," which got most of its early exposure from the Highway, "Chillin' It" picked up steam quickly. After the Highway added it May 7, downloads climbed from 800 for the week ending May 5 to 4,700 for the week ending May 12, according to Nielsen SoundScan. After Memorial Day weekend, when SiriusXM gave summer-themed music extra spins, weekly sales jumped to 13,900. They've exceeded 12,500 since.

Much as "Cruise" led to FGL's Republic Nashville signing, "Chillin' It" got Swindell a deal with Warner Music Nashville. It was announced July 22, the same day the label officially released it to terrestrial radio via Play MPE. The song debuted this week at No. 52 on Country Airplay. SiriusXM's early support was, to Swindell, key in the song's cruise to prominence.

"Not only did they help me get a record deal, they helped put me on the fast track," Swindell says. "The power of radio, I'm getting to experience it firsthand." ●



MEDIA

SiriusXM Fights to Dominate the Dashboard of the Connected Car

By BEN SISARIO FEB. 20, 2016

On the 36th floor of a Midtown Manhattan skyscraper, the actors Ice Cube and Kevin Hart joshed with fans inside a glass-walled radio studio one afternoon last month. They were in the broadcast headquarters of SiriusXM, and across the lobby, near Howard Stern's dedicated wing, Brooke Shields posed for selfies with three "Sesame Street" puppets, while Senator Rand Paul — at that point, still a candidate for president — hovered with a small entourage. Overhead, a screen announced the imminent arrival of the thrash-metal band Anthrax.

By any measure, it was an odd cross section of pop culture. Surveying the scene, Scott Greenstein, SiriusXM's chief content officer, smiled and declared, "This is how I like it — just this diverse."

At SiriusXM, the satellite-radio network, executives use terms like "mosaic," "bundle" and, inevitably, "curated" to describe the company's mix of programming. With more than 175 channels, SiriusXM has much more variety than typical AM/FM radio but a small fraction of the ads. It has channels dedicated to the Grateful Dead and the Metropolitan Opera; five feeds of thumping electronic dance music; every pro baseball, football and basketball game; and, of course, Mr. Stern's blend of

raunchy humor and celebrity interviews. Around the Super Bowl, it had 162 hours of live programming related to the game that ran across 22 shows on 10 channels.

Once flirting with bankruptcy, SiriusXM has quietly become a financial powerhouse at a time when other radio and digital music outlets are struggling to make a profit, and also as the behavior of so-called cord cutters — who cancel their cable TV subscriptions to pick and choose their entertainment online (and to save money) — has made Wall Street nervous about the future of bundled media. SiriusXM last year earned \$510 million on \$4.6 billion in revenue, and renewed major deals with Mr. Stern and the National Football League.

“This has been a remarkable success story against huge odds,” said Barton Crockett, a media analyst with FBR Capital Markets. “Most of the investing public thought there was no way this would work, spending huge amounts of capital to launch satellites and put equipment in cars. But they were right. This is a great business.”

SiriusXM has hit on the formula for getting people — nearly 30 million of them — to pay for radio, a form of media that has always been free. But while the company likes to emphasize the awesomeness of its audio “mosaics,” there is another, more mundane, explanation for its success: cars.

SiriusXM pays about \$1 billion a year in subsidies and revenue splits to automakers, and according to the company, 75 percent of all new vehicles sold in the United States come with satellite radio installed. (It works with every major carmaker.) Of the 29.6 million subscribers to SiriusXM at the end of last year, 24.2 million paid the \$11 to \$20 monthly fee themselves, with the rest covered through promotions by car companies.

“If I ask myself two questions every day,” James E. Meyer, SiriusXM’s chief executive, said in an interview, “the first one is, ‘What do I got to do to make sure people pay us \$15?’ The second one: ‘What do I need to do to make sure that my position with the auto companies remains strong?’”

Yet cars are changing in ways that could threaten SiriusXM’s position. New technologies, loosely referred to as the connected car, are bringing the Internet to

the dashboard. For drivers, that means that various new audio apps — many of them free — will soon be available at a touch. For SiriusXM, that means a lot of new competition in the car, the place where consumers listen to radio the most. This process has already begun, with Apple and Google pushing for their own car media platforms, and Mr. Meyer said that he expected the technology to be in most new cars by the end of this decade. Will listeners still fork over \$15 for SiriusXM if they can just as easily tune in to Spotify, Pandora or Beats 1 from Apple?

“The major enemy of SiriusXM these days is Internet radio,” said Jack Nerad, executive editorial director of Kelley Blue Book. “It’s important for Sirius to be in automobiles, but I think that for the car companies, it’s going to be just another programming source.”

Mr. Meyer, who spent years managing the company’s relationships with Detroit before he became chief executive in 2012, has been hearing this refrain for a long time. But he said that SiriusXM was well positioned for the change, with plans for a new, more interactive version of its radio system, code-named SXM17, and the advantage of knowing that car companies make changes to their machines very slowly. “Even when you’re Apple,” Mr. Meyer said, “they will still live with the speed carmakers want to go.”

Phil Abram, the chief infotainment officer of General Motors, said that Pandora, as well as platforms like Apple’s CarPlay and Google’s Android Auto, have had no significant effect on how many of its customers subscribe to SiriusXM.

“People like to have a plethora of content,” Mr. Abram said. “One day you might want to listen to music on your iPhone, the next day talk radio, and the next day you want a curated set of music from a company like SiriusXM. We want to try to make it as easy as possible for our customers to enjoy whichever they want.”

Satellite radio’s fortunes have not always been so rosy. After years of planning and investment in the 1990s, the new medium began broadcasting in the early 2000s from two companies, Sirius and XM. For years both lost money as they competed to build their programming slates and sign multimillion-dollar deals with celebrities like Oprah Winfrey and Martha Stewart.

The biggest catch, by far, was Mr. Stern, who signed a five-year, \$500 million deal with Sirius to begin broadcasting at the start of 2006. His arrival instantly put satellite radio on the map. Sirius and XM merged in 2008 — during the recession, when car sales were plummeting. After nearly going bankrupt under the weight of its debt, the combined SiriusXM was saved by a last-minute infusion of capital from Liberty Media, the cable and entertainment empire controlled by John C. Malone, which in early 2009 lent \$530 million in exchange for preferred shares convertible into 40 percent of the common stock of the company.

Gregory B. Maffei, Liberty's chief executive and the chairman of SiriusXM, recalled that at the time of the deal, a colleague told him, "Either the world ends, or we're going to make a lot of money." They made a lot of money. SiriusXM repaid the loans in five months, and the roughly 62 percent stake that Liberty now has in the company — which is formally known as Sirius XM Holdings — is worth about \$11 billion.

SiriusXM's strategy for competing with free radio has been to give people a lot of the radio they like — music, sports, talk, news — and minimize what they do not, namely commercials. That means the station's programmers do not feel the ratings pressures that bedevil terrestrial radio.

"When you don't have ratings," Mr. Greenstein said, "you can be very open-minded about your belief in what might be a hit."

That has freed the network to indulge a deep degree of niche programming, much of it seemingly reflecting an older male demographic, with channels devoted to Billy Joel, Elvis Presley, Tom Petty and Bruce Springsteen. But the network also aggressively goes after young ears, with dance, alternative and pop stations, and relishes its role as the early champion of hot new acts that later go big, like Halsey, Elle King and Chris Stapleton, who just won two Grammys. (Not that things between SiriusXM and the music industry are completely peachy: In 2015 the company also agreed to pay \$210 million to settle a lawsuit over royalties for recordings made before 1972, an obscure copyright issue that became a rallying point for older artists.)

Another success story is “Honey, I’m Good,” an ode to monogamy by the clean-cut singer Andy Grammer that came out in late 2014. Steve Greenberg, the president of Mr. Grammer’s label, S-Curve, believed the song had hit potential but was too quirky for terrestrial radio. So he pitched it to Kid Kelly, a SiriusXM programmer, who put the song into heavy rotation on Hits 1, the network’s pop station.

The song caught on and was soon selling 30,000 copies a week, almost entirely because of SiriusXM’s exposure. But in the music business nothing happens in a vacuum, and after a few months, AM/FM stations began playing it, too. The song eventually sold about 2.5 million copies, making it one of the biggest hits of 2015.

The success of “Honey, I’m Good” underscores a fact that is often forgotten in the age of Spotify and YouTube: Radio remains popular and influential — according to Nielsen, 93 percent of adults tune in at least once a week — and music executives say that blanketing stations everywhere is still the most effective way to secure a hit.

“There is absolutely no chance in the world that this record could have launched without the backing of Hits 1,” Mr. Greenberg said of “Honey, I’m Good.” “And there is no way it could have gone Top 10 without the backing of terrestrial radio.”

If the connected car is a challenge looming in SiriusXM’s future, the biggest threat in its recent past was the potential loss of Mr. Stern, perhaps the network’s only indispensable star — “the heart and soul of SiriusXM,” as Mr. Greenstein put it.

Mr. Stern’s contract was expiring at the end of last year, and speculation began to spread that he might abandon satellite radio for yet another media frontier. Don Buchwald, Mr. Stern’s agent for more than 30 years, said that he met with dozens of companies, all promising to be an exciting new home for the show. Mr. Stern himself sometimes grumbled on and off the air about whether, at age 62, it was time to retire. Longtime fans have heard this one before, but Mr. Buchwald said it was genuine.

“People think it’s a negotiating ploy, but I can tell you there is reality to it,” said [REDACTED] Buchwald, whose Manhattan office contains decades’ worth of Howard Stern memorabilia, including an enormous cardboard theater stand for the 1997 movie

“Private Parts,” released not long after Mr. Stern started calling himself “king of all media.”

“He loved when he did the movie, he loved when he published the books, he loved the TV shows,” Mr. Buchwald continued, “and he’s thinking, ‘Why am I getting up at four o’clock in the morning and doing the same drivel?’”

Adding to the uncertainty about the negotiations was the fact that Mr. Buchwald was unfamiliar with Mr. Meyer, who commutes to New York each week from Indianapolis and has spent his entire career in operations — “All I ever wanted to be was a plant manager,” he said — far away from the world of show business. (He took over from Mel Karmazin, who had a decades-long relationship with Mr. Stern but left SiriusXM in 2012 after battling publicly with Liberty over its plans to take over majority control.)

But Mr. Buchwald said that he and Mr. Stern were charmed by Mr. Meyer’s earnestness, and by SiriusXM’s willingness to experiment with new technology. The deal they agreed to at the end of 2015 would keep Mr. Stern doing his radio show for five more years, and also lock in 12 years of access to Mr. Stern’s audio and video archives, along with new video plans that are still under development.

Neither SiriusXM nor Mr. Buchwald would comment on the specific terms of the deal, but analysts say it could be worth \$90 million a year, including salaries and production expenses for Mr. Stern’s team.

Mr. Meyer, whose New York office is mostly bare except for some landscape photos and jerseys of Indianapolis sports teams, was obviously pleased to have renewed Mr. Stern’s contract, which both he and Mr. Buchwald called a particularly complex deal to negotiate.

But Mr. Meyer was also proud of the broader programming surrounding Mr. Stern. He listens to SiriusXM’s classic rock and outlaw country channels, he said, and hardly ever listens to terrestrial radio.

“Too many commercials,” he said.

A version of this article appears in print on February 21, 2016, on page BU1 of the New York edition with the headline: SiriusXM Fights to Dominate the Dashboard.

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From: [REDACTED]
Sent: Thursday, August 06, 2015 8:34 PM
To: [REDACTED]
Cc: [REDACTED]
Subject: Re: I have NEVER seen anything like this. Power of Hits1
Attachments: IMG_1669.PNG

This is Insane ! The power of Sirius XM Hits 1 ! But more importantly, I have never had a record this reactive !!!!! Thank you , Steve.



On Aug 6, 2015, at 4:54 PM, [REDACTED] wrote:

After u put Daya "Hide Away" into full time Hits1 rotation.

2 days ago.

We move up in iTunes every time u spin it

Now at 54*. Jumped 30 positions due to hits 1 weekday play

INSANE guys. Seriously



Begin forwarded message:

From: [REDACTED]
Date: August 6, 2015 at 3:19:57 PM PDT
To: [REDACTED]
Subject: iTunes Pop 54 !!!

The screenshot shows a mobile application interface for a music chart. At the top, it displays "Pop" and "Songs". The chart lists songs from rank 47 to 55. Each entry includes the rank, song title, artist, album, and a price button. A "PLAY" button is also present for some songs.

Rank	Song	Artist	Album	Price
47	Chandelier	Sia	1000 Forms of Fear	\$1.29
48	Jordan Belfort (feat. Dyl)	Wes Walker	Jordan Belfo...	\$0.99
49	Young Blood	Bea Miller	Not an Apology	\$0.99
50	Story of My Life	One Direction	Midnight...	\$1.29
51	Lay Me Down	Sam Smith	In the Lonely...	\$1.29
52	This Summer's Gonna	Hurt Like a MotherF***r	Maroon 5. — V (Deluxe)	\$1.29
53	Bang Bang	Jessie J, Ariana Grande &... BANG BANG		\$1.29
54	Hide Away	Daya	Hide Away - Single	PLAY
55	Try	Music		

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From: Davenport, Liam [REDACTED]
Sent: Wednesday, May 18, 2016 6:48 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Thursday, May 19th, 2016

Guests for Tomorrow: Thursday, May 19th, 2016

Performance Guests

Band of Horses interviews/performance- **NYC** (XMU, Outlaw Country) 12:30pm- 3:00pm

Music Guests

Kelly Roland interviews- **LA** (Menounos, EW, HHN, Shade 45, Rush) 1:00pm- 3:00pm

Jake Owen interview- **TN** (The Highway) 1:00pm- 2:00pm

Ben Rector interview- **NYC** (The Pulse) 1:30pm- 2:00pm

One Republic interviews- **NYC** (The Pulse, Hits 1) 2:00pm- 2:30pm

Jesse Leach interviews- **NYC** (Faction, Liquid Metal) 2:00pm- 3:45pm

Slim interview- **NYC** (Fly) 2:00pm- 3:00pm

Maggie Rose interview- **TN** (The Highway) 3:00pm- 4:00pm

Eric Benet interviews- **DC** (Heart & Soul, Silk) 5:00pm- 6:30pm

Talk Guests

Gary Belsky interview- **NYU** (Doctor Radio) 6:30am- 7:00am

Cheech Marin interviews- **NYC** (Insight, EW, McCarthy) 9:00am- 11:00am

Renee Elise Goldsberry interviews- **NYC** (Shade 45/Sway, EW, On Broadway) 10:00am- 11:30am

Marilu Henner interviews- **NYC** (Radio Andy, Shade 45/Sway) 10:00am- 11:00am

Jason George interview- **LA** (Menounos) 1:00pm- 2:00pm

Nathaniel Pilbrick interview- **NYC** (Pia Lindstrom) 1:20pm- 1:40pm

Greg Proops interview- **NYC** (Insight) 2:00pm- 2:30pm

Nicholas Wapshott interview- **NYC** (Insight) 3:00pm- 3:30pm

Dave Smith interview- **NYC** (Insight) 4:00pm- 4:30pm

Randy Credico interview- **NYC** (Insight) 4:00pm- 4:30pm

Kelli Provocateur interview- **LA** (Shade 45) 4:15pm- 4:45pm

John Breglio interview- **NYC** (On Broadway) 5:00pm- 5:30pm

Phoner Guests

Craig Tullier interview- **phoner** (Doctor Radio) 7:00am- 7:30am

Justin O. Schmidt interview- **phoner** (Doctor Radio) 10:05am- 10:30am

Robert Lahita interview- **phoner** (Doctor Radio) 10:30am- 11:00am

David Osmond interview- **phoner** (Doctor Radio) 11:35am- 12:00pm

Ben Thrower interview- **phoner** (Doctor Radio) 11:35am- 12:00pm

Dr. Anthony Youn interview- **phoner** (Hutt) 7:05pm- 7:25pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Wednesday, May 25, 2016 7:55 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Thursday, May 26th, 2016

Guests for Tomorrow: Thursday, May 26th, 2016

Performance Guests

Jordan Fisher performance- **NYC** (Hits 1) 1:30pm- 2:30pm

Music Guests

Money B & Lil Mickey interview- **NYC** (Shade 45/Sway) 11:00am- 11:30am

Wale interview- **NYC** (Shade 45/Sway) 11:30am- 12:00pm

T.I. interviews- **NYC** (HHN, Shade 45) 12:00pm- 2:00pm

Dweezil Zappa interview- **NYC** (Radio Andy, Road Dog, Jam On) 12:15pm- 1:45pm

Flo Rida interview- **NYC** (Hits 1) 8:00pm- 8:30pm

Talk Guests

Sam Waterson interviews- **NYC** (EW, Insight, Shade 45/Sway, Progress) 9:30am- 12:00pm

Norman Reedus interviews- **NYC** (Hits 1, Insight, EW) 10:00am- 11:00am

Marcia Clark interviews- **NYC** (EW, 90s on 9, Radio Andy) 10:30am- 12:00pm

Chris Voss interview- **LA** (Rush) 11:45am- 12:30pm

Danica McKellar interviews- **LA** (Rush, EW) 12:30pm- 1:30pm

Senator Barbara Boxer interview- **NYC** (Leading Ladies/Potus) 3:00pm- 4:00pm

Kanisha Buss interview- **LA** (Shade 45) 4:15pm- 4:45pm

Samantha Brown interview- **NYC** (Radio Andy) 4:30pm- 5:30pm

Phoner Guests

Dr. Karen Sutton interview- **phoner** (Doctor Radio) 6:30am- 7:00am

Dr. Steven Moore interview- **phoner** (Doctor Radio) 7:00am- 7:30am

Anita Gupta interview- **phoner** (Doctor Radio) 11:00am- 11:30am

Edmund Pribitkin interview- **phoner** (Doctor Radio) 11:35am- 12:00pm

Daniel Shapiro interview- **phoner** (Hutt) 7:05pm- 7:25pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Wednesday, June 01, 2016 7:05 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Thursday, June 2nd, 2016

Guests for Tomorrow: Thursday, June 2nd, 2016

Performance Guests

DNCE interview- **NYC** (Hits 1/Fan Event) 8:30am- 10:00am
Charles Bradley performance- **DC** (The Loft) 11:30am- 2:00pm
Nonpoint interview/performance- **NYC** (Octane) 2:00pm- 4:30pm

Music Guests

Kaytranada interview- **NYC** (Shade 45) 11:00am- 11:30am
De La Soul interviews- **NYC** (Shade 45, Backspin) 11:15am- 2:45pm
Fleur East interview- **NYC** (EW) 11:30am- 12:00pm
Shai Wosner interview- **NYC** (Symphony Hall) 1:00pm- 1:30pm
Mickey Raphael interviews- **NYC** (Road Dog, Outlaw Country) 1:30pm- 2:30pm
Kiefer Sutherland interview- **TN** (The Highway) 2:00pm- 3:00pm
Steve Porcaro interview- **LA** (70s on 7) 6:00pm- 7:00pm

Talk Guests

Tom Brokaw interview- **NYC** (Patriot) 8:30am- 9:00am
Mark Preston interview- **NYC** (Insight) 9:00am- 9:30am
Morgan Spurlock interviews- **NYC** (Insight) 10:00am- 11:00am
Phillipa Soo interviews- **NYC** (EW, On Broadway) 10:00am- 11:00am
Marc Manone interview- **NYU** (Doctor Radio) 10:05am- 10:30am
Katie Lee interviews- **NYC** (Wake Up, Hutt, EW) 10:30am- 12:30pm
DeAngelo Hall & Deon Grant interviews- **NYC** (NFL, College Sports) 10:30am- 11:15am
Danica McKellar interviews- **NYC** (Insight, EW, Hutt) 11:00am- 12:30pm
Mo Rocca interview- **NYC** (Radio Andy) 12:15pm- 12:55pm
Gloria Estefan interview- **NYC** (Leading Ladies) 1:30pm- 2:45pm
Ezra Edelman interview- **LA** (EW) 1:30pm- 2:00pm
Susan Lucci interview- **LA** (EW) 2:00pm- 2:30pm
Paul Virzi interview- **NYC** (Raw Dog) 4:00pm- 6:00pm
Ben Gleib interview- **LA** (Faction) 4:00pm- 5:00pm
Soraya Doolbaz interview- **NYC** (Shade 45) 4:15pm- 4:45pm
Shawn Crahan and Kim Coates interview- **LA** (Faction, EW) 6:15pm- 8:45pm

Phoner Guests

Peter Loomer interview- **phoner** (Doctor Radio) 11:00am- 12:00pm
Chantal Adair interview- **phoner** (Hutt) 6:15pm- 6:30pm
Loni Edwards interview- **phoner** (Hutt) 6:30pm- 6:50pm
Caron (Little Lola Sunshine) interview- **phoner** (Hutt) 6:45pm- 7:00pm
Andi Zeisler interview- **phoner** (Hutt) 7:05pm- 7:25pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio



From: Davenport, Liam [REDACTED]
Sent: Wednesday, June 08, 2016 7:48 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Thursday, June 9th, 2016

Guests for Tomorrow: Thursday, June 9th, 2016

Performance Guests

Rascal Flatts interview/performance- **TN** (The Highway/Artist Confidential) 4:00pm- 5:30pm
Chris Potter interview/performance- **NYC** (Real Jazz) 6:00pm- 8:00pm

Music Guests

Dhani Jones interview - **NYC** (Sway/The Heat) 8:30am- 9:30am
New Kids on the Block interviews- **NYC** (McCarthy/Town Hall, 80s on 8) 10:00am- 11:30am
Rita Wilson interviews- **LA** (Rush, EW) 12:30pm- 1:30pm
August Darnell interviews- **NYC** (Radio Andy, EW, Studio 54, Insight) 12:30pm- 3:00pm
Christine & the Queens interview- **NYC** (EW) 1:00pm- 1:30pm
Kany Garcia interview- **NYC** (Caliente) 2:00pm- 3:00pm
Jack Novack interview- **NYC** (BPM) 2:00pm- 3:00pm
Gotay interview- **NYC** (Flow Nacion) 2:30pm- 3:30pm

Talk Guests

Dhani Jones interviews- **NYC** (Shade 45/Sway, The Heat) 8:30am- 9:30am
Patrick Wilson interviews- **NYC** (Hits 1, EW) 9:25am- 10:50am
Deshauna Barber (Miss USA) interviews- **NYC** (EW, Shade 45/Sway, Radio Andy) 9:30am- 11:00am
Aubrey O'Day interviews- **NYC** (Wake Up, Shade 45/Sway) 10:00am- 11:00am
Tim Miller interview- **NYC** (Radio Andy) 10:00am- 10:30am
Travis Fimmel interviews- **NYC** (EW, Road Dog) 11:00am- 12:30pm
Terence Crawford interviews- **NYC** (Shade 45/Sway, HHN, At The Fights) 11:30am- 1:00pm
Leeza Gibbons interview- **LA** (Menounos) 1:00pm- 2:00pm
David Swinson interview- **NYC** (Road Dog) 1:00pm- 1:30pm
Kevin Hart interviews- **NYC** (Shade 45/Sway, Hits 1, EW, Radio Andy, 90s on 9, Comedy Greats) 1:30pm- 3:00pm
Paula Patton interviews- **NYC** (EW, Heart & Soul) 1:30pm- 3:00pm
Michael Somerville interview- **NYC** (Comedy) 2:00pm- 3:00pm
Rose Windmiller, Cheryl Gay Stolberg & Charles Robinson interviews- **DC** (Urban View) 7:00pm- 9:00pm
Keith Carradine interview - **LA** (EW) 7:15pm - 7:45pm

Phoner Guests

Gregory Miller interview- **phoner** (Doctor Radio) 6:30am- 7:00am
Colin O' Brady interview- **phoner** (Doctor Radio) 7:00am- 7:30am
Fay Wolf interview- **phoner** (Hutt) 7:05pm- 7:25pm

Liam Davenport
Talent & Industry Relations

SIRIUS XM Radio



From: Davenport, Liam [REDACTED]
Sent: Monday, June 20, 2016 5:46 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Tuesday, June 21st, 2016

Guests for Tomorrow: Tuesday, June 21st, 2016

Music Guests

YG interview- **NYC** (Shade 45) 12:00pm- 12:30pm
Sadat X interview- **NYC** (Shade 45) 1:15pm- 1:45pm
Redman interview- **NYC** (Shade 45) 2:15pm- 2:45pm
Wheeler Walker Jr interview- **NYC** (Outlaw Country) 3:30pm- 4:00pm
Hozier interviews- **LA** (Pulse, EW, Spectrum) 5:00pm- 6:00pm

Talk Guests

Blake Lively interviews- **NYC** (EW, Shade 45/Sway, Rush, Hits 1) 9:30am- 11:00am
Anna Kendrick interviews- **NYC** (EW, Hits 1, McCarthy) 9:30am- 10:30am
Aparna Nancherla & Steph Tolev interview- **NYC** (Raw Dog) 11:00am- 12:30pm
Philippe & Ashlan Cousteau interviews- **NYC** (Shade 45/Sway, Insight) 11:00am- 12:00pm
Luann de Lesseps interview- **NYC** (McCarthy) 11:30am- 12:00pm
Aubrey Plaza interview- **NYC** (EW) 12:00pm- 12:30pm
Amanda Starc interview- **PA** (Business Radio) 12:00pm- 1:00pm
Nia Vardalos interviews- **NYC** (Radio Andy, EW, Hutt) 1:00pm- 2:30pm
Thelma Adams interview- **NYC** (Pia Lindstrom) 1:05pm- 1:35pm
Tom Cotter interview- **NYC** (Pia Lindstrom) 1:40pm- 2:00pm
Thelma Adams interview- **NYC** (Hoda) 2:00pm- 2:30pm
Gretchen Law interview- **NYC** (Pia Lindstrom) 2:05pm- 2:30pm
Jenny Mollen interviews- **LA** (Shade 45, Faction) 3:00pm- 4:00pm
Cory Hardrick & Qasim Basir interview- **LA** (Potus) 3:00pm- 3:30pm
Jeff Arnett interview- **NYC** (Insight) 3:00pm- 3:30pm
Alie Ward interview- **NYC** (Insight) 4:00pm- 4:30pm
Carrot Top interviews- **LA** (Faction, Shade 45) 5:30pm- 7:00pm
Burt Ward interview- **LA** (EW) 7:15pm- 7:45pm

Phoner Guests

John Fugelsang interview- **phoner** (Hutt) 6:30pm- 6:50pm
Jessica Herrin interview- **phoner** (Business Radio) 7:00pm- 7:30pm
Dr. Jennifer Wider interview- **phoner** (Hutt) 7:05pm- 7:30pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Thursday, June 23, 2016 11:05 PM
To: Davenport, Liam
Subject: Guest For Tomorrow: Friday, June 24th, 2016

Guest For Tomorrow: Friday, June 24th, 2016

Performance Guests

Brady Rymer & the Little Band That Could interview/performance –**NYC** (Kid's Place Live) 9:00am-10:00am
Arliss Nancy performance- **DC** (The Loft) 12:00pm- 2:00pm
Hi-Five interview/performance- **NYC** (Fly) 12:30pm- 3:00pm
Wilder Adkins performance- **TN** (Coffee House) 2:00pm- 3:30pm

Music Guests

Steven Tyler interviews-**NYC** (Outlaw Country, The Highway, Deep Tracks) 9:45am-11:15am
Tommy Trash interview- **NYC** (BPM) 3:30pm- 5:30pm

Talk Guests

Dr. Mark Kronenfeld interview- **NYU** (Doctor Radio) 7:00am-8:00am
Dr. Eugenia Gianos interview-**NYU** (Doctor Radio) 7:00am- 8:00am
Tom Segura interviews-**NYC** (Raw Dog, Insight) 9:00am – 12:00pm
Dr. Aaron Carroll interview- **NYC** (Insight) 9:30am- 12:00pm
Nastasya Generalova interview- **LA** (Shade 45) 3:00pm- 3:30pm
Jason Mewes interview- **LA** (Shade 45) 4:15pm- 4:45pm
Maika Monroe interview- **LA** (EW) 7:00pm- 7:30pm

Phoner Guests

DR. Tim Bilkey interview- **phoner** (Doctor Radio) 8:00am-9:00am
Dr. Edward interview- **phoner** (Doctor Radio) 9:00am-9:30am
Jess Rona interview- **phoner** (Hutt) 6:30pm- 6:50pm
Emmanuel Sanders interviews- **phoner** (Fantasy Sports, Mad Dog) 8:05pm-8:25pm

From: Davenport, Liam [REDACTED]
Sent: Thursday, August 25, 2016 8:48 PM
To: Davenport, Liam
Subject: * Updated - Guests for Tomorrow: Friday, August 26th, 2016

Guests for Tomorrow: Friday, August 26th, 2016

Performance Guests

All Time Low performance - **NYC** (Hits 1) 9:30am- 12:00pm- **Interscope**
Leon Timbo interview/performance- **DC** (Heart & Soul) 1:00pm- 3:00pm- **Entertainment One**
Trivium interview/performance - **NYC** (Octane) 2:00pm-4:00pm- **Roadrunner**

Music Guests

Lizzo interview- **NYC** (EW) 9:30am- 10:00am
CeeLo Green & Swagu Style House interview- **NYC** (Shade 45/Sway) 10:00am- 11:00am
Debbie Gibson interviews – **NYC** (McCarthy) 11:40am – 12:00pm
Young Dolph interview- **NYC** (Shade 45/Sway) 11:00am- 11:30am
Britney Spears interview- **NYC** (Hits 1) 12:00pm- 1:00pm
Barbra Streisand interview- **Offsite NY** (Town Hall) 3:00pm- 4:00pm

Talk Guests

Kathy Wakile interview- **NYC** (Wake Up) 8:00am- 9:00am
Bill Bellamy interviews- **NYC** (McCarthy, Insight) 10:30am- 11:30am
Bruce Bruce interviews- **NYC** (Insight, Comedy) 10:30am- 11:30am
Kim Dickens interviews - **NYC** (EW, Insight) 11:00am- 12:00pm
Christopher Ledbetter interview- **NYC** (Shade 45/Sway) 11:30am- 12:00pm
Michelle Ang interview- **LA** (Rush) 12:15pm- 1:00pm
John Kransinski interview - **NYC** (EW/Event) 12:30pm- 1:30pm
Matt Swider interview – **NYC** (Shade 45) 1:15pm – 1:45pm
John Holl interview- **NYC** (Insight) 3:00pm- 4:00pm

Phoner Guests

Marc Chandler interview – **phoner** (Business Radio) 1:00pm – 1:30pm
Worth Wray interview – **phoner** (Business Radio) 1:30pm – 2:00pm
Scott Rodkey interview- **phoner** (Insight) 3:30pm- 4:00pm
Pamela Donnelly interview - **phoner** (Jenny Hutt) 6:30pm-6:50pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Monday, September 19, 2016 6:04 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Tuesday, September 20th, 2016

Guests for Tomorrow: Tuesday, September 20th, 2016

Performance Guests

Blind Pilot interstitials/performance- **NYC** (Coffee House) 10:00am- 11:30am- **ATO Records**
The Griswolds interstitials/performance- **NYC** (Alt Nation) 11:30am- 1:30pm- **Concord**
Kristin Chenoweth interview/performance- **NYC** (On Broadway/Artist Confidential) 1:00pm- 3:00pm- **Concord**
The Devil Makes Three interview/performance- **NYC** (Outlaw Country) 2:00pm- 4:00pm- **New West Records**
Greensky Bluegrass interview/performance- **NYC** (Jam On) 3:00pm- 5:00pm- **Big Blue Zoo Records**
Steve Cropper interview/performance- **CA offsite** (Volume) 3:00pm- 5:30pm **429 Records**

Music Guests

Shawn Mendes interviews- **NYC** (Hits 1, The Pulse) 9:00am- 9:45am
Steve Moakler interview- **TN** (The Highway) 11:15am- 11:45am
Mac Miller interview- **NYC** (Shade 45) 10:00am- 12:00pm
Harlan Coben interview- **NYC** (E Street) 12:00pm- 1:00pm

Talk Guests

Dr. Dorothy Fink interview- **NYU** (Doctor Radio) 7:00am- 8:00am
Gary Sheffield interviews- **NYC** (Bleacher Report, MLB) 10:00am- 10:30am
Jeffrey Tambor interviews- **NYC** (EW, Insight, Shade 45/Sway, Raw Dog, Radio Andy) 10:00am- 12:30pm
Jordana Brewster interviews- **NYC** (Hits 1, Mad Dog, McCarthy, EW) 10:30am- 12:30pm
Michael Cook interview- **NYC** (Radio Andy) 11:00am- 12:00pm
Dan Cummings interviews- **LA** (Faction, EW) 12:15pm- 1:30pm
Dr. Hildegard Messenbaugh interview- **NYC** (Pia Lindstrom) 1:05pm- 1:30pm
Tia Mowry interview- **LA** (Menounos) 1:00pm- 2:00pm
Danny Harris interview- **NYC** (Radio Andy) 1:40pm- 2:10pm
Vlad Yudin interview- **LA** (Shade 45) 2:00pm- 2:30pm
Kiefer Sutherland interviews- **NYC** (EW, The Highway) 6:00pm- 7:00pm
Hayley Orrantia interview- **LA** (EW) 7:15pm- 7:45pm

Phoner Guests

Dr. Jay Portnoy interview- **phoner** (Doctor Radio) 6:00am- 6:30am
Dr. David Stukus interview- **phoner** (Doctor Radio) 6:30am- 7:00am
Ben Ratliff interview- **phoner** (Pia Lindstrom) 1:40pm- 2:00pm
Simon Pagenaud interview- **phoner** (Bleacher Report) 4:15pm- 4:30pm
Michael Grunwald interview- **phoner** (Hutt) 6:30pm- 6:50pm
Dr. Jennifer Wider interview- **phoner** (Hutt) 7:05pm- 7:30pm
Mark-Paul Gosselaar interview- **phoner** (MLB Radio) 7:45pm- 8:00pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Tuesday, October 04, 2016 6:27 PM
To: Davenport, Liam
Subject: Guest for Tomorrow: Wednesday, October 5th, 2016

Guest for Tomorrow: Wednesday, October 5th, 2016

Performance Guests

David Bromberg interviews/performance- **DC** (Bluesville, The Village) 2:00pm- 4:30pm **Red House**
Emily King interview/performance- **NYC** (Coffee House) 2:30pm- 4:00pm **Ingrooves**

Music Guests

Rick Astley interviews- **NYC** (80s on 8, EW, The Blend) 9:00am- 11:40am
Tim McGraw interview- **TN** (The Highway) 10:00am- 10:30am
Tyler Glenn interview- **NYC** (EW) 11:30am- 12:00pm
Kelly Clarkson interview- **NYC** (Hoda) 1:30pm- 2:00pm
Scott Fowler & Trey Ivey interview- **TN** (enLighten) 3:00pm- 4:00pm
Ryan Dempster interview- **NYC** (Pearl Jam) 3:30pm- 4:30pm

Talk Guests

Bruce Campbell interviews- **NYC** (Shade 45/Sway, EW) 9:00am- 10:30am
Tim Matheson interviews- **NYC** (EW, Insight) 10:00am- 11:30am
Giuliana Rancic & Bill Rancic interview- **NYC** (McCarthy) 10:15am- 10:45am
Rory Albanese interview- **NYC** (Insight) 11:00am- 12:00pm
Eddie Ramos interview- **NYC** (Hits 1) 11:15am- 11:45am
Josh Gates interview- **LA** (Faction) 12:15pm- 1:00pm
Christine Ebersole interview- **NYC** (Radio Andy) 12:25pm- 12:55pm
Sela Ward interviews- **NYC** (EW, Hutt, Hoda) 1:30pm- 3:00pm
Sophia Amoruso interviews- **NYC** (Hutt, Hoda) 1:30pm- 3:00pm
Sharon Needles interview- **NYC** (EW) 3:00pm- 4:00pm
Danny Gokey interview- **LA** (Latidos) 3:00pm- 4:00pm
Dr. Fahad Khan interview- **NYU** (Doctor Radio) 4:00pm-5:00pm
Lol Tolhurst interview- **LA** (EW) 7:15pm- 7:45pm
Prentice Penny interview- **LA** (EW) 8:15pm- 8:45pm
Gary Owen interview- **LA** (Mad Dog) 8:30pm- 9:00pm

Phoner Guests

Elizabeth Snyder interview- **phoner** (Doctor Radio) 5:00pm- 5:30pm
Willam Hazzard interview- **phoner** (Doctor Radio) 5:30pm- 6:00pm
Claire Zulkey interview- **phoner** (Hutt) 6:30pm- 6:50pm
Angela Davis interview- **phoner** (Hutt) 7:05pm- 7:25pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

From: Davenport, Liam [REDACTED]
Sent: Thursday, October 06, 2016 6:06 PM
To: Davenport, Liam
Subject: Guests for Tomorrow: Friday, October 7th, 2016

Guests for Tomorrow: Friday, October 7th, 2016

Performance Guests

Imagination Movers performance- **DC** (Kids Place) 9:30am- 12:00pm- **Rec Room Records**

Regina Spektor interviews/performance- **NYC** (Coffee House, EW, XMU) 10:30am- 12:30pm- **Warner Brothers**

Music Guests

Yoshiki interviews- **NYC** (Boneyard, Volume, Hair Nation) 10:00am- 11:30am

Robert Earl Keen interview- **NYC** (Road Dog, Outlaw Country) 12:30pm- 1:30pm

Robert Plant interview- **offsite LA** (Volume) 1:30pm- 4:00pm

Green Day interview- **NYC** (Faction/Lithium/Town Hall) 2:00pm- 3:00pm

Talk Guests

Sarah Paulson & Mark Duplass interviews- **NYC** (EW, Insight) 10:00am- 11:00am

Abigail Spencer interviews- **NYC** (EW, Hits 1) 10:00am- 11:30am

Trae Crowder, Drew Morgan & Corey Ryan Forrester interviews- **NYC** (Hits 1, Insight, Road Dog) 10:00am- 11:30am

John Roberts interviews- **NYC** (McCarthy, EW, Laugh USA) 10:30am- 12:30pm

Jeffrey Dean Morgan interviews- **NYC** (Hits 1, EW, Road Dog) 11:00am- 12:30pm

Tyler Hoechlin interviews- **NYC** (EW) 12:30pm- 1:30pm

Danny Masterson interviews- **LA** (Rush, EW, Shade 45, NASCAR) 12:30pm- 3:00pm

Rod Fergusson interview- **NYC** (Shade 45) 1:15pm- 1:45pm

Bradford Bernstein interview- **PA** (Business Radio) 1:30pm- 2:00pm

Phoner Guests

Mark Preston interview- **phoner** (Insight) 9:30am- 10:00am

Dr. Kathryn Hirsh-Pasek interview- **phoner** (Doctor Radio) 12:00pm- 12:30pm

Marianne Smith Edge interview- **phoner** (Doctor Radio) 12:30pm- 1:00pm

Dr. Devin Peterson interview-**phoner** (Doctor Radio) 1:00pm- 1:30pm

Michael Batnik interview- **phoner** (Business Radio) 1:00pm- 1:30pm

Brett Heyman interview- **phoner** (Hutt) 6:30pm- 6:50pm

Liam Davenport
Talent & Industry Relations
SIRIUS XM Radio
[REDACTED]

SXM Dir. Ex. 42

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (SDARS III)

SXM Dir. Ex. 44

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16-CRB-0001 SR/PSSR
(2018-2022) (SDARS III)


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SXM Dir. Ex. 43

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Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
Adjustment of Rates and Terms for)
Preexisting Subscription and Satellite)
Digital Audio Radio Services)

Docket No. 2006-1 CRB DSTRA

WRITTEN DIRECT TESTIMONY OF TERRENCE SMITH

(On behalf of Sirius)

Background and Experience

1. I am Senior Vice President, Engineering of Sirius Satellite Radio Inc. ("Sirius"). I joined Sirius in February 2002, just as we were commencing broadcast operations. I submit this statement in support of Sirius' direct case in this matter to describe the extraordinary innovation and continuing technological effort needed to make the Sirius service a reality.

2. I have been involved in digital technology for approximately 27 years. Prior to joining Sirius, I was employed at RCA Labs and at Sarnoff Labs, where I was involved in pioneering work with High Definition Television and the development of digital satellite television service launched by DIRECTV. I hold a Bachelor of Science in Electrical Engineering degree from the University of Notre Dame and a Master of Science in Electrical Engineering degree from Drexel University. I am a named inventor or co-inventor on 18 United States Patents.

3. At Sirius, I direct all of our engineering activities and technology developments. These include our system design and development; our broadcast studios; our satellite uplink; our satellite design, development and operations; our ground repeater design, development and operations; our digital compression technologies, our chipset and antenna design and development; our product design and development; and testing and quality control. I am also personally involved in securing the necessary licenses for our devices and operations from the Federal Communications Commission ("FCC") and other governmental entities. I have a team of 200 employees that reports to me, including dozens of engineers with advanced degrees in systems engineering, communication systems, orbital dynamics, and digital compression systems. As Senior Vice President, Engineering, I am familiar with the engineering challenges that have confronted Sirius since its inception and the solutions that have been developed and implemented. I base this testimony on my experience and information I have learned through my work at Sirius.

Sirius' Technical Contributions

4. The difficulty of the technical challenge that faced Sirius at its inception can hardly be overstated. Sirius took on the enormous task of designing and building from scratch a reliable, practical and affordable satellite digital audio radio service. At the time that Sirius (then operating under the name Satellite CD Radio, Inc.) was founded, the technology existed to send a basic stream of audio data to a fixed point on the earth via satellite, but no one had ever succeeded in developing – or to my knowledge, had even attempted to develop – a satellite system for distribution of audio content on a seamless nationwide basis to moving vehicles. Among other issues, commercial satellite antennae capable of capturing the relatively weak signal from a satellite were generally large and expensive dishes, which are not practical for use

with vehicles. Even DirectTV-type dishes were far too large to mount on a family vehicle. Sirius also had to engineer around issues of blockage so that service to moving vehicles would be seamless even in crowded urban areas. Thus, in addition to dedicated satellites, Sirius simultaneously pioneered the development of highly advanced yet small and affordable antennae, the use of advanced audio compression techniques, and the construction of an advanced chipset and receiver. In 1990, Sirius was the first company to apply to the FCC to construct, launch, and operate a satellite system to provide digital audio radio programming to users across the continental United States. However, the system did not become operational, and even limited service did not begin, until February 2002. This decade-long gestation period reflects the technological and regulatory hurdles that were required to be overcome in order to make Sirius a reality. Moreover, the technical challenges posed by digital satellite audio stand in stark contrast to traditional terrestrial radio, where the underlying technology has been established for many years.

5. It is very important to note that, even with the satellites in orbit and a fully operational system, Sirius has had to continue to invest in intensive technological innovation. We are constantly upgrading our chipset and antenna designs to provide better sound quality with smaller size using less power. We are also constantly improving our compression technology, so we can provide higher fidelity sound and greater diversity from the available bandwidth. Finally, in addition to the constant enhancement updating of our technology on the ground, we will be required in the future to replace our satellites, at significant cost and risk.

6. A pictorial representation of the Sirius system is included as SIR Ex. 10. From our broadcast studios in New York the more than 130 channels of content are aggregated, individually compressed, and multiplexed into a single, encrypted digital signal that is

transmitted via fiber optic cable to our satellite uplink facility in Vernon, New Jersey. There the signal is uplinked to the two satellites that are then above the equator ("live" over the United States as described below) and then retransmitted back down to Earth. For subscribers in certain urban areas where a signal from the satellite might be difficult to receive directly due to blockages from building clutter, there are terrestrial repeaters that also broadcast the same signal. Each subscriber's radio includes a very small, specially designed antenna to receive the signal from the satellite, a proprietary chipset that permits the signal to be processed, service to be provisioned for each subscriber, and typical control and amplification functions. Through our satellite signal, entitlement messages are also sent that enable (or disable) individual receivers' ability to decrypt the subscribed services. This system is described in greater detail below.

The Satellites

7. , Sirius uses a constellation of three dedicated satellites owned and controlled exclusively by Sirius to provide a very high quality of service throughout the continental United States. The satellites are deployed in inclined, elliptical, geosynchronous orbits, on three different planes, as illustrated by SIR Ex. 11. Each satellite's orbit has a period equal to the earth's rotational period. This unique configuration ensures that there is always at least one satellite at a high elevation relative to any given point in the continental United States at any given time. This helps to provide continuous coverage and minimize blockage, which significantly reduces Sirius' reliance on terrestrial repeaters. Sirius is the world's first commercial satellite broadcast system using non-geostationary orbits. The initial decision to use inclined, elliptical orbits rather than geostationary orbits (fixed in orbit over the equator) drove many of the engineering decisions.

8. The three-satellite geosynchronous approach required that the satellites be launched on three different planes, 120° apart. This allows each satellite to spend 16 hours north of the equator transmitting to the continental United States, and 8 hours south of the equator at “rest.” At any given moment, two of the satellites are above the equator, providing signal throughout the continental United States. The two active satellites transmit the same signal at slightly different frequencies with a 4 second delay between them. A matching four second delay in the receiver allows the streams to be matched up in time. This architecture permits receivers to find the best signal at any given moment and create a seamless listening experience. So, for example, if a driver goes through a tunnel, the four second delay helps ensure that once the obstruction of the tunnel is removed, the receiver still has a complete and seamless programming stream for the listener.

9. The development of this three-satellite system was more than ten years in the making. The designs needed to be constantly updated to accommodate changing payload requirements, as well as other technological advances, all while maintaining the integrity of the overall system quality. Our engineers had to take into account dozens of orbit-specific requirements, as well as operational requirements. Each decision was critical to the creation of a functional and affordable commercial service. While Sirius’ geosynchronous orbits ensure broad signal coverage on the ground, they created many engineering challenges to the design of the satellites themselves.

10. For example, by choosing a geosynchronous orbit rather than a geostationary orbit, Sirius had to engineer around the problem of orbital disturbance caused by its satellites’ relative location to the sun, moon, and earth. In a geostationary orbit scenario, the satellite is in relatively the same plane as the sun and moon, so most tidal disturbances cancel each other out.

Sirius' orbits, however, are prone to much greater orbital disturbances, resulting in notable differences in fuel requirements amongst the three satellites. Having an elliptical geosynchronous orbit also means that the satellites have a variable orbital rate, rather than the fixed orbital rate of a geostationary satellite. The satellites therefore had to be designed to include an on-board system to provide constant reference information to allow the satellites to compensate for their varying orbital rates and apparent variations in earth size.

11. Similarly, the satellites had to be designed to constantly correct for sun-moon intrusions. For geostationary orbits, sun-moon intrusions occur at regular, predictable points in a satellite's orbit, and can be programmed to regularly inhibit earth sensor scans during intrusion periods to prevent the satellite from losing its lock on the earth. Satellites in geosynchronous orbits experience a much larger number of intrusions, often in rapid succession. The Sirius satellites are therefore programmed to constantly calculate sun and moon intrusions and automatically disable and re-enable earth sensor scans as necessary to ensure that the satellite does not lose communications with the Earth.

12. Moreover, although the high elevation of the chosen orbits ensures the fullest possible ground coverage, such high elevation can block the satellites' access to solar power, resulting in an unacceptable near total loss of array power generation. Sirius solved this problem by employing "yaw steering" for its satellites. The satellite body rotates about its yaw (earth-pointing) axis, which helps keep the body of the satellite properly perpendicular to the sun at all times, maximizing the efficiency of the solar panels. This is done only during certain months out of the year; at other times, the satellite follows a normal orbit path to maximize solar exposure. The flexibility of yaw steering allows Sirius' satellites to best take advantage of solar power

without affecting signal quality. This steering choice also helped ensure that the satellites do not experience too great of a fluctuation in temperature.

13. Taking into account commercial considerations, the satellites lower their signals while in the southern hemisphere, so as to avoid interference with services licensed to operate below the equator. To ensure signal accuracy while minimizing disruptions to service, the satellites thrusters and antennae are reoriented daily while the satellites are below the equator. The satellites are steered using antennae beam steering, which allows control of both the yaw steering and normal orbit modes of operation. To keep the elliptical orbit pattern aligned with the continental U.S. while in yaw steering mode, the antenna subreflector mechanically rotates in the opposite direction of the rest of the satellite. The satellites also employ compensation heaters to ensure that the communications panels maintain stable temperatures during their cold trip through the southern hemisphere.

14. The satellites receive signals from our satellite uplink facility in New Jersey at the 7.1 GHz frequency, then send the signals to subscribers throughout the continental United States at the 2.3 GHz frequency. The satellite antenna that receives the signal from the ground is a mere .75 meters in diameter, and is steered on two axes to ensure that it always receives the signal. The main reflector of the sending antenna is 2.4 meters in diameter. The subreflector is continuously rotated to maintain the elliptical coverage pattern even when the satellite's body is rotated in yaw. In order to amplify the signal sufficiently, Sirius uses a unique single transponder design which combines 32 Traveling Wave Tube Amplifiers to feed our single digital stream to the antenna. The satellites also carry redundant control electronics, receivers for tracking, telemetry and command (TT&C), a propulsion subsystem, an attitude control system, a thermal subsystem, a power subsystem, and a mechanism subsystem. All of these systems must

work flawlessly together to ensure that the satellites remain in orbit and properly send and receive the programming data.

15. The antennae used for ground tracking, telemetry, and command (TT&C) of the satellites are more complex for Sirius' inclined elliptical orbits than those that would be required to run geostationary satellites. Sirius' ground antennae are full-motion, continuously tracking antennae, located near the equator in Quito, Ecuador and Utive, Panama. These tracking stations are required to ensure communication with the satellites while they traverse both the northern and southern hemispheres.

Launching the Satellites

16. Even after Sirius completed the satellite designs, Sirius still faced an enormous hurdle in launching the satellites successfully. The selection of the vehicles to launch the satellites also reflect the enormous risks, costs, and capital investments Sirius has taken on in order to provide its service. The highly inclined elliptical orbits of the Sirius satellites required a heavy lift launch vehicle capable of injecting the 3800 kg separated mass satellites into the chosen orbit. Only two commercially available launch vehicles could possibly have met these requirements. Sirius chose to launch its satellites using the Proton K/Block DM launcher. The first of Sirius' satellites, dubbed Sirius-1, was launched in June 2000 from the Baikonur Cosmodrome in Kazakhstan. The remaining two satellites, Sirius-2 and Sirius-3, were launched in September 2000 and November 2000, respectively, also from Kazakhstan.

17. Designing, building and launching a satellite is an enormously lengthy, costly, and risky proposition. Launch vehicles are extremely complex and fail on a regular basis. Moreover, even when a satellite is in orbit, it is required to function in extremely difficult

conditions and is subject to complete or partial failure at any time. If a serious failure occurs, commercial satellites are for all practical purposes unrepairable once in orbit. For this reason, Sirius designed and built Sirius-4, a backup satellite that has never been launched and that remains in storage in Palo Alto, California.

18. In the near future, Sirius will be required to update the existing satellite constellations. Although it is impossible to predict with any degree of certainty how long the existing satellites will continue to function, all three are showing various signs of aging. Accordingly, beginning in 2008, Sirius will begin replacing them. Sirius has commissioned Space Systems/Loral to construct a new, powerful satellite that is intended to be launched in 2008. This new satellite will be placed into a geostationary position to augment the existing satellites in their highly inclined elliptical orbits. Subsequently, Sirius will launch additional satellites to replace those currently in the inclined elliptical orbits by 2012.

Sending the Programming to the Satellites

19. In order to deliver a compelling service offering, Sirius also had to pioneer substantial breakthroughs in the area of audio compression. Because the bandwidth available to Sirius is severely constrained, Sirius faces an inherent trade-off between the number of channels it can broadcast and the quality of the sound on those channels. The challenge is to provide acceptable quality for each audio application while using the fewest number of bits. Through the advanced digital compression technologies that Sirius has developed and funded, which reduce the number of bits required to provide equivalent sound quality, Sirius is now able to deliver more channels simultaneously with better sound quality. Sirius continues to invest heavily in basic research into how the human brain and audio system perceive sound, which ultimately will lead to further advances in the quality of the Sirius service.

20. To further enhance the efficiency of our audio compression system, Sirius has also pioneered the use of statistical multiplexing for audio applications. The fundamental basis of statistical multiplexing is the simultaneous analysis of multiple audio channels and reliance on the probability that not all audio passages will be equally difficult to code at high quality. For example, silence is often found in passages of both voice and music channels. Since silence does not represent a very complex audio signal, fewer bits can be assigned to a channel during those moments of silence. The bits that are saved from the temporarily silent channel can be dedicated to another channel that currently represents a complex audio passage. While statistical multiplexing is common in video systems, Sirius is unique in its investments to apply these concepts to audio compression schemes.

Terrestrial Repeaters

21. While Sirius' pioneering geosynchronous inclined, elliptical orbits greatly reduced the need for an extensive network of terrestrial repeaters, even Sirius' advanced system requires terrestrial repeaters in the densest urban areas to ensure continuous coverage. Sirius has drawn from the lessons of AM/FM transmission, cellular telephone transmission, and satellite television services such as DirecTV to design a unique system that provides maximal coverage.

22. At present, Sirius' system employs approximately 140 terrestrial repeaters nationwide. These repeaters receive the Sirius signal not from the main Sirius satellites, but rather through a VSAT service delivered via a geostationary satellite on which a transponder is leased by Sirius. This leasing arrangement provides significant cost savings to Sirius as compared to launching a fourth satellite specifically to feed the repeaters. Because the signal is relayed by this third-party satellite, however, the repeaters receive the signal at a frequency that is not within the range at which Sirius is licensed to transmit its signals to subscribers. Sirius'

repeaters must therefore first translate the signals they receive into the correct frequency to be transmitted to the receivers. The repeaters send the signal out at a modulation that allows for better transmission in dense urban areas. At the same time, the repeaters had to be designed with sophisticated filtering to ensure that they did not interfere with the signals from our own satellites, or with our rival XM's service.

23. In the future, Sirius will likely employ even more repeaters, to help fill in coverage gaps. However, each additional repeater imposes a significant financial and legal burden on Sirius. For each repeater Sirius places, it must first determine, from an engineering standpoint, the best possible location that will allow for maximal ground coverage while still receiving the signal from the VSAT satellite. When possible, Sirius prefers to place the repeaters on top of tall buildings in order to maximize the coverage of each transmitter. Once the optimal location is identified, Sirius must obtain placement permission from the landowner, as well as obtaining the required state and local building permits, state communications permits, and FCC approval. Often, Sirius is forced to settle for a less-than-optimal location for a given repeater because of permitting issues. Navigating this bureaucracy can take a year or more for each additional repeater, and requires the steady attention of a team of lawyers and engineers.

The Sirius Chipset and Receivers

24. To complete the delivery of the Sirius service to subscribers and turn the signal sent out by Sirius' satellites and terrestrial repeaters into an enjoyable consumer listening experience, Sirius also had to develop a system to receive, decode, and decompress the satellite signals. Working intensively with Lucent and their microelectronics division (now Agere Systems), Sirius created the proprietary set of application specific integrated circuits, or chipset.

The chipset is the core technology in every Sirius radio, no matter what the interface looks like. In creating such a system, Sirius was ever mindful of two primary factors: size and pricing.

25. Sirius' first generation chipset technology was pioneering in many respects. Sirius developed technology to allow the radio to choose the strongest signal from any of the two currently transmitting satellites or a terrestrial repeater at any given time. The radios also buffer the signals so that, even if the signals of all of the satellites are momentarily blocked, the user hears only seamless programming.

26. Perhaps one of the greatest achievements of Sirius' technology is the small, extraordinarily sensitive antennae used by the system. Whereas the Digital Satellite Services (DSS) such as DirecTV to this day require a relatively large antennae between 18 and 24 inches in diameter with a fixed aim to receive the service signal, the original Sirius antenna was a mere four inches by two inches by one inch and could operate in any direction. With further development, the antenna has now been reduced in size to 47mm x 40mm x 12mm. The tear drop-shaped antenna is installed on the roof of a vehicle. Despite its small size, the Sirius antenna is able to discern the very low-power signal that Sirius transmits, which is just a few decibels above the cosmic background radiation. Before Sirius developed this small antenna, only the military used such low-powered signals. By creating this small antenna, Sirius pioneered the commercial use of low power signals.

27. Sirius has continued to innovate with respect to chipset development as well. In February 2003, Sirius announced that it would begin shipping a second-generation chipset technology. The newer chipset utilized Agere's COM2H process technology to integrate all digital portions of the receiver circuitry, excluding memory, into a single chip. This reduced the

receiver design dimensions to the size of a credit card, from that of a videocassette in the first generation commercial products. In addition to a dramatic reduction in size, the second generation chipset reduced required power by 50 percent and provided improved thermal performance. In 2004, we introduced a Generation 2.5 chipset that further reduced the size, cost and electrical requirements of the chipset. Most recently, in 2005, we rolled out our Generation 3 chipset from ST Microelectronics, representing a significant further advance in all major design parameters. A pictorial representation of our chipset advances is shown in SIR Ex. 12. As with our other technologies, chipset development is an area that requires constant, substantial investment in order to remain competitive.

28. Consumer electronics companies, with the aid of Sirius engineers and substantial monetary subsidies from Sirius, have developed a wide variety of radios for factory installation into new vehicles, installation into existing vehicles in the after market, and home and mobile use. The user interface of the Sirius system presents many innovations beyond traditional terrestrial radios. Foremost, the interface allows easy transition between the more than 130 channels of programming Sirius provides. In addition to consumer electronics products, Sirius works closely with our automotive partners and their suppliers in order to integrate our service into new automobiles as they roll off the manufacturing line. This effort requires significant investment to ensure the high quality standards of the automotive industry are consistently met.

Public Recognition of Sirius' Technological Contributions

29. The satellite and engineering industries have extensively recognized Sirius' enormous technological contributions. On April 11, 2002, Sirius was inducted into the Space Foundation's Space Technology Hall of Fame. The honor recognizes innovators who transform technology originally developed for space use into commercial products. Inductees are selected

by a team that includes input from NASA, the Departments of Defense, Commerce, and Transportation, and commercial aerospace and technology companies. Sirius joined an elite group of fewer than 40 technologies to be so honored, including DirectTV, the Debakey heart pump and the Global Positioning System (GPS).

30. In December 2001, *Popular Science* magazine honored Sirius as the Grand Prize winner of its "Best of What's New" award in its electronics category. *Popular Science* is the world's largest science and technology magazine, with a circulation of more than half a million. Each year in its Best of What's New issue, *Popular Science* features 100 winners in ten different categories honoring product innovation. Among these 100 winners, the magazine also selects ten Grand Prize award winners that represent a significant step forward in each category. In recognizing the Grand Prize recipients, the magazine's editors look for products that must in some way improve the quality of life.

31. The technologies developed by Sirius have resulted in the granting of twelve United States Patents. Many of these innovative technologies are embodied in the Sirius system as it operates today. Moreover, my team continues to file new patent applications as new technology is developed. In addition to these filed patents, many technological advances are held as trade secrets to preserve our competitive advantages and service security.

Conclusion

32. For more than fifteen years, Sirius has been a major innovator of all aspects of satellite radio. From its pioneering three-satellite geosynchronous orbital system to its audio compression technology, from its terrestrial repeaters to its amazingly small antenna and innovative receiver technology, Sirius has invested more than fifteen years of engineering know-

how and hundreds of millions of dollars to develop a commercially viable subscription service to deliver cutting-edge programming. These innovations allow a broad variety of music to reach listeners who otherwise might not be reached by traditional music distribution channels.

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)
)
)
 Adjustment of Rates and Terms for) Docket No. 2006-1 CRB DSTRA
 Preexisting Subscription and Satellite)
 Digital Audio Radio Services)
)

DECLARATION OF TERENCE SMITH

I, Terrence Smith, 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 30th day of October 2006 at New York, New York.

Terrence Smith
Terrence Smith

Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of:)

)

Adjustment of Rates and Terms)

for Preexisting Subscriptions) Docket No.

Services,) 2006-1

and) CRB DSTRA

Satellite Digital Audio Radio)

Services)

)

Room LM-408

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Thursday,

June 7, 2007

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

APPEARANCES: (CONT.)

On Behalf of Music Choice

PAUL M. FAKLER, ESQ

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1 regulatory agency approvals. We need the
 2 Justice Department to make sure the merger is
 3 not anticompetitive, and we need the FCC to
 4 determine that not only is it not
 5 anticompetitive, but the merger is in the
 6 public interest.

7 So we are in the process of going
 8 through a second request with the Justice
 9 Department. The FCC has not yet accepted our
 10 application, has not put out a public notice
 11 yet. So we have a long process. We're very
 12 early in the game. I had our annual
 13 shareholders meeting right before Memorial
 14 Day, so I guess it must have been about two
 15 weeks ago, and I told our shareholders that I
 16 believe though the merger should be approved
 17 that we have an uphill battle to get it done.

18 So there is certainly no certainty
 19 to it. I'm optimistic about it, but there is
 20 no certainty.

21 Q Is there a drop dead date in the
 22 merger agreement?

1 that you need to turn profitable?

2 WITNESS: We have not come to a
 3 pure number that says once you get over a
 4 certain amount you become profitable. Because
 5 right now we are counting subscribers two
 6 ways. One is that if you pay \$12.95 you are
 7 a subscriber, and if you pay \$6.99 to get a
 8 second receiver, you are a subscriber. So
 9 that - the way the accounting works, that
 10 counts as two.

11 So the revenue is really the key
 12 number that drives whether or not we will be
 13 profitable. So if you work backwards to where
 14 we are today with our cost structure the way
 15 it is today, is that we believe that we will
 16 need somewhere at least 10 million, maybe 11
 17 million subscribers, to where we could be in
 18 this area of EBITDA profitable. If you are
 19 getting into profit in the GAAP term of
 20 profit, we might need to have a number
 21 significantly north of that.

22 JUDGE WISNIEWSKI: Thank you, sir.

1 A I believe - yes, there is a drop
 2 dead date. And I don't think -

3 Q Do you know approximately when
 4 that is?

5 A I think it's in the first quarter
 6 of next year.

7 MR. WYSS: No further questions,
 8 thank you, Your Honor.

9 CHIEF JUDGE SLEDGE: Any further
 10 cross by XM?

11 MR. RICH: No, Your Honor.

12 CHIEF JUDGE SLEDGE: Anything else
 13 by Music Choice?

14 MR. FAKLER: No, Your Honor.

15 CHIEF JUDGE SLEDGE: Anything else
 16 by Sound Exchange?

17 MR. HANDZO: No, Your Honor.

18 CHIEF JUDGE SLEDGE: Any questions
 19 from the bench?

20 JUDGE WISNIEWSKI: I have one.

21 Mr. Karmazin, has your firm
 22 identified some critical mass of subscribers

1 CHIEF JUDGE SLEDGE: All right,
 2 thank you, sir.

3 Mr. Joseph.

4 MR. JOSEPH: Your Honor, my
 5 partner, Mr. Kirby, will call our next witness
 6 and examine our next witness.

7 CHIEF JUDGE SLEDGE: All right.

8 MR. KIRBY: Your Honor, Sirius
 9 calls Mr. Terrence Smith.

10 Whereupon,

11 TERRENCE SMITH
 12 was called as a witness by counsel for Sirius
 13 and, after having been first duly sworn, was

14 examined and testified as follows:

15 CHIEF JUDGE SLEDGE: Thank you,
 16 please be seated.

17 MR. KIRBY: May I proceed, Your
 18 Honor?

19 CHIEF JUDGE SLEDGE: Yes.

20 DIRECT EXAMINATION

21 BY MR. KIRBY:

22 Q Good morning, Mr. Smith.

1 A Good morning.
 2 Q What is your full name?
 3 A My full name is Terrence Raymond
 4 Smith, though I am commonly known in the
 5 industry as Terry Smith.
 6 Q I'll probably call you Mr. Smith.
 7 Where are you employed, Mr. Smith?
 8 A I'm employed by Sirius Satellite
 9 Radio.

10 Q And what is your position?
 11 A My position is senior vice
 12 president of engineering.
 13 Q And in that position, what are
 14 your responsibilities?
 15 A I have responsibilities for all of
 16 the engineering operations in technology
 17 development that feeds Sirius Satellite
 18 Radio's enterprise, with one exception being
 19 information technologies.
 20 So I have responsibilities for the
 21 satellites, their designs, their operations,
 22 our terrestrial network, the integrated

1 MR. KIRBY: Your Honor, if I could
 2 ask that copies of the witness' statement be
 3 passed out, and I believe they should be
 4 designed Exhibit 32.

5 (Whereupon the aforementioned
 6 document was marked for
 7 identification as Sirius Exhibit
 8 No. SIR 32)

9 BY MR. KIRBY:

10 Q Mr. Smith, since we have mentioned
 11 Exhibit 32, would you examine that. Is that
 12 your written direct testimony in this case?
 13 (Witness examines document)
 14 WITNESS: Yes, it is.
 15 BY MR. KIRBY:
 16 Q And you signed that testimony
 17 under penalty of perjury?
 18 A Yes.
 19 Q And it was true when you signed
 20 it?
 21 A Yes, it is.
 22 MR. KIRBY: Your Honor, I would

1 circuits and research that goes into antennas
 2 and receivers and so on.
 3 Q And when did you become employed
 4 by Sirius?
 5 A I joined Sirius in February of
 6 2002, just actually a week prior to the
 7 commencement of the commercial operations of
 8 Sirius.
 9 Q How would you describe your
 10 professional field?
 11 A I feel I belong in the field of
 12 digital communications systems, digital
 13 broadcast systems.
 14 Q And how long have you worked as a
 15 professional in that field?
 16 A I have been - since graduating
 17 college in 1979. So my math is 28 years I
 18 guess.
 19 Q I think maybe your direct
 20 statement said 27, but I guess time marches
 21 on.
 22 A That's correct.

1 move the admission of Exhibit 32.
 2 CHIEF JUDGE SLEDGE: Objection?
 3 MR. DeSANCTIS: No objection.
 4 CHIEF JUDGE SLEDGE: Without
 5 objection it's admitted.
 6 (Whereupon the aforementioned
 7 document previously marked Sirius
 8 Exhibit No. 32 for identification
 9 was received into evidence)
 10 MR. KIRBY: Now what led us to this
 11 was the statement that you had worked for 28
 12 years in digital communications technology.
 13 BY MR. KIRBY:
 14 Q Describe for us your professional
 15 background in that field. Where have you been
 16 employed in that field?
 17 A Prior to joining Sirius I was, for
 18 22 - 23 years at the RCA Laboratories, which
 19 later became the Sarnoff Corporation,
 20 following the acquisition of RCA by General
 21 Electric.
 22 Q And what were you doing while you

1 were there?

2 A In that capacity I was responsible
3 for technology development and the management
4 of teams that developed, what became the HDTV
5 television standard, as well as worked with
6 Thompson Consumer Electronics and used to
7 create the Direct TV system.

8 Q Did you have a managerial role in
9 those operations?

10 A I had what I would consider a
11 technical management role. Early in my
12 career, I was an engineer developing a lot of
13 the technology. As I grew in my
14 responsibilities, I started managing other
15 engineers, but still kept my hand in a whole
16 lot of engineering aspects as well.

17 Q And did you do any inventing?

18 A Yes, I did.

19 Q And what is the result of that?

20 A I believe I'm the inventor or
21 coinventor of 18 U.S. patents, and a number of
22 those have also been filed internationally.

1 A I had a high level understanding
2 of what satellite radio was doing, and what
3 was going on at Sirius and XM, and in the
4 months that led up to my joining Sirius, I had
5 actually initiated engagements of consulting
6 exercise for Sarnoff to assist Sirius in
7 getting to their commercial launch. And so I
8 had some due diligence associated with that.

9 Q Now at the time Sirius was ramping
10 up, DirectTV was already offering a
11 subscription service broadcast from satellite;
12 is that correct?

13 A That's correct. It would be
14 called direct-to-home broadcasting is the
15 acronym that I think we typically spoke about.
16 Obviously that has a lot - there are some
17 commonalities with the Sirius system in that
18 they take advantage of having satellites to
19 broadcast across a wide footprint of the
20 United States and Canada, the difference
21 obviously being that DirectTV has the good
22 fortune of just having to broadcast to

1 Q Mr. Smith, I want you to now think
2 about the situation as you found Sirius when
3 you joined it. Let me simply ask that. When
4 you joined Sirius, you said they were just
5 getting ready to begin commercial operations;
6 is that right?

7 A That's correct.

8 Q Was it necessary for you to
9 acquaint yourself with the technological steps
10 that had led Sirius to that point?

11 A Yes, it was. The responsibilities
12 that I had undertaken initially as their chief
13 technology officer, but with the understanding
14 that I would take over the entire engineering
15 department's responsibilities, I quickly had
16 to become familiar with all the aspects of the
17 Sirius system.

18 Q And let me ask you, when you were
19 with Sarnoff Labs working on HDTV and
20 DirectTV, were you aware of what Sirius radio
21 was doing - of what Sirius was doing during
22 that time?

1 stationary targets, the homes.

2 Q Well, what was your understanding
3 of the fundamental technological challenge
4 that Sirius faced to move from existing
5 technology to its own successful service?

6 A So the mission that I believe that
7 Sirius had at that time and continues to have
8 is to provide a very high quality digital
9 audio experience to consumers in mobile
10 vehicles across the entire nation with a
11 system that provides coverage that is
12 continuous and seamless and also importantly
13 is affordable; and they have to do that with
14 what I would consider a fairly modest
15 amount of spectrum in order to be able to
16 transmit the necessary signals.

17 Q Now when you say a high quality
18 signal, what do you mean by that?

19 A Because this is a subscription
20 service, we need to be able to provide the
21 fidelity of audio that customers will feel
22 matches the subscription price that they are

1 paying. It needs to be free from a lot of
 2 interruptions, and I think that was one of the
 3 primary challenges that we had. Because the
 4 environment of transmitting to mobile
 5 vehicles, you encounter many disruptions to
 6 the signals.

7 Q Was there any benchmark of quality
 8 that you had to equal or beat for Sirius to be
 9 successful?

10 A Well, certainly because we assume
 11 that we aspire to being in all radios and AM
 12 button and FM button and a satellite button,
 13 a Sirius satellite button, that clearly you
 14 need to be able to exceed the level of
 15 performance they expect from their AM and FM
 16 transmissions.

17 Why I say exceed is because,
 18 again, we're seamless from market to market,
 19 and we charge a subscription fee.

20 Q Now you indicate in your written
 21 testimony that the first thing you have to do
 22 to maintain a broadcast system like Sirius is

1 through them.

2 One is what we would call spatial
 3 diversity, meaning that we have multiple
 4 satellites that are now beaming the same
 5 content to the signals.

6 And by doing that if you are
 7 blocked from one satellite the likelihood is
 8 that you might not be blocked from another
 9 satellite if you are one side of the building
 10 versus the other.

11 The second is frequency
 12 diversities. Because we have some amount of
 13 spectrum, we separate our two satellite
 14 signals to the extreme ends of our spectrum so
 15 that if there were any disruptions that may
 16 happen to the signal to cause degradation in
 17 certain frequencies, it might not affect the
 18 other frequencies, so as long as you get one
 19 of those signals we are in good shape.

20 And we've also created what we
 21 call time diversity, and it's a mechanism that
 22 allows us to be blocked temporarily from a

1 to deliver the signal. What was Sirius'
 2 approach to delivering a signal to these
 3 mobile receivers?

4 A So the first thing we did was
 5 recognize that unlike a DirectTV system where
 6 you can orient an antenna to find a perfect
 7 view of the satellite once and always have it
 8 set in that fashion, that our vehicles and our
 9 receivers would always have to deal with the
 10 fact that the vehicles move; they move at
 11 various rates of speed; they pass by trees,
 12 buildings and other things that block the
 13 signal from the satellite reaching down to the
 14 vehicles.

15 So what we devised was a system
 16 that allowed us to deliver the signal through
 17 a diverse number of means to elevate the
 18 likelihood that you'll get the signal.

19 Q What do you mean when you say
 20 diversity in this context?

21 A We look at there being three types
 22 of diversity, and I'll try to quickly go

1 view of both of the satellites at the same
 2 time but still to provide a seamless
 3 experience for customers by being able to play
 4 out of memory.

5 Q Let's look at each of those forms
 6 of diversity in a little more detail.

7 First, elaborate on how you
 8 achieve spatial diversity.

9 A So the - I guess the advantage
 10 that DirectTV has is that they can beam
 11 channels from a single satellite and know that
 12 the person is going to be able to set up their
 13 antenna to be able to receive that. And once
 14 they get past clipping whatever tree limbs and
 15 things like that they need to do, that view of
 16 the southern sky, it allows them to be able to
 17 deal with that.

18 I do know that there are certain
 19 people that they don't have access to the
 20 southern sky because of their building or
 21 whatever, DirectTV can't provide that service.
 22 And I think of that in the same way that

1 Sirius has. If you are driving on the wrong
 2 side of the building, and you are blocked from
 3 a particular satellite, you are not going to
 4 be able to receive that signal.

5 And so by creating a redundancy or
 6 diverse path for the same content to go from
 7 two separate satellites, we are able to
 8 increase the likelihood that the receiver will
 9 be able to see at least one of those two.

10 Q So you use multiple satellites; is
 11 that right?

12 A We use multiple satellites. And I
 13 would say that there is a third piece that I
 14 didn't mention previously, and that is,
 15 despite all fo our efforts to provide that
 16 spatial diversity there are certain areas in
 17 urban areas that we won't be able to get view
 18 of the satellites because of the height of the
 19 buildings.

20 So in those areas we have also
 21 dedicated about a third of our spectrum to
 22 having terrestrial transmitters repeat our

1 I believe it's captured in one of
 2 my exhibits here. So it may be easy for me to
 3 point to it.

4 Sirius employees what's called -

5 JUDGE WISNIEWSKI: Which exhibit
 6 are we looking at here?

7 WITNESS: I guess this would be
 8 Exhibit C. It's basically a map.

9 MR. KIRBY: So this is Exhibit C,
 10 Your Honor, to Exhibit 32 that the witness is
 11 referring to.

12 JUDGE WISNIEWSKI: All right.

13 WITNESS: So it's basically a map
 14 of the world, and you will see that there is
 15 a figure eight - so this represents the ground
 16 track.

17 Most typical satellites including
 18 those of Direct TV, those communication
 19 satellites are in what's called a
 20 geostationary orbit, so they basically reside
 21 on the equator at a fixed point in the sky.
 22 So they contribute their orbit at the same

1 signals as well.

2 So there are basically three
 3 different ways a receiver could possibly get
 4 our signal: from one satellite; from another
 5 satellite; or from a terrestrial repeater if
 6 it is available in that service area at the
 7 time.

8 Q So how many satellites do you have
 9 operating at this time?

10 A So we have three satellites that
 11 operate. We broadcast from two of them at a
 12 time, and it's a fairly unique constellation
 13 and very unique orbits that we have developed
 14 for this purpose.

15 Q Could you describe how those
 16 orbits work? I see that, every time I come to
 17 your office, I see that figure eight on top of
 18 the building. What is that all about?

19 A What that represents is the ground
 20 track of what the satellites provide. If you
 21 were on the ground, that's basically where the
 22 satellites are traversing our signal path.

1 speed and same height and position relative as
 2 the earth rotates, and they complete their
 3 orbit in exactly 24 hours just as the earth
 4 rotates.

5 MR. KIRBY: That was too simple for
 6 Sirius?

7 WITNESS: What we were concerned
 8 about is that - so what I'll explain is these
 9 orbits that we chose allowed us to get a much
 10 higher look angle for the satellites down into
 11 the CONUS of the United States.

12 And if you think about operating
 13 DirectTV dishes on your home, I'm in New
 14 Jersey, so I think ours are kind of around 30
 15 degrees to the horizon, 35 degrees to the
 16 horizon. And if - so as long as I can find a
 17 spot for us to get to that point in the sky,
 18 then I'm okay.

19 If you start driving around, and
 20 you are trying to have that kind of a look
 21 angle, then you start running into a lot of
 22 things - trees, buildings, semi trucks that

1 are driving past you on highways, that can
 2 start to block you if you are just at that
 3 type of an angle.

4 If the orbits that we chose, and
 5 having a constellation of three satellites
 6 orbiting in those fashions, allowed us to
 7 always have one satellite that no matter where
 8 you were in the United States, rather than
 9 being at 30 degrees, you have a minimum of
 10 about 60 degrees. And so we removed an
 11 extraordinary number of blockages we might
 12 otherwise have to create to fill in with gap
 13 filling terrestrial repeaters.

14 BY MR. KIRBY:

15 Q But with only three satellites,
 16 how do you keep one always in that little
 17 loop?

18 A So the orbits that we developed,
 19 and our technical founder, Rob Briskman, is
 20 the inventor, holds patents in actually using
 21 these orbits, the orbits are what are called
 22 highly inclined elliptical orbits.

1 By doing that we create this
 2 pattern. And what that does is, it allows
 3 there to be one satellite that will come and
 4 be in this high elevation loop always, and so
 5 I just traced one satellite as an example.
 6 You could start it at the equator, and you can
 7 see that it is over the Caribbean as it rises.
 8 And at that point in time, there is a second
 9 satellite that is descending at the equator,
 10 that will be going down into the Southern
 11 hemisphere.

12 So we don't have the ability for
 13 that satellite to see the United States, there
 14 is no sense in broadcasting a signal from that
 15 point. So we turn off the signal for the
 16 satellite going into the Southern hemisphere,
 17 and we now turn on the signal and broadcast
 18 from the satellite that is now ascending into
 19 the Northern hemisphere.

20 And that satellite rises, and it
 21 takes about four hours to get to a point that
 22 is above Kansas, and that starts the top loop

1 And the inclination allows it to
 2 be over the United States so that it's not
 3 over the equator, but actually is able to
 4 move. And the ellipse is such that it allows
 5 it to spend more of its time over the Northern
 6 hemisphere than over the Southern hemisphere.

7 And because it's an inclination
 8 and tipped, it means that it will have an
 9 apogee and a perigee, and those are, the
 10 apogee is the highest point of the orbit, the
 11 furthest away from earth, and the perigee is
 12 the closest to earth.

13 So what that results in each of
 14 these satellites follows the same ground
 15 track, but we offset them in their launch so
 16 that they are traversing this ground track
 17 apart from one another in about eight hours.

18 And this figure eight loop is
 19 performed in exactly 24 hours just like a
 20 geostationary satellite, so everyday it keeps
 21 pace with the earth, so it's synchronous with
 22 the earth's rotation.

1 of the figure eight. And then it spends eight
 2 hours in this high elevation loop, and then it
 3 takes another four hours to descend back down
 4 to the equator, where it will be turned off
 5 and another satellite will be up.

6 Q So as it's rising, and begins
 7 broadcasting, there is already a satellite up
 8 in the high altitude loop that also is
 9 broadcasting?

10 A That's right. By having three,
 11 there is always one that will be below the
 12 equator; there will always be one that is
 13 above in the high elevation loop; and the
 14 other one will be somewhere on the rising arms
 15 of the figure eight.

16 Q Now is that configuration of
 17 satellites anything new for communications
 18 technology, civilian communications
 19 technology?

20 A Absolutely.

21 Q Not something that was used by
 22 Direct TV?

1 A It is not.

2 Q And did I hear you say that Sirius
3 holds patents with respect to this?

4 A That is correct.

5 Q Now you mentioned the terrestrial
6 array. If you've got these three satellites,
7 and one of them is always essentially like the
8 sun at noon, and another one coming in from
9 the side, why do you need repeaters?

10 JUDGE ROBERTS: Before we go on to
11 the repeaters, Mr. Smith, three satellites, is
12 that the ideal number for that figure eight
13 orbit?

14 WITNESS: We have looked at a
15 variety of different things, particularly with
16 what we might do in terms of putting a fourth
17 satellite into orbit.

18 And we believe it is the optimum
19 choice in terms of trading off costs of
20 satellites and providing the type of coverage
21 that we are able to do.

22 You could create constellations of

1 particular satellite.

2 But we have recently contracted
3 with Space Systems Loral to build us a fifth
4 satellite which we intend to launch in 2008
5 and place that into a geostationary orbit to
6 complement the three satellites that we
7 currently have.

8 Q Now why is that a good idea? You
9 have these three satellites that you don't
10 need in geostationary orbit, and now you are
11 going to use one. Was Direct TV right, is
12 that what you are telling us?

13 A No, there are a couple of reasons
14 we have chosen to do this. Number one,
15 particularly when as our subscribers have
16 grown we want to make sure that we are able to
17 deal with any potential failure mechanism we
18 might have with the satellites.

19 And so we want to make sure that
20 we are able to place - basically have an in
21 orbit spare if you will. It's difficult with
22 our particular orbits, since you would have to

1 four or more. But if you only have two
2 satellites you can't keep both of them above
3 the equator and able to broadcast at the same
4 time.

5 So as long as we are looking for
6 having this spatial diversity of being able to
7 broadcast from two different satellites at a
8 time, there is a minimum of three that you
9 need.

10 BY MR. KIRBY:

11 Q Now as long as this issue has
12 arisen, Sirius is planning to launch a fourth
13 satellite into a somewhat different orbit;
14 isn't that right?

15 A That's correct. I should say that
16 we have constructed a fourth satellite that is
17 held in storage as a ground spare, so that if
18 we were to have an in orbit failure, and I
19 wish this was wood of some sort, but if we
20 were to have an in orbit failure, we would
21 rush that satellite into a launch vehicle, and
22 place that into orbit to replace that

1 basically guess which of the three satellites
2 is going to fail. And I'm not a particular
3 gambling man, so it's difficult to try to
4 launch something in there hoping that that is
5 the satellite that is going to fail, and find
6 that it is significantly out of its orbit, and
7 you would have to, in order to rectify that,
8 consume a tremendous amount of fuel in order
9 to reorient the other satellites to balance
10 the constellation.

11 By now placing a high powered
12 satellite - and this will be the highest
13 powered satellite built for commercial
14 enterprise - by placing that in a
15 geostationary orbit, we can always broadcast
16 from that particular spot. We will always be
17 broadcasting from whatever satellite is in
18 that high elevation loop. So that we get the
19 greatest spatial diversity.

20 So we believe it will enhance our
21 coverage already. It will also provide us
22 with basically better in orbit sparing as well

1 should there be a failure of one of the other
2 satellites.

3 Q And is there an effect on
4 satellite life?

5 A It will actually allow us to use
6 the existing three satellites for a longer
7 period of time as well.

8 Q That's because one of them is
9 turned off when it's not in high altitude?

10 A The operation that we have for our
11 three satellites is, in the normal course of
12 a day, they end up broadcasting for 16 hours
13 a day and then turned off for eight hours a
14 day. One of the unique aspects of this is
15 that we are able to use the batteries that are
16 on board for times where we may need to be
17 able to increase the power, if it's not
18 available from our solar arrays.

19 Since we won't be broadcasting for
20 16 hours a day now from those satellites, they
21 have a greater amount of time to recharge
22 batteries.

1 frequency; that was the second area of
2 diversity.

3 Very quickly, why and how does
4 Sirius achieve diversity and frequency?

5 A So as I mentioned, we have a
6 fairly modest amount of spectrum that we are
7 licensed to broadcast in, 12-1/2 Megahertz,
8 and we basically carve that up into thirds.
9 And in the lower third of the band of
10 frequencies we broadcast from one satellite.
11 At the upper band of the spectrum, we transmit
12 from the second satellite. And the middle is
13 used for any of the terrestrial repeaters,
14 should they be turned on in that particular
15 area.

16 By having the frequencies
17 broadcasted at different ends of the band, you
18 often run into problems with signals being
19 reflected off of buildings, and having
20 potential interference from other carriers.
21 Those are typically things that are relatively
22 localized within particular bands of

1 Q Now to the terrestrial repeaters,
2 why do you need terrestrial repeaters if
3 you've got one satellite up high all the time?

4 A It is just the fact that you end
5 up having blockages that regardless of high
6 elevation a satellite, unless I have something
7 that is directly overhead I can't combat the
8 shadows cast by buildings.

9 Q How many terrestrial repeaters
10 does Sirius presently have?

11 A Sirius is currently operating 128
12 repeaters.

13 Q Do you know how many terrestrial
14 repeaters XM has?

15 A I believe they are operating
16 somewhere in the order of 850 repeaters.

17 Q And is the difference between
18 those two related to this satellite array?

19 A It is absolutely related to the
20 fact that we have far fewer gaps that need to
21 be filled; far fewer shadows to fill in.

22 Q Let's talk about now diversity of

1 frequencies.

2 So the statistics are that if it's
3 attacking one of our signals, it's not likely
4 to be attacking the others. So all we care
5 about is that one of those three signal paths
6 is still available to our subscribers.

7 Q Talk about diversity of time.

8 A Sure. So I think this was - and
9 again this is a patented technology and
10 approach that I thought was very clever.

11 So the issue is that if you are
12 driving along on highways, and you are away
13 from urban areas so you don't have shadows
14 being cast by large buildings and things, you
15 may not be very near a large population
16 center, so it's not an area where we would
17 target with terrestrial repeaters to fill in
18 the gap, you often encounter overpasses.

19 And if you are under an overpass
20 with your vehicle, for the period of time that
21 you are under there, you are blocked from view
22 of both of the satellites. And so it creates

1 a thing where if we didn't have time
 2 diversity, every time you went under an
 3 overpass you would get a disruption of the
 4 signal. Basically your signal would cut out
 5 and be very choppy. And that is obviously
 6 something that is not an acceptable listening
 7 environment for any of our subscribers.

8 Q So how does the time diversity
 9 solve that problem?

10 A So what the time diversity does
 11 is, we basically in some ways create an echo
 12 of our own signal. For the one satellite that
 13 we would transmit, we immediately transmit
 14 that signal up to the satellite. For the
 15 paths that then feed the terrestrial repeater
 16 and the second satellite, we create an echo.
 17 We basically delay on the ground by four
 18 seconds that same signal, that same content,
 19 and then it proceeds on a pass for the
 20 terrestrial repeaters and the second
 21 satellite.

22 In our receivers, we use memory in

1 signal like that?

2 A So again the challenge that we
 3 have that are somewhat unique is that it's a
 4 signal that is very weak. We have very - I
 5 mentioned that we have very high power
 6 satellite that is being constructed, but when
 7 that satellite is 30,000 miles away from the
 8 earth, then we end up having a very weak
 9 signal by the time that it reaches the
 10 vehicle.

11 The first element in receiving the
 12 signal is an antenna. And if you were to
 13 compare this to the DirectTV signals, they
 14 have the advantage of having a reflector dish
 15 that is able to catch a lot of the signal and
 16 be able to concentrate on the receiving
 17 element.

18 Now much like my voice dies away
 19 the further away you get from it, I often find
 20 myself cupping my ear to be able to hear a
 21 person as they catch more of the sound in my
 22 ear. In that fashion we don't have the

1 the receiver so that the signal that was not
 2 delayed on the ground is now delayed in the
 3 receiver by four seconds. And if you are - as
 4 you drive under that overpass, you are not
 5 receiving either one of those signals, but you
 6 still have this four seconds of memory of what
 7 was broadcast previously, that now you can
 8 seamlessly play out of the device.

9 And so as long as you are able to
 10 reacquire a view of the sky and a view of the
 11 satellites, then it becomes a very seamless
 12 operation for us.

13 Q And as long as you have any one of
 14 these signals coming through your set, you
 15 have the programming, is that right?

16 A That's correct.

17 Q Now you are delivering a very
 18 complex signal through these moving targets.
 19 It's coming from different directions, if
 20 we're moving at different speeds and at
 21 different frequencies in offsetting times.

22 How do you possibly detect a

1 ability to put such a concentrator on our
 2 vehicles.

3 Q Why not?

4 A Well, if you are driving them
 5 along at 80 miles an hour, then the wind shear
 6 itself would just rip it off the vehicle.

7 Q Any other reason?

8 A Sure, the other reason is that
 9 because our signals come from a variety of
 10 directions, elevations, and azimuth, it
 11 becomes difficult to try to figure out where
 12 am I orienting my concentrator.

13 Q Were there any considerations
 14 relating to consumers that dictated what sort
 15 of antenna would work?

16 A So there are a couple of factors
 17 that did go into that. Number one is that it
 18 has to be small and aesthetically pleasing.
 19 We have both selling things in retail markets,
 20 as well as convincing car manufacturers to
 21 include this as an option that they include in
 22 their vehicles, if it's a very large element

1 that they are sticking on a roof top there is
 2 an awful lot of resistance that they have
 3 because they feel that it clutters things or
 4 creates a less of a streamlined fashion that
 5 the car designers had intended for there to
 6 be.

7 Q And what about from a retail
 8 perspective?

9 A The other element is that it needs
 10 to be very affordable as well. So if it's
 11 mass produced, it has to be small enough and
 12 low cost enough that it's able to do its job
 13 effectively but not cost a fortune to install.

14 Q Now I had meant to get to this
 15 before I got to the antenna, but I'm going to
 16 back up one step.

17 You describe the satellite array
 18 that Sirius uses, but I neglected to ask you
 19 where the satellite is coming from.

20 A The satellites were constructed by
 21 Space Systems Loral, based on our own
 22 specifications.

1 amplifier, and direct a number of channels
 2 they've got. They've got 500 channels, maybe
 3 they take 20 or 50 of those channels and
 4 direct it from one particular amplifier or set
 5 of amplifiers.

6 And because they have wider
 7 bandwidth and spectrum to be able to do that,
 8 they can offer that type of capability to only
 9 use a portion of the power for one part of the
 10 signal to be transmitted. That's called a
 11 transponder.

12 In our case, we have to combine
 13 all of the outputs from those amplifiers into
 14 a single signal that then gets directed down.
 15 And if we had chosen to only send from one
 16 amplifier at a time, it would require us to
 17 create a less efficient use of that spectrum.
 18 And we would get less bits to be able to
 19 create fewer channels to the customer.

20 So it requires us to do a
 21 tremendous amount. The fact that we have to
 22 combine all those amplifiers together required

1 Q You say based on your
 2 specifications, did Sirius develop those
 3 specifications in house?

4 A I believe that we also
 5 incorporated a number of consultants in
 6 addition to the in house staff that we had.

7 Q How are these satellites different
 8 from other broadcasting satellites?

9 A So there are couple of things that
 10 make them different. And perhaps the first
 11 thing I'll start with is the power that needs
 12 to be concentrated.

13 The physical - the guts of the
 14 satellite itself have common missions with
 15 other programs. There are a number of things
 16 that had to be done to them to customize them
 17 to our application to make them unique.

18 As I mentioned before, we have a
 19 fairly modest amount of spectrum in order to
 20 be able to broadcast our signal.

21 In DirectTV's case, they are able
 22 to take a few amplifiers, perhaps one

1 a few things to happen. It meant that there
 2 were certain components that had to be
 3 developed by Space Systems Loral, tested and
 4 known that they would work at these higher
 5 temperatures, and higher output values.

6 And so that's one piece that is
 7 different about the satellites.

8 The other piece about the
 9 satellites is that because they are moving in
 10 these orbits, there are a number of things
 11 that change, and primarily on the on board
 12 electronics, they have to go through a much
 13 more sophisticated algorithm to make sure that
 14 the space ship is properly oriented both to
 15 the earth as well as to the sun; and it also
 16 requires there to be additional and more
 17 extensive gyroscopes that are able to make
 18 this spacecraft move in directions that it
 19 typically doesn't have to move if it were just
 20 a geostationary satellite.

21 Q And are all of these elements that
 22 you described, do all of them have to be

1 working for that satellite to function well?

2 A Absolutely.

3 Q And if one of them ceases to
4 function, is it easily repaired?

5 A Well, we certainly can't send any
6 repairmen up to work on that. There are
7 redundancies that are included on each of
8 these, but as soon as you lose one part of
9 your redundancy then you are obviously at
10 risk. And it also requires an awful lot of
11 engineering effort to manage the satellite, if
12 you have lost some of your redundancy as well.
13 So it increases the complexity, increases the
14 risk, and increases my lack of sleep.

15 JUDGE ROBERTS: Mr. Smith, I note
16 that it says in your testimony that you are
17 the inventor or coinventor of 18 United States
18 patents.

19 WITNESS: Yes, sir.

20 JUDGE ROBERTS: How many of those
21 are during your work with Sirius?

22 WITNESS: None are associated with

1 that it's able to find that warmth, orient
2 itself, find that warmth and know that it's
3 not pointing at the moon, know that it's not
4 pointing at the sun or some other planet.

5 If you had the same view of the
6 earth all the time, then it's a much easier
7 task to be able to do. In our case, because
8 the satellites are changing in altitude as
9 they climb into this figure eight, the earth
10 recedes, it's going around things differently,
11 and it gets different views of the sun and
12 moon as well that cause it some additional
13 concerns about how it's able to maintain that
14 lock.

15 At the same time it also would
16 have to make sure that the spacecraft is
17 always pointing, when it's broadcasting, at
18 the center of the United States, so that the
19 pattern is always centered around the United
20 States, and doesn't drift off one way or the
21 other.

22 So there are a lot of maneuvers

1 Sirius. They are all predicated, sir.

2 BY MR. KIRBY:

3 Q I don't want to spend a lot of
4 time on this, because it makes my brain hurt.
5 But did the satellites have particular demands
6 placed on them because of the unique orbital
7 arrays that Sirius has?

8 A Yes, so I'll just talk about two
9 elements.

10 One is making sure that you are
11 pointing at the earth. So one of the failure
12 mechanisms that has happened to a number of
13 satellites is that they lose their lock on the
14 earth for whatever reason.

15 If you are at a geostationary
16 orbit, where you are always flying at the same
17 spot in the sky, same height, then you always
18 have the same view of the earth. And the
19 satellites use infrared sensors in order to
20 find warmth from a planet as opposed to the
21 coldness of space.

22 So what has to be important is

1 that have to happen as part of its orbit to
2 make sure the spacecraft is not disoriented.

3 And the final piece is that
4 because we have solar arrays that capture the
5 sun's energy, to power the satellite, to power
6 the transmission, the satellites also have to
7 not only be pointing at the earth the right
8 way, but they also have to orient the solar
9 panels to have the most efficient use of the
10 sun's - the most efficient use of the view of
11 the sun. And so that creates yet another
12 issue that the spacecraft has to deal with in
13 these types of orbits.

14 Q I'm a little still on the uptake,
15 but does Sirius hold any U.S. patents relating
16 to its systems?

17 A Sirius I believe we currently hold
18 about 16 patents. There are a number of
19 additional patents that we have in the works
20 that are pending.

21 Q Don't go into details on those.
22 So you said 16?

1 A I believe that's the number.
 2 JUDGE WISNEWSKI: All these
 3 satellites were launched in 2000 before you
 4 joined?

5 WITNESS: Yes, that's correct.

6 BY MR. KIRBY:

7 Q Now, you have got this signal
 8 coming in from different places, and at
 9 different times, and how many channels of
 10 programming does Sirius provide?

11 A We currently provide 135 channels
 12 of audio and data services.

13 Q Was it a challenge to get 135
 14 channels out of a single radio beam like
 15 you've been describing?

16 A It was a tremendous challenge. So
 17 apart from the challenges that I mentioned
 18 about combining all the power amplifiers into
 19 a single signal, now the challenge shifts to
 20 how efficiently can I manage the amount of
 21 bits that I am able to get. So that gets into
 22 how well we compress the audio information so

1 had primarily focused on say dedicating
 2 128,000 bits per second for providing an audio
 3 service associated with good programming. In
 4 some cases they would go higher than that if
 5 they wanted to have better stereo sound, if
 6 they wanted to have surround sound, they may
 7 go as high as 350 kilobits, with my experience
 8 in digital television and DirectTV.

9 And there the focus was going to
 10 be more on how do I increase quality of that,
 11 and not have to drive the bit rate further
 12 down.

13 So if we had relied on the rest of
 14 the industry to be able to deal with this type
 15 of compression technique, I think we really
 16 would have been stalled in our efforts to
 17 increase the number of channels.

18 We had worked extensively with a
 19 company called Ibiquity to improve our audio
 20 codecs, and Ibiquity is the company that is
 21 providing the technologies for the transition
 22 of AM and FM radio to transition to digital

1 that we can represent faithfully to a high
 2 degree of quality as many audio channels as we
 3 possibly can.

4 And Sirius has invested tremendous
 5 amounts over the years in order to be able to
 6 increase those number of channels from what
 7 may have early have been the inception of
 8 somewhere on the order of 30 to 40 channels up
 9 to the 135 channels that we now have.

10 Q Well, you say that originally the
 11 30 to 40 seemed feasible. Was that because
 12 compression technology was already known?

13 A Yeah, I don't claim that we
 14 invented audio compression. Obviously it's
 15 used in many many roles.

16 Q It's used with DirectTV for
 17 example?

18 A Absolutely.

19 Q Well, what did Sirius do with
 20 compression audio?

21 A So what we viewed was that the
 22 industry particularly for broadcast services

1 broadcasting.

2 And what we found was that even
 3 with all of their efforts, they weren't able
 4 to really focus on technologies that broke
 5 down to the bit rates and held the qualities
 6 that we needed, while still maintaining their
 7 efforts to try to provide something that hit
 8 the target bit rates that the radio broadcast,
 9 terrestrial radio broadcast hits.

10 Q Is there a particular technique
 11 that Sirius applied to its compression
 12 technology that allowed it to achieve what
 13 it's achieved?

14 A In addition to - there are a
 15 couple of things. One is that all audio
 16 compression technologies basically use a model
 17 of how the brain and the ear and the auditory
 18 system understands and processes the audio
 19 information that is received.

20 And so we've had a lot of ongoing
 21 research into understanding how that operates;
 22 what types of information might be redundant

1 or useless to the brain for these types of
 2 signals that we are broadcasting; and if you
 3 can find something that is redundant, you
 4 choose not to broadcast that, because it is
 5 just taking up space in your bitstream.

6 An example of that is if I have
 7 somebody whispering in my ear, and next to me
 8 somebody sets off a firecracker, when that
 9 firecracker comes along, that sound of that is
 10 going to mask anything that this person
 11 whispering to me does. So I am clearly not
 12 going to have to bother to send the whisper
 13 along in that fashion, because it just would
 14 be redundant information that the frame
 15 wouldn't be able to process anyway.

16 So we continue to find ways of
 17 improving our algorithms in ways that is the
 18 most efficient use of bits to provide high
 19 quality audio.

20 The second thing we did is use
 21 what's called statistical multiplexing. And
 22 it's the - the term multiplexing really is

1 were sampling this.

2 A So the multiplexing is basically
 3 sampling all these 100 channels that are
 4 simultaneously being broadcast and putting
 5 them into a single stream.

6 And in our process we have to
 7 compress and encode each of these 135 channels
 8 simultaneously. The statistical nature comes
 9 in in recognizing that the complexity of
 10 compressing each of those 135 channels is not
 11 going to be identical at any particular point
 12 in time.

13 So an easy way of thinking about
 14 that is that in talk channels, in
 15 conversations, there are often lulls in
 16 conversations, silence. So silence is a very
 17 easy thing to encode. You just basically say,
 18 nothing happens.

19 So the statistics would say that
 20 if I don't need to use all the average bits
 21 that I would typically use for this one
 22 particular channel, I could steal those bits

1 just how you mix a number of different
 2 channels and signals together onto a single
 3 signal.

4 So in our transmissions, if you
 5 will, having 100 channels that you mix all
 6 those 100 channels together so that you take
 7 one second of one channel, a second of the
 8 second channel, a second from the third
 9 channel and so on.

10 Q When you say a second, you don't
 11 literally mean a second?

12 A I don't literally mean a second.
 13 I was trying to piece these together.

14 And by sampling each one of these
 15 and putting it on to a single stream which you
 16 would be dealing with, then it provides -

17 Q Let me interrupt you for a second
 18 while Mr. Joseph mops up the water. I think
 19 we are all being distracted by the drama
 20 there.

21 A Sorry about that.

22 Q You didn't do it. All right, you

1 to apply to a channel that maybe is having
 2 music passages that goes through a crescendo
 3 at that particular time.

4 And so the statistics basically
 5 say I can rely on the fact that not all of
 6 these things are unique and commonly
 7 challenging all at the same time, and allow me
 8 to dynamically allocate the bits across all
 9 these channels.

10 Q Now statistical multiplexing as a
 11 concept was known before Sirius; wasn't that
 12 right?

13 A Absolutely. It's actually an area
 14 that I worked with Direct TV on is they used
 15 that for their video encoding and compression
 16 systems as well.

17 Q But if I understand your testimony
 18 the application of it to audio was something
 19 new; is that correct?

20 A Yes, it was.

21 Q And in your view was that
 22 significantly challenging?

1 A It was a significant challenge,
 2 and we found that it had significant impact
 3 for us as well. We may be in somewhat of a
 4 unique situation because we have lots of
 5 channels that are being broadcast and
 6 compressed simultaneously, whereas there
 7 aren't a number of other applications that
 8 have that type of a challenge that they have
 9 to face.

10 Q Now I don't want to spend a lot of
 11 time on this, but most of the equipment that
 12 you describe is subject to regulation by the
 13 Federal Communications Commission and even
 14 internationally; isn't that true?

15 A That's correct.

16 Q Have you had involvement in that
 17 aspect of the Sirius operation?

18 A Yes.

19 Q Has that been a significant
 20 challenge for Sirius?

21 A Quite a bit. So I wasn't involved
 22 in it, but the very first part of it is just

1 challenges?

2 A Well, number one, we continuously
 3 look to improve the quality of our services,
 4 so that the audio fidelity continues to
 5 improve as much as we possibly can.

6 We continue to recognize that
 7 there are more interests that our subscribers
 8 have that we'd like to serve, and that drives
 9 the cause for more channels to be created.

10 We obviously have to continue to
 11 drive on costs, so we make ongoing investments
 12 in our proprietary chip sets, into our antenna
 13 development to drive down the costs, make it
 14 much more appealing type of a factor that we
 15 could possibly do.

16 And then there are obviously the
 17 challenges of maintaining a satellite network.
 18 And for those that are in the satellite
 19 industry it's one where you don't rest very
 20 easily.

21 Q And how many employees did you say
 22 are involved under you in this effort at

1 getting the spectrum allocated for satellite
 2 radio services, and that was a very diligent
 3 effort that the founders of Sirius undertook
 4 just to create the system.

5 And I think Sirius and Rob Briskin
 6 in particular who was our technical founder
 7 has been recognized for a lot fo that
 8 pioneering effort.

9 But we are always needing to
 10 address any concerns that there are for
 11 interference or other issues that the FCC may
 12 ask.

13 Q I think every one in the room
 14 appreciates the joys of dealing with federal
 15 regulation.

16 So you've described this wonderful
 17 technology and the technological advances
 18 Sirius made to get on the market. So you're
 19 home free, right?

20 A No, there are still plenty of
 21 challenges.

22 Q Just in a nutshell what are those

1 Sirius?

2 A I have approximately 200 employees
 3 that work on all these different aspects of
 4 operating, maintaining and engineering the
 5 next generation of infrastructures.

6 Q Has there been any third party
 7 recognition of what Sirius has achieved in the
 8 technology area?

9 A Yeah, we have been inducted into a
 10 number of halls of fame, including the Space
 11 Foundation, which gets a lot of its inputs
 12 from NASA, Department of Commerce and
 13 Transportation and others.

14 We have been identified as hot
 15 products in a number of publications. We are
 16 frequently cited for the innovations that we
 17 bring to the industry.

18 So there has been a tremendous
 19 amount of recognition for the service.

20 Q If I recall your direct testimony
 21 you indicated that only fewer than 40
 22 technologies had been inducted into the space

1 hall of fame; is that correct?

2 A That's my understanding, yes.

3 Q And with the Popular Science, you
4 mentioned you were the grand prize winner
5 12/01 and the best of what's new; right?

6 A Correct.

7 Q And then ending with something
8 that we actually touched on before, the Sirius
9 technology program has led to how many
10 patents?

11 A I believe 16 have already been
12 earned.

13 MR. KIRBY: Your Honor, that
14 concludes my direct exam.

15 CHIEF JUDGE SLEDGE: We will recess
16 for 10 minutes.

17 (Whereupon at 11:01 a.m. the
18 proceeding in the above-entitled matter went
19 off the record to return on the record at
20 11:16 a.m.)

21 CHIEF JUDGE SLEDGE: We will come
22 to order. Any questions by XM?

1 Q You testified on direct a moment
2 ago that your predecessor at Sirius has a
3 patent on the elliptical orbit. Is that
4 right?

5 A The technical founder of Sirius
6 has such a patent.

7 Q But you are not the first to use
8 elliptical orbits, are you?

9 A Well, they have certainly been
10 used in, as I understand it, spy satellites
11 and the like, but they have very different
12 orbits. So this is a unique orbit, and I
13 think that is reflected in the fact that it
14 was able to be patented.

15 Q But it is called the Molniya type
16 orbit. Right?

17 A I believe it is based upon a
18 Molniya orbit.

19 Q Or a Tundra type orbit?

20 A Correct. It's a family of orbits,
21 I would guess it is called.

22 Q And it has been practiced since at

1 MR. JOSEPH: No, Your Honor.

2 CHIEF JUDGE SLEDGE: Music Choice?

3 MR. FAKLER: No, Your Honor.

4 CHIEF JUDGE SLEDGE: Cross by
5 Sound.

6 MR. DeSANCTIS: Thank you, Your
7 Honor. I would like to begin by handing out
8 what has been marked as Sirius Trial Exhibit
9 30.

10 CHIEF JUDGE SLEDGE: This is
11 SoundExchange Exhibit 30, not Sirius.

12 MR. DeSANCTIS: I apologize if I
13 said Sirius -- SoundExchange Exhibit 30.

14 (WHEREUPON, THE DOCUMENT
15 REFERRED TO WAS MARKED
16 AS SOUNDEXCHANGE EXHIBIT
17 NO. 30 FOR
18 IDENTIFICATION.)

19 CROSS-EXAMINATION

20 BY MR. DeSANCTIS:

21 Q Good morning, Mr. Smith.

22 A Good morning.

1 least the 1960s in Russia and elsewhere?

2 A For war missions that -- Yes, but
3 not for the types of full broadcasting for the
4 types of applications that Sirius is using it.

5 Q I direct your attention to the
6 document marked as SX Trial Exhibit 30 that I
7 just handed out. I think you had a moment to
8 look through it earlier.

9 Are you familiar with this
10 document?

11 A I am not intimately familiar with
12 it. I have seen similar types of --

13 Q Do you know if this was created by
14 someone in your department at Sirius?

15 A It would appear to be one of the
16 people that works in our Detroit office.

17 Q Are these kinds of documents
18 typically created by your department at
19 Sirius?

20 A We have -- We try to provide a
21 document that we use to acquaint people,
22 either as new partners that we might be

1 bringing on or potentially new employees that
 2 are in engineering departments, to give them
 3 a brief overview of the company.

4 Q And this is the type of document
 5 that would be created for that purpose?

6 A I believe this had a fairly
 7 limited use that was done just for the Detroit
 8 offices. This was not something that was
 9 embraced by corporate or anything like that to
 10 do any specific training, if I would.

11 Q You know that this one was made
 12 for a specific office?

13 A Yes. My sense is that Erik
 14 Streeter, who works in our Detroit office, put
 15 this together and is one of the people that
 16 would go through this with a new employee out
 17 in the Detroit office.

18 MR. DeSANCTIS: Your Honor, I
 19 would like to move for the admission of
 20 SoundExchange Trial Exhibit 30 at this time.

21 CHIEF JUDGE SLEDGE: Any objection
 22 to Exhibit 30?

1 point out what the witness said.

2 With the foundation that has been
 3 laid, the objection is sustained.

4 MR. DeSANCTIS: Thank you, Your
 5 Honor.

6 BY MR. DeSANCTIS:

7 Q Mr. Smith, are you familiar with
 8 a company called Satellite Data System, also
 9 known as SDS?

10 A I am not sure I am familiar with
 11 them.

12 Q Then you wouldn't be aware of the
 13 fact that they launched a satellite system in
 14 the 1970s in this country using an elliptical
 15 Molniya type orbit?

16 A I'm not familiar with that.

17 Q You testified on direct, Mr.
 18 Smith, that it sounded to me like what was
 19 primarily unique about your satellite system
 20 is that the three satellites are
 21 geosynchronous and not geostationary. Is
 22 that--

1 MR. KIRBY: Yes, Your Honor. I
 2 will object on the grounds that there is no
 3 adequate foundation. This is not a corporate
 4 level document, and it is not a document that
 5 this witness is familiar with.

6 CHIEF JUDGE SLEDGE: Mr.
 7 DeSanctis?

8 MR. DeSANCTIS: Yes. Your Honor,
 9 the witness has stated that it was created by
 10 people in his department, that they are
 11 regularly created for various purposes, and he
 12 also knew the purpose for which this document
 13 has been created, and he further testified
 14 that he is familiar with various slides that
 15 he was able to identify just quickly flipping
 16 through the document.

17 CHIEF JUDGE SLEDGE: Mr. Kirby,
 18 you are standing?

19 MR. KIRBY: Yes. I just -- If I
 20 could reply briefly.

21 CHIEF JUDGE SLEDGE: Well, I heard
 22 what the witness said. You don't need to

1 A I think that's one of the things
 2 that I testified as being somewhat unique.

3 Q One of the things is fine. And I
 4 think you also testified that the
 5 geosynchronous system created a lot of
 6 complexities from an engineering standpoint
 7 and a maintenance standpoint that wouldn't
 8 have been present in a geostationary system.
 9 Is that right?

10 A It added to the challenges, yes.

11 Q Did it add expense?

12 A Absolutely.

13 Q And you could have used a
 14 geostationary system. Right?

15 A In fact, I believe that initially
 16 we had looked at using a geostationary system,
 17 but after doing further studies, we determined
 18 that for the power that the satellites were
 19 able to deliver, we needed to get them into a
 20 higher inclination orbit and look at the --
 21 improve the look angle so that we would not --
 22 our signals would not be degraded so much by

1 foliage.

2 Q But XM uses a geostationary
3 system. Correct?

4 A That's my understanding, yes.

5 Q But you determined that you
6 couldn't?

7 A Not with the class of satellites
8 that were available to us at the time that we
9 began.

10 Q Was that after or before XM
11 launched?

12 A We began our construction of
13 satellites prior to XM engaging their
14 satellites.

15 Q How much prior? Do you know?

16 A I don't.

17 Q And it is your testimony that
18 geostationary satellites weren't available
19 when Sirius began developing its satellites?

20 A I don't believe that's what I
21 said. They were certainly available. The
22 power levels of the geostationary satellites

1 satellites.

2 Q That's in-house at Sirius?

3 A That's correct.

4 Q Let me direct your attention to
5 Sirius Exhibit 32, which is your written
6 direct testimony. This is something you
7 didn't actually testify to on direct, but
8 since this statement has been admitted into
9 evidence, I would like to ask some questions.

10 In the second sentence of
11 paragraph 16, you state, "The selection of
12 vehicles to launch the satellites also reflect
13 the enormous" --

14 JUDGE ROBERTS: That is page 8.

15 MR. DeSANCTIS: I apologize, Your
16 Honor. That's right, Your Honor.

17 BY MR. DeSANCTIS:

18 Q This is where you are discussing
19 launching satellites and the risks involved in
20 launching satellites.

21 The second sentence of paragraph
22 16 reads: The selection of the vehicles to

1 that were being constructed did not provide
2 sufficient power to the ground for us to be
3 able to reliably deliver the signals that we
4 needed to.

5 Q That was a judgment that Sirius --
6 that was made by the Sirius engineering
7 department?

8 A That's my understanding, yes.
9 That preceded me, but that is my
10 understanding.

11 Q You testified also that Sirius
12 didn't build its satellites. It contracted
13 them out to Belleau. Is that correct?

14 A Well, there are only a few
15 companies that actually construct satellites.
16 Yes.

17 Q And who manages -- who maintains
18 them in the air? I think the common phrase is
19 "flying" them. Who flies the Sirius
20 satellites?

21 A In our case, we have a team of
22 engineers that are dedicated to flying the

1 launch the satellites also reflect the
2 enormous risks, costs, and capital investments
3 Sirius has taken on in order to provide its
4 service..

5 Do you see that?

6 A Yes.

7 Q Now let's look at the second
8 sentence in paragraph 17 down below: Launch
9 vehicles are extremely complex and fail on a
10 regular basis.

11 Do you see that?

12 A Yes.

13 Q None of Sirius' launches have
14 failed, have they?

15 A We are very fortunate that all
16 three of our launches to date was successful.

17 Q And you contracted your launching
18 services out to a company called Proton
19 Systems. Is that right?

20 A I believe that's correct.

21 Q Do you know -- Are you aware of
22 the fact that Proton has launched 200

1 satellites since 1980?

2 A I don't know the exact number. I
3 know that they have had a number of successful
4 launches, yes.

5 Q Well, actually, do you know if
6 their success rate is 94 percent?

7 A I didn't know that, but I guess I
8 would not be surprised. Just fortunate we are
9 not on the six percent of that.

10 Q Let's keep reading in Paragraph
11 17, the third sentence. It reads: Moreover,
12 even when a satellite is in orbit, it is
13 required to function in extremely difficult
14 conditions and is subject to complete and
15 partial failure at anytime.

16 This is the part in your testimony
17 where you are talking about risks, once the
18 satellite is already launched. Is that right?

19 A Correct.

20 Q And isn't it true that Sirius'
21 first three satellites have exhibited
22 excellent in-orbit reliability?

1 improved from your satellites -- I think they
2 are named FM-1, FM-2 and FM-3?

3 A Well, I would certainly believe
4 and hope that all engineering enterprises go
5 through a learning process and don't tend to
6 repeat mistakes, but I don't kid myself to
7 believe that this will be completely a
8 bulletproof design either.

9 MR. DeSANCTIS: Your Honor, I
10 would like to show the witness what has been
11 pre-marked as SoundExchange Trial Exhibit 31,
12 please.

13 (WHEREUPON, THE DOCUMENT
14 REFERRED TO WAS MARKED
15 AS SOUNDEXCHANGE TRIAL
16 EXHIBIT NO. 31 FOR
17 IDENTIFICATION.)

18 BY MR. DeSANCTIS:

19 Q Mr. Smith, have you seen this
20 document before?

21 A I believe this is a document that
22 was meant to provide a management update to

1 A They -- We have experienced some
2 component failures, and it has increased the
3 complexity with which we have had to operate.
4 I think we have -- I think we discussed that.

5 Q You've never had even a second of
6 outage, have you?

7 A I believe that, through our
8 diligent team, I think we have kept it to 100
9 percent availability, and I would say,
10 however, you know, we are fortunate with the
11 choice of orbits that we have; because there
12 are eight hours a day where we are not
13 broadcasting from a particular satellite, and
14 that has afforded us on a number of occasions
15 to address potential anomalies by going
16 through software updates and the like.

17 So it was very fortunate that we
18 chose the orbits that we did, from that
19 perspective.

20 Q And do you expect that the
21 satellites you launch in the future will be
22 even more reliable and better, having been

1 where we are with our satellites.

2 Q Could you describe what you mean
3 by management -- who you mean, in particular?

4 A Because there is not an
5 attribution as to whether this is part of a
6 larger package, I don't know the particular
7 occasion upon which this was done, but from
8 the context and the level of detail that we go
9 into, it could be a briefing that we were
10 giving to my boss or to Mr. Karmazin or to
11 someone else.

12 Q Is this something that is done on
13 a routine basis, preparing these reports for
14 management, including Mr. Karmazin and your
15 boss?

16 A There are times where we give
17 verbal updates on status of things on a more
18 regular basis, and there are occasions where
19 we may be requested to provide an update. I
20 don't believe we have a routine of providing
21 a satellite update as prescribed.

22 Q Provide them whenever they are

1 requested by Mr. Karmazin or your direct
2 supervisor?

3 A Absolutely.

4 Q And would this have been prepared
5 -- If asked by Mr. Karmazin or your
6 supervisor, for such an update in writing,
7 that would be prepared by someone in your
8 department?

9 A Correct.

10 Q Are you ever involved in making
11 those updates?

12 A I would typically review those. I
13 pay people that have far greater expertise in
14 these types of things to actually prepare
15 them.

16 Q Do you review them before it is
17 presented to Mr. Karmazin or your boss?

18 A Yes.

19 Q Are you involved in presenting
20 them ever to Mr. Karmazin and your boss?

21 A I typically allow the people that
22 are more expert in the particular device to be

1 this.

2 Q There is no attribution on it?

3 A That's correct.

4 Q Do you actually recall having seen
5 this particular document before?

6 A I don't have a specific
7 recollection of this particular document.

8 Q Do you have any personal knowledge
9 as to why this document was prepared?

10 A I couldn't say specifically why it
11 was prepared.

12 MR. KIRBY: That's all I have,
13 Your Honor, and I would object to the
14 admission of the document for lack of
15 foundation.

16 CHIEF JUDGE SLEDGE: Mr. Smith,
17 are you the technical witness for Sirius?

18 THE WITNESS: Yes, sir.

19 CHIEF JUDGE SLEDGE: The objection
20 is overruled. The exhibit is admitted. Mr.
21 DeSanctis.

22 (WHEREUPON, THE DOCUMENT

1 able to be the ones that present it, and give
2 them a little bit more visibility. So i don't
3 feel I need to be the guy in the spotlight all
4 the time.

5 MR. DeSANCTIS: Your Honor, at
6 this time, I would like to move for the
7 admission of SoundExchange Trial Exhibit 31.

8 CHIEF JUDGE SLEDGE: Any objection
9 to Exhibit 31?

10 MR. KIRBY: Yes, Your Honor, and I
11 would like to voir dire, if I may

12 CHIEF JUDGE SLEDGE: Yes.

13 MR. KIRBY: I haven't seen this
14 done. Do I go to the podium?

15 CHIEF JUDGE SLEDGE: Yes.

16 VOIR DIRE

17 BY MR. KIRBY:

18 Q Mr. Smith, did you prepare this
19 Exhibit 31?

20 A I did not.

21 Q Do you know who prepared it?

22 A I don't know for sure who prepared

1 REFERRED TO, PREVIOUSLY
2 MARKED AS SOUNDEXCHANGE
3 TRIAL EXHIBIT NO. 31 FOR
4 IDENTIFICATION, WAS
5 RECEIVED INTO EVIDENCE.)

6 MR. KIRBY: Your Honor, I then
7 would move for the protection of this as a
8 confidential Sirius document or the Court's
9 orders. As the Court will see, this is a
10 recent document. It talks about the status of
11 ongoing Sirius projects that are fairly
12 central to our operations and to our
13 competitive position.

14 This is the kind of information,
15 for example, Your Honor, that would not be
16 shared with XM, despite the pending merger
17 CHIEF JUDGE SLEDGE: Page 2 would
18 be publicly disclosed.

19 Mr. Smith, is the information on
20 page 3 identified as Risk Issues matters that
21 are included in the disclosures to investors
22 or in your 10-5, if you know?

1 THE WITNESS: I believe this goes
2 into greater detail than we would disclose.

3 CHIEF JUDGE SLEDGE: Give me an
4 example.

5 THE WITNESS: Getting into any
6 particular issues about the risks associated
7 with the solar arrays themselves, anything
8 that -- the control system.

9 CHIEF JUDGE SLEDGE: You don't say
10 anything about the control system except that
11 there are many issues. What's private about
12 that?

13 THE WITNESS: Well, to the degree
14 that it goes to the potential for any schedule
15 slips, I think that is something that we
16 wouldn't necessarily be disclosing at this
17 time.

18 CHIEF JUDGE SLEDGE: It doesn't go
19 into schedule status. Why are you raising
20 that possibility?

21 THE WITNESS: It talks about risks
22 and how we have to manage the risks in certain

1 talking about areas of satellite control
2 system that are not stated on this page.

3 THE WITNESS; Your Honor, I
4 apologize for it not being responsive, but
5 where I looked at this was to say that, at the
6 time of this writing, there were open issues
7 related to the control system that needed to
8 be resolved, and at that time represented
9 risks to the schedule. This is supporting to
10 the previous page that talks about schedule.

11 CHIEF JUDGE SLEDGE: There is
12 nothing on here on the control system that
13 would be subject to the protective order.

14 What else is private?

15 THE WITNESS: You're just talking
16 about page 3 at this point?

17 CHIEF JUDGE SLEDGE: Yes.
18 Technical risk issues. I don't see anything
19 else in this document that could possibly fit
20 within the definition.

21 THE WITNESS: To the degree that
22 the solar array cell selection discusses

1 decisions that need to be made and information
2 we need to be able to --

3 CHIEF JUDGE SLEDGE: You are
4 characterizing something that's not on this
5 page. Satellite control system, the ground
6 system: There are many issues, but all are
7 close to resolution. Period.

8 THE WITNESS: But not resolved at
9 that particular time.

10 CHIEF JUDGE SLEDGE: That's not on
11 here. That has nothing to do with what you
12 were just saying a minute ago.

13 THE WITNESS: I'm putting it in
14 the context of the overall document that's
15 giving a briefing about schedule and the risks
16 associated with maintaining that schedule. So
17 I believe, to the degree that technical risks
18 are involved, it is speaking to my -- where
19 there may be risks on schedule.

20 CHIEF JUDGE SLEDGE: You are not
21 responding to our conversation. You said
22 satellite control system, and then you started

1 potential reduction in capacity and the
2 selection of the technical decisions being
3 made as to that, that basically then allows
4 someone to better understand the capabilities
5 of -- the technical capabilities of our
6 satellite that we are procuring, and we
7 typically don't go into technical detail that
8 would allow some of those levels of details to
9 come to the public.

10 CHIEF JUDGE SLEDGE: Has this
11 information under the heading "Solar Array
12 Cell Selection" been disclosed outside of
13 Sirius?

14 THE WITNESS: I don't -- Other
15 than with our vendor, I don't believe it has.

16 CHIEF JUDGE SLEDGE: All right.
17 That's the only part of this document that
18 would fit in a -- for protection under the
19 order. As it is part of the document, the
20 motion is granted.

21 MR. DeSANCTIS: Your Honor, I am
22 going to refer the witness to page 3.

1 However, I don't believe I am going to go into
 2 any of the technical information. So just
 3 letting counsel know, if they still feel the
 4 need to clear the courtroom.

5 CHIEF JUDGE SLEDGE: He will
 6 respond to the questions. Go ahead.

7 BY MR. DeSANCTIS:

8 Q Mr. Smith, I would like to turn
 9 your -- First of all, what would be the
 10 purpose of preparing this document for
 11 presentation to management?

12 MR. KIRBY: Objection, Your Honor.
 13 That asks the witness to speculate. He's
 14 testified he doesn't know who prepared this or
 15 why it was prepared.

16 CHIEF JUDGE SLEDGE: Overruled.

17 THE WITNESS: Sorry. Could you
 18 repeat the question?

19 BY MR. DeSANCTIS:

20 Q What would be the purpose of
 21 presenting this document to management, such
 22 as Mr. Karmazin or your direct supervisor?

1 model 5. It is the fifth satellite that we
 2 are having constructed and the one that I
 3 mentioned would be launched into a
 4 geostationary orbit, hopefully, in 2008.

5 Q So you have three in the air right
 6 now. You have one on the ground that you
 7 don't intend to launch, because it is a --

8 A We hope we don't.

9 Q -- a back-up. You hope not to.
 10 So FM-5, the one that is discussed here, is
 11 going to be the next one you launch.

12 A If the fleet remains intact until
 13 that point, that would be the next one we
 14 would launch.

15 Q Okay. And it lays out a number of
 16 technical risks, as they are referred to in
 17 the document. Is that right?

18 A Correct.

19 Q And are these many of the kinds of
 20 risks that you make reference to, either in
 21 specific or general terms, in your written
 22 direct statement?

1 A Depending upon the timing -- and I
 2 am not clear on the timeline of this
 3 presentation relative to decisions -- it could
 4 be that this was trying to give a status
 5 update of where the program is, so that any
 6 concerns over the procurement of that
 7 satellite might be made known.

8 It could have been potentially
 9 looking for decisions on proceeding with any
 10 future satellites.

11 Q Let me direct your attention to
 12 the first page of the document. It is dated
 13 September 22, 2006. Does that help
 14 contextualize the purpose for you at all?

15 A Not to a specific event, no.

16 Q Okay. Well, let me direct your
 17 attention to page 3 of the -- or the third
 18 page of the document. The pages are not
 19 numbered in the document itself.

20 This page is entitled "FM-5."

21 What is FM-5 ?

22 A FM-5 is referred to as flight

1 A I think these are very much
 2 focused on understanding the risks that have
 3 been presented to us as part of program
 4 reviews from the Loral identifying what needs
 5 to be resolved in order to deliver the
 6 satellite and potentially any schedule risks
 7 that we may have or tradeoffs that we need to
 8 make in order to balance the capabilities, the
 9 technical risks, and the schedule.

10 Q I'm not sure that answered the
 11 question. The question was whether these are
 12 specific examples of the kinds of risks that
 13 you discuss in your direct testimony.

14 A So I believe in the risks that I
 15 referred to in my direct testimony focused an
 16 awful lot on the issues of creating satellites
 17 that could fly in the special orbits that we
 18 had, and then we talked about risks associated
 19 with how there may be component failures in
 20 normal operation of the satellites.

21 I think this gets into an area of
 22 managing the construction of the satellite and

1 the choices that are made with this particular
 2 satellite, which is a different satellite than
 3 FM-1, 2 and 3.

4 Q So this is a new area for Sirius,
 5 I think you have testified, because this is
 6 geostationary as opposed to geosynchronous.
 7 Is that right?

8 A Correct.

9 Q So even though it is in the area,
 10 as the document reads with the first bullet
 11 point, all hardware issues are understood and
 12 are being managed proactively. Is that right?

13 A That's what it says.

14 Q Do you believe that?

15 A I believe -- I believe that all
 16 the high risk issues we do understand, and we
 17 are addressing. We are paying a lot of money
 18 to make sure that not only we have our own
 19 team but Loral is managing these issues as
 20 well.

21 Q Mr. Smith, your satellites are
 22 insured, aren't they?

1 Q Okay. And Sirius paid a lot of
 2 money for its spectrum, didn't it?

3 A Yes, we did.

4 Q Would you consider it a
 5 significant asset of the company?

6 A The CFO is probably a better
 7 person to ask that question.

8 Q Okay. Are you aware of the fact
 9 that music channels occupy roughly double the
 10 bandwidth of non-music channels?

11 A So in this instance, are you
 12 talking about their uncompressed bandwidth or
 13 their compressed bandwidth?

14 Q Let's take their compressed
 15 bandwidth for the moment.

16 A So I know in our system, we are
 17 able to deliver in much lower bandwidth talk
 18 channels than music channels, primarily
 19 because they are mono and are not carried in
 20 stereo.

21 Q And they don't need the high
 22 quality -- the high bandwidth that music

1 A Our satellite -- We do not carry
 2 in-orbit insurance on our satellites. I
 3 believe that's disclosed in our 10K.

4 Q You mentioned bandwidth in your
 5 direct testimony.

6 A Yes.

7 Q You described it as limited.
 8 Limited, if I understood correctly, in the
 9 sense that you can't just add bandwidth
 10 anytime you wish, day to day. Is that
 11 correct?

12 A So I just want to make sure I'm
 13 clear about which bandwidth you are reflecting
 14 to. So I talked about the bandwidth of
 15 spectrum that we've been licensed, and that is
 16 a limited amount of spectrum that we have been
 17 licensed by the FCC, and there is -- So we
 18 have 12.5 megahertz, and there's 12.5
 19 megahertz adjacent to us that XM has been
 20 licensed in, and that is the only spectrum
 21 that has been licensed for satellite digital
 22 audio radio services.

1 requires to deliver the high quality sound.
 2 Is that correct?

3 A They both require high fidelity.
 4 There are differences in the content
 5 themselves that create different challenges,
 6 but our need to faithfully deliver the
 7 fidelity that our customers anticipate for
 8 both services is demanding.

9 Q So is it true that the music
 10 channels compressed occupy -- Each music
 11 channel would occupy twice the bandwidth of a
 12 non-music channel?

13 A I just need to do some math here,
 14 because -- In some instances, yes.

15 Q In most instances?

16 A In many instances.

17 Q But not most?

18 A I'm trying to --

19 Q Is it your testimony that it is
 20 most or that you don't know?

21 A I don't know. I would have to try
 22 to go through the math of our line-ups, and my

1 current understanding of how we allocated
 2 targets, that's through many different
 3 channels.

4 Q Let me just go back for a minute.
 5 You are aware that other companies do have
 6 insurance on their satellites, aren't you?

7 A As I understand it, yes.

8 Q You testified, Mr. Smith that one
 9 of the primary challenges you faced was
 10 sending your satellite signals to moving
 11 vehicles. Is that right?

12 A That's correct.

13 Q And that's because the antenna
 14 isn't stationary. Is that why it's a
 15 challenge?

16 A That is certainly a challenge,
 17 yes.

18 Q Were you -- You weren't the first
 19 service to send satellite signals to non-
 20 stationary antennas, were you?

21 A I'm sure there were -- there are
 22 instances of, certainly, government

1 say it's probably a minimum of four inches,
 2 maybe more like six, six inches it telescopes
 3 up.

4 BY MR. DeSANCTIS:

5 Q And you are aware of the fact that
 6 omni-directional antennas were described in
 7 satellite literature as early as the 1960s and
 8 '70s. Correct?

9 A I'm sure omni-directional antennas
 10 have been used in many cases.

11 Q Are they used in GPS receivers?

12 Sorry, that's global positioning systems.

13 A Yes, I'm familiar with that. Yes.
 14 Yes, they are. It's not a continuous service,
 15 however. It does not require a continuous
 16 reception in order for the application to
 17 work.

18 Q But it's omni-directional?

19 A It is an omni-directional antenna.
 20 I don't know that it has, however, the
 21 characteristics that our antennas require in
 22 terms of having sufficient gain both to the

1 communication systems that communicate to
 2 moving vehicles.

3 Q Right. Are you familiar with a
 4 company named Iridium?

5 A Yes.

6 Q In the 1990s, didn't they have a
 7 handheld, keyway voice and data satellite
 8 service where the antenna was in the handheld
 9 device that could be carried all around?

10 A Very -- Yes. Very expensive
 11 device and one that I don't believe has
 12 achieved very high degree of acceptance.

13 Q But it existed, and it was small,
 14 and it predated Sirius. Correct?

15 A I wouldn't necessarily call it
 16 small with respect to our antenna.

17 Q It's the size of a phone?

18 A It typically has an extension on
 19 it so that the antenna is basically a mast
 20 about this large that sticks up.

21 CHIEF JUDGE SLEDGE: How large?

22 THE WITNESS: I'm sorry. I would

1 horizon as well as directly overhead. So I
 2 don't -- We certainly can't simply plug a GPS
 3 antenna into our radios and have them work.

4 Q Okay. Let me go back to something
 5 we discussed earlier. Your decision, decision
 6 of the Sirius engineering team to use
 7 geosynchronous as opposed to geostationary
 8 satellites was because it would yield better
 9 reception for the subscribers. Is that right?

10 A That's correct.

11 Q Are you aware of the fact that
 12 Sirius regularly surveys its subscribers and
 13 asks various questions about their views of
 14 the service?

15 A I was aware of some surveys, yes.

16 Q So you are aware of the fact that
 17 Sirius surveys its subscribers?

18 A I am aware of surveys that have
 19 been taken in the distant past. I have not
 20 been involved in any market research
 21 associated with those.

22 Q Okay. Are you aware of the fact

1 that one of the questions that Sirius asked in
 2 its most recent customer satisfaction survey,
 3 at least the most recent one produced here,
 4 was what is your number one complaint about
 5 Sirius satellite radio, and by far the largest
 6 answer, 37 percent of Sirius subscribers, said
 7 that their number one complaint about Sirius
 8 satellite radio was the reception. Were you
 9 aware of that?

10 A So the most recent survey that you
 11 are referring to is when?

12 Q Is August 28, 2006. Subscribers
 13 were asked what is their number one complaint
 14 about Sirius satellite radio, and far and away
 15 the largest number one complaint -- in fact,
 16 37 percent of those polled -- said that their
 17 number one complaint was the reception. I'm
 18 asking if you are aware of that?

19 A So I'm aware that we asked about
 20 reception issues, and I don't recall what the
 21 percentage was. We do know that reception in
 22 some of these instances is -- as asked, is

1 station that may interfere with the broadcast
 2 of our audio signal from our receiver to their
 3 FM radio in their vehicle.

4 These are for retail subscribers.
 5 This is the typically the way that they
 6 connect our receivers to their radios.

7 Q You're talking about after market
 8 subscribers in the car?

9 A Yes.

10 Q Not OEM subscribers?

11 A OEM subscribers would have it
 12 fully integrated into their vehicle. So if
 13 this were information that was localized to
 14 OEM subscribers, then I think we would
 15 understand what they meant by reception. If
 16 it is from a retail subscriber, then I think
 17 there is some ambiguity. That's all I'm
 18 cautioning.

19 Q And I appreciate that. And you
 20 are not talking about plug and play devices?

21 A A plug and play device is one of
 22 the retail type of devices that is typically -

1 somewhat ambiguous between whether it's
 2 talking about the reception of the service by
 3 the radio -- of our receiver, I should say, or
 4 the reception of the automobile's FM radio of
 5 our audio signal being rebroadcast from our
 6 receiver. If I could describe that a little
 7 bit?

8 Q So that the ambiguity -- What you
 9 are saying is that there is an ambiguity as to
 10 whether it's from the receipt of the signals
 11 or the broadcast of the signals through the
 12 radio?

13 A Yes. I believe the ambiguity
 14 comes from -- It's purposely made as a very
 15 open question to try to elicit people to tell
 16 us what their complaint is. By having it
 17 being that the customers refer to as reception
 18 issues, to me, it is unclear that we have been
 19 able to identify that they find gaps in our
 20 services delivery of the transmitted signal or
 21 whether they are experiencing interference on
 22 their car radios because of driving near an FM

1 - sorry. The plug and play devices themselves
 2 are one of many products that we have that
 3 retail customers will select and put into
 4 their vehicles, and they hear the audio
 5 through a wireless FM link from our plug and
 6 play radio through the car antenna into their
 7 FM radio.

8 Q So are you also aware of the fact
 9 that one of the next largest complaints in the
 10 survey was the hardware?

11 A I believe I've been told that
 12 hardware was another issue that we were
 13 looking into. I should also say that -- So
 14 since you've mentioned that the survey was in
 15 2006, we have made a significant improvement
 16 in reception by our investment in chipsets
 17 that are phasing in now; and, certainly, they
 18 are phasing in more rapidly in our retail
 19 products than they are in our OEM products.

20 It takes a very long time for new
 21 technology to get into a vehicle. So we do
 22 know that there were much better reception

1 capabilities by our newer chipsets than our
2 older chipsets.

3 Q So you did have chipsets in the
4 past? Chipsets aren't new.

5 A We have a proprietary system that
6 we designed chipsets --

7 Q Mr. Smith, the question was you
8 had chipsets in the past. Correct?

9 A We had a -- We have now introduced
10 four generations of chipsets, proprietary
11 chipsets, for reception of the Sirius
12 satellite signal.

13 MR. DeSANCTIS: Okay. Thank you.

14 No further questions.

15 JUDGE ROBERTS: Mr. Smith, did I
16 hear you saying that your receivers, at least
17 the mobile ones that you can hook up inside
18 your car, are capable of getting better
19 reception than some of the older generation
20 receivers?

21 THE WITNESS: Absolutely, sir.

22 JUDGE ROBERTS: I only asked

1 Q Mr. Smith, this issue of getting
2 your signal from the after market receiver
3 into the radio and out that we have just been
4 talking about -- is that one of the continuing
5 technological issues that your team is dealing
6 with?

7 A Yes, it is.

8 Q And do you expect further
9 improvements in that area?

10 A We certainly hope so.

11 Q And is it correct that your
12 efforts in that area have to operate within
13 constraints imposed by the Federal
14 Communications Commission?

15 A They do.

16 Q And those regulatory risks -- is
17 that a continuing problem for Sirius?

18 A Yes, it is.

19 Q You were asked early on if Sirius
20 could have used geostationary orbits, and you
21 talked about one problem dealing with the
22 available satellites.

1 that, a because I'm a Sirius satellite
2 subscriber, and have been so for three years.
3 That's interesting to know.

4 THE WITNESS: Sir, I would tell
5 you that one of the major reasons I was
6 brought to Sirius was to bring and develop a
7 team in-house that would focus our efforts on
8 improving the reception through our chipsets,
9 and that I am very proud of the effort that
10 that team has done. So I hope you purchase a
11 new vehicle in model year '08 or pick up a
12 recent retail receiver.

13 JUDGE ROBERTS: Well, I will have
14 to let Santa Claus know that.

15 CHIEF JUDGE SLEDGE: If you don't
16 mind talking to the Congress Appropriations
17 Committee, we would appreciate that.

18 THE WITNESS: Yes, sir.

19 CHIEF JUDGE SLEDGE: Any redirect?

20 MR. KIRBY: Yes, sir.

21 REDIRECT EXAMINATION

22 BY MR. KIRBY:

1 Secondly, would the use of a
2 geostationary configuration have affected the
3 quality of the signal that Sirius was able to
4 deliver to the automobiles?

5 A With -- I just want to make sure I
6 understand the question. With the available
7 satellites that we had appropriated at that
8 time, it would have been a weaker signal;
9 because it would have been -- after attenuated
10 by foliage. It would have affected the
11 reception of the signal.

12 Q Would it also have required
13 additional repeaters?

14 A We would certainly have many more
15 gaps, and we would have to have expanded our
16 terrestrial repeater network somewhere on the
17 order that XM has deployed, around 850
18 repeaters.

19 Q And you have about 150. Is that
20 right?

21 A About that, yes.

22 Q And each terrestrial repeater is

1 in essence a little radio station regulated by
2 the FCC. Is that right?

3 A That is correct.

4 Q And have there been regulatory
5 issues with the FCC coming out of some of
6 those terrestrial repeaters?

7 A Yes. We operate under a special
8 temporary authority and, therefore, we need
9 permission from the FCC for each and every
10 site that we operate.

11 Q Now, Mr. Smith, I am going to draw
12 on your statistical -- the statistical part of
13 your professional expertise.

14 You were told during questioning
15 that the launch service that Sirius used -- I
16 think Proton was the name -- had about a six
17 percent failure rate. Do you remember that?

18 A Yes.

19 Q And in a statistical sense, I
20 would assume that each launch is pretty much
21 an independent event, isn't it? Is that a
22 fair assumption?

1 A Correct.

2 Q Okay. And if one of those
3 satellites had failed, Sirius didn't have a
4 back-up, did it?

5 A We still had a unit that was under
6 construction, but it was certainly not ready
7 in that time frame.

8 Q And once it was completed, you
9 would have to get a launch date?

10 A That's correct.

11 Q And then you would run another six
12 percent chance that it might not make it to
13 orbit. Right?

14 A That's correct.

15 Q You were asked if the Sirius
16 satellites had performed well in orbit. Do
17 you remember those questions?

18 A That's correct.

19 Q And you said, yes, they had
20 performed well.

21 A They have.

22 Q Was it a foregone conclusion that

1 A I think it's a fair assumption,
2 yes.

3 Q And I believe you answered one of
4 the Judges by saying that Sirius really needed
5 all three of its satellites to maintain a high
6 quality service. Is that right?

7 A In 2000 we needed a successful
8 launch of every single one of those satellites
9 in order to start our service.

10 Q And if I remember my math
11 correctly, and you are -- Well, let me simply
12 ask. If you have a six percent chance of
13 failure on each of three independent launches,
14 what was the risk that one of those three
15 satellites wouldn't make it to orbit?

16 A Now you're really taxing me. It
17 certainly grows each time.

18 Q Well, it's in the range of 18
19 percent. Right?

20 A Yes.

21 Q Six percent, six percent, six
22 percent, eighteen percent. Right?

1 they were going to perform well?

2 A Absolutely not. I mean, that's
3 one of the reasons that we continue to fly our
4 own satellites and have people that are well
5 skilled in our particular orbits and our
6 particular satellites.

7 Q I have only one further question.
8 If you would find your SX Trial Exhibit 31 and
9 turn to the third page of that exhibit that

10 has the title "FM-5 Technical Risk Issues."

11 Do you see that page?

12 A Yes, I do.

13 Q Now I believe you indicated that,
14 although you didn't know, you suspected that
15 this document was prepared for some sort of
16 internal briefing purpose. Is that right?

17 A That would be my speculation, yes.

18 Q You don't think it was prepared
19 for purposes of this case?

20 A No, certainly not.

21 Q And I just direct your attention
22 to the first bullet point on this page, and

1 the first words on this page are "All high
2 risk issues are understood." Do you see that?

3 A Yes, I do.

4 Q So this document is telling us, in
5 internal Sirius discussions, that Sirius is
6 facing high risk issues. Is that right?

7 A Correct. I mean, just because we
8 understand them and we have action plans
9 doesn't minimize the fact that they remain
10 high risk.

11 MR. KIRBY: That is all I have,
12 Your Honor.

13 CHIEF JUDGE SLEDGE: Any questions
14 from the bench?

15 JUDGE ROBERTS: I have one
16 question.

17 Mr. Smith, in looking at SX Trial
18 Exhibit 31, the last page, there is mention of
19 a Sirius FM-6 and a Sirius FM-7. I assume
20 that these are additional satellites that are
21 on the drawing board?

22 THE WITNESS: That is correct.

1 eventually. And I believe we have indicated
2 that we are likely needing to replace
3 satellites -- I believe it's in 2013 and 2015.
4 JUDGE WISNIEWSKI: You say 2013
5 and 2015?

6 THE WITNESS: Yes, sir.

7 JUDGE WISNIEWSKI: But your
8 testimony in here said 2012.

9 THE WITNESS: I apologize. I'm
10 sure my written testimony is correct. I was
11 just trying to recall what we had in our 10K.

12 JUDGE WISNIEWSKI: That is an
13 interesting statement.

14 CHIEF JUDGE SLEDGE: 2012 would be
15 one of the years that you have indicated.
16 Which was the other year?

17 THE WITNESS: I believe 2015.

18 CHIEF JUDGE SLEDGE: Fifteen.

19 THE WITNESS: I would say that we
20 continuously monitor the health of our
21 satellites, and that the balancing act that we
22 have --

1 JUDGE ROBERTS: Can you tell us
2 approximately when they may launch and what
3 their purpose is?

4 THE WITNESS: So for FM-6 we will
5 likely start construction soon on that, simply
6 because we need to guard against the potential
7 launch failure for FM-5. But the current plan
8 would be to construct FM-6 and FM-7 and
9 operate those in a highly inclined elliptical
10 orbit. And since we would be operating the
11 geostationary satellite, FM-5, on a continuous
12 basis, we only need one other satellite to be
13 broadcasting at a time.

14 So we can create orbits now that
15 just have two satellites flying in those
16 highly inclined elliptical orbits, and they
17 would still maintain high elevation angles and
18 be able to broadcast to the CONUS.

19 JUDGE ROBERTS: So are these two
20 satellites replacements for 1, 2 and 3
21 eventually?

22 THE WITNESS: They would be,

1 JUDGE WISNIEWSKI: I want to come
2 back to this question of timing here, because
3 I am looking at your testimony. I am looking
4 at paragraph 18. This is your written direct
5 testimony, and the last sentence of it says,
6 "Subsequently, Sirius will launch additional
7 satellites to replace those currently in the
8 inclined elliptical orbits by 2012."

9 Could you please clarify whether
10 that is the case or we are talking about one
11 in 2013 and one in 2015 or, as you just
12 responded to Judge Sledge, one of these would
13 be in 2012? Which is it?

14 THE WITNESS: At this point in
15 time, I would say 2012.

16 JUDGE WISNIEWSKI: All of them
17 would be up by 2012?

18 THE WITNESS: That would be our
19 current plan.

20 JUDGE ROBERTS: I am afraid I am
21 still a little confused then. In 2012 what is
22 projected to be flying at that time?

1 THE WITNESS: Flying at that time
 2 would be FM-5, FM-6 and FM-7. What we also
 3 believe is that, by launching FM-5, FM-1, 2
 4 and 3 would still have useful life, and so our
 5 ability to manage at that time in the future
 6 exactly when to launch would be a decision
 7 that we could make based upon the current
 8 health of those satellites.

9 JUDGE ROBERTS: So there is
 10 nothing planned for 2013 or 2015?

11 THE WITNESS: No. I believe that
 12 reflects what we believe the useful -- the
 13 current useful life of those satellites are.
 14 I believe that is what I am recalling from our
 15 10K.

16 JUDGE ROBERTS: Of 1, 2 and 3?

17 THE WITNESS: Yes, sir.

18 JUDGE ROBERTS: Thank you for
 19 clarifying that.

20 CHIEF JUDGE SLEDGE: Judge
 21 Wisniewski, anything else? Any other comments
 22 in response to the Judges' comments?

1 CHIEF JUDGE SLEDGE: Mr.
 2 Wilsterman, will you please raise your right
 3 hand?
 4 Whereupon,
 5 DOUG WILSTERMAN
 6 was called as a witness by counsel for the
 7 Sirius Satellite Radio, Inc., and, having been
 8 first duly sworn, was examined and testified
 9 as follows:

10 CHIEF JUDGE SLEDGE: Thank you.
 11 Please be seated.

12 DIRECT EXAMINATION
 13 BY MR. STURM:

14 Q Will you state your name, please?
 15 A Doug Wilsterman.

16 Q You have in front of you Exhibit
 17 33, which is your written direct testimony.
 18 Can you identify that as your testimony?
 19 A Yes, this is my testimony.

20 Q Right. Have you reviewed that
 21 testimony again recently?
 22 A Yes, I have.

1 Questions?

2 Thank you, sir.

3 THE WITNESS: Thank you.

4 CHIEF JUDGE SLEDGE: Would it
 5 interrupt anyone's schedule to change our
 6 break, now as opposed to 15 minutes from now?

7 MR. JOSEPH: No, Your Honor. That
 8 would be fine with Sirius.

9 CHIEF JUDGE SLEDGE: All right.

10 We will recess for an hour.

11 (Whereupon, the foregoing matter
 12 went off the record at 12:15 p.m.)

13 CHIEF JUDGE SLEDGE: Thank you.

14 We'll come to order.

15 All right, Mr. Joseph.

16 MR. JOSEPH: Your Honor, I'd like
 17 to introduce my partner, Michael Sturm, whom
 18 I actually introduced earlier, who will be
 19 calling our next witness.

20 CHIEF JUDGE SLEDGE: Thank you.

21 MR. STURM: Your Honor, Sirius
 22 calls Doug Wilsterman.

1 Q Okay, and do the statements you
 2 made there remain true to the best of your
 3 knowledge, sir?

4 A Yes, to the best of my knowledge
 5 they remain true.

6 MR. STURM: I would move the
 7 admission of Sirius Exhibit 33, Your Honor.

8 CHIEF JUDGE SLEDGE: Any objection
 9 to Exhibit 33?

10 MR. DeSANCTIS: No objection, Your
 11 Honor.

12 CHIEF JUDGE SLEDGE: Without
 13 objection it's admitted.

14 (Whereupon, the document
 15 referred to was marked
 16 as Sirius Exhibit No. 33
 17 for identification and
 18 received in evidence.)

19 BY MR. STURM:

20 Q Mr. Wilsterman, before we get into
 21 the meat of your testimony, just so the Judges
 22 have a little bit of context, could you tell

**Before the
LIBRARY OF CONGRESS
Copyright Royalty Board**

In the Matter of)
)
Adjustment of Rates and Terms for)
Preexisting Subscription and) Docket No. 2006-1 CRB DSTRA
Satellite Digital Audio Radio Services)
)

**DIRECT TESTIMONY OF ANTHONY J. MASIELLO
(ON BEHALF OF XM SATELLITE RADIO INC.)**

1. My name is Anthony J. Masiello. I am currently employed by XM Satellite Radio Inc. ("XM") as Senior Vice President of Operations. I have been employed by XM in that capacity since 1999. My responsibilities at XM encompass all technical aspects of our broadcast operation, including our broadcast signal, broadcast studios, transmission equipment, network operations and radio receivers.

2. My testimony will discuss, from a technological standpoint, the enormous effort and expense required to develop and launch the XM service, the ongoing efforts and expense of our operations, and our continuing commitment to innovation. This effort is unparalleled in the radio industry. Not since the introduction of FM broadcasting has an audio broadcasting service had to design, build and launch, virtually from scratch, all aspects of its service infrastructure from signal to receiver. But, unlike today's FM radio broadcasters, satellite radio had to pay for the spectrum, as well as design and build satellites and receivers in order to deliver their service to the public.

3. Each stage of this effort was undertaken with great care to deliver the best possible sound and a diverse array of program and data services using a finite amount of bandwidth. As a result of these efforts, XM has opened new technological avenues in the broadcasting field -- creating the world's largest state-of-the-art digital broadcast studio complex, which feeds more channels of audio with better sound quality, and new data services, to increasingly smaller car, home and portable radio receivers. Perhaps only the evolution of satellite television from a service utilizing expensive, large dishes as receivers to easy-to-install DBS service is comparable. XM, however, achieved this in just a few years, with much more compact equipment, and in a much more demanding mobile vehicle transmission environment.

Industry Experience Prior to Joining XM

4. I have more than 35 years of relevant experience in broadcast operations, starting with a position at Fordham University's WFUV-FM in 1968. At WFUV, I operated and maintained the transmitter facilities as part of a work-study assignment. I also took courses in basic broadcast signals and electronics, computer science, and tube design, and obtained my FCC First Class license to operate and maintain broadcast facilities. In 1971, I was employed by ABC Radio Networks, where I was assigned to the radio network division and began doing field and studio technical work. By 1977, I was manager of broadcast services for ABC Radio. My responsibilities included station interconnects to the network, and setting up remote broadcasts for major news and sporting events such as political conventions and the Olympics. Initially, the network operated over analog AT&T land lines. In 1979, toward the end of my tenure at ABC, the network was making the transition to use of digital broadcast satellites. On the management side, I was the team member receiving and reviewing bids on how to link to our affiliates to the

ABC Radio network via satellite, and we conducted numerous audio tests to evaluate the sonic quality of satellite digital radio transmissions.

5. In 1980, I became Director of Operations and Engineering for Enterprise Radio, a start-up 24 hour sports talk service. In 1982, I became the Vice President of Engineering for Dick Clark Productions' United Stations. I built the studios and satellite transmission infrastructure for the company, a 24-hour broadcaster and syndicator of programming to radio stations, including shows such as Dick Clark's "Top 40" countdown.

6. In 1984, I became Vice President of Engineering at Meadowlands Communications. The company built systems for satellite transmission at stadiums, all in digital format. We handled all of the 1984 Los Angeles Olympic coverage. We also handled news coverage, interconnecting with local audio/video lines and then uplinking the signal for distribution. In 1986, I became an industry consultant. For one of my clients, based in Homdel, New Jersey, I developed a business plan to deliver commercials to stations via satellite (as opposed to shipping physical tapes).

7. I joined CBS Radio Networks in 1988 as the Director of Technical Operations, and was later promoted to Vice President, Technical Operations. In these roles, I had responsibility for all the technical and engineering aspects of CBS's AM and FM owned and operated stations, as well as the CBS radio network programming delivered to affiliate stations. My work included designing facilities and building studios for broadcasting. I led cutting-edge technology efforts at CBS in which I developed substantial expertise in the processing of digital audio signals, and in "audio compression" technology that could reduce the amount of digital information in a broadcast transmission signal yet still produce clear digital sound quality. I also developed a second area of expertise concerning digital audio broadcasting by terrestrial radio

broadcast services. I studied the European Digital Audio Broadcasting system, and worked on early in-band on channel digital audio transmission systems (a technological standard that provides a method for transmitting near-CD quality audio signals to radio receivers along with new data services such as station, song and artist identification, stock and news information, as well as local traffic and weather bulletins). I also participated in founding a company known as USA Digital, which later became iBiquity – the company that created the terrestrial broadcast signal technology used in HD Radio in the United States.

My Role at XM

8. In 1999, I was recruited by XM. When I joined the company as Vice President of Broadcast Operations, XM had little more than an FCC license and satellite designs. There were no studios, no chipset technology and no satellites had been launched. The owners of what would become XM had invested \$90 million dollars in an FCC license on the assumption that the right team of people would be willing to come to XM to design and build the entire technology and operating infrastructure needed for the successful launch of the audio service, a service that competes with AM/FM radio, which people traditionally used for free. The satellites needed to be built to XM's specifications, insured and launched. Likewise, a network of terrestrial repeaters had to be constructed so that the XM signal could be heard coast to coast with little interference or interruption. Signaling protocols, integrated circuits, chipsets and radios had to be developed from scratch. An entire broadcast operations center needed to be created, including studios for production and transmission of programming.

9. My job was to oversee the design and build out of XM's broadcast infrastructure. This was an enormous technological challenge. However, I thought it could be accomplished, and was fairly confident that consumers would pay for radio as they did for cable television

service. I was enthusiastic about the opportunity, and left a conventional and secure broadcasting job to move to Washington and help start XM.

10. My primary responsibilities include oversight of all technical aspects of XM's operation through to the uplink to the satellite. My department includes about [70] technical operations employees at our Washington, D.C. facilities. Another [75-100] technical employees reside at our Florida technical development location (known as the "Innovation Center"). Since I started at XM, I have recruited top tier people with the ability to think "outside the box," which was necessary when launching a new technology service. On the satellite side, we hired people who had worked at RCA Americom (now SES Americom), a pioneering communications satellite firm. Patent holders and innovators who previously worked at Motorola, Inc. make up part of the staff in Florida.

XM's Facilities and Technology

11. In our D.C. facility, XM built the largest digital broadcast studio complex under one roof, using state-of-the-art digital production and broadcast technology. All of the 82 studios in that facility, including dedicated production studios, are able to go live on-air. By way of comparison, at the time that I worked for CBS, CBS radio network had only 10-11 studios. In addition to being the largest digital complex, I believe XM has one of the largest radio studio complexes of any type, analog or digital, in the western hemisphere. Only the BBC can rival the number of distinct studios under one roof. [Masiello Exhibit 1 is the floorplan of our D.C. studio complex.]

12. To accommodate air talent in other parts of the country, we have three studios in New York City, including one at Jazz at Lincoln Center; one in Nashville, Tennessee; and one in Chicago (used in conjunction with Oprah Winfrey's Harpo Productions). We lease the space at

Jazz at Lincoln Center, have built studios and own all of our broadcasting equipment. Likewise, in Nashville, our studio is at the Country Music Hall of Fame, but we built out the studio and provided the equipment. At the other two locations in New York, we lease the space but have built the studios to our own specifications and supplied all equipment. The Chicago studio is owned and operated by XM and was built in conjunction with Harpo Radio, Inc. as part of the agreement to create the Oprah & Friends channel on XM. In addition to the effort and expense involved in building these state-of-the-art studios, XM must maintain the equipment, create the technological link to the XM's main broadcast center, and staff the space with skilled personnel. Masiello Exhibit 2 is a photograph of our Jazz at Lincoln Center studio. Masiello Exhibit 3 is a photograph of our Nashville studio. Masiello Exhibit 4 is a photograph of our Chicago studio.

13. Our Washington, D.C. facilities include our broadcast, network and technical operations centers. Broadcast operations consists of the studio and technical facilities that enable our programmers to generate the content aired on XM. Broadcast operations prepares and stores content and makes content available for broadcast to subscribers. Masiello Exhibit 5 is a photograph of our D.C. broadcast center.

14. Network operations runs the network and the satellite uplink. It is the control center that supervises operation of the satellite network and the terrestrial repeater network. The company also has a back-up uplink site in an undisclosed location. Masiello Exhibit 6 is a photograph of our D.C. control center.

15. Technical operations provides support for all of XM's departments. We support all aspects of the studio and broadcast operation, and the uplink to the satellite. We monitor IT operations (the servers, switches, and local area networks), but do not offer general IT support to XM desktop PC users.

16. Costs of broadcast operations were \$17 million for 2005. These include costs associated with the management and maintenance of systems and facilities, production and performance studios used in the creation and distribution of XM-original and third party content via satellite broadcast, and web and other new distribution platforms. I now turn to a more detailed account of the development of XM from a technological perspective.

Initial Design

17. Contracting for the first and second satellite was completed by March 1998, and some work was done on XM's system technology during 1998. Most of the design and development process took more than three years prior to the launch of the XM service. The process encompassed the design of the XM signaling protocols, the design, manufacture and launch of the satellites, the design and construction of XM's broadcast and operations facilities, the design and manufacture of the terrestrial repeater network, the design and development of XM's chipset and the design and manufacture of the XM radio receivers. The satellites had to be specially designed for XM. The steps I describe below basically needed to occur in sequence.

18. The first and most critical step toward XM's launch was to develop the technical specifications (or "waveform") for the signals that transport the XM broadcast content from the studio to the XM radios. Many fundamental and difficult decisions had to be carefully made in developing these specifications. All these decisions had to be made correctly from the start. The audio signal protocols could not be changed once the service launched, because any such changes to the signal would make the signal incompatible with radios already in the field. Some of these critical design decisions were:

-- Because all XM subscribers receive exactly the same broadcast signal, the signal design had to take into account variations in listeners' locations and the demands of transmitting signals to moving vehicles and portable receivers.

-- The system had to be robust enough to uplink to the satellite and be received clearly by subscribers.

-- We had to select a secure encryption method that could guard against theft of the XM service, without imposing severe processing obligations on the receivers that would have to decrypt the signal.

-- The key question was how to manage the trade-off between the sound quality of each channel and the total number of channels that XM could broadcast. Better sound quality requires greater bandwidth, and the amount of total available bandwidth was a finite commodity allocated to us by the FCC. Therefore, one of the most important initial decisions was to test various compression technologies, and license the most efficient algorithm for broadcasting. To further maximize sound quality, XM also licensed from Neural Audio a processing technology customized for XM that would deliver a high quality, optimized stereo image to the consumer, while reducing the amount of data XM must transmit per channel. The distinctive "sound of XM" relates directly back to this decision. Two independent tests conducted in 2002 concluded that the XM signal yielded superior satellite radio sound quality. We were able to launch the service in 2001 with 100 digital channels and today we offer more than 170 channels of talk, music, and other entertainment on the XM service.

Satellite and Uplink Design and Launch

19. Another fundamental question that we needed to address when I joined XM was how to ensure the best possible reception of the satellite-delivered signal. XM has three

enormous challenges: delivering a signal to moving vehicles; delivering a signal in urban areas where a satellite may not have the necessary line of sight with the receiver; and ensuring complete, nationwide coverage. Because consumers long have experienced interference in receiving FM stations, and loss of signal when traveling out of the range of the station's antenna, XM had to provide outstanding nationwide coverage in order to convince consumers to pay for an XM subscription.

20. The entire XM transmission system consists of satellite uplink dishes that send the XM signal to several geostationary satellites, which in turn re-transmit the signals to the United States; and a network of approximately 800 terrestrial repeaters, located in the top broadcast markets, which receive and re-transmit the satellite signals in places where the direct satellite signal might otherwise be obstructed by tall buildings, mountains, or tunnels. These repeaters are installed on rooftops or existing tower structures. They receive the XM signal from one of the satellites, amplify it and retransmit it at higher signal strength to overcome any obstructions. Masiello Exhibit 7 is a photograph of one of XM's satellites. Masiello Exhibit 8 is a photograph of one of XM's repeaters.

21. Our system, which was initially designed entirely on paper, included repeaters from the outset. We launched commercial service only when a sufficient repeater network was in place so a consumer could drive from coast to coast through dense urban and wide open areas and never lose the XM service. XM had to participate in the design of the repeaters, as satellite radio was the first (and remains the only) satellite based service that uses S-band repeaters this extensively. We also had to determine proper placement of the repeaters, and take into account the degree of overlap needed and the chance that repeaters may cause interference with one another, as they all share the same frequency band.

22. After the “on paper” phase of this signal design was complete, the transmission system had to be tested in the field before we launched our satellites. Our testing included simulations where test XM transmitters were “launched” in helicopters, and the signal was received on pre-prototype XM satellite radio receiver boxes.

23. We next had to design and map out the basic elements of the satellite system including the physical uplink, the construction of the satellites, and the actual launch. This effort was enormously expensive, at a cost of [\$220-225 million per satellite for XM 1 & 2 and over \$290 million for XM 3.] Hughes (now part of the Boeing Company) constructed the satellites, which includes the basic satellite infrastructure. Alcatel provided the communications payload elements of the satellites that are particular to the transmission of XM and were designed specifically to handle our application. Each of the satellites was launched by rocket from the sea. The Sea Launch consortium handled the launch for XM. Sea Launch was a new satellite launch service at the time, having successfully launched only a handful of satellites before sending XM’s first satellite into orbit. Launching satellites is inherently a risky endeavor, even for the most experienced launch companies, and therefore insurance is required, costing per satellite over [\$40 million for XM 1 & 2 and \$50 million for XM 3].

24. To enable nationwide reception and the technology necessary for a viable satellite radio service, XM had to launch its own satellites built to its own power and other specifications. Thus, XM did not have the option of merely renting time on another company’s satellite. Commercial communications satellites generally transmit low-power signals that can be received by dishes of various sizes, from the relatively small dishes that feed DBS such as DirecTV or Echostar to commercial dishes several feet in diameter. But cars cannot drive around even with the small parabolic dish antennas that focus and amplify a low-power signal. The need to

purchase and install dishes would also limit the appeal for home use, and would rule out any reasonable opportunity to develop portable and personal radios. Moreover, because the signal must be delivered to moving vehicles, this signal must be omnidirectional, rather than narrowly targeted to specific stationary receiving dishes. Therefore, to be successful, XM needed satellites capable of blanketing the country with an extremely high power signal that could be received by a very small antenna mounted on the roof of a car, or situated in a consumer's home, or embedded in a hand-held portable device.

25. We planned the launch of two geostationary satellites located at widely spaced orbital positions (85°W and 115°W) covering the entire 48 contiguous states with overlapping footprints. Each satellite alone covers the entire 48 contiguous states. (We named these satellites "Rock" and "Roll.") Each satellite has two transponders that transmit across different frequencies. The purpose of having multiple satellites and transponders is to ensure that if a subscriber's receiver were to lose contact with one satellite, it could quickly pick up the signal from another satellite. The different positioning of the two satellites in space provides for "Space Diversity" making satellite reception robust. In addition to space diversity, XM's waveform also employs "Time Diversity" which buffers 4 seconds of all signals (from the satellites and terrestrial repeaters) in the radio receivers eliminating "drop outs" when the vehicles travel into small tunnels and/or highway underpasses.

26. We have launched a third satellite, named "Rhythm," in February 2005 and will launch a fourth satellite, named "Blues," sometime in 2006. We had to launch additional replacement satellites, only four to five years from our initial service launch, due to the unexpected rapid deterioration of the transmission power of the two original satellites. This was

the result of a manufacturer's defect in the satellite's solar power system which was discovered shortly after the satellites were launched into space.

27. The "uplink" side of XM is the transmission of broadcast signals from large (7-meter wide) parabolic satellite dishes located at XM's facilities to the satellites, which then beam back down to subscribers' radios and the terrestrial repeaters. In case of technical interruptions, XM also has a redundant uplink facility in an undisclosed location. Masiello Exhibit 9 is a photograph of XM's parabolic satellite dishes used in our uplinks.

28. The uplink system that prepares the signal and transmits it to the satellites had to be developed from scratch. The uplink system first compresses the 170 channels of audio and the non-audio data channels and builds them into a single encrypted XM signal. That "multiplexed" signal then is modulated onto a carrier frequency, and is fed to the satellite dishes which amplify the signal for transmission to the satellites. The uplink system also includes the business authorization system. This is part of the broadcast signal that transmits commands that "turn on" each individual subscriber's radio when a consumer activates a new subscription account.

29. For urban areas, where the satellite signals could be blocked by tall buildings, we needed to design and install a network of signal terrestrial repeaters on the ground that would receive the satellite signal and retransmit that signal to fill in the gaps in coverage. These repeaters had to be designed to operate on a different signal frequency and use a different modulation method than the satellites. This optimizes propagation of the signal, and avoids interference with the satellite signal. As noted above, our approximately 800 terrestrial repeaters are a central part of the XM system architecture, and contain some custom-built components. XM obtained a separate FCC authorization for these repeaters. That authorization was granted

on an interim basis in 2001. Creating our repeater network is not just a one-time investment, since we have to maintain the repeaters on a continuous basis. Subject to FCC approval, we are also planning to add repeaters during the next 1-2 years, and on an ongoing basis, to replace existing repeaters to further enhance the integrity of our signal reception. For 2005 alone, XM's costs relating to its satellites and terrestrial repeater network was \$42 million.

Progression of Radio Receivers

30. All XM radios perform the same essential functions. They receive the signal from the XM satellites and repeaters. They then amplify the signal, de-modulate the digital signal from the carrier frequency, separate (or "de-multiplex") the single signal into channels that can individually be tuned, then tune in each individual channel. These radios are capable of receiving and processing the XM signal from XM satellites and from terrestrial repeaters. These radios are one-way receivers that send no information back to the satellite. For that reason, XM has no technological way to know whether or how long a particular XM radio is on, or what any subscriber is listening to.

31. XM itself designed all aspects of the radios used to receive the XM signal. These XM radios have several key components. The first, most fundamental, element is the chipset, which provides the "brains" of the radio devices subscribers use to receive the XM signal. It has evolved substantially over the years to become more capable, sophisticated and complex, yet significantly smaller and lower cost than the first generation chips. Our own engineers at XM's Deerfield Beach, Florida facility designed the radio, including proprietary chipsets. Although it was more expensive to do it this way, XM reaped a tremendous competitive benefit by retaining control over all aspects of the design process and understanding how all of the technological

elements came together. Once the chipset was developed, we sent it to outside manufacturers to mass produce.

32. The second element is the “XM stack” – the software the radios use to control the radio hardware, tune individual channels, and display information to the user. All display functions, including the information displayed about a song as it is played on XM and data-only displays, such as scrolling stock prices and sports scores, are controlled by the stack. The XM stack also incorporates complex algorithms resulting in a robust signal reception in “difficult” terrestrial environments (areas with high terrain and multiple building reflections).

33. The third element is the antenna to receive the XM signal. All XM antennas must be electrically powered to receive the signal from the XM satellites and the terrestrial repeaters, and then to amplify the signal. A major radio design milestone was the reduction of the size of the antenna, which has led to development of portable receivers similar in size to a cell phone (which I discuss below).

34. Through dedicated development efforts, we have evolved these three elements substantially over time to provide additional functionality in a much smaller form factor, while remaining compatible with the same XM signals that still work in the very first generation of radios.

35. The first XM radio receivers available for consumers were after-market units designed for use only in vehicles, and were produced by Pioneer and Alpine. To install these units, the old car radios had to be replaced with the new XM unit. The XM radios consisted of two pieces. One was a very large (about 6” by 9”) black box unit that was installed in an automobile’s trunk. The other part was a head unit installed in the dashboard, which allowed for tuning to different XM channels. A separate antenna for satellite and repeater reception that

looked like a shark fin was installed on the roof of the car. Masiello Exhibits 10 and 11 show an early radio and antenna.

36. Sony was the first manufacturer to come out with the first generation “Plug and Play” XM radio, with a chipset designed by XM, which enabled subscribers to add XM radio to their existing car audio system using an adapter unit rather than replacing the existing car radio. Masiello Exhibit 12 is a photograph of a first generation “Plug and Play” radio.

37. The constant reduction in chipset size led to the next generation “Plug and Play” radio, the “SKYFi,” a unit that could be powered by an AC adaptor or batteries, allowing subscribers to experience XM in the car, at home or virtually any location. The SKYFi was designed entirely by our Florida engineers and branded by Delphi. Masiello Exhibit 13 is a photograph of a SKYFi radio.

38. The chipset continued to shrink, allowing for production of the smaller “Roady” series. In 2005, XM introduced the first portable “XM2Go” receiver radios that subscribers could use either to receive live XM signals (like a portable transistor radio) or to record 5 hours of XM to enjoy in locations where XM signals cannot reach (such as in an office, the gym or on an airplane). The technological breakthrough with these “XM2Go” devices was a reduction in chip size and power consumption and development of an integrated antenna without losing signal quality in outdoor environments. Masiello Exhibits 14 and 15 show an XM2Go and MyFi (with integrated antenna) radios.

39. Following the introduction of radios in the retail or automotive after-market channel, XM began working with automotive partners to include XM radio as a factory-installed option in new cars. GM began to offer XM radio as original equipment in certain new Cadillacs in late 2001 and expanded its offering to other vehicle makers in subsequent years.

40. In less than five years, XM not only released the first satellite radio receivers, we reduced the size of the entire radio – including the chipset and antenna – to a device that could fit in the palm of a subscriber’s hand.

41. Hardware innovations continue at a fast pace. Just this year, XM introduced two new devices. One is the “Mini-tuner,” which is a matchbook sized XM radio receiver unit that a consumer can snap into a specially-equipped car unit or home stereo. The second is our new series of smaller, more attractive XM2Go devices. Known as the “inno” by Pioneer and the “Helix” by Samsung, these devices can receive live XM radio, record XM channels or programming (like a TiVo or VCR), and store sound files from the subscriber’s own collection (such as from the Napster online music service or from the subscriber’s own PC). Masiello Exhibit 16 is a photograph of an XM mini-tuner. Masiello Exhibit 17 is a photograph of an inno radio.

42. Another innovation by XM is the delivery of audio channels in “surround sound,” that can be enjoyed on home theater systems manufactured by consumer electronics manufacturers such as Yamaha, Pioneer, Onkyo, Denon, and Sony. At present, the XM Classical “Pops” channel and XM’s “Fine Tuning” are encoded for surround sound.

43. XM’s research and development efforts are extremely costly. For example, costs of research and development were total \$31 million for 2005. But innovation is essential to help make the XM service more ubiquitously available to consumers, as well as to drive down costs of the hardware. To penetrate the mass market rapidly, radios had to evolve from bulky, expensive devices to a range of price points, including small, \$30-50 units that could easily be used in a car or home stereo system.

XM's Data Services

44. The XM service also includes transmission of data, some of which is broadcast on non-audio data channels. For example, data concerning channel identification, program content and/or song information is sent for each channel. All of this information is sent on a Broadcast Information Channel separate from the audio channels themselves. Other data also enables textual and graphic features (such as channel names and logo designs) on XM radios or display of sports scores and stock prices.

45. XM's local traffic, weather, and emergency alert service provides audio channels dedicated to 21 metropolitan areas, covering 177 million people, just over 50% of the total population of the United States. The traffic data is provided by traffic.com, which is a service that uses traffic sensors on roadways, coupled with state and local Department of Transportation data, to create a database that in turn provides usable information to XM. Weather data is provided by The Weather Channel, which has a dedicated website that XM may access. Emergency alert information is provided by a number of government sources, as well as broadcast and cable news networks. XM employees create the audio broadcasts for each of these channels from our studios utilizing this third party data.

46. We also provide "XM WX Satellite Weather," an aviation and marine service. This data provides real-time graphical weather data, including NEXRAD radar, temperature, windspeed, and other information in plane cockpits. It has been adopted as the leading cockpit weather solution for the aviation industry, and is now a built-in feature on over 80% of new general aviation planes sold in the U.S. Baron Services provides the weather data to XM for broadcast. Masiello Exhibit 18 is a page from the XM website describing the XM WX Satellite

Weather service. This service is only possible because of the extensive capabilities of the XM broadcast system to deliver real-time data to an aircraft while in flight.

47. XM's "NavTraffic" service provides real-time traffic updates to a vehicle's on-board GPS navigation system. The service, which launched in October 2004, is now available in 44 metropolitan areas. Honda, GM, Toyota, and Nissan offer vehicles equipped with suitable GPS navigation systems to receive the NavTraffic service and leading manufacturers of aftermarket navigation systems, including Garmin, Pioneer, and Alpine, offer devices which also use the service. The data for the NavTraffic service is provided by Navteq, a provider of digital map data for vehicle navigation systems. Navteq gathers traffic data from multiple government and commercial sources and transmits the data to XM in a codified form that is relevant to a map-based display. Masiello Exhibit 19 is a page from the XM website describing the XM NavTraffic service.

48. Automotive telematics, which include data services such as "NavTraffic" that can interact with GPS systems, were envisioned by XM at the outset of developing XM's service. Other automotive telematics services now in development or in limited use include sending an overlay of weather information onto maps showing traffic information; information from Zagat on restaurants located close to the subscriber's vehicle; and information which utilizes sensors in parking garages to help locate open parking spaces.

49. The Zagat restaurant data is the result of a partnership with Honda, and is available in certain Honda and Acura vehicles. With this service, XM does not provide the data content itself, but acts as a pipeline to the carmaker's vehicles.

50. XM's far-reaching, reliable coverage uniquely positions XM to provide vital emergency assistance to communities in need; terrestrial disasters may devastate other

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communication services but not affect XM's satellite-based communication. When Florida was devastated by hurricanes in September 2004, XM launched XM Emergency Alert Channel 247, which is dedicated to providing critical information after natural disasters and other emergencies. We make this service available to emergency responders with XM radios, without any subscription. In the aftermath of Hurricane Katrina, XM was able to broadcast to the affected areas, while traditional radio and television stations were knocked off the air for an extended period of time. XM established another free service during Katrina, the Red Cross Radio channel, which reached workers and aid stations in the Gulf Coast region. XM donated 300 radios during this crisis to quickly disseminate critical emergency news and aid information.

51. This commitment to public service led to the development of an alert feature that tells the user that important safety, weather or traffic information is being transmitted on another XM channel. [Starting in early 2007, subscribers with second-generation XM2Go receivers will be able to type in location information, and automatic alerts will be delivered when there is an emergency in the area].

Future and Continuing Technology Investments for XM

52. As discussed above, XM is continually innovating to make its service and radios attractive and more affordable to subscribers and partners. I expect such innovation to continue at an accelerated pace over the next five years so XM can remain competitive in the ever-changing consumer electronics and audio entertainment industries.

53. In addition to developing new features and hardware, XM must perform ongoing maintenance so that our infrastructure remains sound and there is no drop-off in the quality and coverage of XM's signal. This maintenance must be done on all of the systems I have described above, including some that I will highlight below.

54. Our fourth satellite will be launched later this year, and work is underway on our fifth satellite, which is being built by Loral. This satellite is being built as a ground spare. Our network operations department will continue to monitor the first two satellites, which will be powered down but kept as in-orbit spares.

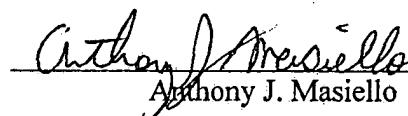
55. Our network of terrestrial repeaters must also be maintained and expanded. As elements of these repeaters reach the end of their useful life, they must be replaced. Leases for repeater sites need to be renegotiated periodically. Subject to FCC approval, we also will add new repeaters to the network over the next five years to improve signal coverage.

56. Our production and performance studios and equipment must also be maintained and replaced as necessary. [For example, in 2008, we are scheduled to begin a three year project to replace the audio consoles and audio routing equipment for all of our studios except for our new Chicago studio.]

Certification

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, DC
October 30, 2006


Anthony J. Masiello
Anthony J. Masiello

Senior Vice President of Operations,
XM Satellite Radio Inc.

Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of: °

Adjustment of Rates and Terms ° Docket No.

for Preexisting Subscriptions ° 2006-1

Services, ° CRB DSTRA

and °

Satellite Digital Audio Radio °

Services °

Room LM-408

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Wednesday,

June 6, 2007

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30

a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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Sirius

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1 THE WITNESS: April of '05.
 2 JUDGE WISNIEWSKI: April of '05
 3 had a negative impact on revenues?
 4 THE WITNESS: Correct. Because it
 5 impacted our churn, which is the percentage of
 6 customers leaving the service, and we saw an
 7 impact to conversion rate.

8 JUDGE WISNIEWSKI: Now, that's not
 9 so surprising in a sense. I mean, a normal
 10 relationship on a typical demand curve is an
 11 inverse relationship between price and
 12 quantity, so that if the price goes up you
 13 would expect to have fewer units sold at that
 14 new price, wouldn't you?

15 THE WITNESS: Right. It changes
 16 the value equation for --

17 JUDGE WISNIEWSKI: The real
 18 question is what happens to total revenue as
 19 a result? Because if prices goes up,
 20 multiplied by the number of new units, even
 21 though the number of units may be less, the
 22 offset in price may make up for that in terms

1 average revenue per unit or per subscription.
 2 CHIEF JUDGE SLEDGE: All right.
 3 Thank you, sir.
 4 THE WITNESS: Thank you.
 5 CHIEF JUDGE SLEDGE: All right.
 6 MR. MILLER: Thank you, your
 7 Honor. We would like to call the last company
 8 witness on behalf of XM, Mr. Anthony Masiello,
 9 who is here to be sworn, your Honor.

10 WHEREUPON,
 11 ANTHONY MASIELLO
 12 was called as a witness by Counsel for XM
 13 Satellite Radio and, having been first duly
 14 sworn, assumed the witness stand, was examined
 15 and testified as follows:
 16 DIRECT EXAMINATION

17 BY MR. MILLER:
 18 Q For the record, this is Ralph
 19 Miller here for XM again. Could you state
 20 your name for the record, please, sir?
 21 A Anthony J. Masiello.
 22 Q Where are you currently employed?

1 of the additional revenue; isn't that a fair
 2 statement?

3 THE WITNESS: That may be,
 4 although it may be that the --

5 JUDGE WISNIEWSKI: I'm trying to
 6 get to Mr. Meyer's reference, oblique
 7 reference to elasticity earlier.

8 THE WITNESS: Right. I think that
 9 the thinking was you could, with the rate
 10 increase, you could increase revenue. But the
 11 intention was to spend back some of that
 12 revenue on other marketing funds.

13 JUDGE WISNIEWSKI: Well, what, in
 14 fact, happened to your annual revenue per
 15 average subscription over this period that's
 16 in the charts, 2004 through 2006?

17 THE WITNESS: The ARPU, as we call
 18 it, did increase over time gradually.

19 JUDGE WISNIEWSKI: Thank you.

20 CHIEF JUDGE SLEDGE: What was the
 21 word you said? The what did increase?

22 THE WITNESS: We call it ARPU,

1 A XM Satellite Radio.
 2 Q What's your position at XM
 3 Satellite Radio?
 4 A Senior Vice President of
 5 Operations.
 6 Q And how long have you been at XM?
 7 A Since August of 1999.
 8 Q Tell us briefly about your
 9 educational background.
 10 A I attended Fordham University and
 11 also took electronic courses to study for the
 12 FCC First Class License and been involved in
 13 continuing education, particularly in the
 14 field of digital audio and digital audio
 15 compression.

16 Q Did you receive any government
 17 licenses related to broadcasting?
 18 A Yes. FCC First Class License.
 19 Q And what did that authorize you to
 20 do?
 21 A It will authorize you to operate

1 transmitters, AM/FM transmitters, to change
 2 parameters and, more importantly, to perform
 3 maintenance on those devices.

4 Q How many years have you been
 5 working in broadcast operations?

6 A Yes, sir, around 35 years.

7 Q Has that been predominantly radio?

8 A Yes, it has.

9 Q Have you worked for any radio
 10 networks?

11 A I worked for ABC Radio Network and
 12 for the CBS Radio Division.

13 Q What was your, what did you do at
 14 ABC?

15 A I started out as an Operations
 16 Supervisor and became a Studio Field and
 17 Master Control Technician, and then became
 18 Manager of Broadcast Services.

19 Q And what did you do for CBS?

20 A Vice President of Technical
 21 Operations, responsible for the owned and
 22 operated radio stations of CBS and the radio

1 A Yes, it is my testimony.

2 Q And are there exhibits attached
 3 with each section of Exhibit 1, which was
 4 restricted?

5 A Yes, there are.

6 MR. MILLER: We would offer XM
 7 Exhibit 7, unless the order has been entered
 8 that says we don't have to do that.

9 CHIEF JUDGE SLEDGE: Any objection
 10 to Exhibit 7?

11 MR. HANDZO: No, your Honor.

12 BY MR. MILLER:

13 Q Mr. Masiello, what, basically, had
 14 been your primary responsibilities --

15 CHIEF JUDGE SLEDGE: Without
 16 objection, Exhibit 7 is admitted.

17 (Whereupon, XM Exhibit
 18 No. 7 was received into
 19 evidence.)

20 MR. MILLER: Sorry, your Honor.

21 BY MR. MILLER:

22 Q What would have been your

1 network.

2 Q And how long were you at CBS?

3 A Eleven years.

4 Q Have you worked at other
 5 businesses in the radio broadcasting field, as
 6 well?

7 A Yes, I have.

8 Q Are those set forth in your direct
 9 testimony?

10 A Yes, they are.

11 MR. MILLER: If I might approach,
 12 we have what's been marked as XM Exhibit 7,
 13 which is the Public Direct Testimony of Mr.
 14 Masiello.

15 (Whereupon, the above-
 16 referred to document was
 17 marked as XM Exhibit No.
 18 7 for identification.)

19 BY MR. MILLER:

20 Q Mr. Masiello, would you look at XM
 21 Exhibit 7 and see if you can identify it for
 22 the Judges, please?

1 responsibilities at XM?

2 A Responsible for the overall
 3 technical aspects of the broadcast operation,
 4 dealing with the broadcast studios, operation
 5 of the uplink. Basically, responsibility for
 6 making sure the signal gets from our
 7 programming center to our subscriber's radio.

8 Q The first subject I'd like to turn
 9 to is, look a little bit at your direct
 10 testimony and talk about the subject of XM's
 11 facilities, which begins on paragraph 11. Do
 12 you recall that part of your testimony?

13 A Yes, I do.

14 Q You have some pictures attached of
 15 some of the facilities of XM.

16 A Yes, there are some pictures
 17 attached of various studios.

18 Q Would you turn to Exhibit 2, which
 19 shows the studios in New York, and explain to
 20 the Judges what happens in a broadcast studio
 21 like the ones we're looking at under Exhibit
 22 2.

1 A We have quite a number of these
 2 studios, and I'd like to give you a couple of
 3 examples of what we used them for. It's
 4 primarily used to really enhance the whole
 5 music experience. One of our channels, the
 6 60s channels for instance, and it's not just
 7 an oldies channel. The whole idea is to
 8 recreate the feel of 1960, so we have disk
 9 jockeys in the studios. They take phone
 10 calls. They have the request line. There are
 11 jingles. There are choruses that sing the
 12 name. In fact, we even went out and got old
 13 reverbs so they have that twangy kind of
 14 echoey sound on the announcements, as much as
 15 they did in the 60s.

16 Another example would be Willie's
 17 Place, which is a traditional country channel,
 18 lots of Hank Williams and Ferlin Husky and
 19 that type. And the whole idea is that it's a
 20 Texas Honky-tonk, and between the songs the
 21 disk jockeys with names like Clarence and
 22 Catfish and names like that, there are sound

1 studios?
 2 A In Washington, D.C. at our
 3 programming center.
 4 Q How many are there?
 5 A Eighty-two.
 6 Q And Exhibit 4 is what studio?
 7 A Those are the studios --
 8 JUDGE WISNIEWSKI: Did you say 82?
 9 THE WITNESS: Eighty-two, yes,
 10 your Honor. Studios at the facilities of
 11 Harpo Productions that we use for the Oprah
 12 and Friends channel.
 13 BY MR. MILLER:
 14 Q Are there any other remote studios
 15 that are in the process of being completed at
 16 this point?
 17 A Actually, yes. There's one in
 18 Carl's Corner, Texas, where we're actually
 19 building a real Willie's Place. Willie Nelson
 20 bought an old truck stop outside of Dallas,
 21 and he's turned it into kind of an event place
 22 and having his biodiesel facility there, and

1 effects of being in a Honky-tonk, you know,
 2 glasses clinking, fist fights, shouting, and
 3 this and that. And the illusion was actually
 4 so complete that a lot of subscribers would e-
 5 mail and want to know where Willie's Place was
 6 as a place to visit.

7 So these studios are used to
 8 enhance the music and really create what we
 9 call the XM experience. It's music plus, you
 10 know, that ambience around it.

11 Q And is Exhibit 3 a picture of a
 12 studio in Nashville?

13 A Yes, it is, at the Country Music
 14 Hall of Fame.

15 Q Why is there a studio in
 16 Nashville?

17 A Well, we have quite a number of
 18 country channels, and the thinking is to be
 19 there at the epicenter of country music so we
 20 can interview artists as they come through
 21 town and originate content there.

22 Q Where do you have the most

1 we're actually building a Willie's Place, a
 2 studio that will look like a bar, to actually
 3 this time have a real destination to go along
 4 with the illusion, if you will.

5 Q What is shown on Exhibit 5?

6 A Exhibit 5 is our performance
 7 studio in our Washington, D.C. facility.

8 Q Could you tell the Judges how a
 9 performance studio differs from the other 82
 10 studios you've just described to us?

11 A Sure. A performance studio is
 12 much, much larger. It's designed to hold an
 13 audience, as well as an orchestra, a band.
 14 This is where we record a lot of the artists
 15 that come in to XM. The control room is
 16 reminiscent of anything you'd find in a major
 17 recording studio in London, New York, or LA.

18 Q When you worked at ABC, did they
 19 have a performance studio?

20 A No, they did not.

21 Q Did CBS have a performance studio?

22 A The Radio Division did not; no,

1 sir.

2 Q Do you know of any major radio
3 networks besides XM that have performance
4 studios?

5 A Yes, Sirius has a performance
6 studio in their facilities in New York and NPR
7 at their facilities here in D.C.

8 Q And do you have any idea how
9 regularly this performance studio is used?

10 A It's in use an average of about
11 three days a week throughout the year.

12 A Certain periods of time, it's almost every
13 day. Others, a little less. But it averages
14 out to about three times a week.

15 Q And about how many artists have
16 actually recorded music in the studio,
17 performance studio?

18 A We've had about 1200 - 1250
19 different artists come through and actually
20 record content.

21 Q And you've produced about how many
22 tracks through the performance studio?

1 And it's their job to understand and know the
2 state of XM at any given time. At the
3 broadcast operations center, we monitor the
4 various channels, take a look at the
5 automation system that's playing back the
6 vices, switching between studios. Then we
7 have the network operations center where the
8 control of the uplink, monitoring of the
9 various multiplexes, and the nationwide
10 repeater network monitoring center is there,
11 as well.

12 Q Would you tell us what's pictured
13 in Exhibit 7 of your direct testimony, please?

14 A That's a picture of a Hughes 702
15 series satellite.

16 Q And this is what was used for
17 which satellites?

18 A XM 1 and 2.

19 Q If we had this satellite in the
20 courtroom here, about how big would it be?

21 A A satellite, wing tip to wing tip,
22 is 150 feet, so I guess about three times the

1 A About 8,200.

2 Q And are those tracks that are used
3 again at times --

4 A Sure, used by the various
5 channels, depending upon the artist, to be
6 incorporated into their normal programming.

7 Q Are there any other performance
8 studios besides the one that's pictured in
9 Exhibit 5?

10 A There's a small one that we had to
11 build to catch the overflow, if you will. We
12 use that a lot for unsigned artists and small
13 groups that may come in.

14 Q What is pictured in Exhibit 6,
15 please, sir?

16 A That's one of our control centers,
17 a programming center. We have a number of
18 them. This is called the ECC or Enterprise
19 Control Center, and it's also a position.
20 That's the Technical Supervisor, Operational
21 Supervisor for XM that's on duty. It's
22 staffed 24 hours a day, seven days a week.

1 size of this room in length. And the center
2 part of it, the box portion of it, is about
3 three stories high, fairly large, massive
4 device.

5 Q Now, the 702 is a basic satellite
6 that Hughes offers; is that correct?

7 A It is their latest iteration, and
8 it is actually one of the more powerful
9 satellites.

10 Q What adaptations were made to the
11 702 for use as XM 1 and XM 2?

12 A Well, the choice of the 702,
13 because as satellite technology evolves, as we
14 know satellite technology has been around for
15 a while, but the innovation here is the amount
16 of electrical power that this satellite
17 generates, the largest amount that's
18 available. And the payload or the business
19 side of what the satellite is doing also had
20 to be specially developed, if you will.
21 Technical advances in the science of satellite
22 were necessary. The extreme or the very large

1 amount of power generated by the satellite is
 2 used by the payload to turn it into a very,
 3 very large amount of RF energy. And there are
 4 challenges with that, as well, that had to be
 5 developed and overcome, particularly in how do
 6 you dissipate the heat of so much RF energy
 7 being generated by tubes within the satellite.
 8 So this satellite payload really was essential
 9 in order to make XM work.

10 Q What does RF stand for?

11 A Radio frequency.

12 Q Are there more powerful satellites
 13 in orbit than these that you know of?

14 A Commercially, not that I know of.

15 Q What is pictured in Exhibit 8 to
 16 your testimony, please, sir?

17 A Typical XM repeater.

18 Q About how big is that box we see
 19 on the right?

20 A About the size of a refrigerator.

21 Q And on the left, what is that a
 22 picture of?

1 overlapping. That's a very daunting problem
 2 that had to be resolved with waveform design,
 3 as I said, lots of testing, and frequency
 4 management.

5 Q Was that something that was
 6 already being done by others, or was it an
 7 innovation?

8 A As far as I'm aware, the first
 9 time this has been done using SDARS.

10 Q And when you say the cells
 11 touching each other, can you explain what you
 12 meant by that?

13 A Well, in typical cell phone usage,
 14 you have, you know, one cell, and they're
 15 designed so that it don't overlap and it hands
 16 off from one tower to the other as you drive
 17 around, so they're really not interfering with
 18 each other. With SDARS, both Sirius and XM,
 19 the satellite and the repeaters are in the
 20 same frequency band, and you have that
 21 problem. So you need to engineer the system
 22 to help mitigate that issue.

1 A A typical antenna installation, a
 2 monopole installation, something that would be
 3 three to four feet tall, maybe an inch in
 4 diameter.

5 Q Now, repeaters were not a new
 6 concept, were they?

7 A No, repeaters and devices that act
 8 as repeaters have been around for a while, but
 9 the real key important part here is that
 10 technologies, waveforms had to be developed
 11 because you have the satellite and the
 12 repeaters operating within the same frequency
 13 band, one actually causing interference to the
 14 other. So waveform and the frequency
 15 allocation and spectrum allocation tables had
 16 to be developed to actually mitigate this kind
 17 of self-generated interference. And that's
 18 really what's unique about what Sirius does
 19 and what we do with satellites and repeaters,
 20 so it's not like your typical cell site where
 21 the cells just touch each other. These are
 22 signals that are common; they're actually

1 Q And without going into the
 2 technical details, just briefly, what sort of
 3 engineering went into making that work?

4 A Waveform had to be specially
 5 developed to handle that, as well as the
 6 positioning of the carriers within the
 7 spectrum, developing a methodology for
 8 transmitting the satellite signals and the
 9 repeater signals.

10 Q Now, we heard before that there
 11 are two satellites transmitting the same
 12 signal, but they're four seconds apart; is
 13 that right?

14 A That's correct.

15 Q Which satellite transmits ahead of
 16 the others?

17 A The eastern satellite, if you
 18 will, transmits ahead of the others.

19 Q And which satellite do the
 20 repeaters work off of?

21 A The eastern satellite.

22 Q What is pictured in Exhibit 9?

1 A That's a photograph of one of the
2 two satellite uplink dishes at our D.C.
3 facility.

4 Q About how big is that across?

5 A Seven meters, about 21 feet.

6 Q And are there other parts of the
7 uplink facility that aren't in the picture?

8 A Yes. This is what folks commonly
9 think of when they see an uplink is the
10 dishes, but there are amplifiers, if you will,
11 that are the actual transmitters that feed the
12 signal into the dish to be beamed to the
13 satellite, as well as in the network
14 operations center racks of equipment and
15 devices that are used to encode the audio,
16 take the data, and begin to multiplex it
17 together to build the signals that go through
18 the satellite. We also incorporate data into
19 that. We add the program associated data to
20 the signal, which basically is the artist/song
21 title information, and all of that gets
22 managed in what we can call the uplink. So

1 selection was available, the PAD data would
2 get displayed. Those are the two components.

3 Q Did you bring the actual XM radio
4 that's pictured here with you?

5 A Yes, I did.

6 Q Could you show that?

7 A This is the Pioneer unit, one of
8 our first XM radios. A complete XM radio
9 power, antenna signal in, and the audio comes
10 out of this.

11 Q Now, does that also contain an
12 AM/FM radio?

13 A No, it's just the XM.

14 Q Has any technological development
15 been done to try to make those smaller?

16 A Absolutely, yes.

17 Q And do you have a picture of the
18 current size version in your exhibits here?

19 A This is a minituner, so this and
20 this are the same thing, separated by four
21 years.

22 Q And that's Exhibit 16 in your

1 it's not just what you see outside. The real
2 business end is, if you will, inside.

3 Q Is there any backup uplink
4 facility?

5 A Yes, there is.

6 Q And is that location considered
7 confidential?

8 A Yes, it is.

9 Q Let's change subjects and talk a
10 little bit about the receivers. What is
11 pictured in Exhibit 10?

12 A It's one of our early XM radios.
13 It's a Pioneer head unit and the actual XM
14 tuner box.

15 Q And what is the difference between
16 the head unit and the tuner box?

17 A The tuner box is what makes it an
18 XM radio. That is the XM radio. The head
19 unit is what you'd find in your dashboard. It
20 had AM, it had FM, but it had a special
21 interface that knew how to talk to the box
22 that's the XM radio so that the channel

1 testimony is a picture of the minituner with
2 a quarter on it, right?

3 A That's correct.

4 Q And can you tell us what all a
5 minituner does?

6 A The same thing as this big box
7 does. You apply power to it, the antenna
8 signal, and out comes the audio and/or data.

9 Q And if I wanted to have XM radio
10 on an airplane that got data, as opposed to
11 radio in a car, would I need a different
12 minituner?

13 A Yes, it uses the same chip set.

14 It may not be this plastic form function, but
15 it is the same chip set inside that's used for
16 all of our applications, whether audio or
17 data.

18 Q So we talked about two of the
19 pieces: the head unit which has the tuner on
20 it; is that right?

21 A That's right.

22 Q It has the dial buttons. The

1 actual radio, are there any other components
 2 installed in a typical XM installation?

3 A Yes, the antenna.

4 Q Do you have a picture of an early
 5 antenna in your exhibits? And if so, can you
 6 tell us is that Exhibit 11?

7 A Yes, that's Exhibit 11.

8 Q Did you bring an actual antenna so
 9 we can see what that used to look like?

10 A Yes, this is what we used to call
 11 our shark fin antenna. This is a magnetic
 12 mount in the roof of a vehicle, either the
 13 front or the back, wherever the easiest place
 14 was to enter the cable. So that typically
 15 would go with this.

16 Q What is inside the shark fin?

17 A There are actually two elements:
 18 one on an horizontal plane and one on a
 19 vertical plane that are specialized for
 20 satellite versus terrestrial receptions. It's
 21 one of the earlier implementations.

22 Q And why are they turned at

1 of the bill of materials to make a receiver
 2 down, so that it's easily accessible by the
 3 users. I mean, we don't make our money off
 4 receivers, we do off subscribers. So you want
 5 to remove the barrier eventually, and buying
 6 an XM radio is a barrier, we've spent a lot of
 7 time and effort to reduce that barrier by
 8 innovating things like reduced chip set and
 9 smaller antennas with the primary driver being
 10 to lower the cost.

11 Q And has that been successful in
 12 lowering the total cost of an XM --

13 A Yes, it has.

14 Q -- installation kit?

15 A Yes.

16 Q I'd like to direct your attention
 17 to a different subject here briefly.
 18 Paragraph 42 of your direct testimony talks
 19 about surround sound. Could you tell the
 20 Judges what surround sound is technically,
 21 briefly?

22 A Sure. It's a methodology to

1 different angles?

2 A Because the satellite signals are
 3 basically coming in at a 30-degree angle from
 4 the east and the west, and the terrestrial
 5 signals tend to be more, if you will,
 6 vertical. So they're designed and peaked, if
 7 you will, to perform specifically in those
 8 areas.

9 Q Has there been any progress in
 10 making those smaller?

11 A Sure. Just as the chip is getting
 12 smaller, this is now the antenna that's used.

13 Q And how big is the actual inside
 14 of that antenna?

15 A About the size of my fingertip
 16 here. And the single element that does both
 17 the terrestrial and the satellite.

18 Q In the move from the larger box to
 19 the smaller tuner, has there been any cost
 20 improvement or change?

21 A Oh, yes. That's one of the
 22 primary reasons to do that is to get the costs

1 reproduce a full spectrum of the audio stage,
 2 if you will, sounds that generate from the
 3 left, from the right, from the center, and
 4 particularly from the rear. It originally
 5 developed for movie theater applications to
 6 add to the realism of a sound track, but
 7 there's also now recorded music that's
 8 recorded using surround sound methodology.

9 Q And when we see these home theater
 10 units in the stores that have a bunch of
 11 speakers all around you, is that surround
 12 sound?

13 A That's correct.

14 Q Does XM transmit anything in
 15 surround sound?

16 A Yes, we do. We transmit two
 17 channels: XM Pops, a classical type station;
 18 and Fine Tuning, an eclectic mix of different
 19 music.

20 Q And what technology makes this
 21 possible?

22 A We use technology from an

1 organization, a company called Neural Audio,
 2 that allows us to take the six channels of
 3 content and mix them down so that they fit
 4 within the spectrum or the bandwidth that we
 5 have available and receivers that are equipped
 6 with a neural decoder can now, when they see
 7 the watermark that tells it it's surround,
 8 mixes it back up to the six channels.

9 Q Do you know if surround sound is
 10 regularly transmitted by any other radio
 11 systems in the world?

12 A As far as I know, no. XM
 13 innovated that particular --

14 Q And where do you get the
 15 recordings to do the surround sound?

16 A From recording companies, record
 17 companies.

18 Q Do you generally buy them?

19 A No, they've been giving us the
 20 content and very happy to see it being
 21 disseminated, in particularly, as surround
 22 sound.

1 Q So help the Judges understand, XM
 2 Caf,, is that the name of a channel?
 3 A That's the name of the channel,
 4 and its channel number is 45.

5 Q And then Sting is the name of the
 6 artist.

7 A Is the name of the artist, and
 8 Sacred Love is the title of the track that's
 9 playing.

10 Q Does sending the artist and title
 11 use bandwidth?

12 A Yes, it does.

13 Q Why do you devote the bandwidth
 14 for that purpose?

15 A We think that's one of the unique
 16 features of satellite radio is to be able to
 17 provide this information, you know. In
 18 traditional radio, you back-announce, as it's
 19 called, a song. Hey, you heard, you will
 20 hear, but you don't get to hear all of them.
 21 It was really thought to be a consumer benefit
 22 to tell the listener this is what you're

1 Q Turn to page 17 of your direct
 2 testimony, and you see the heading for XM data
 3 services.

4 A Yes.

5 Q Could you tell the Judges briefly
 6 what is data service?

7 A Anything that's not audio we
 8 consider to be data service, and there is some
 9 data services that are tied directly to the
 10 audio, if you will, and that is the artist and
 11 song title information, which we call program
 12 associated data, and that's what's displayed
 13 on your radios.

14 Q Do you have any pictures in your
 15 exhibit of where there is an artist and song
 16 title displayed that we could look at?

17 A Yes, Exhibit 13 shows one of our
 18 XM SKYFi's, and there's an example of what the
 19 display tells you. The data also tells you
 20 the channel you're listening to, both in title
 21 and number, who's performing, the title track,
 22 as well as some other information.

1 listening to. Even if you came in in the
 2 middle of a song, the artist and song title
 3 information stays throughout the song as it
 4 plays. If you really like the song, you can
 5 jot down the information and go out and buy it
 6 and have it for your own, if you wish.

7 Q Does Sirius have this same
 8 feature?

9 A Yes, they do.

10 Q How about Music Choice?

11 A Yes, they do, as well.

12 Q What is Exhibit 18?

13 A Exhibit 18 is another one of our
 14 data services, and that's called XM Weather.

15 Q What does that do?

16 A XM Weather is a service that was
 17 primarily initiated for the aviation and the
 18 marine environment, and it's become not only
 19 popular but almost a necessity now. XM
 20 Weather is factory-installed in over 80
 21 percent of general aviation aircraft. You
 22 can't buy a jet without getting XM Weather in

1 it. And there are also other companies, such
 2 as Rockwell Collins, Honeywell, Garmin, that
 3 now, you know, include this as part of an
 4 avionics package.

5 Q Is that a different signal from
 6 the satellite that's sending weather signals?

7 A No, it's the same signal, it's the
 8 same chip set. The same chip that produces
 9 music, the audio channels also carries all of
 10 this other, this particular weather
 11 information.

12 Q Can your repeaters deal with the
 13 weather data?

14 A Yes, they do. It's, again, the
 15 same signal from the satellite goes through
 16 the repeaters, and it ends up being used for
 17 this service, as well.

18 Q What is Exhibit 19?

19 A Nineteen talks about NavTraffic,
 20 which is another one of the XM data services.
 21 NavTraffic is the transmission of data that's
 22 used to update in real time navigation systems

1 think of it as a sports ticker, the line
 2 scores, the teams that are playing, and what
 3 their scores are, and that also is transmitted
 4 on the same platform.

5 Q Does traditional terrestrial radio
 6 send that sort of thing to cars?

7 A No, they don't.

8 Q I'll direct your attention to
 9 paragraph 50, which talks about XM Emergency
 10 Alert Channel 247. Do you see that?

11 A Yes, I do.

12 Q Are there any advantages for
 13 emergency notification over satellite radio as
 14 opposed to terrestrial radio?

15 A Yes, the one big advantage is just
 16 that, it is not terrestrially based. As we've
 17 seen in the past few years with hurricanes and
 18 manmade disasters, the satellites, because the
 19 way they are positioned, they are not
 20 subjected to a destruction of the
 21 communications facilities on the ground.

22 Q Have there been any examples of

1 that exist in modern cars. If you have one of
 2 these Nav systems and subscribe to XM and have
 3 NavTraffic, the roadways in front of you, for
 4 instance if you were stuck on the beltway
 5 between point A and point B, say around the
 6 American Legion Bridge, that portion would
 7 show up as red on the display. There would be
 8 a little icon that could simulate or show that
 9 there was an accident there or construction.
 10 So it's really a benefit because you can
 11 actually update in real time and take a look
 12 at what's going on with the traffic, and you
 13 can plan your route accordingly.

14 Q Are there other data services
 15 besides the ones we've looked at that are
 16 commonly sent over the XM signals?

17 A Sure. As that other exhibit shows
 18 with the PAD data, we actually send out stock
 19 quotes and sports scores. We give an end
 20 number of stock quotes that you can choose to
 21 find information about, and that scrolls at
 22 the bottom of the radio. And also sports,

1 when terrestrial radio was not able to work to
 2 deal with local disasters?
 3 A Well, Katrina was a good example.
 4 The towers were taken down, and broadcast
 5 stations, cell towers, etcetera, were not
 6 functioning; and, yet, the satellite signals
 7 were still available.

8 Q Since your direct testimony was
 9 prepared, have there been any other
 10 developments in emergency services provided by
 11 XM?

12 A Yes. We have been chosen by FEMA
 13 to be a participant in the upgrade of the
 14 Emergency Alert System. This system has been
 15 around for many, many years, since the 1950s.
 16 It basically was designed to deliver what's
 17 called the Presidential message in time of
 18 emergency. Presently, that's done via phone
 19 lines to certain key stations in each market
 20 called primary entrance points. You've all
 21 heard these tones that they use for weather
 22 alerts, I know severe weather warning. Those

1 same tones, special ones, are used to actually
 2 activate decoders that take over the audio of
 3 the radio stations, and other stations listen
 4 to the primary ones. It is this daisy chain.
 5 But we've developed a special XM receiver
 6 that's presently being installed in these PEP
 7 stations, and we will be transmitting the
 8 tests, as well as the Presidential message, if
 9 and when it ever comes.

10 Q With regard to the Emergency Alert
 11 Channel 247, do you have to subscribe to be
 12 able to get that?

13 A No, that channel is available
 14 right out of the box. You buy a radio, turn
 15 it on. Even if you're not a subscriber, you
 16 get the Emergency Alert Channel.

17 Q And does XM expect to make much
 18 money on this new program for FEMA?

19 A No, the receivers are done at
 20 cost, and the channel space and all of that
 21 was necessary to put it together done pro
 22 bono.

1 Do you see that?
 2 A Yes.
 3 Q And you describe RCA Americom as a
 4 pioneer in communications satellite firm?

5 A Yes.
 6 Q What was it that Americom did?
 7 A Americom was a communications
 8 company. They managed, if you will, the
 9 spectrum available on the satellites that it
 10 launched. RCA built, if you will, the
 11 satellites, and Americom managed them, and you
 12 could buy spectrum space from them, if you
 13 will, buy transponders, etcetera.

14 Q And so you hired people from that
 15 company who had expertise that you needed --

16 A People who had worked there in the
 17 past, sure, who had expertise in those
 18 systems.

19 Q So they developed expertise at
 20 Americom, and then they brought it to XM: is
 21 that right?

22 A Sure.

1 MR. MILLER: That concludes my
 2 direct questions of this witness, unless
 3 there's something that the Court would like me
 4 to clarify.

5 CHIEF JUDGE SLEDGE: Any questions
 6 by Sirius?

7 MR. JOSEPH: No, your Honor.

8 CHIEF JUDGE SLEDGE: Music Choice?

9 MR. FAKLER: No, your Honor.

10 CHIEF JUDGE SLEDGE: Cross
 11 examination?

12 MR. HANDZO: Thank you, your
 13 Honor.

14 RECROSS EXAMINATION

15 BY MR. HANDZO:

16 Q Good afternoon, Mr. Masiello.

17 A Good afternoon, sir.

18 Q Mr. Masiello, turning to paragraph
 19 10 of your direct testimony, you talk about
 20 some of the employees who were recruited for
 21 XM, and you say on the satellite side you
 22 hired people who had worked at RCA Americom.

1 Q And then what did they do for XM?
 2 A They were part of the satellite
 3 team.

4 Q So they were doing the same sorts

5 of things that they had done at Americom?

6 A Yes, they had.

7 Q Now, XM, of course, did not build

8 its satellites, right?

9 A Well, it did not physically build
 10 them. It contracted to have them built.

11 Q Right. The satellites were built
 12 by Hughes?

13 A Hughes, then Boeing.

14 Q Then Boeing. Hughes became

15 Boeing?

16 A That's correct.

17 Q And the payload was built by
 18 Alcatel?

19 A That's correct.

20 Q Now, XM did not design the
 21 satellites either, correct?

22 A No, they didn't design them, but

1 they certainly had a lot to do with the
2 features that had to exist in order to make
3 the XM service work.

4 Q Well, XM had to provide
5 specifications for what it needed, right?

6 A Well, for instance, the power
7 generation. The satellites had to be able to
8 generate a large amount of electrical power in
9 order to generate a lot of RF energy. Again,
10 they were the most powerful satellites at the
11 time, and part of the impetus was to push to
12 get that power generation. You know, you're
13 transmitting RF to tiny little antennas such
14 as this. The need for the payload, for
15 instance, from Alcatel, you have to generate
16 a large amount of RF energy. And one of the
17 problems was how do you dissipate the heat
18 generated by the tubes? It's not a complete
19 efficient transfer from electrical power to
20 RF. Heat is given off. How do you do that?
21 And so there was special challenges that had
22 to be overcome specifically to make a

1 our system, what we proposed to design. So,
2 you know, they offered, obviously, lots of
3 guidance in trying to get developed what we
4 needed developed.

5 Q In order for them to design their
6 satellite, they had to understand how you were
7 going to use it, right?

8 A That's correct.

9 Q Now, it was Alcatel that designed
10 the payload, right?

11 A That's correct. It built a
12 payload.

13 Q And Alcatel had previously
14 designed and built the payload for World
15 Space, right?

16 A That's right.

17 Q And World Space was a company that
18 was in the business of providing satellite
19 radio service to third-world countries?

20 A That's correct.

21 Q And it existed prior to XM,
22 correct?

1 satellite to service XM and to make XM work.

2 Q And so the reason XM selected
3 Hughes, Boeing, was because it had the 702
4 series of satellites, right?

5 A It had the 702 series that had a
6 very powerful bus.

7 Q And Hughes had previously designed
8 that for other companies before XM, right?

9 A It had designed that series of
10 satellites, yes.

11 Q Okay. And so XM went to Hughes,
12 which already had this powerful satellite, and
13 gave Hughes its design specifications, right?

14 A Asking that it generate this
15 amount of power, etcetera.

16 Q And then Hughes went about doing
17 what XM needed, right?

18 A They provided what we requested.

19 Q Okay. And it was Hughes that
20 designed that, right?

21 A But in conjunction with our folks,
22 as well, providing input because we understood

1 A That's correct.

2 Q So Alcatel had already built
3 payload for World Space before it built the XM
4 payload?

5 A Right, but not one that was as
6 powerful as what we needed for XM. So XM's
7 payload was bigger, more power, if you will.

8 Q Now, looking at, again, paragraph,
9 I'm sorry, paragraph 23, you discuss the
10 launch of the satellite and you say that XM
11 chose to use Sea Launch?

12 A That's correct.

13 Q And you say that Sea Launch had
14 successfully handled only a handful of
15 satellites before XM?

16 A Yes.

17 Q XM had the option to use a more
18 experienced launch service, correct?

19 A There were other launch providers,
20 yes.

21 Q That were more experienced than
22 Sea Launch?

1 A That's correct.
 2 Q But they were more expensive?
 3 A I really don't know that. I'm not
 4 familiar with that.

5 Q You weren't involved in that part
 6 of it?

7 A Not in the costing of it, no.

8 Q Okay. With respect to the
 9 operation of the satellites, that's not
 10 handled by XM, correct?

11 A The satellites are flown, if you
 12 will, managed by Telesat Canada, but there is
 13 a control facility here in D.C. that's fully
 14 operational, and a number of times a year the
 15 operators come down and our operators are
 16 trained on taking over the, quote, flying of
 17 the satellites.

18 Q Okay. But on a day-to-day basis -

19 -
 20 A Yes, it's Telesat Canada.

21 Q Now, in paragraph 18 of your
 22 statement, you discuss at the beginning of the

1 document?
 2 A It depends when this document is
 3 from. It's a group that did a lot of the
 4 presentation and PowerPoints along the way,
 5 and I guess that group would do that.

6 Q Okay. Would that group have
 7 gotten information from you or people
 8 reporting to you?

9 A Just by looking at this, I think
 10 this was put together before I joined the
 11 company.

12 Q Let me ask you to turn to page
 13 five of the document.

14 A Okay.

15 Q And looking down at the second
 16 bullet point from the end, is it correct to
 17 say that the digital wave form technology was
 18 based on proven World Space technologies?

19 A Partly, yes. But it's important
 20 to note that the World Space system is a bit
 21 different than ours. They don't have
 22 terrestrial repeaters sharing the same

1 paragraph the waveform for the signals.

2 A Yes, sir.

3 Q Actually, before I go there, let
 4 me show you what we're going to mark as
 5 SoundExchange Trial Exhibit 21.

6 (Whereupon, the above-
 7 referred to document was
 8 marked as SoundExchange
 9 Exhibit No. 21 for
 10 identification.)

11 BY MR. HANDZO:

12 Q Mr. Masiello, have you seen this
 13 document before?

14 A Yes, just recently when it was
 15 shown to me by counsel.

16 Q Okay. Is this a document created
 17 by XM?

18 A I assume it is because it says so.
 19 I'm not familiar when it was created or who
 20 created it.

21 Q Is there a group or department
 22 within XM that would have likely created this

1 frequency space, and their system was not
 2 primarily designed for a mobile reception. So
 3 while that may have been, you know, based upon
 4 that, considerable work had to be done on the
 5 waveform by XM creating its own waveform to
 6 handle some of the issues we talked about
 7 earlier: repeaters sharing the same frequency
 8 space and, particularly, driving down the road
 9 at 70 miles an hour or stopped, you had to
 10 have an acceptable signal. So it is different
 11 than World Space.

12 Q Some portion of the waveform
 13 technology was borrowed from World Space,
 14 right?

15 A Yes, some portion of it. That's
 16 correct.

17 Q And by the way, World Space was an
 18 early investor in XM, right?

19 A I'm not familiar with the -- yes,
 20 so I hear. I'm not familiar with the actual -

21 -

22 Q Is that before your time?

1 A Yes, that is.

2 JUDGE ROBERTS: Mr. Handzo,
3 haven't we heard most of these questions in
4 direct to Mr. Parsons?

5 MR. HANDZO: Probably, yes. I'm
6 going to take that as a suggestion that I move
7 on.

8 JUDGE ROBERTS: Yes.

9 BY MR. HANDZO:

10 Q Mr. Masiello, let me ask you to
11 look at paragraph 10 again. Again, going back
12 to recruitment, you mentioned that you
13 recruited some people from Motorola; is that
14 right?

15 A I specifically didn't. The
16 company, XM, recruited people from Motorola.

17 Q Okay. And you refer to them as
18 patent holders, do you see that?

19 A Yes.

20 Q Okay. Does that mean that they
21 were already patent owners when they were at
22 Motorola?

1 your Honor.

2 CHIEF JUDGE SLEDGE: Mr. Handzo
3 got no information on cross. I'm wondering
4 what you could redirect on.

5 MR. MILLER: Sea Launch.

6 CHIEF JUDGE SLEDGE: All right.

7 REDIRECT EXAMINATION

8 BY MR. MILLER:

9 Q Mr. Masiello, is there any
10 technical advantage to using Sea Launch from
11 the equator as opposed to another launch
12 provider?

13 A Yes. One of the benefits of Sea
14 Launch is that they launch from the equator,
15 and that provides for very accurate insertion
16 orbits. In other words, it's like trying to
17 shoot an arrow on a bulls eye over five miles.
18 They're very good at positioning the satellite
19 at the exact point for transfer orbit, and
20 this saves fuel. So that's like not missing
21 the mark. It's real close, and you can
22 preserve fuel on spacecraft that way.

1 A That's correct.

2 Q And did they bring those patent
3 rights with them to XM?

4 A I don't know if they do or not. I

5 --

6 Q So you don't know whether these
7 patents are part of what XM currently
8 considers its patent portfolio?

9 A That's correct.

10 Q Just a couple more questions, Mr.
11 Masiello. Going back to the document that I
12 just showed you on page five, there's a
13 discussion there of proven techniques for
14 microwave signal distribution. Do you know
15 what that's a reference to?

16 A Where do we see that?

17 Q The fourth bullet point.

18 A I really don't know what that
19 refers to. Sorry.

20 MR. HANDZO: Thank you. That's
21 all I have.

22 MR. MILLER: Very brief redirect,

1 Q What fuel does the spacecraft use,
2 in addition to solar energy?

3 A It has xenon gas that's then
4 ionized to provide propulsion.

5 Q And why is propulsion important to
6 a satellite?

7 A Well, you're going to need it for
8 station keeping over the years. It's one of
9 the determinants of the life of the satellite
10 if so much fuel is available.

11 Q And just to be clear, these are
12 geostationary satellites, right?

13 A That's correct. They appear to be
14 stationary when viewed from the respect to the
15 Earth.

16 Q And that has some relationship to
17 the equator, right?

18 A It certainly does. They're above
19 --

20 Q It's right over the equator?

21 A -- the equator. That's correct.

22 Q So they're turning at the same

1 speed as the Earth, right?

2 A That's correct.

3 Q And why was it important
4 technically to XM to have as much fuel as
5 possible in the satellites when they reach
6 their station?

7 A Because one of the determining
8 factors of a satellite's life is how much
9 onboard fuel there is, again for station
10 keeping, maneuvering, things that are going to
11 be necessary during the life of the satellite
12 to keep it stable.

13 MR. MILLER: I have no further
14 redirect.

15 CHIEF JUDGE SLEDGE: Any questions
16 from the bench? Thank you, sir.

17 THE WITNESS: Thank you, your
18 Honor.

19 CHIEF JUDGE SLEDGE: Mr. Miller, I
20 think I've missed something. What's the
21 purpose of Mr. Masiello's testimony?

22 MR. MILLER: Your Honor, Mr.

1 JUDGE WISNIEWSKI: Mr. Miller,
2 would you collect Mr. Masiello's exhibits?
3 Thank you.

4 JUDGE ROBERTS: Mr. Joseph, before
5 you begin, the respective sides may be
6 interested to know, now that we've completed
7 the initial portion of XM, that SoundExchange,
8 of the 50 hours allotted for direct case, five
9 hours and 45 minutes. And the services have
10 consumed nine hours and 45 minutes.

11 MR. JOSEPH: Thank you, your
12 Honor.

13 CHIEF JUDGE SLEDGE: Are we ready?
14 Please proceed.

15 MR. JOSEPH: Your Honor, I'd like
16 to introduce my partner, John Wyss, who
17 unfortunately wasn't here for the opening but
18 was here yesterday, so he's observed the
19 proceedings and is familiar with the rules,
20 and he will call our first witness.

21 CHIEF JUDGE SLEDGE: Mr. Wyss?
22 MR. WYSS: May I approach, your

1 Masiello is dealing with the technical
2 innovation aspect of the 801(b) factor, which
3 deals with the relative contribution of
4 technological innovation. We believe he also
5 is explaining -- well, I think that's the
6 central focus, your Honor, is technological
7 innovation. I might also add, your Honor,
8 that his testimony, I think, on broadcasting
9 goes to the issue of the addition that is made
10 to the music besides simply playing the
11 recorded music, what's done in the studios for
12 example, your Honor. And it also goes, I
13 believe, to disruptive effects, the fact that
14 this business has many benefits besides simply
15 delivery of entertainment, for example, and
16 should things be done that threaten the
17 business in its future, then that would have
18 considerable disruptive effects, including
19 disruptive effects, for example, in emergency
20 services. And that was one of the reasons for
21 his testimony.

22 CHIEF JUDGE SLEDGE: Thank you.

1 Honor? Thank you. I bring my water with me,
2 as well.

3 CHIEF JUDGE SLEDGE: So far, we're
4 allowing that.

5 MR. WYSS: Thank you. Your Honor,
6 our first witness is Mel Karmazin who we would
7 call. Could Mr. Karmazin please come forward?

8 WHEREUPON,

9 MEL KARMAZIN

10 was called as a witness by Counsel for Sirius
11 Satellite Radio and, having been first duly
12 sworn, assumed the witness stand, was examined
13 and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WYSS:

16 Q Would you please state your name
17 for the record?

18 A My name is Melvin Karmazin. I go
19 by the name of Mel.

20 Q And what is your current position
21 with Sirius?

22 A I'm President and CEO of Sirius

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

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

WRITTEN DIRECT TESTIMONY OF DAVID J. FREAR

(On behalf of Sirius XM Radio Inc.)

Introduction and Witness Background

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 Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings, Inc. (“XM”), I served as Executive Vice President and Chief Financial Officer of Sirius. 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. I testified on behalf of Sirius in the predecessor proceeding before the Copyright Royalty Board (“CRB”) to set rates for the 2007-2012 period (“*Satellite I*”).

3. My prior testimony 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 generates revenues. Sirius XM has designated that testimony for inclusion in this proceeding.

4. My present testimony is organized as follows: I begin with a discussion of the financial health of Sirius XM, updating the record since the time of the last proceeding, summarizing key financial events that have transpired during the current license term, and addressing the more salient risks the Company is currently facing. I next discuss the negative impact that an increase in the sound recording royalty rate beyond that applicable for 2012 would have on the Company. Finally, I discuss our recent efforts to procure licenses in direct dealings with individual record labels that would encompass the rights for which rates are to be set in this proceeding. We have experienced considerable success with this license initiative to date, despite the overt interference with those direct-licensing efforts by SoundExchange and other record industry trade groups, which would strongly have preferred avoiding the implications for rate-setting here of the rates established in those licenses.

The Financial State of Sirius XM

A. The Merger of Sirius and XM

5. On February 19, 2007 Sirius and XM announced their intent to merge. Shortly thereafter, in March 2007, the two companies filed a “Consolidated Application for Authority to Transfer Control” with the Federal Communications Commission (“FCC”). In June 2007, the FCC’s Mass Media Bureau gave public notice that it had accepted the application for filing, started its informal six-month merger review clock, and set a deadline for comments or petitions for July 2007. At around the same time, in April 2007, the U.S. Department of Justice (DOJ) announced it would conduct an investigation of the merger as well.

6. Sirius' shareholders approved the transaction in November 2007, but it was not until March 2008 that the DOJ announced it had closed its investigation of the merger, citing no harm to consumers or competition. As part of its ultimate findings, the DOJ concluded that the evidence did not establish that any reduction in competition would result from the merger; according to the DOJ, the relevant market in which Sirius and XM competed was broader than just satellite radio, and included terrestrial radio, Internet music services, iPods, and various other audio options.

7. The FCC approved the merger on July 25, 2008. The companies officially merged on July 29, 2008. As a result of the merger, XM shareholders received 4.6 shares of Sirius common stock for each share of XM stock they held.

B. Sirius XM's Near Bankruptcy Experience

8. 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 the remaining outstanding balance due on the \$300 million of 2½% Convertible Notes that were set to come due on February 17, 2009 (the “Notes”) and an inability to access the capital markets to refinance this (and other) debt. In an effort to avoid bankruptcy, the Company retained Evercore Capital (“Evercore”) in November 2008 to raise capital to refinance the Notes. Evercore solicited 21 prospective investors, spanning the range of likely private equity, debt investor, and corporate sources. None was willing to provide the necessary financing to the Company.

9. Among the stated reasons that potential investors declined to invest in the Company during this period of crisis were:

- The Company and its predecessors had sustained nearly 20 years of losses and did not have positive EBIDTA margins;
- Sirius XM’s business is highly risky;
- Sirius XM faces a risk of declining market share due to new competition and technology;
- The business is too dependent on the cyclical automotive industry and GM and Chrysler were themselves on the precipice of bankruptcy;
- Institutional investors were faced with large cash redemptions at the time; and
- The Company was not a good fit for traditional investors.

10. These are the same Notes that SoundExchange, through its expert witness Sean Butson, opined in *Satellite I* could be refinanced. Indeed, Mr. Butson “conservatively assumed that all maturing SDARs bonds will be refinanced at 10%, which is above the coupon rate of the bonds.” Rebuttal Testimony of Sean Butson, CFA, at 17 (“Butson Rebuttal”) (emphasis added). No one, myself included, anticipated at the time of the last proceeding that the Company would be unable to refinance the Notes at all.

11. Two weeks prior to the maturity of the Notes, Sirius XM expected to sign an agreement with a large group of noteholders to extend the maturity of the Notes. On the day of the scheduled signing, the largest holders informed the Company that they had sold their Notes to a third party, whom they declined to identify. We immediately initiated a call to a party that we suspected, based on industry rumor, had purchased the large block of Notes. With only days remaining until the February 17, 2009 maturity date of the Notes, and with no viable sources of financing, we engaged in discussions

A series of seven horizontal black bars of varying lengths, decreasing from left to right. The first bar is the longest, followed by a shorter one, then a longer one, then another shorter one, then a very long one, then a short one, and finally the shortest bar on the far right.

12. With financing options running out, Sirius XM hired the consulting firm Alvarez & Marsal, which spent eight weeks preparing the Company to file a Chapter 11 petition on the date that the Notes were to come due. Filing for Chapter 11 bankruptcy protection was averted only when, after brief but intense negotiations, Liberty Media Corporation (“Liberty”), a potential lender we had only recently been introduced to, agreed to provide a \$380 million loan (in two phases) in a series of transactions that enabled the Company to avert a bankruptcy and a default on its debt.

13. The terms of the Liberty deal, 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.

14. The Liberty funds were used to pay all the principal and interest on the Notes that came due on February 17, 2009, as well as for general corporate purposes. Also in

early 2009, we extended two bank credit agreements totaling \$350 million. The terms of the extensions were also onerous, requiring the Company to pay a 2% restructuring fee to existing lenders and for Liberty to take a \$100 million participation in the credit agreement.

15. To repay the Liberty loans and the extended bank agreement, Sirius XM issued new notes, which were non-investment grade “junk” bonds. This debt consists of \$526 million of 11.25% Senior Secured Notes due in 2013, which we issued in June 2009, and \$257 million of 9.75% Senior Secured Notes due in 2015, which we issued in August 2009.

16. The Sirius XM stock price reflects this tumultuous financial history and near bankruptcy experience. The stock fell from over \$4 in January 2007 down to \$.055 per share on Feb. 11, 2009, a time when bankruptcy seemed inevitable. On September 15, 2009, we received a delisting notice from NASDAQ because our common stock had closed below \$1.00 per share for 30 consecutive days and was therefore not in compliance with the NASDAQ Marketplace Rules.¹ The stock price still has not recovered or even approached its historic highs.² The share price remains substantially below January 2007 levels – currently trading at approximately \$1.75 per share – and in

¹ As the Company was unable to cure this noncompliance in the allowed time, NASDAQ set a hearing to determine if the Company should be de-listed or given an extension of time to comply with marketplace rules. On April 27, 2010, two days before the hearing was set to take place, NASDAQ informed Sirius XM that it had regained compliance with all marketplace rules and allowed the Company to remain listed. *See April 27, 2010 Press Release “SIRIUS XM Regains Compliance With All NASDAQ Listing Rules.”*

² By comparison, on March 7, 2000, XM’s stock closed at a high of \$45.93 and Sirius’ at \$66.50 on February 17, 2000.

the past 52 weeks has ranged from \$1.27 to \$2.44 per share. Consequently, investors that purchased stock in January 2007 have lost over 50% of their investment. Those that purchased stock in February 2000 – when Sirius’s share price was at a high – are even worse off. They have lost over 97% of their investment.

C. Sirius XM’s Current Financial Position

17. After nearly 20 years of losses and following the Company’s recent near bankruptcy experience, Sirius XM achieved its first year of positive net income in 2010 and, in 2009, its first year of positive free cash flow (“FCF”) and Adjusted EBITDA. Key financial metrics since the *Satellite I* proceeding are shown in the chart below:

	2007 ³	2008 ³	2009	2010
Total Revenue	\$2,059	\$2,437	\$2,473	\$2,817
Net Income (Loss)	(\$1,248)	(\$902)	(\$352)	\$43
Adjusted EBITDA	(\$565)	(\$136)	\$463	\$626
FCF	(\$505)	(\$552)	\$185	\$210
EBIT	(\$859)	(\$429)	\$153	\$353

18. While this recent performance is encouraging, it is important to recognize that Sirius XM is still a long way from recouping the massive expenditures that were necessary for the Company to provide a product that now, after 20 years of losses, generates sufficient revenues to cover its ongoing costs.⁴ As of September 30, 2011, Sirius XM had amassed a cumulative FCF of negative \$5.5 billion and a cumulative EBITDA of negative \$3.7 billion. It also has cumulative net operating losses of \$8 billion. Even if the Company is able to continue its recent trend of profitability, it will be

³ Pre merger figures for Sirius and XM are combined for 2007 and 2008.

⁴ Many of these expenses are detailed in my *Satellite I* testimony and the *Satellite I* testimony of Mark Vendetti.

years before Sirius XM recoups all of its losses from the last two decades. Any increase to our costs, such as an increase in the SoundExchange royalty rate, will only lengthen the time it takes to recoup these losses.

19. Furthermore, were it not for the one-time merger-related cost cutting efforts, the Company would not be profitable today. As part of the merger, we were able to reduce our subscriber acquisition, sales, marketing, and administrative costs by more than \$500 million. As part of these efforts, we reduced the number of employees of the combined company considerably.

20. We have also succeeded in reducing our programming costs more than \$100 million over the 2008-2009 period and continue to renegotiate key contracts with content providers in an effort to further reduce our costs. Below are examples of some of the more significant cost reductions we have achieved through contract renegotiations:

- a. **Howard Stern:** [REDACTED]
- b. **National Football League:** The original seven year contract called for stock and cash payments of nearly \$230 million, or an average payment of nearly \$33 million per year. The renegotiated [REDACTED] .

⁵ The original seven year agreement also contained \$73 million in warrants. If one includes this additional value received by the NFL, the annual savings increases to over [REDACTED].

- c. **Oprah:** The original three year contract called for \$55 million of payments over three years, or annual payments of over \$18 million. The new [REDACTED]
[REDACTED].
- d. **Bruce Springsteen:** [REDACTED]
[REDACTED]
- e. **National Basketball Association:** [REDACTED]
[REDACTED]
- f. **NASCAR:** The original five year agreement calls for payments of \$107.5 million, or \$21.5 million per year. The revised agreement calls for payments [REDACTED]
[REDACTED]

As these savings make clear, the cost of content that Sirius XM has been able to secure through individualized, marketplace negotiations has been declining over the last several years. The fee paid to SoundExchange, by contrast, is not the product of a similar marketplace dynamic, increasing substantially year after year, and is currently one of our largest costs.

21. Even with these cost cutting efforts, Sirius XM continues to expend extraordinary sums of money each year in operating expenses to maintain its business, primarily to support its delivery infrastructure as well as the specialized reception devices (satellite radios) that transmit our service to consumers.

22. It is important to note that these costs differ substantially from those incurred by the Internet-based services with which we are increasingly competing for subscribers. Internet-based services are simply able to piggyback on delivery networks

(broadband/wireless Internet) and reception devices (PCs and mobile phones) that were built, and are maintained and marketed at tremendous cost, by other parties (including broadband and cellular providers, PC makers, smartphone manufacturers, etc.). Sirius XM, by contrast, incurs the costs of content as well as the costs of delivery and receiver development.

23. I describe this because it provides important context to the competitive dynamics discussed in the accompanying testimony of James Meyer (“Meyer Testimony”). I also understand that our economic expert in this case, Dr. Noll, is adjusting certain marketplace benchmarks to account for the fact that the costs and revenues of those Internet-based benchmark services do not include or cover certain of the delivery and receiver costs that are wrapped into Sirius XM’s stem-to-stern delivery of content through our proprietary satellite network and receivers. I have reviewed Dr. Noll’s allocation of costs as between those that are unique to Sirius XM and those of the type incurred by Internet music providers. In the following paragraphs I highlight and briefly describe those cost categories that are unique to Sirius XM as relied upon by Dr. Noll. The following dollar amounts are rounded annual totals based on Sirius XM’s 2010 operating costs, as reflected in our Annual Report on Form 10-K.

24. *Satellite and Transmission Costs:* \$81 million. This category comprises the Company’s costs associated with the operation and maintenance of our technological infrastructure, including satellites, satellite telemetry, tracking and control systems, terrestrial repeater networks, satellite uplink facilities, and broadcast facilities. The costs associated with our satellites are described in greater detail in the Meyer Testimony.

25. *Engineering Design and Development Costs:* \$45 million. This category

of costs relates to the Company's development of new chipsets and products, research and development for broadcast information systems, and costs associated with the incorporation of our radios into vehicles manufactured by automakers.

26. *Subscriber Acquisition Costs:* \$413 million. Sirius XM's business being dependent on its subscriber count, the cost of attracting and retaining subscribers is among the Company's largest and most important costs. The category of "subscriber acquisition costs"⁶ as reported in Sirius XM's public filings is derived principally from hardware subsidies and other commissions and incentives paid to automakers to install and activate satellite radios in their vehicles and subsidies paid for chipsets and certain other components used in manufacturing radios.

27. *Sales and Marketing Costs.* [REDACTED]. While our total annual costs for Sales and Marketing in 2010 were over \$215 million, the [REDACTED] allocated by Dr. Noll includes only those costs associated with the OEM and retail markets.⁷

28. *Revenue Share and Royalties:* [REDACTED]. While our total annual costs for Revenue Share and Royalties in 2010 were over \$435 million, the [REDACTED]

⁶ In terms of dollars, the reported category of subscriber acquisitions costs is our second highest, following only the category revenue share and royalties.

⁷ In total, our sales and marketing costs include those for advertising, media and production, including promotional events and sponsorships; cooperative marketing; customer retention and personnel. Cooperative marketing costs include fixed and variable payments to reimburse retailers and automakers for the cost of advertising and other product awareness activities performed on the Company's behalf. In the first half of 2011 alone, Sirius XM expended nearly \$100 million in sales and marketing, a slight decrease from the previous year. However, we expect sales and marketing expenses to increase going forward as we increase our advertising and promotional initiatives to attract new customers in existing and new distribution channels, and to launch and expand programs to retain our customers.

allocated by Dr. Noll includes only Sirius XM's revenue-sharing arrangements with OEMs as part of our hardware distribution network.

29. *Depreciation and Amortization:* \$200 million. While our total Depreciation and Amortization costs were nearly \$274 million, the \$200 million allocated by Dr. Noll covers depreciation expenses associated with satellite transmission including satellites (\$134 million) and the costs associated with the launch vehicle, broadcast equipment, and the terrestrial repeater network (\$16 million).⁸

30. In addition to these large ongoing costs, Sirius XM currently carries a substantial amount of debt. Today, Sirius XM has \$3.086 billion of outstanding debt, of which \$2.386 billion matures between 2013 and 2015 – *i.e.*, during the license term covered by this proceeding:

Type	Face Value	Coupon Rate	Maturity Date
Senior Notes	\$779 Million	13%	8/1/2013
Exchangeable Senior Subordinated			
Convertible Notes	\$550 Million	7%	12/1/2014
Senior Notes	\$800 Million	8.75%	4/1/2015
Senior Secured Notes	\$257 Million	9.75%	9/1/2015
Senior Notes	<u>\$700 Million</u>	7.625%	11/1/2018
TOTAL	\$3.086 Billion		

31. This debt load poses significant risks to the Company, as many of the risk factors that prevented the Company from accessing traditional credit markets in 2008 and 2009 persist today: the credit markets remain tight and the current economic climate continues to be filled with uncertainty.⁹ While the Company hopes to be able to

⁸ There is also a \$50 million purchase price adjustment properly allocated by Dr. Noll to this category of expenses.

⁹ The risk of another financial crisis has been a leading news item and now factors into the financial planning of many companies. “My worry about the next financial crisis is

refinance much of this debt, there is no assurance that it will be able to do so in the coming years on acceptable terms.

32. As described in the Company's most recent Annual Report on Form 10-K, this indebtedness:

- increases our vulnerability to general adverse economic and industry conditions;
- requires us to dedicate a substantial portion of our cash flow from operations to payments on indebtedness, reducing the availability of cash flow to fund capital expenditures, marketing and other general corporate activities;
- limits our ability to borrow additional funds or make capital expenditures;
- limits our flexibility in planning for, or reacting to, changes in our business and the audio entertainment industry; and
- may place us at a competitive disadvantage compared to other competitors.¹⁰

it will come from some corner we haven't really thought about, and we'll be locked into more constraints on the Fed's ability and on the Treasury's ability to really do anything," said Jeremy Stein, an economics professor at Harvard University who worked as an adviser to both the Treasury Department and the White House in 2009." Shahien Nasiripour, "Financial System Riskier, Next Bailout Will Be Costlier, S&P Says," *The Huffington Post*, 4/19/11. "The financial system is riskier than it was before the 2008 crisis that led the U.S. economy to the worst contraction since the Great Depression, Taleb [author of *The Black Swan*] said." Renee Bonorchis and Miles Weiss, "Taleb Says Government Bonds to Collapse, Avoid Stocks," *Bloomberg News*, 8/11/10. S&P has said that "we believe the risks from the U.S. financial sector are higher than we considered them to be before 2008." Shahien Nasiripour, "Financial System Riskier, Next Bailout Will Be Costlier, S&P Says," *The Huffington Post*, 4/19/11.

¹⁰ 2010 Sirius XM Radio Inc. Annual Report, Form 10-K at p. 18.

D. Sirius XM's Financial Outlook

33. Despite these large costs and significant debt, I am optimistic about Sirius XM's near term prospects. I believe that revenues will continue to increase over the next twelve months, without a commensurate increase in costs. Indeed, Sirius XM has provided some limited guidance to investors to this effect. On September 14, 2011 we provided the following estimate of future revenues and Adjusted EBITDA:

	2011(E)	2012(E)
Revenue	\$3 Billion	\$3.3 Billion
Adjusted EBITDA	\$715 Million	\$860 Million

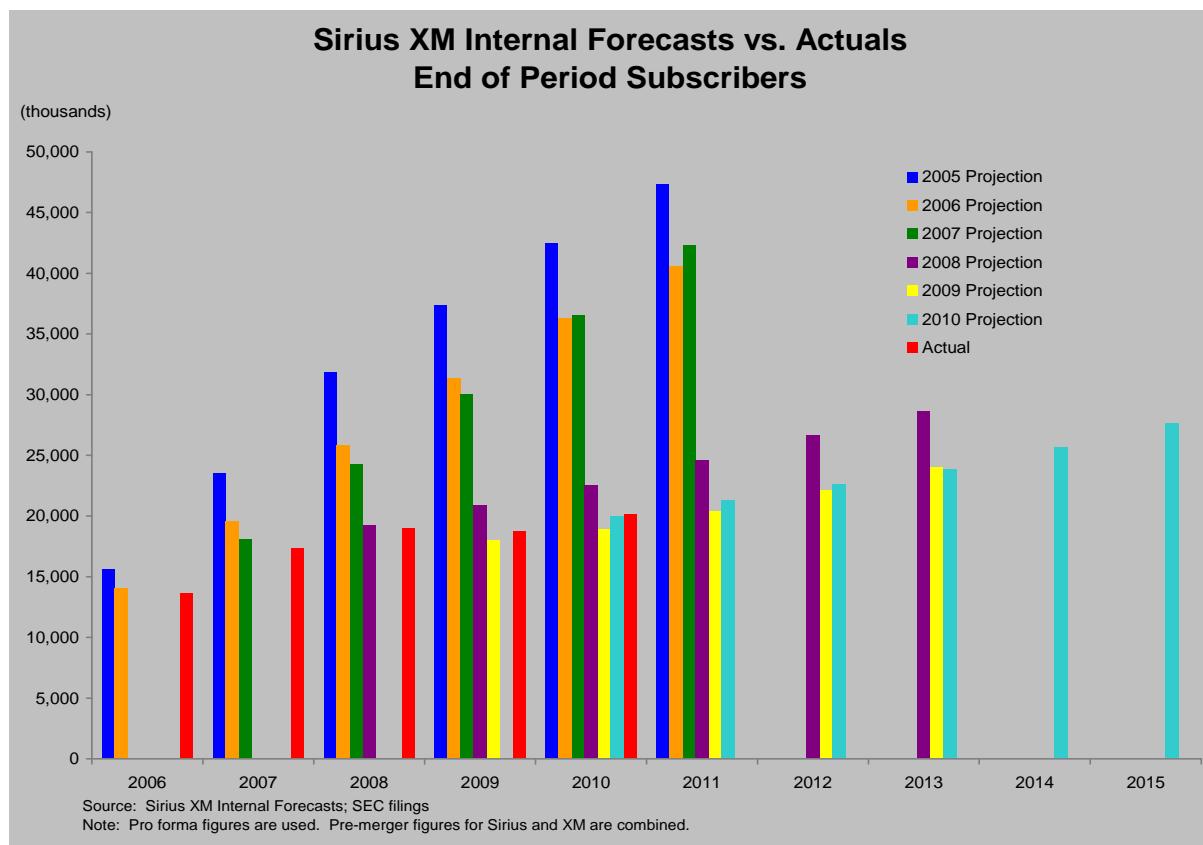
This guidance was accompanied by warnings that a number of risks may come to pass that would cause our results to materially differ.¹¹

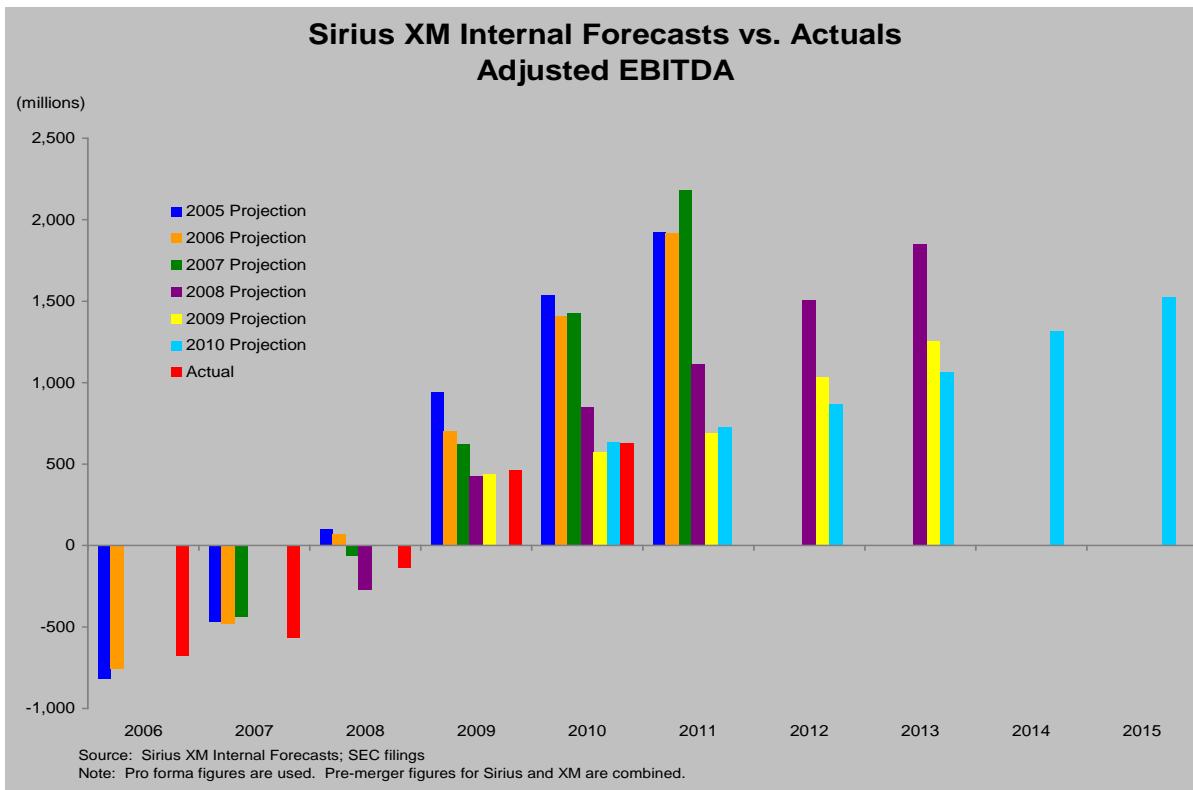
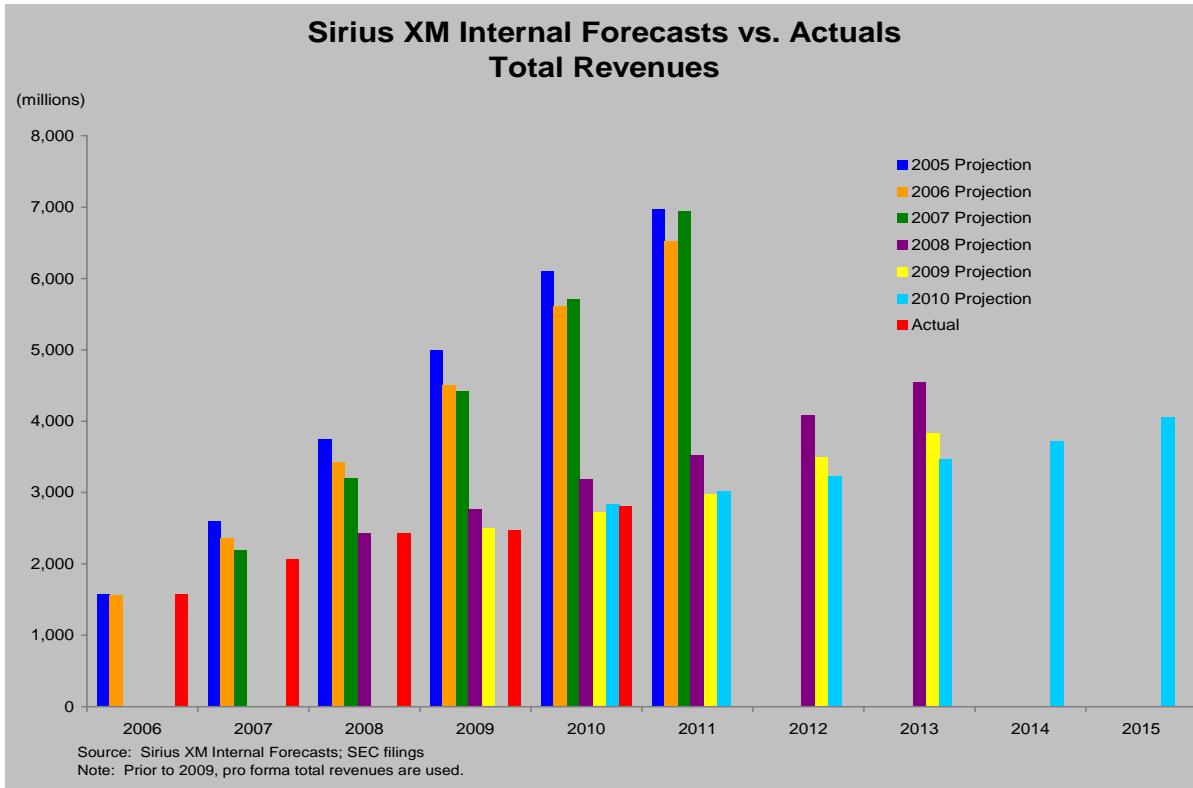
34. The Company, however, has not provided guidance past 2012. The uncertainties associated with a business such as Sirius XM's are simply too great to allow for reliable forecasts over the longer term. Indeed, the Company does not place much weight on its own internal long-term forecasts. Good evidence of this difficulty in forecasting the future of the Company is the utter failure of anyone to predict during the *Satellite I* proceeding that Sirius XM would find itself on the precipice of bankruptcy

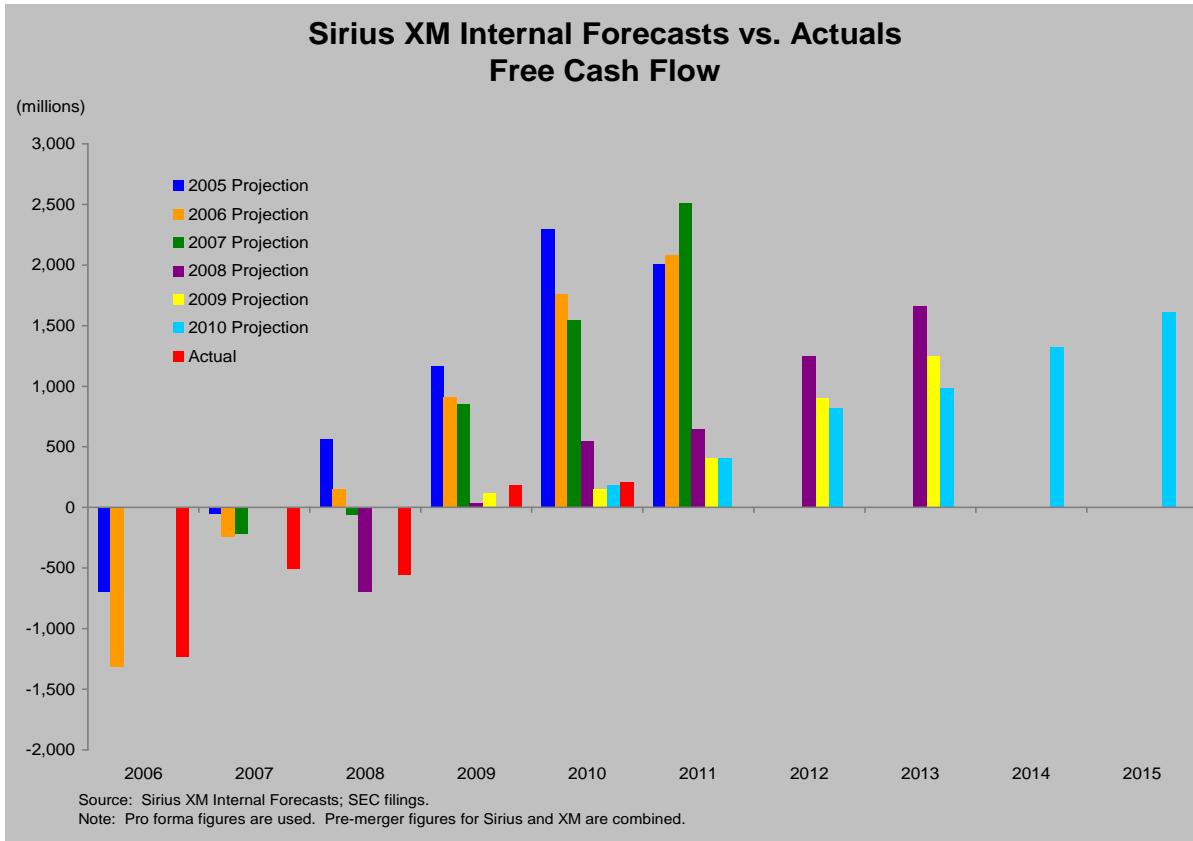
¹¹ If these results can be achieved, and the Company does not experience other setbacks, the Company will, for the first time in its history, be in a position to return capital to its equity investors. The Company has long depended on the public markets to raise the billions of dollars it needed to start and fund its operations. The Company has never returned capital to its investors through either a dividend or a stock buyback; long term investors in the Company have seen the value of their Sirius XM shares decline substantially over the last few years. A dividend or stock buyback is a way to return capital to equity investors and to encourage future equity investment in the Company.

within 12 months of the close of the proceeding. Even Sirius' own cautious optimism turned out to be incorrect in light of unforeseen developments.

35. In fact, the Company for years has had difficulty accurately predicting its future. As shown in the following charts, which compare the Company's internal five-year forecasts to its actual results, Sirius XM has year after year missed its long-term internal forecasts. This reality reflects the extreme difficulty in accurately predicting long-term results in this business.







36. In my own written direct testimony in *Satellite I*, I predicted: “Based on the consensus of widely quoted analysts’ estimates, Sirius will not turn free-cash-flow positive until 2008, and EBITDA positive and earnings positive until 2009.” ¶ 10. These prognostications, like our internal forecasts, proved to be unduly optimistic. Furthermore, as discussed in greater detail in the expert testimony of Professor David Stowell (“Stowell testimony”), SoundExchange has had similar difficulty forecasting Sirius XM’s future, and, in fact, missed the mark by an even wider margin. SoundExchange witness Sean Butson estimated a combined subscriber base of 33.3 million by 2010 for Sirius and XM.¹² As it turned out, the total subscriber base in 2010

¹² Written Direct Testimony of Sean Butson, 10/26/06, Appendices A & B. See also, *Satellite I* decision at p.49.

was only 20 million, and, of those subscribers, more than 3.5 million were on promotional trial subscriptions.¹³ Mr. Butson's other projections for 2010 similarly missed the mark: actual revenues were 42% below those projected by Mr. Butson and actual Free Cash Flows were 58% below his predictions.¹⁴ Mr. Butson revised these forecasted metrics in his rebuttal testimony, but still missed the mark by a wide margin.

37. Predicting the future of Sirius XM has become even more difficult than it was at the time of the *Satellite I* proceeding. This is primarily due to the current difficult economic climate and the significant financial uncertainty faced by the Company. While the U.S. auto market (with which Sirius XM's fortune is directly tied) has improved from the depths of the 2008-2009 recession, 2011 auto sales have "recovered" only to the level of the 1992 recession. The prospects for the strength of the recovery have dimmed recently as analysts and automakers have been revising **downward** their forecasts for 2012 auto sales; in fact, if these forecasts prove correct, auto sales for the four years from 2009-2012 will be at the lowest level since 1980-1983. This recent trend, along with concerns about sovereign risk and its effect on the U.S. financial system, as well as the lack of job creation and the malaise enveloping U.S. consumers, all pose significant threats to Sirius XM's ability to generate revenues. The tightened credit markets also reduce Sirius XM's access to capital, and could pose additional threats to the Company should it find itself once again unable to repay its debt. Most critically, as more fully discussed in the Meyer Testimony and that of William Rosenblatt ("Rosenblatt

¹³ 2011 Second Quarter Sirius XM 10-Q

¹⁴ Written Direct Testimony of Sean Butson, 10/26/06, Appendices A & B.

Testimony”), there are now a host of new competitors that were either in a fledgling state or non-existent at the time of the *Satellite I* proceeding that have dramatically changed the competitive environment in which the Company operates. Many of these new competitors have made significant inroads with car manufacturers and constitute a real threat to the Company’s core subscriber base – those who listen to Sirius XM in the car.¹⁵ Furthermore, these new competitors have shown the ability to raise billions of dollars in funding that will allow them to compete with Sirius XM year after year even if they are unable to become profitable.

E. Other Costs and Risks: Research and Development; Subscriber Acquisition and Retention

38. In an effort to stay competitive, Sirius XM continues to invest in research and development to improve its product offerings. The Meyer Testimony contains a more detailed discussion of these product improvements and their associated costs.

39. In addition to the need to expend substantial amounts of capital on research and development to simply remain competitive in the rapidly evolving marketplace, the Company also continues to spend vast sums of money in an effort to add new subscribers and retain existing ones. Over the 2008-2010 period, these costs came to nearly \$1.3 billion.¹⁶

¹⁵ Significant investments have been made by wireless operators in their data networks which position them to stream their content into cars and displace Sirius XM in the car market.

¹⁶ 2010 Sirius XM Radio Inc. Annual Report on Form 10-K, at p. 47.

40. It is important to note that while the Company did experience some notable efficiencies and synergies as a result of the merger of Sirius and XM, which contributed in large part to its recently-improved operating performance, many of those efficiencies and cost-savings were one-time or limited-duration only and have already been realized. So, while the Company's per-subscriber costs may have decreased over the last several years primarily as a result of the merger, we expect this downward trend to slow, and for those savings to level out and perhaps even to increase as we redouble our efforts to grow our subscriber base. On balance, while it is difficult to predict with any certainty, Sirius XM expects that its total operating expenses, including those that are unique to Sirius XM and not borne by our Internet-based competitors, will increase from their 2010 levels through the 2013-2017 licensing period.

41. In light of all of the foregoing, the Company's near bankruptcy in February 2009, the severe consequences of running out of cash, the increased difficulty of predicting the long-term cash needs of the Company, the Company's current \$1.5 billion deferred revenue liability, and the Company's increased size as a result of the merger, I believe it is prudent to maintain a large cash reserve – much larger than the \$100 million reserve that I testified was necessary (¶ 23) in the *Satellite I* proceeding. The increased cash reserve is necessary to provide the Company with enough of a cushion to survive another downturn in the economy, a shock to our revenue stream, build replacement satellites, help secure new financing and, should we be unable to secure such financing, to repay the \$2.386 billion of debt that matures over the next four years.

Implications of a Royalty Rate Increase

42. Prior to the last rate-setting proceeding, the Company paid a royalty rate equivalent to some 2% of its revenue to SoundExchange. This rate was increased to 6% in 2007, and rises to 8% in 2012. Recently, SoundExchange boasted to the record labels that it succeeded in obtaining a 300% rate increase in the *Satellite I* proceeding and that it intends to seek another substantial increase in this proceeding. *See SXM Dir. Ex. 6.*

43. Should the Company achieve its budgeted revenue for 2012, it would pay approximately ~~\$190 million~~ to SoundExchange in royalties for that year alone (at an 8% royalty rate). A payment of this magnitude would represent a 28% increase over our 2010 payment of ~~\$148 million~~.¹⁷ The SoundExchange royalty payment has consumed a large percentage of the Company's earnings over the last term and, as currently structured, is an uncontrollable cost that is not linked to the value of music to subscribers.

44. We expect SoundExchange to seek a significant and immediate increase in the royalty rate as of 2013, conceivably to a level of 13% or higher. A rate of 13% would represent an increase of over 60% from the 2012 rate to be paid by the Company (and be more than double the rate paid in 2007). Our overall presentation in this filing demonstrates the impropriety of an increase of such magnitude – or anything like it. It is

¹⁷ While we charge many of our customers an additional monthly fee to cover the cost of the SoundExchange royalty, our ability to increase this fee is limited by the number of subscribers who would cancel or not renew their subscriptions if the fee was increased. This is a threat that is increasing due to the widespread availability of lower priced infotainment alternatives. Because we were operating under a rate cap that was holding our rates artificially low through 2011, adding an additional fee to customer invoices posed less of a risk to customer loss. In other words, we cannot continue to increase our prices without losing money. Viewing a recent lesson from the marketplace, on October 22, 2011, Netflix reported it lost 800,000 of its 23 million subscribers following an increase in its subscriber fees.

not only, as Dr. Noll demonstrates, economically unfounded; it would, in addition, be sufficiently material to pose a risk of disruptive hardship for the Company if it is unable to pay off its debt or access the credit markets once again, especially if current revenue levels are not sustained. While the Company's ability to access the credit markets did not seem like an imminent risk during the last proceeding, we have seen that assumptions about the direction of our business and the ability to obtain financing can be proven wrong.¹⁸ Since 2007, the Company has become only more dependent on the auto industry and its debt load remains substantial. At the same time, the competitive threats faced by the Company have dramatically increased – posing a real threat to the Company's subscriber base and its ability to attract new subscribers. In a challenging market, a material uncontrollable cost can impact both the terms on which the Company can borrow as well as its ability even to secure credit. In my estimation, the risks that the Company faces over the upcoming license term when factoring in all relevant considerations are greater than those faced in the past license term.

45. As more thoroughly discussed in the expert testimony of Professor David Stowell, and as we have seen by reviewing the Company's performance since the last proceeding, Wall Street analysts and corporate managers often fail to see the confluence of factors that can quickly undermine their business. In the 2008-2009 period, the increased royalty rates payable to SoundExchange, the price controls placed upon us by

¹⁸ SoundExchange's expert incorrectly posited at the last proceeding that the Company could just issue new stock instead of borrowing: "They [Sirius and XM] would not have to access the credit markets for additional funds by issuing new stock." *See Butson Rebuttal* at 16. This turned out to be wrong. The price of the Company's common stock (and its market capitalization) declined so significantly after the last proceeding that it even today is referred to as a "penny stock" by certain analysts.

the FCC, and the collapse of the capital markets and the economic recession all combined to trump the significant synergies we were able to achieve through the merger of the two companies, and nearly forced the Company into bankruptcy. Should the Company's subscriber base be materially impacted by the evolving competitive environment, by a significant decline in new car sales, or by any number of other risks and unforeseen factors, it may once again find itself in a state of financial distress, even if royalty rates are maintained at their current levels. An increase in the royalty rate, under such circumstances, significantly increases the likelihood of Sirius XM, once again, facing a potential disruption of its business.

Direct License Initiative

46. As noted, reflecting the challenging environment in which it operates, the Company has sought to reduce its costs by negotiating more favorable contracts with Howard Stern, the NFL, Oprah Winfrey, Bruce Springsteen, and others. As part of this effort, we also have sought to control the cost of music programming by negotiating royalty rates directly with individual record labels. We believe this approach has much to commend it, not only for Sirius XM, but for the record labels themselves.

47. In December 2009, I met with SoundExchange to discuss the possibility of entering into a license that would cover both our SDARS and Internet services under a single license. We have developed radios, and pricing plans, by which customers can receive our service either from our satellites, terrestrial repeaters, or the Internet; the transmission infrastructure is transparent to the consumer. With the advent of connected cars (as discussed more thoroughly in the Rosenblatt Testimony), consumers will increasingly be able to enjoy our service across multiple transmission infrastructures. A

multiplatform license would allow us to align our royalty arrangements with how we package our service to our customers. Sound Exchange told us they did not have the legal authority to engage in such multi-platform licensing discussions and suggested we contact the labels directly. Shortly thereafter, and following internal discussions regarding the possibility of seeking licenses directly from labels, we met with Music Reports, Inc. (MRI) to discuss and evaluate the prospects of securing such direct licenses. Starting in 2010, I attempted to meet with all of the major labels and many independent labels to discuss the possibility of direct licensing. Meetings with major labels were very difficult to arrange and for those that I could arrange, proved to be fruitless. Promises to discuss internally and get back to me largely resulted in complete silence. Proposals made went unresponded to. In meetings with former label executives (including former board members of SoundExchange), I learned that it was unlikely that any major label would “break ranks” and enter into discussions with us. Therefore, I focused the Company’s efforts on the independent labels. In the summer of 2011, we formally engaged MRI to assist us in contacting record companies to offer them the opportunity to enter into direct license agreements with us.

48. From our perspective, direct licensing offers an opportunity that relying solely on statutory licensing does not: letting the marketplace itself determine the reasonable level of fees for sound recording performance rights in a process in which individual licensors compete with one another for increased plays on Sirius XM. Such agreements also provide us with rate certainty beyond 2012 for at least some portion of our music use. We also have been developing certain product features that are not covered under the statutory license, such as single track recording and programming that

exceeds the sound recording performance complement. We operate a number of services other than our core satellite radio service – an Internet streaming service, a business establishment service, and a cable-television music service; for administrative simplicity we thought it would make sense to roll the rights for those services into a single direct-license agreement.

49. In turn, the direct license offers several advantages to record companies: (a) Sirius XM has an incentive to increase plays of the direct licensors' works, resulting in greater exposure for their artists' works and a greater share of the overall royalty pool; (b) the royalty statements we will provide will reflect an accurate count based on census reporting of all plays; (c) there is no deduction for SoundExchange's administrative fee; and (d) our royalty payments are made faster than those made by SoundExchange.

50. Perhaps most importantly for purposes of this proceeding, our licensing efforts provide the only direct evidence of market rates between a willing buyer and a willing seller for the music performed by the Company. As I explain below, SoundExchange itself acknowledged this in its flagrant attempts to interfere with our marketplace negotiations.

51. As described in the accompanying testimony of Ron Gertz, we worked with MRI to develop a form of direct license agreement (the "Direct License"), a sample of which is attached as SXM Dir. Ex. 7. MRI analyzed Sirius XM playlists to develop a list of the record companies whose artists we play most often. We sent our Direct License offer to those companies (other than the majors) in late July 2011, and have been negotiating final licenses since that time. As Mr. Gertz explains in more detail, the Direct License grants Sirius XM all of the rights necessary to operate our various services,

including through-to-the-listener public performance rights and reproduction and distribution rights to cover server copies and, in the event such functionality is introduced by Sirius XM, copies of songs saved on user devices. In exchange for these rights, Sirius XM has agreed to pay each directly-licensing record company its *pro rata* share of between 5% and 7% of revenue, with a revenue definition similar to that contained in the current SDARS regulations.¹⁹

52. To date, we have been successful in signing licenses with over 60 record companies representing over 7,000 artists, 9,000 albums, and 110,000 sound recordings. Although these companies are not “majors,” they are significant labels with important artists that we play on our service every day.

53. There is no doubt that we would have signed many more Direct Licenses were it not for interference from SoundExchange and industry associations, such as the American Association of Independent Music (A2IM), the American Federation of Television and Radio Artists (AFTRA), the American Federation of Musicians (AFM), and the Recording Academy. Indeed, we have been told as much by certain labels (*see., e.g.*, SXM Dir. Ex. 8, email from the label Signature Sounds informing MRI that “after reading about the positions of AAIM and NARAS on this issue, [Signature Sounds has] decided to stay with SoundExchange for now.”) When these organizations learned that we were negotiating directly with record labels, they immediately sought to discourage

¹⁹ The revenue definition makes certain modifications to make it applicable to a single record company rather than a collective like SoundExchange. It also clarifies that performances of under 30 seconds (generally “skips” on our webcasts where the person may be changing the channel or coming in at the end of a song) are not considered to be performances.

record labels from signing with us. A2IM President Rich Bengloff, who sits on the SoundExchange board with executives from each major label and the Recording Industry Association of America (RIAA), issued a public statement in response to the Direct License offer claiming that statutory (as opposed to direct) licenses are “good for the independent music label community,” and that “under direct licenses there are cases where independents have received less than equitable rates.” (“Statutory Rates Versus Direct Licenses for Digital Music Streaming,” Aug. 9, 2011, attached hereto as SXM Dir. Ex. 9.) Mr. Bengloff went on to exalt the role of SoundExchange: “The authority of SoundExchange to aggressively pursue the best possible statutory rates and handle all of the administration, including processing and auditing, results in having a central group to protect Indie rights as the statutory rate is working and Indie labels are benefiting from having this central voice.” He further made clear that SoundExchange would be seeking a rate in excess of 8% of revenue during this CRB proceeding. The underlying message was unmistakable: don’t break ranks by signing the Sirius XM direct license.

54. Three days later, SoundExchange was even blunter in its messaging to its constituency. In an August 11, 2011 “Statement on Satellite Radio Royalty Proceedings,” SoundExchange falsely asserted that in the prior CRB SDARS proceeding “[t]he Judges actually concluded that the appropriate ‘market rate’ was 13%,” and only dropped that rate to current levels based on “Sirius’s and XM’s precarious financial positions.” After painting a rosy picture of Sirius XM’s current and projected financial condition, the release went on to explain (in bold type): **“We . . . are planning to seek a substantial increase in the statutory rate. In other words, we plan to seek rates well in excess of the 2012 rate of 8%.”** The release went so far as to claim that “We believe .

. . . our industry should expect to see a significantly increased statutory rate.” (This release is attached as SXM Dir. Ex. 10 hereto.) To reinforce its message, the release also pointedly observed that individual record label agreements of the type Sirius XM was soliciting would serve as evidence of prevailing market rates in this proceeding.

55. More recently, on October 27, 2011 in what appears to have been a coordinated attack on our direct licensing efforts, SoundExchange, the Recording Academy, and AFTRA, all released statements discouraging labels from licensing directly with Sirius XM (attached as SXM Dir. Ex. 6, 11, and 12 hereto). SoundExchange, after touting its success in the *Satellite I* proceeding of obtaining “a 300 percent increase in the rate paid by Sirius XM,” reiterated its belief that “the current royalty rates are artificially low” and that it will “seek a substantial increase in the next term.” The Recording Academy, through a letter from its president Neil Portnow, stated that Sirius XM’s efforts “will likely result in substantially reduced payments to artists and producers, a lowering of the value of performance royalties, and unnecessary conflict between artists and their labels.” Mr. Portnow went on to state that “it is in your interest to refrain from direct licensing. While Sirius may be offering positive terms, the long-term effect of accepting a rate lower than the compulsory rate could be to reduce rates overall in the future.” Finally, AFTRA (in a joint statement with AFM) stated that “Sirius XM is seeking to . . . lower the rates for music on the backs of artists and musicians” labeling our direct licensing efforts as “blatantly anti-artist and anti-musician.” The combined messaging could not be plainer: DO NOT sign direct licenses, at least at the rates offered; to do so would undermine SoundExchange’s efforts as the industry collective to ratchet rates up well beyond existing levels.

56. More recently, the Future of Music Coalition (FMC) weighed in to “applaud [their] artist colleagues for urging their members … to not accept these direct licensing deals.” (This release is attached as SXM Dir. Ex. 13 hereto). FMC went on to note that “we are more powerful collectively than we are separately” and that “the statutory rate-setting process represents an opportunity for labels to work together to get the best rate possible,” In other words, don’t allow the forces of competition to interfere with the labels’ efforts to collude and charge supra-competitive rates.

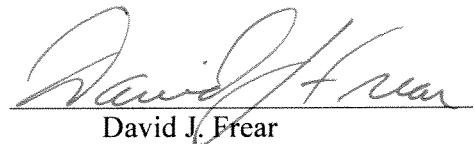
57. It is, in my view, quite remarkable that in the face of this and undoubtedly other, undocumented pressure from these industry trade groups, we have been as successful as we have been to date in securing direct licenses.

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

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

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 28th day of November 2011 at New York, New York.



David J. Frear

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

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

UNITED STATES COPYRIGHT ROYALTY JUDGES

WASHINGTON, D.C.

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)
In the Matter of:) Docket No. 2011-1
) CRB PSS/Satellite II
Determination of Rates and Terms)
for Preexisting Subscription)
Services and Satellite Digital) Volume III
Audio Radio Services) Pgs. 629 - 871,
) Pgs. 877 - 942,
-----X Pgs. 948 - 956

Washington, D.C.

Thursday, June 7, 2012

The following pages constitute the
continued proceedings held in the above-captioned
matter, held at the Library of Congress, Madison
Building, 101 Independence Avenue, Southeast,
Washington, D.C., before Cindy L. Sebo,
RMR/CRR/CSR/RPR/CCR/RSA of Capital Reporting Company,
a Notary Public in and for the District of Columbia,
beginning at approximately 9:35 a.m.

Capital Reporting Company

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1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

3 CHIEF JUDGE SUZANNE M. BARNETT
JUDGE WILLIAM ROBERTS
4 JUDGE STANLEY C. WISNIEWSKI

5

6 On behalf of SiriusXM:

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9 MIRANDA S. SCHILLER, ESQUIRE

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Capital Reporting Company

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1 A P P E A R A N C E S (Continued) :

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

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1 C O N T E N T S

2 WITNESSES:

3 DAVID JOHN FREAR DIRECT CROSS REDIRECT RECROSS

4 By Ms. Schiller 636 --- 799 ---

5 By Mr. Freedman --- 703, 759 --- ---

6 RONALD HOWARD GERTZ DIRECT CROSS REDIRECT RECROSS

7 By Mr. Larson 819 --- 933 ---

8 By Mr. Freedman --- 861 --- 948

9 10 SIRIUSXM TRIAL EXHIBITS: * MARKED ADMITTED

11 12 637 639

12 13 640 ---

13 14 819 821

14

15 SOUNDEXCHANGE TRIAL EXHIBITS: * MARKED ADMITTED

16 11 707 ---

17 12 760 765

18 13 760 768

19 14 774 776

20 15 785 786

21 16 791 793

22 17 880 883

Capital Reporting Company

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633

1 C O N T E N T S (Continued)

2	SOUNDEXCHANGE TRIAL EXHIBITS: *	MARKED	ADMITTED
3	18	885	887
4	19	892	894
5	20	900	901
6	21	907	909
7	22	920	922
8	23	920	922
9	24	928	930

10

11

12

13 (* Exhibits Retained by Counsel.)

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

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1 P R O C E E D I N G S

2 CHIEF JUDGE BARNETT: Good morning.

3 Please be seated.

4 Mr. Rich, you may call your next
5 witness.

6 MR. RICH: Thank you.

7 My colleague, Ms. Schiller, will be
8 taking the examination of David Frear.

9 MS. SCHILLER: Good morning.

10 CHIEF JUDGE BARNETT: Ms. Schiller,
11 could you spell your name for me?

12 MS. SCHILLER: It's Miranda,
13 M-I-R-A-N-D-A, Schiller, S-C-H-I-L-L-E-R.

14 CHIEF JUDGE BARNETT: Thank you.

15 Before we begin that testimony,
16 Ms. Schiller, Judge Roberts reminded me we left an
17 open issue yesterday, which was the proffer of
18 testimony from prior proceedings.

19 We have conferred on the issue of the
20 attachments or exhibits. That objection is
21 overruled.

22 With regard to the relevance, I do

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1 believe it is necessary that -- with regard to
2 the -- to the sponsorship, that also is overruled.

3 But with regard to relevance, we do
4 need to have an offer -- a proffer of relevance of
5 any testimony that SiriusXM hopes to continue to
6 move on that ground.

7 MR. RICH: In light of that,
8 Your Honor, would it be useful and acceptable if
9 we, in the next several days, put together a
10 proffer by proposed witness and perhaps be able to
11 narrow the focus on certain subparagraphs of it
12 that we think are necessary?

13 To your point yesterday, Judge Roberts,
14 we clearly don't need you to look at everything.
15 We didn't want to rehearse the technology history
16 of the company, for example, to the extent that
17 hasn't changed.

18 We make that proffer to Your Honors.

19 CHIEF JUDGE BARNETT: I think that
20 would be preferable, frankly.

21 MR. RICH: Perhaps by Monday, if that's
22 suitable?

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1 CHIEF JUDGE BARNETT: Sure.

2 MR. RICH: Thanks.

3 CHIEF JUDGE BARNETT: Ms. Schiller, you
4 may proceed.

5 MS. SCHILLER: SiriusXM calls
6 David Frear.

7 WHEREUPON,

8 DAVID JOHN FREAR
9 called as a witness, and having been first duly
10 sworn, was examined and testified as follows:

11

12 DIRECT EXAMINATION

13

14 BY MS. SCHILLER:

15 Q. Good morning, Mr. Frear.

16 Could you please state your full name?

17 A. David John Frear.

18 Q. What is your position at SiriusXM?

19 A. Executive vice president and chief
20 executive officer.

21 CHIEF JUDGE BARNETT: Mr. Frear, I'm
22 sure you have spelled your name for the court

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1 reporter.

2 Can you spell it for the record as
3 well?

4 THE WITNESS: Yes. David John --
5 everybody's got that one -- Frear, a little more
6 difficult, F-R-E-A-R.

7 BY MS. SCHILLER:

8 Q. How many years have you been the chief
9 financial officer of SiriusXM and its predecessors?

10 A. Nine years.

11 Q. Have you testified before the CRB
12 previously?

13 A. Yes, I have.

14 Q. When was that?

15 A. Five years ago.

16 Q. Did you also provide written direct
17 testimony in this proceeding?

18 A. Yes, I did.

19 (SiriusXM Trial Exhibit Number 12 was
20 marked for identification purposes.)

21 BY MS. SCHILLER:

22 Q. We're going to hand you what is marked

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1 as SiriusXM Trial Exhibit Number 12, which is a
2 copy of your written direct testimony and the
3 exhibits appended to it.

4 And I'm going to ask you to turn to the
5 last page of your written direct testimony where
6 there is an affidavit -- a declaration, rather.

7 And is that a copy of the declaration
8 that you signed?

9 A. Yes, it is.

10 Q. And was this submitted in November 2011
11 in this proceeding?

12 A. Yes.

13 MS. SCHILLER: SiriusXM moves for the
14 admission of Exhibit 12 and the accompanying
15 exhibits to Exhibit 12, two of which have
16 previously been admitted into evidence yesterday,
17 which are, for the record, Exhibit 10 to
18 Mr. Frear's written direct testimony was marked as
19 Trial Exhibit 2 and moved into evidence -- and
20 admitted into evidence; and then I think it's
21 Exhibit -- Exhibit 9 was marked as Exhibit 4 and
22 admitted into evidence yesterday.

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1 CHIEF JUDGE BARNETT: Thank you.

2 Mr. Handzo.

3 MR. FREEDMAN: Good morning,

4 Your Honors. I'm Jared Freedman for

5 SoundExchange --

6 CHIEF JUDGE BARNETT: You're not

7 Mr. Handzo.

8 MR. FREEDMAN: That is true.

9 CHIEF JUDGE BARNETT: Something wasn't
10 clicking quite right for me.

11 There he is hiding in the back row.

12 MR. FREEDMAN: We have no objection.

13 CHIEF JUDGE BARNETT: Thank you.

14 SiriusXM Exhibit 12 is admitted.

15 (SiriusXM Trial Exhibit Number 12 was
16 admitted into evidence.)

17 MS. SCHILLER: And, additionally,

18 subject to the proffer of relevancy which Mr. Rich
19 referenced this morning, we will also be moving in
20 what we are going to label as Exhibit 13, which is
21 the prior written direct testimony designations
22 that were appended to his written direct submission

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1 in this case.

2 (SiriusXM Trial Exhibit Number 13 was
3 marked for identification purposes.)

4 MR. FREEDMAN: Your Honor, I have no
5 objection in principle. Perhaps should we wait
6 until we see the proffer --

7 CHIEF JUDGE BARNETT: Yep.

8 MR. FREEDMAN: -- and determine that.

9 MS. SCHILLER: That's fine for us.

10 CHIEF JUDGE BARNETT: Certainly.

11 BY MS. SCHILLER:

12 Q. Mr. Frear, since you were last here,
13 there has been a merger of Sirius and XM.

14 Can you tell us when that occurred?

15 A. Sirius and XM merged in July of 2008.

16 Q. Did you need regulatory approval from
17 the Department of Justice before that merger could
18 take place?

19 A. Yes, we did.

20 Q. Did the DOJ make any findings about the
21 merger's effect on competition?

22 A. The DOJ found that the merger of Sirius

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1 and XM would not adversely affect competition in
2 the audio entertainment marketplace.

3 Q. Why did Sirius and XM merger?

4 A. Well, you had two fundamentally
5 unsuccessful companies. Financially, they had lost
6 billions of dollars together. And without the
7 synergies of the merger and, most notably,
8 synergies to be achieved at the -- on the cost
9 items in the company, it was -- you know, ultimate
10 financial success and survivability was
11 questionable for each of the companies.

12 So the merger was really to take two
13 struggling entities and ensure they survived.

14 Q. How did the merger make that survival
15 possible?

16 A. The fact is the two companies were
17 largely similar. When we would go through each
18 other's offices imagining what the synergies of the
19 merger could be, right, I think -- and
20 Joe Euteneur, who had the similar position at
21 XM Radio before the merger -- that when each of us
22 thought about what could a merger produce, we just

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1 think of, well, I've got so many people in
2 accounting; I have so many people in engineering; I
3 have so many people in music programming.

4 And as you thought about what would
5 happen if you combined the companies, you thought
6 to yourself, well, jeez, I'd need one of those; I'd
7 need two of those; I'd need one and a half of
8 these.

9 And so it was overwhelmingly an
10 assessment of the cost synergies that we would be
11 able to achieve by putting the two companies
12 together.

13 Q. What are the total cost savings that
14 you've been able to achieve as a result of the
15 merger?

16 A. The annual operating -- operating cost
17 savings exceeds 600 million a year.

18 Q. Are there significant expenses that you
19 have not been able to reduce as a result of the
20 merger?

21 A. Yes, most notably, the music royalty
22 costs for specifically the sound recording

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1 performance. We have been successful in
2 negotiating great reductions on the composition
3 side.

4 Q. Can you tell us, in the recent years,
5 how much you've paid to SoundExchange for those
6 royalty fees?

7 A. Well, for this year, we would expect
8 the number for the satellite radio royalty to
9 approach \$190 million.

10 Q. And in the prior year?

11 A. I believe it was right about
12 165 million.

13 Q. And in 2010, was it about 148 million?

14 A. That's correct.

15 Q. All right. If you go back to 2006,
16 which was the last year before the rates changed,
17 can you tell us roughly what you paid in royalty
18 fees under the old royalty structure in the 2006
19 period?

20 A. Yes. Sirius and XM, together, paid
21 \$39 million in 2006.

22 Q. The costs that you have paid in the

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1 last rate term to SoundExchange, have you been able
2 to recoup any of those costs in the form of a music
3 royalty fee that is charged to subscribers?

4 A. Yeah, some, but not all.

5 For the period 2007 through the end of
6 2011, that we recovered about 53 percent of what we
7 incurred.

8 For 2012, the last year of the rate
9 proceeding, we should recover about 87 percent of
10 what we incur.

11 Q. All right. Tell us about how the
12 companies have fared financially in the
13 immediate months after the merger.

14 A. Well, from an operating perspective --
15 JUDGE WISNIEWSKI: If I could just ask
16 you to embellish that last answer a little bit for
17 me or explicate it further, Mr. Frear?

18 In terms of recovering the royalty
19 rates and the percentages that you mentioned, are
20 you specifically limiting those percentages to the
21 recovery of sound recording royalty rates?

22 THE WITNESS: That -- I'm pretty

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1 certain that it's all royalty costs associated with
2 the satellite radio service, so it would not only
3 be the sound recording performance royalties, but
4 also the royalties paid to the composing societies.

5 JUDGE WISNIEWSKI: So musical works
6 royalty as well?

7 THE WITNESS: Yes.

8 JUDGE WISNIEWSKI: And anything else?

9 THE WITNESS: No, sir.

10 JUDGE WISNIEWSKI: Because I noticed
11 yesterday, Mr. Meyer, in a footnote to his
12 testimony, seemed to indicate that it went a little
13 bit further than that. But perhaps you'd like to
14 look at that at some point and let us know.

15 THE WITNESS: Will do.

16 JUDGE WISNIEWSKI: Thank you.

17 BY MS. SCHILLER:

18 Q. How have the combined companies fared
19 in -- in the immediate months after the merger?

20 A. Well, from an operating perspective, we
21 got off to a very fast start. The cost reductions
22 came almost immediately. The -- you know, we

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1 merged, of course, on effectively the last day of
2 July of 2008. And we made staff reductions
3 starting in -- in August. We rationalized the
4 music channels.

5 So, you know, Sirius and XM had very
6 similar music offerings, so each company uplinking
7 about 70 -- creating and uplinking 70 music
8 channels to each satellite system, but largely
9 similar.

10 So, you know, a '60s channel, the
11 playlist largely similar between the two, so why
12 program two if you can just program one. So we
13 went through the music lineup and picked which --
14 which channels were going to survive and, in
15 November of 2008, rationalized the channel lineup
16 that led to additional reductions in programming
17 staff.

18 And as each contract came up for
19 renewal -- and it's a big business with a lot of
20 contracts. They come up every month. So, for
21 instance, the contract for Opie & Anthony, two talk
22 radio personalities that we have, was actually up

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1 in September of 2008. So that contract was -- was
2 renegotiated at substantial savings to the company.

3 Just as each contract has come up in
4 the months since that we've -- it's a new business
5 deal, a new negotiation, and we undertook it. So
6 cost savings started to come very fast.

7 On the capital expenditures side, we
8 immediately cancelled about \$60 million worth of
9 information technology upgrade plans that XM had,
10 and we also cancelled plans to build two additional
11 satellites for Sirius that saved us roughly
12 \$400 million, although that would have been
13 incurred over a period of years.

14 JUDGE ROBERTS: Mr. Frear, on the topic
15 of cost savings with respect to programming, as I
16 recall a couple of years ago -- and it's no secret
17 that I've been a Sirius subscriber for a long time
18 and was a subscriber when we last had this
19 proceeding -- but I recall from a couple of years
20 ago listening to the Howard Stern show hearing your
21 name brought up quite frequently on the air in not
22 too nice terms, as I recall.

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1 THE WITNESS: I did go to an all-boys
2 Catholic high school and I knew something -- I got
3 a call the night before, so on my way to the train
4 in the morning -- I don't usually listen to
5 Howard -- I turned it on and I heard one of his
6 fans deliver an opinion on me.

7 And I honestly burst into laughter
8 because it sounded exactly like the 15-,
9 16-year-old-boy statements I frequently hear in gym
10 class. So they're funny in a way, but not so funny
11 later in the day when my wife and daughters called.

12 And my first question was -- actually
13 to somebody who approached me in the office was,
14 did anybody give out my telephone number or my
15 address or say where I lived on the air? And the
16 first question I asked my wife was, did anyone come
17 by the house?

18 There is an unfortunate history with --
19 on Howard's program where, a long time ago, he made
20 comments about the chief financial officer of
21 Infinity, and it turned into a physical problem
22 for -- for the -- one of the kids -- kids of that

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1 person at school.

2 So Howard was understandably upset at
3 something he read in the press from what he thought
4 was a credible source.

5 When we gave him the transcript for
6 what I actually said, the -- he read it the way I
7 did and, the next morning, while he said he had
8 absolutely no reason to deliver an apology to
9 anybody and was completely justified in what he --
10 what he had said the morning before, that he had no
11 problem with David Frear. So . . .

12 JUDGE ROBERTS: I'm glad it all turned
13 out well.

14 THE WITNESS: Me, too.

15 BY MS. SCHILLER:

16 Q. On the subject of negative press, there
17 has been a fair amount of news coverage, even
18 today, when the press speaks about your company,
19 that it nearly filed for bankruptcy in 2009.

20 You know, you've told the Court how
21 well you did in the immediate months of the merger,
22 but how is it that you came to be on the precipice

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1 of bankruptcy by 2009?

2 A. Yes.

3 So things change fast in the world,
4 right? And, you know, when we closed the last
5 proceeding and -- and the Judges rendered their
6 decision December of 2007, sometime later, we found
7 out that that was actually the same month that the
8 recession started.

9 Sixty days after that decision --
10 nobody would have foreseen it -- Bear Stearns
11 collapsed.

12 We finally got the merger through
13 after 17, 18 months of waiting, you know, just
14 seven or eight months after the decision was
15 rendered, but in the middle of the summer of 2008,
16 the mortgage markets were collapsing.

17 So as we looked at -- you know, there
18 was certain debt of XM that needed to be refinanced
19 in connection with the merger by terms -- terms it
20 was due at that point in time. So we went into the
21 market to raise \$1.3 billion in order to close the
22 merger.

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1 Now, I remember Mr. Butson providing
2 expert testimony in the last proceeding on behalf
3 of SoundExchange saying all of our debts could
4 easily be refinanced 10 percent, yet we went into
5 the market seven or eight months after the close of
6 this proceeding, and the bond debt that we
7 raised -- the junk bonds that we issued cost us
8 16 percent. We had to price a convertible bond to
9 finish the refinancing.

10 On the night of the pricing, the stock
11 fell 30 percent. So did we get the financing done?
12 Yeah, we did. The interest rate on it
13 was 7 percent, but the equity option given to those
14 investors, that drove the price of the stock down
15 by 30 percent in a single night. So it was
16 incredibly expensive financing.

17 Now it's July of 2008 and, you know,
18 Mel and I looked at the terms. We hated the terms
19 on both the bond and the convert, but knew the
20 merger was good for shareholders, knew it was good
21 for the -- for the company and for its subscribers,
22 so, you know, it's worth taking a little bit of a

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1 hit to keep marching forward, and we'll figure this
2 all out.

3 In August and September of that year,
4 while we're telling everybody about all these
5 synergies we're going to get -- the cost synergies
6 and all that, but the cost synergies are still a
7 story to the market at that point, we start getting
8 proposals from investment banks.

9 I remember one in particular, that on
10 September 10th of 2008, we had a presentation from
11 Lehman Brothers to refinance the remaining debt of
12 the company. And five days later, Lehman Brothers
13 evaporates, and the capital markets, world capital
14 markets, just shut.

15 So we were facing -- despite the fact
16 that all these contracts are getting renewed, we're
17 making cuts, from an operations perspective, things
18 are going well, that we have what I would
19 characterize as extrinsic risk, right.

20 World capital markets close, we still
21 have a lot of debt to refinance in 2009, and we
22 entered the fall of 2008 with a good story. It's

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1 not yet a track record for investors, but the
2 capital markets are largely closed.

3 Q. Did you have to hire an investment
4 banker to try to raise financing?

5 A. We did. We hired Evercore to help us.

6 Q. How many investors did Evercore
7 contact?

8 A. A couple of dozen.

9 Q. Were any of them willing to invest in
10 the company?

11 A. No.

12 Q. Did you go and speak to the holder of
13 the convertible notes and try to get that
14 noteholder to change the maturity of the notes?

15 A. Yeah. The first debt coming up in 2009
16 was a convert that we issued a number of years
17 before. It was due in mid-February. There was
18 roughly 300 million outstanding when we entered
19 default.

20 And as -- after Lehman collapsed, we
21 immediately started contacting holders and
22 exchanging equity for that note. We continued to

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1 pressure the stock, but we knew that we had to get
2 it down. We knew there was a big problem in the
3 credit markets at that point.

4 And so we began discussions with one of
5 the largest holders of the note, a Goldman Sachs
6 affiliate called Liberty Harbor, who was acting not
7 only on behalf of itself, but was sort of the point
8 in negotiations for a few other large holders of
9 the note. And we began discussions with them about
10 how to restructure those notes on terms that would
11 be acceptable to -- to the noteholders and give us
12 some additional time to repay them.

13 Q. And why didn't you close with that
14 noteholder?

15 A. Well, on -- I believe it was
16 February 3rd, 2009, and at that point in time,
17 there was 172 million of the notes left
18 outstanding.

19 That morning when I came into work --
20 it was a Monday -- I was expecting to sign the
21 documents with Liberty Harbor that morning and I
22 couldn't reach them.

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1 They called me -- actually, not the guy
2 I spent the time negotiating with, but someone he
3 worked for called me about midday and said he had
4 some bad news to deliver, that they had sold their
5 position to another investor two weeks before the
6 notes were due.

7 Q. Did you -- did you contact that other
8 investor?

9 A. We asked Liberty Harbor who it was.
10 They wouldn't tell us. And -- but we sort of
11 guessed.

12 We had been hearing rumors about a,
13 quote/unquote, Denver-based investor who had been
14 buying up some of our most junior debt over the
15 course of the -- the fall of -- of '08 and into the
16 early part of '09; nothing confirmed, just talk in
17 the marketplace.

18 And after I got the call, I went in and
19 spoke to Mr. Karmazin, and we assumed it was
20 Charlie Ergen from Echostar, who was a Denver-based
21 investor.

22 And so Mel Karmazin initiated a call to

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1 Charlie to find out if, in fact, he was the holder
2 of the notes. And he was.

3 Q. Would he agree to do the deal on
4 substantially the same terms as the Goldman Sachs
5 affiliate?

6 A. Well, he did say in the call, when we
7 asked him what his objectives were, that he just
8 wanted to be helpful. So when he sent in his
9 advisors and his representative to talk to us about
10 what their conception of helpful was, the -- and we
11 did offer him the same terms as we were prepared to
12 sign with Liberty Harbor that they declined.

13 Q. The convertible notes that you've been
14 referring to that came due in February 2007, are
15 those the same notes that --

16 A. Sorry. February 2009?

17 Q. February -- yes.

18 A. Yeah.

19 Q. -- are those the same notes that
20 SoundExchange's expert had testified in the last
21 proceeding could be sort of refinanced
22 conservatively?

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1 A. Yes, they were among the notes. The
2 SoundExchange expert felt all of that could be
3 refinanced at 10 percent.

4 Q. Was what the price of the company's
5 stock by February of 2009?

6 A. It hit a low of a nickel.

7 Q. Okay. As the CFO of the company, do
8 you have occasion to speak, sometimes on a
9 quarterly basis, to financial analysts?

10 A. Yes, I do.

11 Q. In August of -- August 7th of 2008, did
12 you make this statement: So as we look at the
13 February maturities and one of the things we have
14 been saying to investors for several weeks now is
15 that we remain very confident of refinancing
16 that?

17 Is that a statement you made in
18 August 2008?

19 A. Yes, I did.

20 Q. Did you believe that statement to be
21 true when you made it?

22 A. Yes.

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1 Q. Did you turn out to be wrong?

2 A. Yes.

3 Q. How much debt does the company have
4 today?

5 A. About \$3 billion.

6 Q. How much of that debt matures by 2015?

7 A. About 2.5 billion.

8 Q. When is the first time that SiriusXM
9 achieved positive net income?

10 A. Positive net income would have been in
11 2010.

12 Q. When did it first achieve positive cash
13 flow?

14 A. Positive cash flow was achieved in
15 2009.

16 Q. And if you -- Page 18 of your written
17 direct -- Paragraph 18 of your written direct
18 testimony -- at the time of your written direct
19 testimony in November 2011, what was the company's
20 cumulative EBITDA?

21 A. Cumulative EBITDA at that point in time
22 was a negative 3.7 billion.

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1 Q. And at that same point in time, what
2 was its cumulative free cash flow?

3 A. Negative free cash flow through that
4 point in time was 5.5 billion.

5 Q. And at that point in time, what was its
6 net operating loss, cumulatively?

7 A. About \$8 billion.

8 Q. For how many years did the company --
9 tell us what the -- for how many years did the
10 company and its predecessors operate at a loss?

11 A. Twenty years.

12 Q. Would you just take a look at the chart
13 on Page 15 of your written direct testimony,
14 Paragraph 35, and tell us what do the charts on
15 these pages show?

16 A. Well, the charts are comparing
17 projections prepared in various prior years to the
18 actual results actually achieved. And what they
19 pretty consistently show is that the further out
20 the projection, the bigger the miss.

21 You won't see any long-term projections
22 where we actually beat the number. We missed them

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1 all.

2 We tend to have our best record of
3 success when projecting within one year.

4 Q. The last time you were in this
5 Courtroom in 2007, did you give testimony about the
6 date that analysts then projected the company would
7 turn positive free cash flow?

8 A. Yes, I did.

9 Q. And did you say it would be positive
10 based on consensus estimates in 2008?

11 A. Yes.

12 Q. And EBITDA and earnings positive in
13 2009?

14 A. Yes.

15 Q. Were the analysts correct about this?

16 A. They were not.

17 Q. What about SoundExchange's expert who
18 testified in 2007? Were his projections borne out
19 for these periods of time?

20 A. No. Mr. Butson, who I had known when
21 he was an equity analyst on the street --
22 Mr. Butson turned out to miss both subscribers and

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1 revenue by roughly 40 percent, and missed free cash
2 flow by 58 percent.

3 Q. What are the biggest risks that you
4 believe the company faces today?

5 A. I think there are four. There's a lot
6 of risk in the 10-K, and we spent a lot of time as
7 the management team kind of evaluating them and
8 deciding how to order them and describe them. But,
9 you know, there are four that -- just to shorten
10 the testimony -- that I'd like to focus on: one is
11 certainly competition; two is changing technology;
12 three would be the fact that we're a consumer
13 discretionary product, and so we're exposed to
14 macroeconomic trends; and the fourth would be risks
15 associated with satellites.

16 Q. And what is that risk associated with
17 satellites?

18 A. Well, I mean, space is a pretty hostile
19 environment. One of the things that I do in my
20 role is I oversee our satellite development
21 programs.

22 And so, for instance, the Sirius 6

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1 satellite was in Kazakhstan in February within two
2 weeks of launch when the prior satellite had some
3 problems with its solar radar deployment. It was
4 the same manufacturer, the same design as ours.
5 And they decided to scrub our launch, pack up the
6 satellite, ship it back to California.

7 And, now, we have a year delay. The
8 next opening in the launch manifest is early 2013.

9 Over the weekend, Intelsat launched a
10 satellite on a Sea Launch platform from the
11 Pacific Ocean, and one of its solar arrays didn't
12 open. It's expected to operate at half power,
13 which will effectively cut its life in half.

14 I was getting e-mails yesterday on a
15 control processor on the XM-3 satellite that had
16 flipped to the off position, which would render it
17 unable to find Earth, unable to fire its thrusters.
18 And, you know, the good news is they're able to
19 switch in the -- a backup control processor and
20 then recover those operating processes.

21 So, you know, the satellites -- in many
22 respects, people think of it as a black box, you

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1 launch it up there, and it seems to be working
2 fine. But every day, you're dealing with
3 incredibly hostile environment, and the risks are
4 severe if you have a failure. To our business
5 plan, it's potentially catastrophic.

6 Q. Do your annual reports on Form 10-K
7 disclose and discuss these risks?

8 A. They do.

9 Q. All right. I want to now talk about
10 your cash.

11 Does the company have a line of credit
12 with a bank or any other lender?

13 A. No.

14 Q. How does it fund its daily operations?

15 A. Through cash receipts from our
16 subscribers.

17 Q. At the last proceeding here, you
18 testified that it was necessary to maintain a cash
19 reserve of \$100 million.

20 Do you believe that a reserve of this
21 size is sufficient for the company today?

22 A. No, I do not.

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1 Q. And why is it insufficient?

2 A. Things go wrong, and when they go
3 wrong, they tend to all go wrong in the same way at
4 the same time. Right.

5 So we're a consumer discretionary
6 product, and, you know, when -- you know, the news
7 is terrible in the marketplace today. It's hard
8 for me to believe that the stock market runs up
9 when the three main central banks in the world all
10 announce that they think there might be some
11 additional stimulus required to keep the economies
12 from slipping into a recession.

13 But, you know, we are recession
14 sensitive. As the volumes drop, demand also drops
15 for our product. We have to engage to keep our
16 subscribers in increased discounting so that you
17 tend to lose volume in numbers of subscribers and
18 rate in terms of the average revenue you can
19 achieve all at the worst time.

20 So we still do have a lot of debt.

21 There's roughly 700 million of notes that are due
22 in August of next year. And for better, for worse,

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1 at this point in time, I think the right cash
2 position for us to hold is roughly \$750 million.

3 Q. All right. Switching topics now, I'm
4 going to ask you about the direct license
5 initiative, which there's been some testimony about
6 in the Court before you arrived.

7 Did you have a meeting with
8 SoundExchange executives sometime around
9 December 2009?

10 A. Yes.

11 Q. Who did you meet with?

12 A. Mike Huppe and Colin Rushing.

13 Q. What are their positions?

14 A. Their positions today are president and
15 general counsel.

16 I think at the time I met with them,
17 Mike was the general counsel, and Colin may have
18 been an associate general counsel.

19 Q. What was the purpose of that meeting?

20 A. Well, I wanted to talk to them about
21 a -- what I call a multiplatform license, all
22 right, so that strategically, that where we know

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1 our business is going is that subscribers are --
2 are going to be largely indifferent as to what
3 platform, but -- transmission platform they receive
4 the services over, right?

5 I don't believe that our customers
6 really care whether they're getting the signal
7 across a satellite or a terrestrial repeater or an
8 Internet connection. What they have come to us for
9 is SiriusXM-branded programming for a specific
10 price. And it's 140 channels of music, talk, news
11 and sports. So they just want to listen to that.

12 What we have in terms of the royalty
13 structure underpinning that business is a lot of
14 different agreements. So we think, for instance,
15 our service on Dish is just promotional, that the
16 cable satellite service isn't a strategic thing for
17 the company; it's a promotional tool.

18 The Internet component of our service
19 is not a separate business plan that could survive
20 on its own; it's an adjunct to providing satellite
21 radio service.

22 So as a subscriber, when I finish

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1 driving my 15 minutes to the train in the morning,
2 I pull out my smartphone and dial into my SiriusXM
3 app so I can keep listening to CNBC while I'm on my
4 way to work.

5 And I think, you know, a lot of our
6 subscribers see our Internet service as an
7 extension of their satellite radio service.

8 So knowing that we'll be incorporating,
9 you know, Wi-Fi technology, for instance, into the
10 radios we build, that it makes sense to us and that
11 we'll establish product and pricing strategies.

12 We have an all access plan where
13 customers can get our full service of, you know,
14 both our select package, our premier channels and
15 the Internet service for an effectively discounted
16 price from what they would cost on a separate
17 basis, so, you know, bundling, just like the cable
18 company does when they send you that triple play
19 thing and it's save, save, save. So we have the
20 same kind of strategy.

21 What we would like to do is align the
22 way that we do royalties with the way that the

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1 technology is merging and with the way that we are
2 productizing and packaging to our customers.

3 So I went to Mike and Colin, told them
4 this great strategy about multiplatform licensing.
5 And I said, look, you know, maybe this is the way
6 for us also to avoid the risk and costs of
7 litigation. We won't end up at the CRB again in --
8 in three years' time, you know, sort of finding
9 this out, and let's see if we can't, you know, sort
10 of pull this together.

11 It was very engaging conversation.

12 They asked a lot of questions. And then we got to
13 the end and the punchline, well, from a statutory
14 perspective, we're not allowed to do that.

15 We can't, you know, take the SDARS
16 license and the Webcaster license and the cable
17 satellite license and the commercial establishment
18 license and bundle it all into one product for you.
19 We're not allowed by law to do that.

20 So I asked them, well, look,
21 strategically, it makes sense for the company to do
22 it. I'd really like to do it, so what do I do?

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1 You guys are the collective. You're the ones I
2 think I'm supposed to talk to.

3 What they said is we can't do it
4 statutorily, so if you want to go down that path,
5 what you need to do is you need to talk to the
6 labels directly and you need to enter into direct
7 licenses with them.

8 Q. Did you then follow up on that
9 suggestion that you talk to the labels directly in
10 an effort to get direct licenses?

11 A. I did.

12 Q. And who were the first labels that you
13 approached?

14 A. Well, I started with the majors, right.
15 The -- the music industry, for better/for worse, is
16 one of the most concentrated industries on the
17 planet. You have four labels that control
18 70 percent of the content.

19 So, I mean, as opposed to the 80/20
20 rule, all right, where 80 percent control --
21 80 percent of the volume is from 20 percent of the
22 participants, this is less than 1 percent of the

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1 participants at 70 percent of the product. So I
2 started with the major labels. You think about
3 administrative simplicity, why not start with the
4 big guys.

5 It was hard to get meetings. You know,
6 for the most part, calls went unreturned for long
7 periods of time that -- had to make multiple calls
8 just to set up meetings.

9 The -- when I got there, you know, I
10 found two things -- and it was the same meeting at
11 every label -- first of all, they listened very
12 politely, very professionally; secondly, they
13 really had absolutely no idea what we meant to
14 their business. Not a single major label executive
15 that I met with, including the guys in charge of
16 licensing, had any idea how much they were
17 receiving from SoundExchange for satellite radio
18 royalties.

19 Nothing wrong with that. It just says
20 that satellite radio is not really important to
21 their business, because if it was important to
22 their business, they would know.

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1 So -- and I think they were all caught
2 a little offguard at the fact that they didn't
3 know.

4 But we had these nice discussions, and
5 they understood the strategy and everything else.
6 They said let us think about it and we'll get back
7 to you.

8 Q. Who did you meet with?

9 A. Well, I met with -- at Universal, I met
10 Nick Henny, who was the CFO at the time, met with
11 Nick twice; at Sony, I met Larry Kanusher, as well
12 as Kevin -- I'm going to forgot his last name.
13 He's the CFO at Sony -- maybe Kelleher; at Warner,
14 I met with Steve Macri, who was the CFO at the
15 time. I also met with Paul Robinson, their general
16 counsel.

17 At Universal, since Nick Henny left, I
18 met with Jeff Harleston a couple of times; and at
19 EMI, I met with a variety of people. But -- but
20 Alasdair McMullan, the general counsel, was the
21 person who is most often there.

22 Q. What year did these meetings take

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1 place?

2 A. They started in 2010 and, you know,
3 they took place over 2010, 2011. They actually
4 continue into 2012.

5 Q. Has anyone responded to your overtures?

6 A. You know, the funny thing is they
7 listen very attentively, but if we have other
8 meetings, it's because I call them. And the -- and
9 they've never asked about economics.

10 Q. Did you come to learn why they were not
11 responding to your offer to negotiate a direct
12 license?

13 A. Yeah. You know, sometimes I think I'm
14 a little slow, right, so -- but I try.

15 I'm not a music industry person. I
16 don't come from the music industry. So everything
17 I know about the music industry I've learned in the
18 course of my nine years at SiriusXM.

19 So when I'm hearing -- having meetings
20 with people that seem to -- seem to indicate they
21 think it made certain strategic sense, it's usually
22 a good way to start a business discussion, but then

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1 there's zero follow-up. I really didn't understand
2 it.

3 So I reached out to other music
4 industry people, generally, who had had major label
5 experience, but -- you know, to see if I couldn't
6 find out.

7 So, for instance, a former general
8 counsel of one of the labels who is also a former
9 SoundExchange member, I met with him; I met with
10 the -- a gentleman who not only runs his -- who not
11 only represents artists, but also is very highly
12 placed in one of the largest event organizations in
13 terms of concerts and things like that in the
14 world.

15 And, you know, basically, the advice
16 from them is you're barking up the wrong tree; that
17 the music industry has been in the siege mentality
18 for a long time; that the people you're talking to
19 are not going to engage with you unless their boss
20 tells them to go get it done.

21 And the reason why they're not going to
22 do it is that, every day, they watch their

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1 colleagues who they've worked with for decades get
2 fired; that if any one of them breaks ranks with
3 SoundExchange and enters into a direct license with
4 you, there's going to be a huge political fallout
5 in the industry.

6 The SoundExchange board meetings will
7 get very hostile, and it's likely the guy who
8 advocates that deal is going to get fired.

9 So you need to figure out how you can
10 break that logjam.

11 The opinion of the former Universal
12 executive was that you can try all you want, you
13 can try going through Doug Morris, you can try
14 going through Edgar Bronfman, you can try going
15 through Roger Faxon, but you're not going to get
16 anyplace. So you're going to find a more
17 responsive cord with the independent labels.

18 Q. When you couldn't make any headway with
19 the major labels, did you then pursue other record
20 labels?

21 A. I did.

22 Q. How did you go about doing this?

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1 A. Well, I started to have, first,
2 informal meetings with independent labels just to
3 educate myself, not any specific discussion, but I
4 just wanted to hear how they talked about the
5 business. And one of the things that was an
6 immediate difference was every one of them knew how
7 much money we were paying.

8 So I go to the major label meetings,
9 the big, sophisticated guys in the organization,
10 they have no idea how we fit into the business.
11 You go to the independent labels, who, you know,
12 some people think -- seem to think are
13 unsophisticated, and my experience is these guys
14 have their finger on the pulse of the business.
15 They know exactly where the money is coming from.

16 So I had some of those initial
17 meetings, but also knowing that I'm -- I'm not a
18 music industry person, I'm not an expert at this
19 stuff; that I've been having conversations with
20 Ron Gertz from Music Reports, Inc. for
21 several years, honestly, that -- you know, Ron had
22 been pitching me on the merits of direct licensing

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1 probably since 2005.

2 And so as I thought about the need of
3 how am I going to resource calling hundreds of
4 labels where I don't have a relationship, no one
5 knows me. So I decided to hire Ron and his team
6 that they've been through a similar effort, but on
7 the composition side of the business in work they
8 did for DMX. Ron has been involved in the music
9 industry for, you know, virtually his entire life.

10 And, you know, as one of the
11 independent labels told me, a gentleman named
12 Daniel Glass from Glassnote Records, that the --
13 the music industry is all about relationships. So,
14 you know, getting these conversations started
15 needed somebody other than me as -- as the face of
16 the company.

17 So we hired Music Reports to help us
18 get started with the initiative.

19 Q. With the assistance of Mr. Gertz, who
20 is going to be testifying later, were you able to
21 obtain some direct licenses?

22 A. Yes.

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1 Q. We can only speak as of the date of
2 your written direct testimony, so as of that date,
3 how many direct licenses had SiriusXM signed?

4 A. As of November, I think it was 61.

5 Q. What are the royalty rates for the
6 direct licenses that you signed in that period?

7 A. They range from 5 to 7 percent.

8 Q. Do any of your direct license
9 agreements have what's called a most favored nation
10 clause?

11 A. No.

12 Q. Why do you believe the independent
13 labels signed direct licenses with SiriusXM?

14 JUDGE ROBERTS: Excuse me a second,
15 Ms. Schiller.

16 MS. SCHILLER: Yes.

17 JUDGE ROBERTS: Mr. Frear, why no most
18 favored nation, MFN, clauses in your agreements?

19 THE WITNESS: It doesn't make us right,
20 but we have sort of a corporate allergy to MFNs.
21 We don't have them for the automaker agreements.
22 We don't have them in other programming agreements.

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1 I don't do them in software licenses.

2 Everybody asks for them, but we just
3 don't think it's good business. Each deal ought to
4 be cut on the merits of that bilateral negotiation.

5 It should stand on its own.

6 JUDGE ROBERTS: So it's SiriusXM's
7 decision, then, not to include them?

8 THE WITNESS: Yes.

9 JUDGE ROBERTS: And in exchange for
10 that -- or not including them, do you give anything
11 in return to the record company?

12 THE WITNESS: Well, it's a negotiation.
13 There are a lot of levers to pull. So we have a
14 rate, we have the scope of rights. They might
15 request an MFN on their side, and there are also
16 advances that can be paid.

17 So, it's a -- it is a negotiation, and
18 so any of those levers can be pulled.

19 JUDGE ROBERTS: So there's not a
20 specific thing when a record company asks you for
21 that type of clause that you say, well, we're not
22 going to give you that, but we'll give you this?

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1 THE WITNESS: No, there's not a
2 specific trade.

3 JUDGE ROBERTS: Okay.

4 THE WITNESS: There is a specific
5 response; it's no.

6 JUDGE ROBERTS: Right.

7 One other question. You said the 5
8 to 7 percent.

9 How is that arrived at in typical
10 agreement that you license?

11 THE WITNESS: Start low and get -- and
12 negotiate up. You know, it's -- we're trying to
13 achieve the lowest rate. We're trying to control
14 costs in our organization. That's sort of our job.
15 And so we negotiate as hard as we can to get the
16 best price that we can.

17 JUDGE ROBERTS: And you don't have any
18 outliers that, well, this record company got
19 10 percent or this one only got 2 percent.

20 THE WITNESS: No. No, we don't.

21 JUDGE ROBERTS: Okay.

22 JUDGE WISNIEWSKI: If I could just

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1 follow up on Judge Roberts' question.

2 The 5 to 7 percent, that encompasses
3 the range of all of the agreements that you're
4 talking about?

5 THE WITNESS: Yes, it does, all 6 --
6 you mean all 61 licenses?

7 JUDGE WISNIEWSKI: All.

8 THE WITNESS: Yes.

9 JUDGE WISNIEWSKI: And the term of
10 those licenses?

11 THE WITNESS: Most of them are three
12 years. There may be one or two that are longer,
13 there may be a couple that are shorter. But I
14 believe most of them are three years.

15 JUDGE WISNIEWSKI: So they would
16 terminate when?

17 THE WITNESS: I'd say most were roughly
18 effective January 1st so that -- of 2012 so that
19 they would expire at the end of 2000 -- what would
20 that be? -- 2014.

21 JUDGE WISNIEWSKI: Is there any
22 provision to opt out earlier?

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1 THE WITNESS: You know, I think there
2 might be in a couple, and they -- there are --
3 there are a handful -- I think five licenses that
4 have advances in it that some of the people asked
5 about opt-outs.

6 The opt-outs are generally at least
7 two years out, and then there are automatic
8 extensions. If they try and opt out before the
9 advances recovered that -- it's -- there are
10 automatic extensions to allow for recovery of the
11 advance.

12 JUDGE WISNIEWSKI: And the 5
13 to 7 percent that you mentioned, does that remain
14 stable over the -- the term that you mentioned?

15 THE WITNESS: Yes.

16 So if you've signed a 5 percent
17 license, it's 5 percent; a 6 percent license is
18 6 percent, yeah.

19 JUDGE WISNIEWSKI: Thank you.

20 BY MS. SCHILLER:

21 Q. Mr. Frear, you've mentioned -- let me
22 just ask you one thing.

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1 Is Exhibit 7 to your written direct
2 testimony a representative sample of one of those
3 direct license agreements?

4 A. Yes, it is.

5 Q. In one of your previous answers, you
6 mentioned there are advances.

7 Do you expect to recoup those advances?

8 A. I do.

9 Q. What makes you believe that?

10 A. Well, it's important for us to get the
11 money back. We care about it. And so -- so we
12 look at the size of the advance relative to what we
13 believe the, you know, sort of proportionate plays
14 are that are associated with that label.

15 We also receive from the labels recent
16 SoundExchange statements so that we're just not
17 relying on our data for how much is being paid, but
18 we're also informed -- or how much is being played
19 and what that would rate out to, but we're also
20 informed by what they've actually received from
21 SoundExchange.

22 So those two pieces of information,

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1 what we know about their playlist and how we use
2 it, as well as what they've received from
3 SoundExchange, help us triangulate in on what we
4 think is a good business decision in terms of a
5 recoverable advance.

6 Q. Have you already begun paying royalties
7 under the terms of those agreements?

8 A. Yes, we have.

9 Q. And on a quarterly basis, can you give
10 us a sense of the range of the -- those royalties?

11 A. The -- very small for the fourth
12 quarter because most of the licenses started in
13 January, the first quarter was about \$1.8 million.

14 Q. Okay. The direct licenses that you
15 signed with the record labels that you mentioned,
16 were they under any compulsion to sign that
17 agreement?

18 A. No.

19 Q. Do you believe that the direct licenses
20 you negotiated were at market rates?

21 A. I do.

22 Q. Did you form any impression of the

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1 sophistication of the counterparties that you dealt
2 with there?

3 A. Yeah. These guys know their business,
4 you know, so -- not only the ones who sign the
5 licenses, but even the ones who don't, and so that
6 we have real business discussions with people who
7 understand where we fit in -- you know, in their
8 business -- business scheme.

9 Q. After you began this direct license
10 initiative, did you find any -- any communications
11 from SoundExchange about your initiative?

12 JUDGE ROBERTS: Before we go on to
13 that, Mr. Frear, how did you target the independent
14 labels? What made you go to one, but not another?
15 Because there's a lot out there.

16 THE WITNESS: There are a lot out
17 there.

18 Music Reports came in and looked at our
19 playlist records from the period of July 2009
20 through June 2010. We took a one-year period. And
21 through their -- they have a fairly extensive
22 database of rights with other work that they've

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1 done for other clients.

2 And they came back with a conclusion as
3 to what they thought the rights were associated
4 with, you know, various labels and what the plays
5 were, so a share of plays.

6 And then we rank ordered it, right, I
7 mean, we just sorted it from most plays down to
8 smallest plays. And that became, effectively, the
9 calling list, right.

10 So they went down -- they prioritized
11 people that they had better relationships with
12 among the list, right, that -- you know, they
13 started making those calls that -- you know, people
14 we played a lot of that they didn't have
15 relationships with, they began to cultivate.

16 They asked the company who we knew
17 there. We provided contact information, just
18 coordinated through and we just started working our
19 way down.

20 JUDGE ROBERTS: Okay. Everybody likes
21 lists. So looking at lists, let's take the top 10
22 in terms of your use, not necessarily in terms of

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1 sales of records or anything else, but in terms of
2 your use. We know the top 4, the majors are out.

3 What about the other six, then, behind
4 that? How many of those did you try --

5 THE WITNESS: Honestly, I'd have to go
6 back and look. I haven't looked at it in a long
7 time.

8 JUDGE ROBERTS: Okay.

9 THE WITNESS: One of the largest
10 independents is a group called Concord Records. We
11 have not signed with -- with Concord.

12 On the other hand, there's a label
13 called E1 Entertainment that we play a lot of. I
14 don't know where it fits exactly in the top list.
15 We have a deal with E1. Cleopatra Records, we play
16 a lot of Cleopatra. We have a deal with them.

17 So off the top of my head, I couldn't
18 tell you how we're doing against them.

19 JUDGE ROBERTS: Maybe when we get to
20 the rebuttal phase, you could take, oh, say, the
21 top 20 or 25 labels, again, according to your
22 playing, not -- not any other standard, and you can

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1 tell us how many of those that you have --

2 THE WITNESS: I'll do that. Maybe if I
3 can leave you with this thought at this point.

4 Knowing that the major labels aren't
5 part of the available universe, that we have about
6 30 percent, roughly, that we can attack -- we've
7 only been at it for 10 months now -- and in the
8 first quarter, the 60 -- I think there were 62
9 licenses in the first quarter payment represented
10 about 6 percent of what we play.

11 We've signed more licenses, but the --
12 but only -- you know, those -- only 6 percent that
13 were effective in the first quarter. And so, in
14 effect, in 10 months, we've gotten about 20 percent
15 of the available product, if all 30 is available.

16 One of the things I find in talking to
17 the labels is that there are distribution
18 relationships in the music business. So it's not
19 unusual for me to go in and have a conversation
20 with, for instance, Welk Music Group, and Welk has
21 a distribution arrangement with -- and I'm going to
22 forget whether it's Universal or Sony, it's one or

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1 the other -- and I also met with Disney, who has a
2 distribution relationship with the other of
3 Universal or Sony and -- and what they will --
4 they -- you know, part of what comes up is are they
5 really available.

6 Because what they'll say is, well, we
7 have a distribution relationship with Universal.

8 I'm not sure that it's consistent with that. Well,
9 that's not true, the distribution agreements don't
10 prohibit them in engaging in direct licensing
11 activity, but it's very clear that breaking ranks,
12 even for people outside of the major music labels,
13 is something that the industry is concerned about.
14 And I see it in the conversations that I have.

15 But we'll come back in rebuttal with
16 what you've asked for.

17 JUDGE ROBERTS: Sure.

18 Now, obviously, you have budgeted the
19 negotiation process, correct? Because there are
20 expenses associated with executing these agreements
21 and making these contacts.

22 Have you provided -- I don't recall

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1 seeing if you've provided to us what you budgeted
2 for, for your negotiations last year or this year.

3 Am I missing something there?

4 THE WITNESS: Budget in terms of the
5 expense of pursuing the negotiation or the results
6 we expected to achieve?

7 JUDGE ROBERTS: No. The expense --
8 your anticipated expenses in these negotiations.

9 THE WITNESS: Our expenses --

10 JUDGE ROBERTS: Am I correct that I did
11 not see that in your testimony?

12 THE WITNESS: You would not have. It's
13 not a material number.

14 JUDGE ROBERTS: Okay. It's not a
15 material number?

16 THE WITNESS: No, it's not.

17 JUDGE ROBERTS: Okay. Does that mean
18 for next year, 2013, you haven't bothered to budget
19 any money for it?

20 THE WITNESS: Well, again, Your Honor,
21 we have budgeted for it, but the number is
22 immaterial. So the expenses -- MRI does most of

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1 the work, and I do work. So we budget my travel
2 expenses and we budget what we pay to MRI. But it
3 is -- I can tell you what the number is, but it is
4 immaterial.

5 JUDGE ROBERTS: Okay. I'm just
6 wondering what you budgeted actually for next year
7 for it, because when our decision comes out in
8 December, I'm wondering to what extent you
9 anticipate you will still be actively in
10 negotiations.

11 THE WITNESS: Okay. Good question.

12 So on the number, the current agreement
13 with Music Reports, I believe, is \$30,000 a month
14 to process and negotiate for us. And there are
15 some time charges they get for the negotiation, but
16 the fees are not materially outside of that range.

17 So I'd have to check with my staff
18 whether we budgeted 360 or 450 or \$500,000 in
19 pursuit of this. But it's a number in that range,
20 which is not material in our business.

21 We'll never stop direct licensing. I
22 mean, the nice thing about my position is that, you

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1 know, while Mel runs the company -- Mr. Karmazin
2 runs the company and, you know, ultimately, his
3 decision -- there are some decisions that he leaves
4 to me -- this one is something that we are always
5 going to do.

6 It makes sense for us to have closer
7 relationships and direct relationships with the
8 people that we buy product from.

9 So in any given year, we -- you know,
10 right now, the size we are, maybe we spend 2-1/2
11 or -- you know, billion dollars on different
12 elements of delivering service to our subscribers.
13 The only place where we don't have a direct
14 relationship with the person providing the service
15 to us is music royalties, and it doesn't make any
16 sense to me.

17 I negotiate directly with auto
18 companies; I negotiate directly with the NFL; with
19 Howard Stern; with NASCAR. I negotiate directly
20 with lawyers and accountants and Oracle and, you
21 know, SAS and all sorts of other entities, but not
22 in the music industry. And we don't think that's a

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1 good thing.

2 We think it's important for our
3 business to be aligned more strategically with
4 them. At the end the day, the Big Machine's Clear
5 Channel announcement the other day, you know, put
6 that aside. Every hour of listening that shifts
7 from terrestrial radio to satellite radio is better
8 for the labels.

9 So since we can't really get that
10 strategic alignment in working with SoundExchange,
11 it, you know, because they have their charter and
12 I'm sure they're doing a good job at what they're
13 supposed to do, but it makes sense for the labels
14 to drive more business to satellite radio at the
15 expense of terrestrial radio. They dominate radio
16 listening in the country right now, and it's better
17 for the music industry and it's better for us.

18 So direct licensing for us is never
19 going to stop, not as long as I'm here.

20 BY MS. SCHILLER:

21 Q. All right. But has somebody -- has
22 SoundExchange tried to stop this direct licensing

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1 effort?

2 A. Yeah. The letters that they sent

3 out --

4 Q. So the record is clear, I want to
5 direct you to Exhibit 6 and 10 to your written
6 direct testimony.

7 Are those letters from SoundExchange
8 that you saw after your direct licensing initiative
9 started out?

10 A. Yes, they are.

11 Q. Did these letters suggest to record
12 labels that they'd be a lot better off if they
13 didn't sign direct licenses with you?

14 A. Yes.

15 Q. What was your reaction to these
16 letters?

17 A. Well, consternation and frustration.

18 And, you know, remember I testified -- and I think
19 this is an important part of my testimony -- that
20 I'm a little slow sometimes.

21 So, you know, I had the meeting with
22 Mike Huppe and Colin Rushing to talk about this

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1 strategy and, strategically, why it was important
2 to the company. And they said, listen, but for the
3 statute, really good idea. We just can't help you.
4 We can't be the agent. So you should go talk to
5 the labels directly.

6 I said isn't that going to tick you
7 off, that you're the collective, aren't I supposed
8 to work with you. Well, you can't work with us on
9 this, so it's fine. And, in fact, we can't tell
10 you not to do this. We have a limited antitrust
11 exemption. So I said, well, okay.

12 So, you know -- so I do what they ask
13 me to do, what they suggest I do; that if I want to
14 pursue this strategic, you know, direction, that I
15 should go talk to them directly.

16 So when I do and we actually start, as
17 opposed to informal discussions, which I'm sure
18 they were aware of when we were having them, when
19 we actually start delivering forms of licenses,
20 they come out with a coordinated PR attack against
21 the effort that they suggested we should pursue
22 between not only themselves, but A2IM -- there are

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1 other exhibits, I'm sure, that will get

2 introduced -- Astra, the Recording Academy.

3 It was a media blitz largely distorting

4 what our efforts were and clearly seeking to impair

5 us from actually being able to -- to accomplish

6 this.

7 Q. Well, let's -- you refer to some other

8 letters.

9 Did other industry groups join in

10 SoundExchange's campaign?

11 A. Yes.

12 Q. Would you please turn to Exhibit 11 to

13 your written direct testimony?

14 Do you see that?

15 A. I do.

16 Q. What is it?

17 A. It's a letter from the Recording

18 Academy to their -- to their members.

19 Q. And does this letter call your direct

20 licenses, quote, a blatant antiartist and

21 antimusician, closed quote, initiative?

22 A. Yes, it does.

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1 Q. And was this letter released the same
2 date that SoundExchange released its October 27
3 letter?

4 A. Yes.

5 Q. Let's now look at Exhibit 13.

6 And what is Exhibit 13?

7 A. It's a letter or -- a letter or a Web
8 posting from the Future of Music Coalition.

9 Q. And did this letter also urge labels
10 not to join in -- or not to consent to your
11 collective -- your direct license effort?

12 A. Yes.

13 Q. And if you turn to the second page of
14 that letter, it says: Submitted by Kristin on
15 October 28th, 2011.

16 Do you see that at the bottom of the
17 page?

18 A. Yes, I do.

19 Q. Also close in time to the SoundExchange
20 letter?

21 A. Yes.

22 Q. Did the actions of SoundExchange affect

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1 your direct license effort and the number of
2 licenses you were able to sign?

3 A. Absolutely.

4 Q. Did anyone try to get out of their
5 license agreements after you got these letters from
6 SoundExchange?

7 A. Yes.

8 Q. Do you believe that SoundExchange has
9 interfered with your business?

10 A. I do.

11 Q. You're familiar with the amount of
12 royalty that SoundExchange is seeking in this new
13 rate proceeding, are you not?

14 A. Yes.

15 Q. What kind -- if that rate was to be
16 adopted by the CRB, what is the effect that could
17 have on your business?

18 A. Well, it's hundreds of millions of
19 dollars a year and, you know, will aggregate
20 depending on the estimates you use, but perhaps up
21 to a couple billion dollars of increases over the
22 term. You know, it's a mind-numbing sum of money.

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1 We can't not act, you know, with that
2 kind of an increase. There's something we're going
3 to have to do. And I don't know at this point in
4 time what we would be able to do.

5 I know that the act of that kind of an
6 increase would create a significant break in -- in
7 the capital markets; that the -- both on the equity
8 and debt side, it would raise a specter of things
9 that people were concerned about in 2009.

10 And there is growing concern today that
11 because of the position of SoundExchange, that
12 music royalties are an uncontrollable part of our
13 cost structure. And for how things are set up
14 today, that is, in many respects, true. You know,
15 significant increases in the rate would certainly
16 exacerbate those concerns.

17 But there's something we would have to
18 do to try and offset it. And, you know, so whether
19 we would be successful in increasing the music
20 royalty fee to try and recover the -- these costs,
21 we would have to assess that.

22 You know, when you go back to the

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1 Number 1 risk I noted in the business, it's
2 competition. And overwhelmingly, since the last
3 proceeding that, you know, one of the things that
4 we've seen really come true is free-to-the-consumer
5 music options have really proliferated, and, you
6 know, the brands of Pandora and Spotify are the two
7 most notable components of that -- of that new
8 market sector, but there are many, many other names
9 and people creating services.

10 Wireless companies are bundling,
11 effectively, music listening into prepaid phones,
12 Move Music, for instance, and what's going on
13 with -- with that.

14 And so as you raise the price of
15 satellite radio, that -- you know, what's -- what
16 kind of demand shift are we going to find between
17 these free-to-the-music -- free-to-the-consumer
18 music listening alternatives and -- and ourselves?

19 Might we be motivated under an increased rate
20 structure to avail ourselves of the separate
21 pricing that's allowed for in, you know, the
22 current structure, where we break apart the pricing

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1 of music and talk?

2 We'd have to go through and evaluate
3 all these things. I have absolutely no idea where
4 they come out.

5 Certainly, if we were to break the
6 pricing apart, there are substantial risks to the
7 satellite radio business model associated with
8 that, because we don't necessarily know how
9 consumers are going to react.

10 And the second thing is that would seem
11 to introduce substantial risk to the music industry
12 as well, because if -- if, in fact, we demonstrate
13 by separate pricing that, you know, with all the
14 free-to-the-consumer music alternatives out there,
15 that the market clearing price for music is \$3 or
16 \$4, then, you know, a percentage of that may be, in
17 fact, considerably less than the percentage of the
18 14.49 that we're paying today, where the one thing
19 that really distinguishes us from
20 free-to-the-consumer music listening alternatives
21 is, in fact, our nonmusic content.

22 Q. I know you speak to banks and investors

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1 on a fairly regular basis.

2 When you speak to them, do they ask you
3 about this music royalty fee?

4 A. You know, I was in Boston two weeks ago
5 meeting with institutional investors up there. It
6 came up in every meeting. I was in Connecticut
7 earlier this week meeting with -- with investors,
8 and it came up in every meeting there.

9 The analysts, the rating agencies,
10 the -- everybody in the financial industry is
11 acutely aware of this proceeding and has a strong
12 interest in what its outcome might be.

13 Q. Did the increase in the royalty rate
14 that went into effect after the last proceeding
15 have any effect on the company's difficulty in
16 repaying those convertible notes when they came due
17 in February of 2009?

18 A. Yeah. It's an interesting confluence
19 of circumstances.

20 We had a 172 million we needed to pay
21 off on February 17th of 2009 to avoid a bankruptcy
22 filing, which -- by the way, that morning is when

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1 we signed the Liberty Media deal, and we were going
2 to do one of two things that day: either Alvarez
3 and Marcel was going to show up at bankruptcy court
4 at 4 o'clock in the afternoon to file or we are
5 going to close the Liberty Media deal.

6 But we had 172 million that was
7 triggering the events on that day. The increased
8 cash payments over the 39 million we paid in 2006
9 through the date of that filing, the increased cash
10 payments to SoundExchange were \$157 million. That
11 would have been -- we really could have used that
12 at that particular point in time.

13 Q. Did you avert bankruptcy only because
14 of Liberty Media coming in at the last minute?

15 A. Yes.

16 MS. SCHILLER: I have no further
17 questions.

18 CHIEF JUDGE BARNETT: I apologize. I'm
19 going to ask you to introduce yourself one more
20 time?

21 MR. FREEDMAN: I'm Jared Freedman.

22 CHIEF JUDGE BARNETT: Freedman.

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1 Can you spell your last name for me,
2 please?

3 MR. FREEDMAN: Yes. F-R-E-E-D-M-A-N.

4 MR. RICH: Thank you.

5 MR. FREEDMAN: I'm on behalf of
6 SoundExchange.

7 CROSS-EXAMINATION

8

9 BY MR. FREEDMAN:

10 Q. Good morning, Mr. Frear.

11 A. Good morning.

12 Q. I'll be asking you some questions on
13 behalf of SoundExchange this morning.

14 I want to start with the direct
15 licenses if we could.

16 MRI and SiriusXM contacted hundreds of
17 independent labels for direct licenses, right?

18 A. Yes.

19 Q. You contacted over 100 -- I'm sorry --
20 over 500 before November of 2011; is that right?

21 A. I actually don't know exactly how many,
22 no.

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1 Q. One of the reasons that SiriusXM
2 initiated the direct license initiative was to
3 establish a benchmark for the rates in this case,
4 correct?

5 A. That's correct.

6 Q. And when MRI and SiriusXM contacted the
7 direct labels -- the independent labels, you
8 offered some a rate of 5 percent, some were offered
9 a rate of 6 percent, and some were offered a rate
10 of 7 percent of revenue; is that right?

11 A. That's correct.

12 Q. And those negotiations began with
13 SiriusXM proposing a rate in the first instance; is
14 that right?

15 A. Since MRI was conducting the
16 discussions, I don't know exactly what the cadence
17 was in the negotiations. You'd have to ask them.

18 Q. In any event, it's true, isn't it, that
19 some labels were offered 7 percent as the first
20 offer that was made to them; is that right?

21 A. That's correct.

22 Q. And SiriusXM and MRI developed the

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1 range of 5 to 7 percent by looking at the existing
2 statutory license and then proposing rates a bit
3 below the statutory rates; isn't that right?

4 A. Well, we looked at our existing costs
5 across the satellite radio, Internet, commercial
6 establishment and cable satellite services.

7 Q. So you looked at the rates for the
8 those various services that you just mentioned,
9 correct?

10 A. We looked at the costs we were
11 incurring, yes.

12 Q. When you say "the costs," how is that
13 different than -- than the rates you're paying for
14 those?

15 A. Well, because you have dissimilar
16 services, right, you know, so that the -- you know,
17 you have a percentage of a defined base of revenues
18 on the satellite radio side, you have a per
19 performance rate on the Webcaster side -- I think
20 the cable satellite rate is -- is actually a per
21 subscriber fee, and then I think the commercial
22 establishment services is a per location fee.

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1 So the rate bases are a little bit
2 different, so you couldn't just look at them on a
3 rate basis. So we had to add up the costs and look
4 at the costs.

5 Q. And with respect to the satellite radio
6 portion of those costs, you would look at the rate,
7 right?

8 A. I think we looked at the costs.

9 Q. All right. Now, in deciding whether to
10 offer a record label, 5, 6 or 7 percent, one of the
11 factors that SiriusXM considered was the size of a
12 label's catalog, right?

13 A. Well, honestly, that question is
14 probably better directed to Mr. Gertz so that
15 the -- the -- Music Reports really kind of led the
16 implementation strategy, so the decisions, label by
17 label, on what to propose were really theirs.

18 Q. But you're familiar with those
19 decisions, are you not?

20 A. Well, I'm familiar with the outcomes in
21 terms of how the negotiations ended. I'm not
22 really familiar with how the negotiations started.

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1 Q. Mr. Frear, do you recall that I took
2 your deposition in this case?

3 A. I do.

4 Q. As soon as we have it labeled, I'd like
5 to show you a copy of the deposition.

6 A. Sure.

10 BY MR. FREEDMAN:

11 Q. Mr. Frear, do you have SoundExchange
12 Trial Exhibit 11 in front of you?

13 A. Yes.

14 Q. And this is a transcript of the -- your
15 deposition in this case.

Do you see that?

17 A Yes

18 Q And can you please turn to Page 41?

19 And you see there are sort of

20 Min-U-Script pages there. I mean the mini Page 41.

21 A. So mini Page 41, the upper right corner
22 of the box?

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1 Q. Yes.

2 A. Yes.

3 Q. Okay.

4 CHIEF JUDGE BARNETT: Just so the
5 record is clear -- I'm not sure if there was more
6 than one deposition of Mr. Frear -- this one was
7 dated Wednesday, March 7th, 2012.

8 MR. FREEDMAN: Thank you, Your Honor.

9 And there was only one deposition, but thank you.

10 BY MR. FREEDMAN:

11 Q. Do you recall when I took your
12 deposition, I asked you about how SiriusXM and MRI
13 decided what rates to offer each label?

14 A. Sorry. Could you ask your question
15 again?

16 Q. Sure.

17 Do you recall when I took your
18 deposition, I asked you how SiriusXM and MRI
19 decided which rates to offer to each label?

20 A. Well, actually, no. But perhaps in
21 reviewing the deposition, it would refresh my
22 memory.

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1 Q. Um-hum. So let me start, if I can, on
2 Page 41, where I directed you, towards the middle
3 of the page -- back up.

4 On the very bottom of Page 40, I asked
5 you:

6 "Question: Do you know who
7 decided what rates to offer each
8 indie?"

9 And you answered:

10 "Answer: MRI, in consultation
11 with me, decided how to structure the
12 rates and what to offer."

13 A. Would it be all right if I read -- just
14 read through it for a moment?

15 Q. Yes, absolutely, please.

16 A. Thank you.

17 (Whereupon, the witness reviews the
18 document.)

19 THE WITNESS: Should I read on to 42 or
20 just stay on 41?

21 BY MR. FREEDMAN:

22 Q. I was going to ask you about 41 and 42,

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1 so if you would like to read it first, please go
2 ahead.

3 A. Okay.

4 (Whereupon, the witness reviews the
5 document.)

6 THE WITNESS: Okay. I've read it.

7 BY MR. FREEDMAN:

8 Q. Does this refresh your recollection
9 that one of the factors that you considered in
10 deciding what rates to offer was the size of an
11 independent label's catalog?

12 A. Yes, it was one of the factors.

13 Q. And was another factor you considered
14 the popularity of the sound recordings in that
15 catalog?

16 A. Now, when you're using the word "you,"
17 do you mean the collective "you" of MRI and
18 SiriusXM acting as two institutions in the interest
19 of getting that done, or do you mean me,
20 personally?

21 Q. I'll clarify.

22 When MRI and SiriusXM were deciding

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1 what rates to offer, was the size of the catalog
2 one of the factors that was considered?

3 A. Yes.

4 Q. And was -- another factor that was
5 considered was the popularity of the recordings in
6 the catalog; is that correct?

7 A. Yes, that was another of the factors
8 that was considered.

9 Q. And another factor was the genre of
10 music; is that correct?

11 A. That's correct.

12 Q. And is it fair to say that the label
13 with the bigger catalog of hit recordings in a
14 popular genre would have been offered a higher rate
15 than a label with a smaller catalog of less popular
16 recordings?

17 A. It -- so if all of those things lined
18 up that way, that might be a logical outcome. We'd
19 have to go back and look at what the negotiations
20 actually produced, but in terms of talking about
21 what we might be prepared to do in the course of
22 negotiations, that a big catalog in a popular

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1 genre, that -- with a quality catalog that we play
2 a lot of, that would -- on balance in the
3 negotiations, we might be willing to go from
4 5 percent to 6 percent to 7 percent; whereas
5 somebody with a really big catalog -- for instance,
6 the deposition refers to bluegrass.

7 No offense to bluegrass, wonderful
8 genre. We have a lot of subscribers who love
9 bluegrass, but fewer people overall in the
10 population listen to it. So even though it might
11 be a really high-quality catalog, lot of plays,
12 that maybe it's not worth us paying quite as much
13 for that one.

14 Q. So you were willing to go higher for
15 bigger and more popular catalogs as opposed to a
16 bigger, but less popular catalog?

17 A. I would say that it's a directional
18 influence on the negotiations, but not an absolute.

19 Q. Now, you testified this morning that
20 you, personally, contacted the four major labels,
21 correct?

22 A. Yes.

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1 Q. You did not propose to any of the
2 majors rates of 5, 6 or 7 percent; is that correct?

3 A. Well, that would be correct, though I
4 think it's important to note that none of the major
5 labels -- well, one major, EMI. But the other
6 three major labels never showed an interest in
7 hearing about the structure of what we were doing,
8 for instance, seeing a draft of a direct license
9 agreement, nor did they ever show an interest in
10 what kind of financial consideration or other
11 consideration might be offered.

12 Q. And so am I right that you did not
13 offer any of them a rate of 5 or 6 or 7 percent?

14 A. Yes. We never sent them a form of
15 license. They -- we never made an economic offer
16 to it. They showed no interest in pursuing the
17 discussions.

18 So we tend not to -- we do this in a
19 lot of business discussions, right, that you know,
20 we were bidding for support for IT platform in a
21 new business initiative a couple of weeks ago. And
22 we had -- we took an RFP out to seven potential

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1 respondents. The -- three did not respond, so we
2 didn't follow-up with them to, you know, kind of
3 ask the costs and negotiate with them what they do,
4 because they weren't interested.

5 Q. And just so the record is clear, am I
6 correct that you never proposed any particular
7 royalty rate to any of the four majors; is that
8 right?

9 A. Asked and answered, I think three
10 times, but yes.

11 Q. Okay. I was previously asking about
12 the particular 5, 6 or 7 percent rates.

13 I just wanted to clarify, you never
14 offered any rate to them?

15 A. The labels -- the three -- three of the
16 four majors never expressed any interest in
17 pursuing it under any terms.

18 Q. And so --

19 A. They never -- they were never curious
20 about what the scope of rights might be, not
21 curious about how their share of plays might
22 increase, not curious about what advances might --

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1 we might be willing to pay, not curious about what
2 the rate might be, they weren't curious whether we
3 would be willing to pay 5 percent or 50 percent.
4 They simply weren't interested.

5 Q. You mentioned three of the four.

6 So EMI, if I recall, was the one who
7 had more interest?

8 A. Yeah.

9 Alasdair McMullan, the general counsel
10 of EMI, was fairly engaged. We met with him
11 frequently on lots of different issues and he was
12 fairly engaged in the -- in the discussion, and
13 actually carried on what I characterize as an
14 intellectual debate about the pluses and minuses
15 of -- you know, of direct licensing initiatives
16 for -- for his label.

17 And at the time, I was also talking
18 about the possibility of crossing over to the
19 compositions as well. And he was helping educate
20 me about how he thought that would be incredibly
21 difficult to do. But we had actually a very good
22 discussion.

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1 And there came a point in time where I
2 sent to Alasdair a form of license, but -- so he
3 could see the scope of the rights and the way we
4 were structurally approaching with it, but with no
5 economics in it, right. Let's just see if we can
6 kind of get an understanding, have a dialogue about
7 the structure. So it got that far.

8 Q. So you sent EMI -- did you say it was a
9 draft license or --

10 A. Yeah, kind of similar -- probably not
11 exactly the same, but not -- not substantially
12 different from what's in Exhibit 7 of my direct
13 testimony.

14 Q. But what you sent to EMI didn't have
15 any proposed rates in it?

16 A. No rates, just a structure of what the
17 approach might be.

18 Q. When -- when MRI and SiriusXM contacted
19 the independent labels, you didn't wait to see if
20 they were interested before proposing rates,
21 correct?

22 A. Again, you would have to ask Ron Gertz

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1 to -- the exact tactics of the approach.

2 Q. Now, Judge Roberts asked you a few
3 questions about budgeting for the cost of the
4 negotiations.

5 Do you recall that?

6 A. Yes.

7 Q. And you mentioned a monthly cost.

8 It's also true that when you first
9 engaged MRI -- I think you mentioned this morning
10 you had MRI prepare a market share analysis so you
11 could figure out which labels to contact?

12 A. Yes.

13 Q. And you paid for that as well, correct?

14 A. Yes, back in 2010, we paid for that.

15 Q. Do you recall how much you paid for
16 that?

17 A. Not exactly -- I'm going to say -- I
18 can get the exact number if you'd like it, but
19 probably around \$100,000.

20 CHIEF JUDGE BARNETT: Is this a good
21 place to stop, Mr. Freedman?

22 MR. FREEDMAN: Yes, Your Honor.

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1 CHIEF JUDGE BARNETT: We'll be in
2 recess for about five minutes.

3 (Whereupon, a brief recess was taken
4 from 10:57 a.m. to 11:14 a.m.)

5 CHIEF JUDGE BARNETT: Good morning
6 again.

7 Please be seated.

8 I take full responsibility for the
9 delay and apologize. Thank you for your patience.

10 Mr. Freedman.

11 MR. FREEDMAN: Thank you, Your Honor.

12 BY MR. FREEDMAN:

13 Q. Mr. Frear, could I direct your
14 attention to Paragraph 52 of your written
15 testimony? Do you still have it there?

16 A. Yes, I do.

17 Q. Okay. And do you see in Paragraph 52
18 you refer to the number of artists and albums and
19 sound recordings represented by the direct licenses
20 you had signed?

21 A. Yes, I do.

22 Q. Okay. And you mentioned that these are

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1 significant labels with artists that we play every
2 day on our service.

3 Do you see that?

4 A. I do.

5 Q. Now, I think you mentioned this morning
6 that you thought that the effective date for most
7 of the direct licenses -- most of the 61 direct
8 licenses was January 1, 2012.

9 Was that -- was that your testimony?

10 A. It was -- effective date might be a
11 term of art, so to speak. In order to enable this,
12 the -- we could sign a -- a license in October or
13 November, but we can't do anything with it until
14 the labels send us their metadata so that we can
15 then match it up with the songs in our playlist.

16 So, you know, you should think about
17 the fourth quarter as, for the most part, gathering
18 everybody's metadata and sort of debugging the
19 systems. And many of the licenses signed before
20 the direct testimony were given effective dates of
21 the first quarter to actually allow for -- you
22 know, for that operational activity.

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1 Q. Are you aware that Music Royalties,
2 Inc., MRI, sent royalty statements to over 50 of
3 the direct license labels for the fourth quarter of
4 2011?

5 A. I'm not aware of -- of that detail, no.

6 Q. Are you aware that in the fourth
7 quarter of 2011, SiriusXM's satellite radio service
8 made over 4 million transmissions of sound
9 recordings?

10 A. No.

11 Q. Does that sound like a ballpark number?

12 A. You know, it's just not a number I
13 would be familiar with in the course of my normal
14 responsibilities.

15 Q. Are you aware that in the fourth
16 quarter of 2011, SiriusXM played about 1,500
17 different recordings covered by the direct
18 licenses?

19 A. No. I don't -- I -- I've seen the
20 first quarter statement, which I understand is
21 maybe not part of my written direct testimony, so
22 I'm a little more familiar with what's in that.

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1 I don't recall having reviewed the
2 fourth quarter statement.

3 Q. I wanted to switch topics now.

4 In Paragraph 16 of your written
5 testimony, you discuss the return on investment
6 that some --

7 JUDGE WISNIEWSKI: Excuse me. Just
8 before you do, if I can clarify one thing --

9 MR. FREEDMAN: Sure.

10 JUDGE WISNIEWSKI: -- in that line of
11 testimony, Mr. Freedman.

12 Turning to your Exhibit 7 that you had
13 attached to your testimony, Mr. Frear, and, in
14 particular, Page 4 of that contract that you signed
15 with the particular independent label that is
16 listed there.

17 If you look at that and read the
18 definition under "term," it says, This agreement
19 will commence as of the date first written above.

20 The -- the only place that I see a date
21 first written above is on the first page of the
22 document, and that date is August 10th, 2011.

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1 So is that, in fact, a -- the date of
2 commencement for this particular agreement, or am I
3 misinterpreting it?

4 THE WITNESS: For this particular
5 agreement, I'm sure that's -- that's the case. We
6 did modify these terms as we went through to make
7 sure we had -- with respect to initiation dates to
8 make sure that we didn't fall down on our
9 operational responsibilities right out of the
10 gates.

11 JUDGE WISNIEWSKI: I was just trying to
12 make sure I was interpreting that correctly.

13 Thank you.

14 Thank you, Mr. Freedman.

15 MR. FREEDMAN: Thank you.

16 BY MR. FREEDMAN:

17 Q. So if I could turn your attention to
18 Paragraph 16 of your written testimony, please.

19 CHIEF JUDGE BARNETT: Did you say 16,
20 1-6?

21 MR. FREEDMAN: Yes.

22 CHIEF JUDGE BARNETT: Thank you.

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1 BY MR. FREEDMAN:

2 Q. And, Mr. Frear, in that paragraph you
3 discuss the return on investment that some of
4 SiriusXm's investors have earned; is that right?

5 A. Are you referring to the top of Page 7?

6 Q. Well, I guess I was referring to the
7 entire paragraph.

8 A. Okay. May I read the paragraph?

9 Q. Yes, please do.

10 (Whereupon, the witness reviews the
11 document.)

12 THE WITNESS: Okay, I've read it.

13 BY MR. FREEDMAN:

14 Q. And in this paragraph, you're
15 discussing the return on investment that some of
16 SiriusXm's investors have earned; is that right?

17 A. Among other things, yes.

18 Q. Among other things?

19 A. Yes.

20 Q. And you state that investors who
21 purchased stock in January 2007 have lost
22 50 percent of their investment; is that right?

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1 A. Yes.

2 Q. Now, it's true, isn't it, that
3 investors who bought stock in February of 2009 at a
4 nickel, plus a little bit, and still owned it when
5 you submitted your written direct testimony,
6 they've had a return of more than 3,000 percent,
7 right?

8 A. Yes.

9 Q. And it's true that SiriusXM's stock
10 price increased over 350 percent in 2009; is that
11 right?

12 A. Well, I don't see that in my testimony,
13 but if you tell me that's the calculation, the -- I
14 think -- the way that I think of the returns on
15 Sirius and the Sirius investment is that over
16 20 years, we put \$13-1/2 billion into building
17 this -- this business.

18 So -- I have a daughter who was born in
19 1990, and I actually just got a note that
20 Rob Briskman, who is our, sort of, founding rocket
21 scientist, is -- it's his 20th year with the
22 company, and, you know, the company was founded

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1 right around the time my daughter was born; that
2 it's kind of like if Rob had come to me at my
3 daughter's birth and said, if you give me a dollar,
4 when your daughter graduates from college, I'll
5 give you a 1.10 back to help pay for her college
6 education.

7 All right. The company's aggregate
8 market value today is \$15 billion, when you look at
9 the equity and debt. So we spent \$13-1/2 billion
10 over 20 years to create a company that's worth
11 10 percent more than that --

12 Q. So my question is --

13 A. -- some people made more money than
14 others, some people less money.

15 Q. -- so my most recent question was more
16 narrow. I was just asking with respect to the year
17 2009, isn't it true that SiriusXM's stock price
18 increased over 350 percent?

19 A. If you have an exhibit that shows me
20 the price at the beginning of the year and the
21 price at the end of the year, I'd be able to answer
22 the question.

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1 But off the top of my head, I don't
2 know what the price was at the beginning of 2009,
3 nor do I know what the price was at the end of
4 2009.

5 Q. Fair enough.

6 The same question for 2010. Are you
7 aware that the stock price increased over
8 150 percent in 2010?

9 A. Again, without an exhibit to help me, I
10 couldn't answer.

11 Q. Now, the largest investor in SiriusXM
12 is Liberty Media; is that right?

13 A. The holder of the largest component of
14 our equity is Liberty Media, yes, that's correct.

15 Q. Well put.

16 And at the time you submitted your
17 written direct testimony at the end of
18 November 2011, what percent of the equity in the
19 company did Liberty control?

20 A. Their preferred stock position was
21 convertible into 40 percent of the company's common
22 equity.

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1 Q. And Liberty invested about \$380 million
2 in SiriusXM in 2009; is that right?

3 A. Actually, I believe it was 350 million
4 was the actual cash expended by them. We did give
5 them 30 million of that back right away, and then I
6 think they got another 2 million in the bank deal,
7 so that their net investment was probably 350 minus
8 32.

9 Q. And Liberty's stake in SiriusXM as of
10 the time you submitted your testimony was around
11 \$6 billion; is that right?

12 A. That would be about right.

13 Q. And you would agree that's a good
14 return on investment, right?

15 A. That's a really good deal.

16 Q. I wanted to ask you some questions
17 about the music royalty fee --

18 A. Sure.

19 Q. -- which you discuss in Footnote 17 on
20 Page 21 of your written testimony.

21 A. Should I read Footnote 17?

22 Q. Sure. Go ahead.

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1 (Whereupon, the witness reviews the
2 document.)

3 THE WITNESS: Okay, I've read it.

4 BY MR. FREEDMAN:

5 Q. So I'm not sure if you used the actual
6 words "music royalty fee" in Footnote 17, but
7 Footnote 17 is referring to the music royalty fee,
8 correct?

9 A. I believe that's true, yes.

10 Q. And the music royalty fee covers not
11 only SoundExchange royalties, but royalties paid to
12 ASCAP, BMI and SESAC; is that right?

13 A. Yes, the music royalty fee does cover
14 those as well.

15 Q. And SiriusXM charges substantially all
16 of its customers the music royalty fee; is that
17 correct?

18 A. Yes, substantially all of our self-pay
19 customers. We don't charge the paid promotional
20 trials from the automakers.

21 Q. And just -- just so we all know what
22 we're talking about, when you refer to self-pay

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1 subscribers, can you explain what that means?

2 A. That would be like any one of us that,
3 you know, you maybe bought a car; you happen to get
4 a trial that, you know, came in the car; when that
5 trial was over, you decided you liked the service,
6 you wanted to continue it, so you gave us a credit
7 card or requested an invoice to continue listening
8 to the service, and now we collect money from you,
9 as opposed to an auto company. That would be a
10 self-pay subscriber.

11 Q. And approximately how many of
12 SiriusXm's subscribers, or maybe what percentage of
13 the subscribers, are self-pay subscribers?

14 A. The self-pay subscriber base is -- is
15 over 18 million now.

16 Q. And SiriusXM implemented the music
17 royalty fee in 2009; is that correct?

18 A. Yes.

19 Q. And the original amount of the music
20 royalty fee was \$1.98 for the standard subscription
21 price; is that right?

22 A. Yes. On a 12.95 monthly subscription,

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1 the music royalty fee was \$1.98.

2 Q. And so that was a \$1.98 that was added
3 on top of the 12.95, correct?

4 A. That's correct.

5 Q. And so that amounted to approximately a
6 15 percent price increase for those subscribers,
7 right?

8 A. Yes, before taxes and things like that.

9 Q. Now, in connection with the merger of
10 Sirius and XM, the FCC order related to the merger
11 regulated the music royalty fee; is that right?

12 A. Yes.

13 Q. And under the -- the FCC order,
14 SiriusXM agreed that it could pass through
15 100 percent of royalty cost increases since the
16 date of the filing of the merger application; do I
17 have that right?

18 A. That's correct. Starting, of course,
19 one year after the merger.

20 Q. And with respect to SoundExchange
21 royalty cost increases, SiriusXM did, in fact,
22 recover most of those cost increases, right?

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1 A. I think I testified earlier that for --
2 through -- from, you know, 2007, when the rate went
3 effective, right, through the end -- the CRB rate
4 went effective -- through the end of 2011,
5 understanding that we started collecting in August
6 of 2009, that we collected an aggregate of
7 53 percent of what we incurred during that period
8 from the beginning of 2007 to the end of 2011.

9 Q. And when you say --

10 JUDGE WISNIEWSKI: Aggregate of what
11 you incurred with respect to the increase, not the
12 whole price?

13 THE WITNESS: With respect to the
14 total.

15 JUDGE WISNIEWSKI: Okay.

16 THE WITNESS: So the total -- the total
17 satellite radio royalty costs from January 1st,
18 2007 through December 31st, 2011 were roughly
19 \$933 million, SoundExchange, ASCAP, BMI and SESAC.

20 The amount that we recovered from
21 subscribers through the music royalty fee through
22 the end of 2011 was roughly 499 million.

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1 So 499 divided by 933 is what we
2 recovered. The other 400-some-odd million we did
3 not recover.

4 JUDGE WISNIEWSKI: Before -- just to
5 kind of close the loop on that.

6 So what percentage of the increased
7 rates that you incurred during that period did you
8 recover, because the increased rates are only a
9 portion of that?

10 THE WITNESS: That's not a number that
11 I'm familiar with.

12 So it's a knowable answer, but we would
13 have to go do work to come up with -- the merger --
14 it's -- remember, it's an FCC definition, the
15 increase, and it starts after the increase in
16 royalty rates went effective, right?

17 So we didn't file the merger
18 application until roughly April 1st, so the rate
19 increase from the last CRB proceeding that was
20 effective January 1st became part of something that
21 we could not recover because it was in that base.
22 So we establish a benchmark of the base of what our

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1 costs were as of the date of the merger
2 application.

3 So we had 2006, plus the increase from
4 the decision reached in December 2007, and then
5 increases over that is what we are able to recover
6 under the FCC rubric.

7 JUDGE WISNIEWSKI: Okay.

8 BY MR. FREEDMAN:

9 Q. And when you mentioned a 53 percent
10 number a minute ago, I think you said that was
11 53 percent of the royalty costs for -- for the
12 three PROs plus SoundExchange.

13 Do you know what the percentage would
14 be if -- of the SoundExchange royalties that you
15 recovered?

16 A. I wouldn't, although I believe that the
17 math would show it's roughly pro rata; it would be
18 53 percent of SoundExchange as well.

19 Q. Now, after SiriusXM instituted the
20 music royalty fee, there was a point in time where
21 you were actually collecting more revenue than you
22 were paying in increased royalty costs; isn't that

734

1 right?

2 A. Could you ask that question again?

3 Q. Did there come a time when you were
4 collecting more in revenue from the music royalty
5 fee than the actual increased costs?

6 A. No.

7 Q. In 2010, you lowered the music royalty
8 fee; is that right?

9 A. Yes, we did.

10 Q. And you lowered it to \$1.40; isn't that
11 right?

12 A. That's correct; 12.95 monthly
13 subscription, \$1.40.

14 Q. Why did you lower it?

15 A. We lowered it because the -- again, the
16 construct established by the FCC in the merger
17 order provided that we could recover increases
18 since the date of the filing of the merger
19 application.

20 We take our regulatory compliance
21 obligations pretty seriously, so we were constantly
22 engaged in a process of monitoring how much we had

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1 recovered and projecting out what we thought might
2 be incurred and, you know -- and then, when the
3 merger order expired three years after the merger
4 was consummated, you know, projecting out to ensure
5 that we didn't overrecover what we were allowed to
6 get through that period of time.

7 So we reduced it in December of 2010,
8 reduced the music royalty fee, to ensure we would
9 not overrecover what the FCC allowed under their
10 formula.

11 Q. And so that I understand, it's your
12 testimony that it's not that you were
13 overrecovering; you lowered it to avoid
14 overrecovery?

15 A. That's correct.

16 Q. Now, the FCC limitation on the music --
17 the amount of a music royalty fee that you can
18 charge no longer applies; is that right?

19 A. Yes; the merger order expired
20 three -- three years after the merger was
21 consummated.

22 Q. And there are no other legal

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1 limitations on your ability to charge a music
2 royalty fee; is that right?

3 A. That's correct. They're market
4 limitations -- there are legal limitations only in
5 terms of notifying customers of changes that we
6 don't have the right, for instance, in -- in our
7 automotive agreements to assess that fee to them.

8 So, yes, there are some contractual
9 restrictions and some at-law restrictions,
10 but . . .

11 Q. Now, in September 2011, SiriusXM
12 announced a 12 percent price increase on the basic
13 subscription price, correct?

14 A. Sorry? On what date?

15 Q. In September 2011?

16 A. Yes.

17 Q. And the basic subscription price rose
18 to 14.49; is that right?

19 A. That's correct, on January 1, 2012.

20 Q. Right.

21 And that's on the basic subscription
22 price, but you raised prices on other packages as

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1 well, correct?

2 A. We did alter our price structure. So,
3 for instance, the annual plan, the price of that
4 changed, that we changed the price of our All
5 Access service. So we did go through and -- and
6 reconstruct the pricing matrix of the company.

7 Q. And approximately how much additional
8 revenue will the price increases generate for
9 SiriusXM on an annual basis?

10 A. When you say "price increases," which
11 price increases?

12 Q. The ones we were just talking about.

13 A. The January 2012 increase?

14 Q. Yes.

15 A. Well, you know, roughly, you stated it,
16 should over time increase subscription revenues by
17 something a little less than the 12 percent, right?

18 So I don't know the exact number, but
19 directionally, if we have \$3 billion of
20 subscription revenue, you have to take out the
21 OEMs, that some of the longer dated plans, the
22 effective increase in price is less than

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1 12 percent.

2 We reduced costs -- the increase in
3 costs associated with getting the premium package
4 or the Internet service; you can bundle it at a
5 lower price.

6 So I would generally expect it to
7 produce something less than 12 percent, but I don't
8 have an exact number for you.

9 Q. I wanted to ask you about the near
10 bankruptcy that you discussed in your written
11 testimony and this morning.

12 JUDGE ROBERTS: Before you go on to
13 that, Mr. Freedman.

14 MR. FREEDMAN: Yes.

15 JUDGE ROBERTS: Do you have any future
16 expectations, Mr. Frear, as to what's going to
17 happen with the music royalty fee in terms of -- as
18 it appears on -- on my bill, for instance, is it
19 going to go up, down, stay the same?

20 THE WITNESS: Well, you know, we -- it
21 kind of depends on what happens with the rates.

22 So the intention -- so if we were to,

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1 for instance, keep rates in the range they are, and
2 maybe if we're successful in direct licensing, you
3 know, effectively bringing down our weighted
4 average cost of royalties, we would expect to pass
5 that on to -- to our subscribers.

6 That if rates are increased, you know,
7 that's a little bit more difficult to sort out.

8 We'd have to look at the size of the increase.
9 We'd have to look at what we thought the effect was
10 on the competitive marketplace, and what we thought
11 might happen to both conversion rates and churn in
12 connection with it.

13 And that's a discussion that we haven't
14 had, so I don't have a point of view on it at this
15 point in time.

16 JUDGE ROBERTS: Okay.

17 I am curious, by the way -- and maybe
18 you can clarify this -- as to why there is
19 something on -- on the bill sent out to the
20 subscribers identified as the music royalty fee.
21 Why isn't there also for other costs, like the
22 satellite failure fee or something else? Why did

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1 you single that one out?

2 THE WITNESS: Well, we singled it out
3 because it's not a cost we believe we control. So
4 it's -- you know, in the satellite failure fee
5 that, for instance, I negotiate with launch vehicle
6 providers on what to pay, I negotiate with the
7 insurance market on what to pay there, and I
8 negotiate with satellite manufacturers. And I play
9 people off one another in that negotiation to see
10 who is going to win the business.

11 I don't really get to do that with the
12 music business, and -- and, you know, notably, with
13 respect to the sound recording performance royalty,
14 that we don't set it, for instance, in a bilateral
15 negotiation with anybody in the music industry,
16 that we come to a court and we present evidence,
17 and the court then tells us what we will pay.

18 So it's something that we view as
19 largely outside of our control. It's imposed upon
20 us by, you know, effectively, a branch of the
21 Government, and understand the statutes it involved
22 and everything else. But it's not really something

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1 that the management believes that it controls.

2 So we think it's actually fair and

3 appropriate to give the subscribers visibility of

4 it.

5 The best -- the example we discussed

6 among the Board when -- when we talked about

7 instituting this fee was -- there's a lot of people

8 on -- involved with our Board, including me, that

9 have telecom experience. In many ways we look at

10 it not unlike the Universal Service Fund, that

11 there's a charge that, really, the telecom

12 providers aren't able to materially impact, and

13 they pass it through with visibility and

14 accountability to their customers.

15 JUDGE ROBERTS: I'm sure your

16 subscribers appreciate the education.

17 Go ahead, Mr. Freedman.

18 MR. FREEDMAN: Thank you, Your Honor.

19 BY MR. FREEDMAN:

20 Q. I was going to turn next to your

21 testimony about the near bankruptcy.

22 When -- when SiriusXM -- you filed your

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1 merger application in March of 2007; is that right?

2 A. Yes.

3 Q. And the merger was not approved until
4 about July of 2008; is that right?

5 A. That's correct.

6 Q. The FCC normally applies a six-month
7 calendar for review of merger applications,
8 correct?

9 A. Normally.

10 Q. And your merger application was pending
11 longer than you expected, right?

12 A. That's correct.

13 Q. You would expect that it would have
14 closed by the end of 2007, right?

15 A. That's what we told our shareholders of
16 both companies when we announced the merger in
17 February of 2007.

18 Q. And if it had closed on that schedule,
19 you could have refinanced your debt on more
20 favorable terms, correct?

21 A. Based on market conditions at that
22 time, I believe that is true.

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1 Q. Because the credit market became
2 seriously distressed in 2008, correct?

3 A. That's correct.

4 Q. And that limited the ability of many
5 companies to issue or to refinance debt, right?

6 A. Yes. In fact, I believe we were the
7 only company of our credit rating to successfully
8 place debt financing in the marketplace after the
9 collapse of Lehman and through the close of the
10 Liberty Media transaction.

11 Q. And remind me. When was the close of
12 that transaction?

13 A. The first phase closed February 17th,
14 2009, when the convertible bonds came due.

15 Q. And, in fact, by -- by the summer of
16 2009, June and August of 2009, you were able to
17 issue new debt for hundreds of millions of dollars,
18 right?

19 A. Yes. I mean, things change -- as I
20 testified earlier, can change pretty rapidly, and
21 just like the fall of the credit markets was swift
22 and sharp, that -- the recovery, you know, of the

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1 credit markets began not long after -- after we
2 took in Liberty Media money in June of that year,
3 we issued debt at an effective yield of just under
4 13 percent. It was secured debt, so -- you know,
5 bizarre in a way.

6 In August of 2005, Sirius, with
7 1.8 million subscribers, raised money at about a
8 10 percent yield from the -- on an unsecured basis
9 from the bond market. We weren't able to repeat
10 that performance until we were ten times the size
11 in October of 2010.

12 Q. The Liberty Media deal, the rate on
13 that debt was 15 percent, right, a deal for 3 --
14 let me repeat this.

15 It was a \$380 million deal, right?

16 A. It was two phases --

17 Q. Okay.

18 A. -- so there was -- on February 17th,
19 280 million of facilities agreed to 250 million
20 drawn, a \$30 million restructuring fee paid to
21 Liberty Media, so our net borrowings on that were
22 really 220 before legal expenses and things like

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1 that.

2 The stated rate on the -- on the debt
3 was 15 percent. It was a secured debt,
4 substantially all of our assets, and the terms of
5 it contemplated a Phase II, where Liberty Media
6 would provide up to, I believe it was, \$100 million
7 to support a bank deal, as well as an additional
8 credit facility, taking their total commitments up
9 to a total of 530 by the close of Phase II.

10 And for all of that, as long as Phase
11 II closed, they were to receive effectively
12 40 percent of the company as part of the
13 consideration.

14 Q. And then, just months later, in 2009,
15 you issued new debt in two parts, right, for about
16 \$780 million?

17 A. Yeah. In June, we placed about
18 \$527 million worth of debt, and we used the
19 proceeds of that to two do things: We had just
20 refinanced a \$350 million bank credit that
21 Liberty Media bought 100 million of to get it done,
22 and we paid the bank credit off. It had near-term

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1 maturities that they -- while they were willing to
2 refinance what was coming due in May, that they
3 wanted payments in the course of 2009.

4 It matured in 2010, the Liberty Media
5 portion of it matured in 2011, so we went back to
6 the market, did a -- I believe a four-year note
7 to -- to refinance that, push out our maturities a
8 little bit.

9 We went back to the market in August
10 and did, I believe, a five-year note to pay off the
11 balance of what Liberty Media -- the 250 of the
12 original loan, we paid that off in August. Also in
13 June -- part of the June proceeds were used to buy
14 out the last piece of debt that Mr. Ergen had
15 purchased. He refused to settle that out earlier,
16 and so we were able to buy it back out of the
17 market in -- in June.

18 Q. And so my question is: The debt that
19 was issued in the summer of 2009, the interest
20 rates on that debt were significantly lower than
21 the interest rates in the Liberty Media deal,
22 right?

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1 A. Yeah.

2 And the effective yields -- I mean, you
3 know, the rates went from, you know, roughly
4 15 percent or maybe a little bit more, when you
5 take the 30 million out, to an effective yield
6 of -- of roughly 13 percent, and then to an
7 effective yield of roughly 12 percent on the other
8 piece of that.

9 So we did get the rates down a little
10 bit. Everything was still secured, and we were
11 able to push out maturities.

12 Q. And today, SiriusXM's debt trades at a
13 rate of about 5.7 percent; is that right?

14 A. You know, actually, the quotes I'm
15 seeing are -- are more like 6-1/2, with the way
16 that the markets are beginning to back up.

17 While treasuries seem to be enjoying
18 some sort of rally and flight to quality in the
19 market, all the worries about Greece and Spain, you
20 know, the treasuries are doing well, the German
21 bonds are doing well, the -- but corporate credit
22 is actually starting to back up with the

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1 uncertainty, and rates for us have worsened by
2 probably 125, 150 basis points over the course of
3 the last 60 days.

4 Q. When SiriusXM was preparing for its
5 possible bankruptcy in 2009, you were preparing a
6 Chapter 11 reorganization, right?

7 A. That's correct.

8 Q. There were no plans to liquidate
9 SiriusXM, right?

10 A. That's correct.

11 Q. You would have continued to operate
12 during the bankruptcy, right?

13 A. Yes. We would have submitted a plan to
14 operate during bankruptcy, yes.

15 Q. And at no time did SiriusXM stop
16 transmitting any satellite radio channels in
17 connection with the near bankruptcy; is that right?

18 A. We did not stop transmitting.

19 Q. Now, you've stated publicly that in
20 2011, SiriusXM delivered a spectacular year
21 financially, correct?

22 A. If you say so, I believe it. I don't

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1 remember that, but it sounds like something I might
2 say. If there is a transcript that I should be
3 looking at, it would be helpful.

4 Q. But sitting here today, do you agree
5 that SiriusXM delivered a spectacular --
6 spectacular year financially in 2011?

7 A. In my role as head of investor
8 relations, that -- I think we delivered spectacular
9 performance in 2011.

10 Q. And you would agree that the debt
11 market has recognized SiriusXM's rapidly improving
12 prospects, right?

13 A. You know, I think yes. Yeah, I think
14 they have so far.

15 Q. And you expect SiriusXM's revenues to
16 expand by nearly 10 percent in 2012, right?

17 A. Our guidance is for 3.3 billion in
18 revenue this year.

19 Q. And that's an expansion of 10 percent,
20 right?

21 A. It is.

22 Q. And you expect SiriusXM's free cash

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1 flow to expand by over 70 percent for 2012, right?

2 A. I don't know the exact percentage, but
3 we expect it to grow from a little bit north of
4 400 million in 2011 to approximately 700 million
5 for 2012.

6 JUDGE WISNIEWSKI: And that's about
7 70 percent?

8 THE WITNESS: Probably.

9 BY MR. FREEDMAN:

10 Q. At the end of 2011, SiriusXM had a cash
11 balance of about \$750 million, correct?

12 A. That's correct.

13 Q. And by the end of 2012, you expect the
14 cash balance will be about \$1.5 billion, correct?

15 A. As long as we don't buy back any debt.

16 So that would be correct -- yes, 750,
17 plus the 700 million of expected cash flow would
18 get you to 1 billion 450 at the end of the year.

19 Q. And you -- you mentioned the
20 possibility of buying back debt.

21 Is that something you might do?

22 A. Well, we did buy debt in the open

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1 market in the first quarter, as well as immediately
2 after, so we're probably more on track for about 1
3 billion 2 in cash at the end of the year.

4 Q. What is the -- what does the term
5 "ratio of net debt to EBITDA" refer to?

6 A. You take your total debt on the balance
7 sheet, subtract your cash; that represents net
8 debt. And then you divide it by the adjusted
9 EBITDA that we publicly report, and the quotient is
10 the net debt to EBITDA that you referred to.

11 Q. And you expect that that ratio will
12 fall to 1 point -- to 1.8 this year, correct?

13 A. I'd have to do the math, to be honest.

14 Q. Can I direct your attention, if I
15 could, to Paragraph 30 of your written testimony,
16 please?

17 And, if you would, just take a moment
18 to read that, and I'll ask you a question about it.

19 A. Just Paragraph 30?

20 Q. Yes.

21 (Whereupon, the witness reviews the
22 document.)

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1 THE WITNESS: Okay, I've read it.

2 BY MR. FREEDMAN:

3 Q. So you say in Paragraph 30 that
4 SiriusXM has \$2.386 billion of debt that matures
5 during the upcoming license term, right?

6 A. That's correct.

7 Q. And that debt matures between 2013 and
8 2015, right?

9 A. That's correct.

10 Q. And you've told investors that SiriusXM
11 can very comfortably cover those debt maturities
12 out of the cash flow of the business, correct?

13 A. Based on our current expectations, yes.

14 Q. In Paragraph 35 of your written
15 testimony, you see you have several charts in that
16 paragraph?

17 A. Yes.

18 Q. And if you look at the bottom of those
19 charts, or start, at least, with the first one on
20 Page 15, it says, source, SiriusXM internal
21 forecasts, and it also says SEC filings.

22 Do you see that?

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1 A. I do.

2 Q. And these charts are showing
3 projections that were made in different years for
4 the future, right?

5 A. That's correct.

6 Q. So, in other words, the dark blue that
7 says 2005 projection, that is showing in the
8 projections you made for future years in 2005,
9 right?

10 A. That's correct.

11 Q. Okay. For the -- my command of colors
12 isn't very good, but I believe that to be teal
13 green, or teal blue, the 2010?

14 A. Ah, okay.

15 Q. Those are the 2010 projections, right?

16 A. Yes.

17 Q. What SiriusXM internal forecasts were
18 used to create the charts for the 2010 projections?

19 A. So starting in November of 2008, when
20 we engaged in that financing activity, in order to
21 have, sort of, meaningful discussions with
22 investors, we actually provided five years of

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1 guidance to the public, and we put out a press
2 release and filed an 8-K.

3 And the reason why we did that was
4 because the investors were concerned, some of whom
5 already owned our securities, about being on the
6 wrong side of reg FD, that having material
7 nonpublic information that would prohibit them from
8 trading in the securities.

9 And so, in order to have the
10 discussions, we actually had to publish a forecast
11 of our current model, whatever we thought it might
12 be, and -- to help protect them on that.

13 So from -- as you know from the
14 collective testimony, that -- we were engaged in
15 nonstop financing activity from effectively the
16 merger in July of 2008 through the near -- the
17 brush with bankruptcy, the Liberty Media financing,
18 the refinancing of the Liberty Media financing.

19 And because those initial refinancings were fairly
20 short term in nature, we also had the refinancing
21 of those that we were going through.

22 So really, from October -- from July of

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1 2008 through the conclusion of 2010, we -- if you
2 look at the number of transactions, we were doing
3 some kind of a financing every few to
4 several months.

5 So what we did, we had rating agency
6 presentations we had to update and things like
7 that, so we kept rolling over, effectively, the
8 work product from 2008, updating it for actuals and
9 just sort of pushing it out because of the
10 intensity of the financing activity.

11 Q. So for -- in these charts that appear
12 in Paragraph 35 of your testimony, the 2010
13 projections, are they based on documents that are
14 sometimes referred to as the long-range scenarios
15 or the long-range plans?

16 A. You know, I can't answer that. If you
17 show me an exhibit, I can do that. What I can tell
18 you is that I was constantly meeting with
19 investors, investment bankers, rating agencies
20 to -- in order to continue the recapitalization of
21 the company.

22 And so during that period of time, we

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1 regularly provided updates, and different updates
2 of different flavors, and so it's really
3 situationally specific.

4 Q. But -- so the specific situation I'm
5 asking about here is your testimony, and so I'm
6 wondering --

7 A. Yeah.

8 Q. -- what documents you used to prepare
9 the 2010 projections that appear in these charts.

10 A. It would have been most likely
11 reflected in rating agency presentations made
12 around that period of time. And I believe there
13 were documents produced in discovery in this case
14 that support this.

15 Q. Okay. I want to show you a couple of
16 documents, if I could.

17 A. Good.

18 JUDGE ROBERTS: How much time left do
19 you have, Mr. Freedman?

20 MR. FREEDMAN: Your Honor, may I take a
21 moment and just look at my notes?

22 JUDGE ROBERTS: Yes.

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1 MR. FREEDMAN: I will give you an
2 estimate.

3 Your Honor, I would estimate half an
4 hour. I might be able to do it a bit faster.

5 JUDGE ROBERTS: Is this a good breaking
6 point, considering it's 5 of 12:00?

7 MR. FREEDMAN: Yes, it is for me,
8 Your Honor; whatever works for you.

9 CHIEF JUDGE BARNETT: Is there anyone
10 representing Music Choice here today?

11 MR. CUNNIFF: Yes, Your Honor;
12 Martin Cunniff, representing Music Choice.

13 CHIEF JUDGE BARNETT: Thank you.

14 Will you have questions for this
15 witness?

16 MR. CUNNIFF: I will not, based on the
17 testimony I've heard so far.

18 CHIEF JUDGE BARNETT: Okay. This is
19 probably, then, a good time for us to take our
20 break. We'll be at recess until 1:00.

21 MR. FREEDMAN: Thank you, Your Honor.

22 (Whereupon, at 11:56 a.m., a

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1 luncheon recess was taken.)

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1 A F T E R N O O N

S E S S I O N

2 (1:03 p.m.)

3 - - -

4 DAVID JOHN FREAR

5 was called for continued examination and, after having
6 been previously duly sworn, was examined and testified
7 further as follows:

8 CHIEF JUDGE BARNETT: Good morning.

9 Please be seated.

10 Let me go back and get my laptop, which
11 I left inside.

12 (Pause.)

13 CHIEF JUDGE BARNETT: Mr. Freedman.

14 MR. FREEDMAN: Good afternoon,
15 Your Honor.

16

17 CROSS-EXAMINATION (Continued)

18

19 BY MR. FREEDMAN:

20 Q. Good afternoon, Mr. Frear.

21 A. Good afternoon.

22 Q. So before the break, I was asking you

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1 about the projections in the chart, the charts in
2 your testimony which begin on Page 15 of your
3 written testimony.

4 Do you recall that?

5 A. Yes.

6 Q. And I was asking you about the 2010
7 projections, correct?

8 A. Yes.

9 Q. So I'd like to show you now, if I
10 could, two documents which we've marked as
11 SoundExchange Trial Exhibits 12 and 13. We'll show
12 you now.

13 (SoundExchange Trial Exhibit Number 12
14 was marked for identification
15 purposes.)

16 (SoundExchange Trial Exhibit Number 13
17 was marked for identification
18 purposes.)

19 MS. SCHILLER: Before you get into
20 this, these are just governed by a protective
21 order. If we can just have that protective order
22 as it applies -- the documents that Mr. Freedman is

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1 about to mark, 12 and 13, are governed by a
2 protective order.

3 And if we could just have the
4 protective order continue to apply to the treatment
5 of the documents here.

6 JUDGE ROBERTS: You have to do a little
7 better than that, Counselor.

8 Can you at least identify what they are
9 and why they should be protected?

10 MS. SCHILLER: Yes. They are internal
11 company projections that are not a matter of public
12 record.

13 JUDGE ROBERTS: And what are they?

14 MS. SCHILLER: One is called Long-Range
15 Scenario Outlook.

16 JUDGE ROBERTS: And that's for what
17 period?

18 MS. SCHILLER: The date of the document
19 is August 2010, and it contains projections that
20 extend out through 2015.

21 JUDGE ROBERTS: And the other?

22 MS. SCHILLER: And the other is dated

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1 September 9th, 2010. It's called Long-Range
2 Scenario and it's similar.

3 JUDGE ROBERTS: All right.

4 MR. FREEDMAN: Your Honor, I have no
5 objection to treating them as restricted. And I
6 will try to ask questions that avoid eliciting
7 restricted information, if I can. If not, we can
8 proceed as the Court wishes.

9 May I proceed?

10 CHIEF JUDGE BARNETT: Yes.

11 BY MR. FREEDMAN:

12 Q. Mr. Frear, let me have you look at, if
13 you could, please, Exhibit 12 first.

14 Do you have that in front of you?

15 A. I do.

16 Q. And this is a document called
17 Long-Range Scenario (Conservative Outlook).

18 Do you see that?

19 A. Yes, I do.

20 Q. And it's dated August 19th, 2010.

21 Do you see that?

22 A. I do.

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1 Q. Have you seen this document before?

2 A. I don't have a specific recollection --
3 recollection of this document. I do have a general
4 recollection of what we were doing at this time.

5 Q. And this is a document that's prepared
6 by SiriusXM's forecasting group, right?

7 A. Yes.

8 Q. And the forecasting group reports to
9 you, correct?

10 A. Indirectly, yes.

11 Q. And these -- the forecasting group
12 prepares long-range scenarios approximately once a
13 year, correct?

14 A. They do it from time to time.

15 Sometimes it's once a year, sometimes less
16 frequently, sometimes more.

17 Q. And this document contains projections
18 for the time period 2010 through 2015, correct --
19 I'm sorry. I should direct you more specifically.

20 If you look at Page 16.

21 A. Would that be Page 16 of 19?

22 Q. Yes.

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1 A. Okay. I'm there.

2 Q. And so this document contains
3 projections through 2015, correct?

4 A. That's correct.

5 Q. And just by way of example, do you see
6 there is a line for EOP subscribers?

7 A. Yes, I do.

8 Q. What does EOP subscribers refer to?

9 A. End of period.

10 Q. And so that refers to the number of
11 subscribers -- subscribers at the end of a
12 particular period; is that right?

13 A. That's correct.

14 Q. And without getting into what the
15 actual numbers are, do you see it then lists EOP
16 subscribers for years 2010 through '15?

17 A. Yes, I do see that.

18 Q. And then, if you look back in your
19 testimony at Page 15, there's a chart on Page 15 of
20 your written testimony?

21 A. Yes.

22 Q. And the chart on Page 15 shows

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1 projections for end-of-period subscribers as well,
2 correct?

3 A. Yes, it does.

4 Q. And if you look for the 2010
5 projections, they are the same as appear in
6 Exhibit 12, correct?

7 A. A little tough to tell if they're
8 precisely the same, but they look to be generally
9 in the same vicinity.

10 MR. FREEDMAN: Your Honor, at this
11 time, I move the admission of SoundExchange Trial
12 Exhibit 12 into evidence.

13 MS. SCHILLER: No objection, subject to
14 the confidentiality.

15 CHIEF JUDGE BARNETT: Thank you.

16 MR. CUNNIFF: No objection, Your Honor.

17 CHIEF JUDGE BARNETT: Exhibit 12 is
18 admitted.

19 (SoundExchange Trial Exhibit Number 12
20 was admitted into evidence.)

21 BY MR. FREEDMAN:

22 Q. Now, if I could have your turn,

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1 Mr. Frear, to the second page of this document.

2 A. Of Exhibit 12?

3 Q. Yes, I'm sorry, of Exhibit 12.

4 Are you with me?

5 A. Yes, I am.

6 Q. Sorry about the confusion there.

7 So in the Overview section, it refers
8 to the competitive landscape, correct?

9 A. Yes.

10 Q. And the first thing it says there is
11 that SiriusXM's relationships with OEMs are a major
12 competitive advantage.

13 Do you see that?

14 A. Yes, I do.

15 Q. Would you agree with that?

16 A. I do agree with that.

17 Q. Now, I'd like to have your turn, if you
18 would, please, to SoundExchange Trial Exhibit 13.

19 Do you have Exhibit 13 in front of you?

20 A. Yes, I do.

21 Q. And it's entitled Long-Range Scenario
22 (Downside Outlook).

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1 Do you see that?

2 A. I do.

3 Q. And it's dated September 9th, 2010,
4 right?

5 A. Yes.

6 Q. Do you know what the difference is
7 between the Downside Outlook, as this document is
8 called, and the Conservative Outlook, as Exhibit 12
9 is called?

10 A. Without referring to the details of
11 these two documents, no, I wouldn't be able to
12 testify out of my general recollection.

13 Q. And the -- Exhibit 13 is a document
14 prepared by the forecasting group, correct?

15 A. That's correct.

16 Q. And, again, the forecasting group
17 reports indirectly to you, correct?

18 A. Indirectly, yes.

19 MR. FREEDMAN: Your Honor, I would move
20 the admission of SoundExchange Trial Exhibit 13
21 into evidence.

22 MS. SCHILLER: No objection, subject to

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1 the protective order.

2 MR. CUNNIFF: No objection, Your Honor.

3 CHIEF JUDGE BARNETT: Exhibit 13 is
4 admitted.

5 Both 12 and 13 are subject to the
6 protective order.

7 (SoundExchange Trial Exhibit Number 13
8 was admitted into evidence.)

9 BY MR. FREEDMAN:

10 Q. Can I please have you turn to the --
11 Page 3 of Exhibit 13?

12 Pardon me. My exhibit comes undone.

13 Do you see in the row for OEM sales?

14 A. Yes.

15 Q. And do you see this document lists --
16 for 2012, lists a number?

17 A. Yes, I do.

18 Q. Is that a number we can talk about in
19 open Court? Is there any reason we can't talk
20 about that?

21 A. Sure, we can talk about that.

22 Q. So the number that's listed there is

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1 11-1/2 million in OEM sales, correct?

2 A. That's correct.

3 Q. And just so we're all on the same page,
4 what does OEM sales refer to?

5 A. You frequently hear it referred to as
6 SAAR, seasonally adjusted auto -- rate of auto
7 sales. It's meant to be an estimate of the sales
8 of cars and light trucks to consumers in the
9 United States.

10 Q. And the assumption of 11-1/2 million
11 OEM sales for 2012 is low, isn't it?

12 A. Say again, please.

13 Q. What do you expect the OEM sales to be
14 in 2012, today?

15 A. In 2012, I think the analysts -- we
16 don't make auto sales estimates; we simply use
17 what's publicly available.

18 And the consensus of analysts at the
19 moment is about 14.2, 14.3 million.

20 Q. And do you see there's also a row on
21 this page that refers to churn?

22 A. Yes, I see that.

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1 Q. And for 2012, it lists a number there.

2 Do you see that?

3 A. I do.

4 Q. Is this a number we can talk about in
5 open Court?

6 A. Sure. I think so.

7 Q. Okay. So it says, a churn -- well,
8 what is a churn -- what does churn measure?

9 A. It's a -- it's a reference to what we
10 refer to in our public calls as self-pay churn. So
11 the -- it's the average monthly rate at which
12 self-pay subscribers disconnect from our service.

13 Q. And the rate that's listed here is
14 2.2 percent, correct?

15 A. That's correct.

16 Q. And what do you, sitting here today,
17 believe the churn rate will be for 2012?

18 A. Well, we haven't provided guidance on
19 that rate, so if I respond with expectations, it
20 will be outside public guidance.

21 I can tell you that for the first
22 quarter, that the churn rate was 1.9 percent. I

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1 can also tell you that traditionally, you know, the
2 first quarter is a -- is -- you know, has higher
3 churn than the rest of the year. So, you know,
4 that's -- that's currently available publicly.

5 If I'm going to provide just a personal
6 estimate, I'd like that to be protected.

7 Q. Okay.

8 A. I'm happy to provide it, I just need to
9 know if it's protected.

10 Q. I actually don't -- the answer you've
11 given now I think is sufficient for my purposes at
12 least.

13 A. Okay.

14 Q. You meet with credit agencies from time
15 to time, correct?

16 A. Yes, that's correct.

17 Q. And there are two ratings agencies that
18 rate SiriusXM's credit; is that right?

19 A. There are at least two.

20 Q. Okay. Well, I was thinking of S&P and
21 Moody's.

22 Is that right?

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1 A. Me, too.

2 Q. Are there others?

3 A. You know, Fitch also rates bonds. I'm
4 not sure if Fitch is currently rating SiriusXM
5 securities.

6 Q. And -- and when you -- you -- so you
7 meet with S&P and Moody's, correct?

8 A. From time to time, yes.

9 Q. Okay. And during those meetings, you
10 have provided them with what you refer to as
11 sensitivity analyses; is that right?

12 A. In one meeting, I did.

13 Q. And are sensitivity analyses
14 essentially projections?

15 A. No. I think -- I guess there are
16 projected figures contained in them, but a
17 sensitivity analysis not necessarily, you know, a
18 projection of expected results; rather, it's meant
19 to show a differential impact based on the things
20 that you're sensitizing.

21 Q. And so -- so you're measuring the
22 impact of whatever you're measuring in -- in the

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1 future; is that right?

2 A. That's correct.

3 Q. Sort of a forecast? Depending on -- on
4 the way different things may happen, there may be
5 different results in the future?

6 A. Yeah, based on the specific variables
7 you're changing, yes.

8 Q. And when you've met with the credit
9 agencies and shown them sensitivity analyses, those
10 are prepared under the direction of people working
11 for you; is that right?

12 A. That's correct.

13 Q. And in particular, you met with S&P and
14 Moody's in the fall of 2010, right?

15 A. Yes, I did.

16 Q. And did you show them a sensitivity
17 analysis at that time?

18 A. Yes, I did.

19 Q. Okay. I'd like to show you a document
20 now --

21 A. Okay.

22 Q. -- which we will mark as SoundExchange

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1 Trial Exhibit 14.

2 (SoundExchange Trial Exhibit Number 14
3 was marked for identification
4 purposes.)

5 BY MR. FREEDMAN:

6 Q. Do you have SoundExchange Trial
7 Exhibit 14 in front of you?

8 A. Yes, I do.

9 Q. And do you recognize this document?

10 A. Yes.

11 Q. Is this the sensitivity analysis that
12 you showed to the credit agencies in 2010?

13 Feel free -- I'm sorry. If you want a
14 moment to look at it, please do.

15 A. Yeah, if you can just give me a moment.

16 MS. SCHILLER: Can I just also note
17 that this is also subject to the protective order
18 because it's confidential. It was not -- this is
19 not a public record document.

20 JUDGE ROBERTS: It's two years old,
21 Counselor.

22 MS. SCHILLER: I believe it provides

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1 information that goes out to 2015, and the company
2 does not provide public guidance through 2015. And
3 ratings -- discussions with rating agencies I don't
4 believe are subject to Reg FD.

5 JUDGE ROBERTS: Where does it provide
6 information going out to 2015?

7 MS. SCHILLER: Page 32.

8 JUDGE ROBERTS: Page 30 -- all right.

9 MS. SCHILLER: It's really a Reg FD
10 concern here as well.

11 JUDGE ROBERTS: All right.

12 MR. FREEDMAN: I have no objection to
13 treating it as restricted, Your Honor.

14 CHIEF JUDGE BARNETT: Thank you.

15 Did you offer it?

16 MR. FREEDMAN: I have not yet, no. I
17 think the witness was taking a moment to look at
18 it.

19 CHIEF JUDGE BARNETT: Thank you.

20 THE WITNESS: I'm all set. I've looked
21 at it.

22 MR. FREEDMAN: I wasn't sure if I was

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1 interrupting your --

2 JUDGE ROBERTS: No.

3 BY MR. FREEDMAN:

4 Q. Okay. You had a chance to review the
5 document?

6 A. Yes.

7 Q. Is this the sensitivity analysis you
8 presented to the ratings agencies in 2010?

9 A. Yes.

10 MR. FREEDMAN: Your Honor, at this
11 time, I would move SoundExchange Trial Exhibit 14
12 into evidence.

13 MS. SCHILLER: No objection, subject to
14 the protective order.

15 MR. CUNNIFF: No objection, Your Honor.

16 CHIEF JUDGE BARNETT: Exhibit 14 is
17 admitted subject to the protective order.

18 (SoundExchange Trial Exhibit Number 14
19 was admitted into evidence.)

20 BY MR. FREEDMAN:

21 Q. And if I could, please, have you turn
22 to Page 30.

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1 And on Page 30, do you see, at the top,
2 it says SiriusXM Projections?

3 A. I do see that.

4 Q. And the page is approximately divided
5 in half, top to bottom, and the top is Baseline
6 Case and the bottom half is Downside Case.

7 Do you see that?

8 A. Yes, I do.

9 Q. And if you will bear with me, if you
10 could turn back, please, to Exhibit 12 and look at
11 Page 16.

12 And let me direct your attention, if I
13 could, for example, to the EOP subscribers row.

14 Do you see that the numbers in these
15 two documents are the same?

16 A. For EOP subscribers, yes, I see that.

17 Q. They are the same, correct?

18 A. Yes, they are.

19 Q. Okay. And if you look at the free cash
20 flow line, do you see, again, that the numbers are
21 the same in these two documents?

22 A. Free cash flow, you said?

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1 Q. Yes.

2 A. Okay. Sorry. Just getting mixed up on
3 the lines.

4 Yes, I see they're the same.

5 Q. Can I have you, please, turn to Page 14
6 of Exhibit 14?

7 A. Page 14?

8 Q. Yes.

9 A. Okay.

10 Q. Do you see it refers to OEM Sales and
11 SiriusXM OEM Gross Adds?

12 A. Yes.

13 Q. And what is this graph demonstrating?

14 A. Well, this graph, for the period
15 through 2009, shows the actual automotive sales in
16 the United States, as well as our reported gross
17 additions.

18 And then, for the period 2010 to 2015,
19 it shows projected OEM gross adds, which I believe
20 is based on the -- there's a footnote here. It
21 says, Source: Company data and industry reports.

22 The projection for the -- for the OEM

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1 sales would be based on the industry reports. And,
2 of course, there's no forecast for gross adds on
3 this chart.

4 Q. And if you look at the next page,
5 please, Page 15, this page relates to
6 Factory-Enabled Vehicles in Operation.

7 Do you see that?

8 A. Yes, I see that.

9 Q. And this is predicting that -- what
10 does a factory-enabled vehicle refer to?

11 A. A factory-enabled vehicle is a car
12 that's rolled off the line with a factory installed
13 satellite radio. So there's a radio in the car.
14 It's not a subscriber; it's just a radio that
15 has -- sorry -- it's a vehicle that has a satellite
16 radio in it.

17 Q. And this chart is showing that
18 factory-enabled vehicles in operation will increase
19 dramatically, correct?

20 A. Yes.

21 We -- to prepare this chart, we would
22 have used those industry analysts' forecasts for

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1 SAAR, we would have used our current penetration
2 rates, you know, the production penetration that
3 the OEMs have and then just done the math; that if
4 they continued to penetrate at that level, given
5 how many cars we started with, some assumption for
6 cars that scrap every year, we just do the math to
7 show how the population would grow.

8 Q. Now, after you met with the -- well, I
9 don't recall.

10 Did you say when you met with the
11 credit agencies?

12 A. I -- I met with them -- I believe it
13 was in early October of 2010. We did a bond issue
14 that month.

15 So the purpose of the meetings was to
16 go in and show them the sensitivity of the
17 company's future performance to changes in auto
18 sales and changes in churn, that -- I opened the
19 meetings by telling them explicitly these are not
20 projections. The company is not telling you this
21 is what's going to happen, it's not where we're
22 going.

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1 We're just saying that if you just take
2 what we know today, that what the industry analysts
3 say might happen with auto sales. And we've looked
4 at that and said, honestly, we don't believe that's
5 going to happen. We think that it's likely to be
6 less.

7 So we just want to show you a couple of
8 scenarios about what happens to our financial
9 condition if auto sales are here or there.

10 But we went to actually considerable
11 lengths at the beginning of the meetings to let
12 them know we were not providing them with a company
13 projection. There was no update to -- beyond the
14 company's public guidance. It was a sensitivity
15 analysis to help them understand.

16 There were a lot of questions from the
17 debt markets at that point in time about -- you
18 know, we're still coming out of a recession. The
19 auto industry is at 30-year lows in -- in
20 production. And, you know, there were a lot of
21 questions about what it meant to our business.

22 And so I think you can look at that

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1 meeting as a way of just helping the analysts at
2 the rating agencies. Because they do their own
3 models and they have their own perspective of how
4 our business will do, that it just helps to show
5 them, okay, if you have a few million change in
6 auto sales, if churn doesn't return to historical
7 levels and, instead, goes up, the -- for whatever
8 reasons you might assume that's occurring, that
9 here's one perspective of the future or a
10 differential future.

11 Q. And after you met with Moody's in early
12 October, Moody's upgraded SiriusXM's rating,
13 correct?

14 A. I don't recall exactly the timing of
15 the Moody's upgrades. I'd need to refer to their
16 releases. They put out press releases on it.

17 Q. Do you recall that you met with them in
18 early October?

19 A. Yes.

20 Q. And do you recall that later in
21 October, Moody's upgraded you?

22 A. I do not.

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1 Q. Okay. Do you recall you met with S&P
2 in early October?

3 A. Yes.

4 Q. And do you recall that shortly after
5 that, S&P upgraded SiriusXM's rating?

6 A. I don't have that recollection, no.

7 Q. And it's true, isn't it, that later in
8 October of 2010, you issued \$700 million of debt
9 securities?

10 A. That's correct.

11 Q. And you were able to issue those at an
12 interest rate of approximately 7.6 percent,
13 correct?

14 A. That's correct.

15 Q. Can I have you look, please, at
16 Pages 23 to 29 of your written testimony?

17 A. Would you like me to review?

18 Q. You're welcome to. I don't think you
19 sort of need to review them all in full right now,
20 but just to focus our discussion.

21 In these paragraphs, you talk about
22 different cost categories, right?

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1 A. Yes, I do.

2 Q. And you mention in Paragraph 23 that
3 these are cost categories as relied on by Dr. Noll.

4 Do you recall that? Do you see that?

5 A. Yes -- yes, I do.

6 Q. Now, it's true, isn't it, that as a
7 percentage of revenue, these cost categories have
8 all declined since 2010, correct?

9 A. Yes, I believe that's correct.

10 I'm not so sure about subscriber
11 acquisition costs, that -- that may have increased
12 as a percentage of revenues.

13 And I would have to double-check
14 revenue share and royalties and whether or not that
15 has increased or not as a percentage of revenues.

16 The -- I do believe satellite and
17 transmission, engineering design and development,
18 and sales and marketing have -- have declined.

19 And, again, I'd have to check on
20 depreciation and amortization.

21 Q. Okay. Let me show you a document.

22 One moment.

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1 (SoundExchange Trial Exhibit Number 15
2 was marked for identification
3 purposes.)

4 BY MR. FREEDMAN:

5 Q. So we'll show you what's being marked
6 as SoundExchange Trial Exhibit 15.

7 Mr. Frear, do you recognize this
8 document?

9 A. Yes, I do.

Q. What is it?

11 A. This is a document that would have been
12 prepared to present our final budget for 2012 to
13 our board of directors.

14 Q. And did you participate in some way in
15 the preparation of this document?

16 A. Yes. I reviewed the document.

17 Q. And if I could have your turn, please,
18 to Page 22.

19 CHIEF JUDGE BARNETT: Are you going to
20 offer this in evidence -- Mr. Freedman, are you
21 going to offer this in evidence?

22 MB. FREEDMAN: Yes. I'd like to move

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1 the admission of SoundExchange Trial Exhibit 15
2 into evidence.

3 MS. SCHILLER: No objection, subject to
4 the protective order.

5 MR. CUNNIFF: No objection, Your Honor.

6 CHIEF JUDGE BARNETT: Exhibit 15 is
7 admitted subject to the protective order.

8 (SoundExchange Trial Exhibit Number 15
9 was admitted into evidence.)

10 CHIEF JUDGE BARNETT: It's marked as
11 restricted.

12 BY MR. FREEDMAN:

13 Q. So, Mr. Frear, a moment ago, I was
14 asking you about -- or you gave an answer about
15 subscriber acquisition costs and whether they are
16 declining as a percentage of revenue.

17 Do you recall that?

18 A. Yes.

19 Q. And so if I can have you look on
20 Page 22, do you see where it says, SAC percentage
21 of revenue? There is a row.

22 A. I do.

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1 Q. Is that referring to subscriber
2 acquisition costs?

3 A. Yes.

4 Q. As a percentage of revenue?

5 A. It is.

6 Q. And does this show -- without getting
7 into the numbers, does this show that they are
8 declining?

9 A. If, in fact, the final numbers turned
10 out to be what is labeled here as preliminary
11 actual and there is no change in the numbers that
12 the 17.3 percent of actuals in 2010 declined to
13 17.2 percent.

14 Q. Sitting here now, do you know whether
15 that is the case or not?

16 A. Without referring to the final numbers
17 for 2011 and especially with the numbers so close,
18 I -- I couldn't testify with certainty.

19 Q. I want to ask you about your agreements
20 with car manufacturers.

21 Those agreements are generally
22 long-term agreements, correct?

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1 A. Yes, that's correct.

2 Q. And SiriusXM touts those long-term
3 agreements as a competitive advantage?

4 A. Yes, we do.

5 Q. And SiriusXM has told -- has publicly
6 told investors that factory-enabled vehicles with
7 satellite radios are going to increase over the
8 coming rate term, correct?

9 A. That's correct.

10 Q. In fact, SiriusXM expects that by the
11 end of 2017, there will be about 95 million cars
12 with satellite radios; is that right?

13 A. I'd have to refer to -- to an exhibit.

14 I know that the one we recently looked at had
15 different -- end year was 69.4. It certainly will
16 go up, you know, from 2011 to 2016 and, presumably,
17 to 2017 unless the automakers change their minds.

18 They're actually under no obligation to
19 put satellite radios in any cars. There's no
20 minimums guaranteed in any of the contracts. So
21 it's a choice that they make each year.

22 So there's no guarantee that we'll get

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1 to those -- those figures, but if they don't change
2 anything and the sales forecasts all come true,
3 then it'll grow.

4 Q. It will continue to increase beyond
5 2015? Was that your testimony?

6 A. Unless something changes, either in
7 auto volumes or the automakers decide to displace
8 it with a -- with a different technology product.

9 Q. Do you know how many cars today have
10 satellite radio installed?

11 A. As of today, it's right about
12 43 million. I don't think all of those have yet
13 been sold through to consumers. I think maybe
14 what's been sold through to consumers is about 40
15 to 41 million. There's a couple million on lots.

16 Q. Now, with respect to the used car
17 market, SiriusXM is also optimistic about the used
18 car market, right?

19 A. Yes.

20 Q. And, in fact, the majority of cars sold
21 in the United States each year are used cars,
22 right?

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1 A. Yes.

2 Q. And SiriusXM expects it will add
3 approximately a million self-pay subscribers this
4 year through the used car market, right?

5 A. Yes, that's true.

6 Q. And you would disagree that in the
7 coming years, nearly all of your new subscribers
8 will be through new car sales, right?

9 A. I would disagree that nearly all would
10 be coming through new car sales?

11 Tough question to answer given the way
12 it's phrased.

13 I continue to expect that most new car
14 subscribers in the coming years will come through
15 new cars.

16 Q. But you expect -- well, I think you
17 said a minute ago this year alone, you expect to
18 add a million self-pay subscribers through used
19 cars, right?

20 A. Yes.

21 Q. You agreed that is a significant
22 number?

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1 A. Yeah, I think a million's a lot.

2 Q. And do you expect that number to grow
3 in future years?

4 A. I'm hopeful that it will.

5 Q. Do you have any reason to think it
6 won't?

7 A. Well, there's so little history on --
8 statistical history, and one of the things we've
9 learned about this business is consumers tend to
10 behave relatively consistently. It's very
11 difficult to predict.

12 We know that the adoption rate of
13 satellite radio among used car buyers is
14 significantly less than the adoption rate among new
15 car buyers.

16 Q. I want to show you one last document,
17 and I think I can promise this will be the last
18 document I show you today.

19 A. Okay.

20 (SoundExchange Trial Exhibit Number 16
21 was marked for identification
22 purposes.)

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1 BY MR. FREEDMAN:

2 Q. Mr. Frear, do you have SoundExchange
3 Trial Exhibit 16 in front of you?

4 A. Yes.

5 Q. Do you recognize this document?

6 A. Yes, I do.

7 Q. What is it?

8 A. It's a presentation that Mr. Karmazin
9 made to our -- our stockholders a year ago.

10 Q. Have you seen this document before?

11 A. Yes, I have.

12 Q. Did you oversee its preparation or
13 assist in its preparation?

14 A. I reviewed it and provided comments on
15 it.

16 MR. FREEDMAN: Your Honor, at this
17 time, I move into evidence SoundExchange Trial
18 Exhibit 16.

19 MS. SCHILLER: No objection.

20 MR. CUNNIFF: No objection, Your Honor.

21 CHIEF JUDGE BARNETT: Exhibit 16 is
22 admitted.

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(SoundExchange Trial Exhibit Number 16)

2 was admitted into evidence.)

3 BY MR. FREEDMAN:

4 Q. Mr. Frear, can I please have you turn
5 to Page -- that ends in the Bates Number 21704.

6 And this is a page that refers to, at the top,
7 Competitive Advantages.

8 Do you see that?

9 A. Yes, I do.

10 Q. And I apologize. I haven't given you
11 context within the presentation.

12 But is this referring to competitive
13 advantages of SiriusXM as compared to other music
14 services?

15 A. As -- yeah, among others. It's a
16 competitive advantage -- we compete in the auto
17 entertainment marketplace, and as of date of this,
18 a primary competition was against terrestrial
19 radio; that the -- we're facing a growing amount of
20 competition from a variety of Internet-based music
21 listening services, some Internet-based service
22 that's go beyond music listening, as well as other

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1 forms of audio entertainment, like iPods and other
2 download services.

3 Q. And looking at the six bullet points
4 here on this page, those are all -- that's a list
5 of competitive advantages that SiriusXM has
6 compared to those other services; is that right?

7 A. We have this -- these advantages over
8 some, but perhaps not others.

9 So, for instance, long-term OEM
10 agreements, at this point in time, is an advantage
11 over the Internet radio services, none of whom have
12 them; although, as of this morning, Pandora is now
13 in 50 models.

14 It's certainly not an advantage over
15 terrestrial radio, where if we go back to the
16 roughly 42 million cars that SiriusXM has on the
17 road today, there are 235 million cars on the road
18 today, all of which have an AM/FM radio in them.

19 So the -- I think that terrestrial
20 radio, on balance, doesn't suffer from a
21 competitive disadvantage because they don't have a
22 long-term OEM agreement. In fact, they don't

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1 contribute anything to get AM and FM radios to put
2 in the car; whereas we pay roughly \$50 a unit.

3 So to get to, for instance, the roughly
4 100 million cars that you suggested earlier that
5 we're in 40 now, we're going to spend 60 million
6 times \$50 -- we'll spend \$3 million enabling
7 vehicles to make that come true.

8 And at that point in time, if we get
9 all the way to 100 million, we'll be about
10 40 percent the size of terrestrial radio.

11 Q. I want to ask you about a different
12 topic, something you mentioned this morning. I'm
13 just circling back and cleaning up a couple things.

14 You talked about the risks associated
15 with satellites, right?

16 A. (No audible response.)

17 Q. During the upcoming rate period, 2013
18 to '17, SiriusXM doesn't have any plan to launch
19 any satellites, right?

20 A. Right now, unfortunately, we have a
21 plan to launch Sirius 6 at the beginning of the
22 rate period. We had hoped to not have that plan.

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1 We hoped to actually have that launch
2 done by now. The original expectation was to get
3 it done in late 2011. Unfortunately, multiple
4 launch failures by our launch vehicle provider in
5 early 2011 pushed that into early 2012.

6 And then, again, as I testified
7 earlier, the satellite was at the launch pad, ready
8 to load on the rocket, and the launch that went
9 right before it didn't go so well, so they packed
10 it back up and sent it back to California.

11 So, unfortunately, we still have
12 another launch to go.

13 JUDGE ROBERTS: Mr. Frear, what's the
14 magnitude of the costs incurred by this delay?

15 THE WITNESS: So it'll be -- it pushes
16 out at least \$50 million of costs, but we suffer
17 some other issues.

18 So our -- the firm quote we have on our
19 space insurance expires on September 1st. We're
20 going to have to go back to the market to replace
21 that. We are running up against the end of where
22 we are guaranteed even our launch price. We paid

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1 about \$110 million to this launch vehicle and as
2 we -- depending on exactly when it comes next year,
3 they may be no longer obligated to provide us with
4 a launcher at that price.

5 You know, how is it going to work out?

6 It kind of depends. We're trying to push to see if
7 we can't get the launch off sometime this year as a
8 way of mitigating some of those risks.

9 JUDGE ROBERTS: But I take it that you
10 have various forms of launch insurance and that is
11 covering some of your costs?

12 THE WITNESS: None of the costs
13 associated with the delay, no.

14 The launch insurance actually attaches
15 at a point in time called "intentional ignition."
16 And, you know, anything that happens before
17 intentional ignition is not covered.

18 So, for instance, several years ago
19 when moving one our satellites in the factory in
20 California, they dropped it. And, you know,
21 dropping something you're going to launch into
22 space and you can't do a truck roll on to fix it if

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1 it's not working so well isn't a good thing.

2 So until intentional ignition, we
3 aren't covered by insurance.

4 BY MR. FREEDMAN:

5 Q. At the point of intentional ignition,
6 you do have insurance?

7 A. We currently do. The market capacity
8 for satellite insurance isn't so great. So -- I
9 mean, they're making money and there -- and that's
10 a good thing. It helps with rates, it helps with
11 capacity, but you pretty much tap out the market at
12 \$250 million. And the cost of Sirius 6 is well
13 over \$300 million at this point.

14 So believe me, we want the launch to be
15 successful and not just because we'll have a
16 shortfall on the insurance, right, that we actually
17 need it up there for continuing service.

18 But if -- if there's a failure, well,
19 yes, it's nice to have insurance that's pretty cold
20 comfort, because it doesn't cover all the costs,
21 and there will be a three-year delay to get that
22 satellite replaced.

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1 Q. Just so I understand your answer, does
2 that mean you do have \$250 million insurance?

3 A. Yeah, roughly. It might be a little
4 bit different, but it's right about that number.

5 MR. FREEDMAN: Your Honor, I think I
6 have no more questions.

7 Can I have the Court's indulgence for
8 30 seconds or less?

9 (Pause.)

10 MR. FREEDMAN: I have nothing further,
11 Your Honor.

12 CHIEF JUDGE BARNETT: Ms. Schiller.

13

14 REDIRECT EXAMINATION

15

16 BY MS. SCHILLER:

17 Q. Does SiriusXM provide long-term
18 guidance to financial analysts or investors
19 publicly?

20 A. Generally no.

21 Q. Do you provide guidance through 2015 to
22 the markets?

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1 A. Today, we do not.

2 Q. All right. Do you provide it through
3 2017?

4 A. No, we do not.

5 Q. And why is that?

6 A. We find that we're -- there's just too
7 much uncertainty. I mean, while we can put a bunch
8 of numbers out there, they're just that; it's just
9 a bunch of numbers.

10 So we find that it's helpful in our
11 business planning, in our guidance to investors,
12 the decisions we make within the company to look at
13 one year out. And we place a lot of weight on
14 looking one year out not only because we provide
15 guidance to investors, but it's -- it sets
16 operating targets and goals for the company.

17 Anything beyond the current operating
18 year or the immediately next one, so, for instance,
19 the -- in the fall, we will start the work on the
20 budget for 2015. So sometime, you know, during the
21 end of 2012, we'll begin narrowing in on what we
22 think is going to happen in 2013 that will begin to

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1 inform management judgments. And we'll continue to
2 provide guidance to the market about how we think
3 we're going to do in 2012.

4 At some point in the fall, perhaps in
5 the early part of next year, we will provide
6 guidance to the market for 2013.

7 We do very little work on periods
8 beyond that kind of a time frame. You know,
9 it's -- the demand side of the business is fairly
10 difficult to predict. That we are at the mercy of
11 what car sales are going, we're at the mercy of
12 what decisions the automakers make about including
13 our product or not including our product, and we
14 have seen where changes in the macroeconomic
15 environment has affected subscriber uptake on -- on
16 the product.

17 So, you know, we don't spend a whole
18 lot of time looking at the demand side of the
19 equation.

20 We will spend a reasonable amount of
21 time looking at what contracts are coming up in the
22 future. So, for instance, I'm very aware of the

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1 fact that Major League Baseball and hockey come up
2 after the 2015 seasons. I know exactly what we're
3 going to pay between now and then, and we're really
4 looking to having the opportunity to renegotiate
5 those contracts when those seasons are up.

6 Q. You were asked about a 2010
7 presentation to ratings agencies.

8 Did you, in the last month, get a call
9 from a ratings agency asking you for a five-year
10 forecast?

11 A. Yes. Moody's called a week or 10 days
12 ago.

13 Q. And did they ask you for those
14 forecasts?

15 A. They did.

16 Q. And what did you tell Moody's?

17 A. We told them we don't have five-year
18 forecasts.

19 MS. SCHILLER: I have no other
20 questions. Thank you.

21 MR. FREEDMAN: Nothing further,
22 Your Honor.

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1 CHIEF JUDGE BARNETT: Judge?

2 JUDGE WISNIEWSKI: Yes, one or two, if
3 I may.

4 Mr. Frear, have you looked at how you
5 might have fared but for the recession over the
6 last three, four years?

7 THE WITNESS: You mean what would have
8 happened had it never happened?

9 JUDGE WISNIEWSKI: Yes.

10 THE WITNESS: I actually -- I haven't
11 run that scenario that -- while I'm thrilled with
12 the company's operating performance, you know, from
13 the merger, I think that the havoc wreaked on the
14 company's shareholders as a result of the credit
15 crisis was -- is a sad day, and it's something I
16 prefer not to look back at.

17 JUDGE WISNIEWSKI: Is it fair to say
18 that had the recession not occurred, you would have
19 come closer to the forecasts that were provided in
20 the last proceeding?

21 THE WITNESS: Well, closer is, of
22 course, a relative concept. So I believe our

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1 numbers would be higher than they are now.

2 I don't believe that we would have
3 achieved the numbers that were in the prior
4 proceeding. In fact, as you look at the analysts'
5 forecasts -- and I saw this, I think, in a
6 SoundExchange exhibit from one of their experts,
7 Lys, I think it was -- where apparently Wall Street
8 is estimating subscriptions will get to almost
9 30 million out in 2011.

10 Now, while we don't have a point of
11 view, it's curious to note it's getting towards the
12 end of the next rate term, that we still haven't
13 gotten to the level that Mr. Butson thought we
14 would get to by the end of the current rate term.

15 JUDGE WISNIEWSKI: But, of course, that
16 reflects the intervening recession?

17 THE WITNESS: It does. Changes in
18 demand, changes in competition, the fact that our
19 churn rate is now higher and, apparently,
20 permanently higher than what we were experiencing
21 when we went through the last proceeding, where,
22 you know, self-paid churn rates were 1.5 to

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1 1.7 percent. And now, if all goes well, we will be
2 able to maintain 1.9 percent.

3 I know it sounds like a small
4 difference, right, you know, 1.7 percent, when it's
5 only 20 basis points. It sounds like a small
6 number, but, you know, every 10 basis points of
7 that over the course of three or four years rolls
8 up to a miss of 3 or 4 million, you know,
9 subscriptions.

10 So, actually, the business is very
11 sensitive to increases in churn. And while we're
12 doing better than we were a year ago, the churn is
13 materially worse than when I sat here before.

14 JUDGE WISNIEWSKI: And you don't
15 factor in forecasts of recessions into your
16 forecast?

17 THE WITNESS: You know, I don't. I had
18 that discussion with automakers' CFOs about what do
19 they do and how do they do it. And the way that
20 the former CFO -- he retired last month of -- or
21 month before -- of Ford explained it to me is that
22 he just makes sure that he has a liquidity cushion

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1 that when it comes, because it's definitely coming,
2 he's going to survive.

3 So as you know from my testimony, the
4 last time I said, well, we need \$100 million in
5 cash. It's clearly inadequate for the size of the
6 business we have now. I will say, now, my view is
7 750 million, in part, being informed by people who
8 have been through more market cycles, more
9 recessionary cycles than I have.

10 JUDGE WISNIEWSKI: And to your
11 knowledge, the -- the Wall Street so-called
12 analysts don't add such prognostications into their
13 forecasts generally, except, perhaps in some cases,
14 in the case of a probability adjustment?

15 THE WITNESS: That's correct. By and
16 large, the Wall Street analysts don't forecast
17 recessions.

18 JUDGE WISNIEWSKI: The question of --
19 of the contracts that you were talking about with
20 the independent record companies, and you mentioned
21 that the offers that you -- the various offers that
22 you made, and some were accepted and some were --

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1 were rejected.

2 I'm curious, to your knowledge, did you
3 ever receive a counteroffer from any of those
4 companies?

5 THE WITNESS: We have received
6 counteroffers. Most of the license agreements, if
7 I understand what Music Reports has been telling
8 me, have involved -- been sort of give and take in
9 the terms of the negotiations. And there have been
10 several contracts where they've escalated the final
11 decision up to -- up to me to ask if it was okay to
12 take a certain final position.

13 JUDGE WISNIEWSKI: On the music royalty
14 fee, you mentioned that you had lowered the music
15 royalty fee at a point in time.

16 I'm trying to recall when that was.
17 I -- I may be a little bit confused by one of the
18 last documents that we just had put in front of us
19 here.

20 If you could turn to SoundExchange
21 Trial Exhibit 12.

22 THE WITNESS: Okay.

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1 JUDGE WISNIEWSKI: And I'm looking in
2 particular at the Bates number ending 30996, which
3 is Page 5 of 19.

4 THE WITNESS: In SoundExchange 12?

5 JUDGE WISNIEWSKI: Yes.

6 THE WITNESS: Am I looking at the wrong
7 one?

8 JUDGE WISNIEWSKI: Yes, you are.

9 THE WITNESS: SiriusXM 12.

10 SoundExchange 12.

11 MS. SCHILLER: Do you need this one?

12 THE WITNESS: No. I have it.

13 CHIEF JUDGE BARNETT: Judge, could you
14 tell me that page number again?

15 JUDGE WISNIEWSKI: Yes. It's Page 5
16 of 19, or Bates Number 30996.

17 THE WITNESS: Yes.

18 JUDGE WISNIEWSKI: And I'm going to ask
19 you some questions about the music royalty fee. I
20 hope to ask them in such a way that -- that we
21 don't have to impose the protective order here in
22 the Courtroom.

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1 But perhaps I could ask as a
2 preliminary question whether -- whether anything
3 related to the last bullet on the page that deals
4 with the music royalty fee as something that we
5 would need to provide that kind of protection to?

6 THE WITNESS: I don't think so, no.

7 JUDGE WISNIEWSKI: Okay. That'll make
8 my life a little easier. Thank you.

9 Looking at that bullet, there's a
10 sub -- three subpoints underneath that. And I was
11 trying to understand the subpoints in the context
12 of the -- of the dates that we had talked about
13 earlier.

14 And the first one talks about estimated
15 trajectory to fully recover current pool of funds,
16 and it mentions the date of July 2011 at current
17 rates.

18 What does that point mean to you, sir?

19 THE WITNESS: Well, the FCC defined a
20 formula for us, and they have a rule. And so what
21 we did was made sure we tracked to it.

22 So the -- based on the FCC definition

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1 of what we were allowed to recover and knowing that
2 the merger order expires at the end of July 2011,
3 that we had tracking mechanisms and forecasting
4 mechanisms to ensure that we did not overrecover
5 what we were entitled to get under the terms of the
6 FCC merger order.

7 JUDGE WISNIEWSKI: Okay. So at that
8 point in time, is it correct to say that you had
9 fully recovered everything that you were entitled
10 to recover?

11 THE WITNESS: At July of 2011?

12 JUDGE WISNIEWSKI: Um-hum.

13 THE WITNESS: We were slightly under,
14 right, we wanted to make sure if we're going to
15 miss, make sure you miss on the right way, because
16 once you violate, you know, your regulator, it's
17 not a good thing.

18 So, you know, I -- I don't remember the
19 precise number, but the -- I believe that we
20 underrecovered what we were entitled to recover by,
21 you know, roughly, maybe 2- to \$5 million.

22 JUDGE WISNIEWSKI: But since the

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1 licensing period hadn't ended yet, were you -- were
2 you still anticipating further recovery, if I can
3 use that word?

4 THE WITNESS: Well, I think the way to
5 think about --

6 JUDGE WISNIEWSKI: Is there a
7 continuation of the pass-through since the
8 licensing period?

9 THE WITNESS: Yeah, so, fortunately,
10 Judge Roberts' bill continues to have the music
11 recovery fee at the bottom of the bill.

12 So we were simply no longer governed by
13 the formula laid out by the FCC as of August of
14 2011 --

15 JUDGE WISNIEWSKI: Um-hum.

16 THE WITNESS: -- and so the -- you
17 know, what we have done since then is that as we
18 move into January 2012 -- and we made no changes
19 in -- in August of 2011. To change that fee, you
20 have to go into the IT systems, and it's a lot of
21 trouble notifying customers.

22 So we left the fee alone until -- and

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1 then, actually, it wasn't the 1.47. In December of
2 2010, it was reduced from a \$1.98 to \$1.40.

3 JUDGE WISNIEWSKI: That's my
4 recollection of what you said, yes.

5 THE WITNESS: Yes.

6 When we went through and put the price
7 increase in, we finally decided what the price
8 increase would be, 12.95 moving to 14.49, then
9 based on the royalties that we're currently
10 incurring, we decided to set a music recovery
11 fee -- or royalty fee of a \$1.42 on a 14.49
12 subscription for the 2012 year. And that took into
13 account the half percent increase in the statutory
14 rates as well as other changes in the mix of our
15 business.

16 JUDGE WISNIEWSKI: And I -- this
17 particular projection shows that continuing on into
18 the next licensing period, is that correct --

19 THE WITNESS: Yes --

20 JUDGE WISNIEWSKI: -- is that your
21 assumption behind the numbers?

22 THE WITNESS: Yes. This projection

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1 just assumes -- again, it was a sensitivity
2 analysis for things happening with auto sales and
3 churn. So all other assumptions were simply left
4 as they are.

5 JUDGE WISNIEWSKI: And, finally, the
6 last subbullet point there, it says, Rate is lower
7 than figures in the aggressive scenario due to
8 higher subscription rates in that plan.

9 Could you tell me what you recollect
10 that means?

11 THE WITNESS: My guess -- my guess is,
12 just knowing the way the guys do numbers, right, is
13 that that's a reference to that in what -- whatever
14 the aggressive scenario ended being was that they
15 had some price increases built into the future.

16 JUDGE WISNIEWSKI: Well, it sounds
17 like -- and if I'm reading that right here, it
18 sounds like they had regular subscription rate
19 increases that were higher than what was in this
20 particular scenario. That's the way I'm
21 interpreting it.

22 And on top of that, they had -- they

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1 had a music royalty fee that was higher than what
2 is reflected in this scenario.

3 Is that correct or incorrect?

4 THE WITNESS: Well, I think that the
5 music royalty fee, to the extent it was higher,
6 would have been higher because of the change in
7 price and the fact that the music royalties are a
8 function of our revenue. So it would rise only to
9 that, as opposed to a change in rate.

10 JUDGE WISNIEWSKI: That was essentially
11 the point I was trying to get to. It's a point
12 that came up earlier in the proceeding before you
13 were here, and I'm glad you were able to shed that
14 light on it.

15 I have one more thing, if I may.

16 On Page 21 of your direct written
17 testimony, Paragraph 43, the last sentence of that
18 paragraph, where it says, The SoundExchange royalty
19 rate has consumed a large percentage of the
20 company's earnings over the last term -- if I could
21 just stop at that portion of the sentence.

22 Are you referring to -- to the whole

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1 term cumulatively?

2 THE WITNESS: Yes.

3 JUDGE WISNIEWSKI: Is there any major
4 category of costs that has decreased over that same
5 period of time for you as a percent of earnings,
6 which is what this statement says?

7 THE WITNESS: Is there any major cost
8 that has declined as a percentage of earnings?

9 I believe most of our costs have
10 declined as a percentage of earnings, you know,
11 over -- over the term that we've -- you know,
12 programming costs, for instance, are down
13 \$100 million and our earnings are up. So that
14 alone would produce a reduction.

15 So either the top line goes up or the
16 bottom line rises --

17 JUDGE WISNIEWSKI: Remember, we're
18 talking cumulatively over that whole period.

19 So, in fact, your earnings didn't go up
20 in every year of that period, unless we're talking
21 about some category of earnings here that -- are we
22 talking about operating profits or what are we

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1 talking about?

2 THE WITNESS: Well, it says earnings.

3 I believe it's referring to net income.

4 JUDGE WISNIEWSKI: That's what I
5 assumed it was.

6 THE WITNESS: And there have been
7 improvements in that income. It's gone from
8 negative to positive. So cumulatively --

9 JUDGE WISNIEWSKI: But cumulatively,
10 what has that number been?

11 THE WITNESS: Which number, sir?

12 JUDGE WISNIEWSKI: Earnings.

13 THE WITNESS: Off the top of my head, I
14 wouldn't be able to answer that.

15 JUDGE WISNIEWSKI: Okay, thank you.

16 CHIEF JUDGE BARNETT: Any follow-up
17 questions from counsel based upon the Judge's
18 questions -- sorry.

19 MS. SCHILLER: No follow-up questions.

20 We would just request that the material
21 that is designated protected in the written direct
22 testimony remain subject to the protective order.

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1 CHIEF JUDGE BARNETT: Okay. Thank you.

2 MR. FREEDMAN: Nothing further,

3 Your Honor.

4 CHIEF JUDGE BARNETT: Okay.

5 MR. CUNNIFF: No questions, Your Honor.

6 CHIEF JUDGE BARNETT: All right. May
7 this witness be excused?

8 THE WITNESS: Thank you.

9 CHIEF JUDGE BARNETT: Thank you.

10 Mr. Frear.

11 Before Mr. Frear leaves the room, I
12 feel compelled to mention that he and I had a
13 discussion in the cafeteria upstairs. I don't know
14 if any -- anyone observed us talking.

15 I realized afterwards it probably might
16 have created a wrong impression. We were talking
17 about junior high school -- or middle school and
18 the perils thereof, so it had nothing to do with
19 the hearing.

20 Thank you, Mr. Frear.

21 Do you want to call your next witness?

22 MR. RICH: Yes. We call as our next

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Before the
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LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
Docket No. 2006-1 CRB DSTRA
Adjustment of Rates and Terms for)
Preexisting Subscription and Satellite)
Digital Audio Radio Services)

)

WRITTEN DIRECT TESTIMONY OF STEVEN BLATTER

(On Behalf of Sirius)

Background and Experience

1. My name is Steven Blatter, Senior Vice President of Music Programming, at Sirius Satellite Radio Inc. ("Sirius"). My whole 20+ year career has been in radio, primarily in programming, but also in marketing, promotion and online. I have worked as a Program Director for local terrestrial radio stations in New York and Los Angeles, as well as in national syndication and network operations. For the last three years I have been employed by Sirius, beginning as a Vice President and moving up to Senior Vice President approximately two years ago. As I will explain below, Sirius is not just radio, but we are a special form of radio that offers a great deal more than traditional radio, adding enormous value for both listeners and record companies and providing access to creative works not otherwise available.

2. I am responsible for the content of all 64 of the Sirius music channels created in the United States and my testimony will focus on them. Sirius also carries five

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music channels created in Canada, but my testimony focuses on the area where my knowledge is greatest. I supervise approximately 200 employees, including two senior directors, each of whom is responsible for about half the music channels, several directors who each handle a genre or two, format managers who handle one to three channels, and coordinators who put the music into playable form for our operation. I also supervise a team of producers who create all the interstitial elements heard between the songs on each of our channels, as well as our talent and industry relations group, whose primary function is to work with the music community to arrange artist interviews and live performances that typically originate from our broadcast studios in New York. I also work with agents, managers, and the Sirius human relations department in recruiting our on-air talent, producers, programmers and other creative staff.

3. In addition to my supervisory role, I am responsible for determining the formats for each of our music channels, the creation of new radio formats, as well as channels and programs we co-produce with recording artists such as Eminem, 50 Cent, Little Steven Van Zandt, Jimmy Buffett, The Rolling Stones and The Who. The channels and programs we co-produce with these artists contribute greatly to the Sirius listening experience and give our listeners access to music not available on terrestrial radio.

4. My entire career has required me to deal directly and extensively with recording companies and their executives and radio promotion teams. It has been important for me to understand their motivations and business models, as well as those of my employers in terrestrial radio. At Sirius I have continued to interact directly with the record labels and also to supervise persons who interact with record labels on a daily

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basis. I have directly observed what does and does not motivate the labels and have participated in two decades of discussions with them. I also pay close attention to label activities by regularly reading trade press.

5. My career has required me to understand how Americans use the radio medium. The appeal of radio stations, including Sirius', is measured by the popularity of a station with its targeted audience. The job of a radio programmer is to identify the target audience of a particular channel, understand what attracts them, and develop a full experience that engages that audience. Again, I have observed the process for two decades, seeing what does and does not work for my own employers and for competitors. I have also paid close attention to the trade press over the years where the actions of Programmers are closely monitored and documented. I also supervise and work with the extensive listener research we conduct to evaluate new formats and identify the most attractive music for those formats.

Summary of Testimony

6. Each of Sirius' 64 music channels offers a listening experience that is designed to create a highly satisfactory listening experience for the intended audience of the channel. We put enormous resources, effort, and creativity into crafting each of our 64 music channels. Creating the experience that a Sirius channel delivers is a demanding and expensive task. Beyond the huge investment in technology, physical infrastructure, and financing lies the creative input of dozens of radio professionals, ranging from those who develop the basic channel concept, to the channel programmers that select and, for most channels, direct the hosts or DJs who provide commentary, and select and sequence

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the music for each hour of the day. There are also producers who write and create all the interstitial material heard between songs that help create the attitude for each channel. In addition, promotions are developed on the appropriate channels to further enhance the listening experience. We make this enormous effort because we are acutely aware that music, as such, is widely available for free, particularly on terrestrial radio. The value created in producing our music channels is critical to our ability to attract and retain subscribers.

7. The distinctive music formats for each of our 64 music channels are determined through proprietary research and the past experiences of our expert programmers. Our research uses both on-line and in-person survey formats, as well as review of the trade press and other public sources. Each radio station is built by populating a library of music for the channel. This library is maintained and updated using our own listener research as well as public sources such as the trade press and information from record company promoters, as I discuss below. Criteria such as tempo, texture, loudness/softness, familiarity, popularity and compatibility are used to determine the viability of each song being considered for airplay.

8. The music library for each channel is actively managed and modified by a music programmer on a daily basis. Within the station's music universe, programmers arrange particular pieces with an eye to the characteristics of each (e.g. tempo, era, gender, and lyrical content), along with special programs (such as artist interviews, live performances and countdown shows), so the DJ/host can develop the specific listening experience that attracts subscribers to that station. Importantly, the Sirius experience can

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be sustained and intensified because, in contrast to terrestrial radio, it is not interrupted by commercials. This also creates greater listener satisfaction and helps us attract and retain subscribers even though music is available for free on terrestrial radio.

9. Airplay on radio has continually proven to be the biggest driver of record sales. As a result, record companies have large operations specifically charged with obtaining radio airplay, typically organized with regional operations under national direction. They also use independent promoters to encourage radio programmers to play their music. Record companies give Sirius and other broadcasters their recordings for free, often weeks before public release, in hopes of generating pre-release demand. The labels know from experience that it is incredibly difficult to break a new album without extensive airplay. Many of the most influential executives at the major labels tend to be those who have a demonstrated an ability to get music played on the radio. In my career in radio programming, culminating in my position in charge of programming the 64 U.S. Sirius music channels, the drive of record labels for airplay has been a constant theme.

10. Satellite radio is, of course, a form of radio. Sirius competes for listeners with and is directly comparable to terrestrial radio. We do everything terrestrial radio does and more. The major record labels rely on their radio promotion operations to work with Sirius, typically from their national office or as part of their New York regional effort. Both listeners and the labels think of Sirius as a form of radio. Sirius airplay now is reflected in chart positions in Billboard, its sister publication Radio and Records, and Mediabase. In trade advertising created by many record companies that target terrestrial radio programmers, airplay on Sirius is now expressly noted.

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11. Although Sirius is a form of radio, it offers significant additional promotional benefits to record companies that terrestrial radio cannot provide.

- Unlike most terrestrial radio, as each song plays, Sirius continuously displays the title and the artist on its digital display. This makes it easier for a listener to remember the song and artist that is playing. Over the years the record labels have expressed their concern with traditional radio's inability to provide such information for each song played. In addition to not having the technical capabilities to display such information, traditional radio DJs often strive for pace and tend not to verbally identify the music they play.
- All music radio stations strive for a distinct "stationality" that adds to the listening experience. Because Sirius has many channels, stationality can be much more targeted than traditional radio. Also, the absence of commercials means the Sirius aesthetic experience is more sustained and fully developed. Music heard in this context allows us to create an even more satisfying listening experience. The greater listener satisfaction explains why subscribers are willing to purchase Sirius radios and pay subscription fees when music can be heard for free on terrestrial radio.
- Sirius' 64 music channels include specialized formats that let us play new or emerging artists that are not yet popular enough to be included on the playlists of terrestrial radio stations that cover relatively broad formats. Record company promoters are very aware of our specialized channels and systematically attempt to place emerging artists on more specialized channels, long before they might appear on terrestrial radio.
- Sirius gets much deeper into the catalog than terrestrial radio. With 64 channels of music, each channel can be more specialized and dig down to music terrestrial radio would never use. This exposure is to persons who have selected that specialized channel and, hence, are most likely to appreciate and purchase that music.
- Because our music stations are supported by subscription fees, not advertising, we can serve listener interests, providing mixes of music that often do not fit with the advertising interests of banks, automobile dealerships, supermarkets, and other businesses that provide the core advertising for local terrestrial radio stations. Our music channels are listener driven, not advertiser driven.
- The availability of 64 distinct stations seems to encourage an active process of listener choice, perhaps because the choice is more meaningful. One of the 64 Sirius channels is more likely to satisfy a particular

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listener's interests than one of a half-dozen ordinary formats. As a result, Sirius listeners seem to be more engaged, and they more quickly become familiar with the music Sirius plays.

12. Because of my job and experience, my testimony will focus on the Sirius music channels and on dealings with the record companies. I will discuss how developing and presenting those channels is, in itself, a highly creative, demanding, and expensive process. Importantly, however, that is just a part of our overall business. To make music channels possible, enormous technical, regulatory, and financial challenges must be overcome. And to make music channels feasible, a large pool of subscribers must be developed, requiring extensive and expensive marketing efforts and a huge investment in the kinds of distinctive and exclusive non-musical features, such as Howard Stern and the NFL, that drive subscriptions. In short, as shown in the web pages that are SIR Ex. 28, musical recordings are just one component of the value we deliver, and our contribution is just one part of the whole.

The Sirius Music Channels

13. Sirius has 69 are music stations without commercials (64 are produced by Sirius in the US; the other five are produced by our Canadian affiliate). Printouts of the web pages of some of these channels are found at SIR NSS Ex. 3.

14. Of those music stations, some are devoted exclusively or almost so to music recorded before 1972. These include Sirius Gold and 60s Vibrations.

15. Other music stations make substantial use of pre-1972 recordings (approximately 50% or more of the recordings played). These include:

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- Classic Vinyl
- The Vault
- Rolling Stones Radio
- The Who Channel
- Sirius Blues
- Standard Time
- Broadway's Best.

16. Additional Sirius music channels use a significant amount of pre-1972 recordings (approximately 25% or more of the recordings played). These include:

- Movin' Easy
- Underground Garage
- The Roadhouse
- Soul Town

17. Our music channels are not limited to recorded music. We have studios for live performances, and hundreds of such performances are broadcast each year.

18. We also have developed channels and programs in conjunction with well known artists such as Jimmy Buffett, Eminem, 50 Cent, Steven Van Zandt, the Who, and the Rolling Stones, as well as the Metropolitan Opera. In addition to bringing their creative talents to bear on shaping the overall listening experience, these artists also make available a range of unreleased recordings that listeners otherwise could not access. For example, The Who channel broadcasts two hours per day of live music that is not

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commercially available; Met Opera Radio broadcasts about 12 hours per day of pieces that are either live or recordings exclusive to radio on Sirius, and Radio Margaritaville airs about three hours per day of live songs.

19. Sirius has carefully chosen the formats of its 64 U.S. music channels to provide a breadth and quality of musical choice that is not and inherently cannot be provided by traditional radio.

20. A given station or channel must have enough listeners to be economically viable on a local market level. (Even public radio faces funding constraints.) Sirius can reach millions of subscribers with its national signal, and that number is growing. Our national audience is large enough to support many different musical channels with distinctive formats.

21. By contrast, the audience in typical local markets for terrestrial radio is much smaller, so that only a few channels and formats can be supported. The tendency is for each market to sustain several stations with formats intended to appeal to large audience segments, perhaps with a few specialty formats supported by institutions such as colleges or by local ethnic concentrations. Even in a major urban area such as Washington, D.C., it is difficult for most listeners to terrestrial radio to receive more than 15 different music formats, and the selections in much of the country can be far fewer.

22. Some of the omissions forced by the constraints on terrestrial radio are striking. For example, the two largest local markets in the U.S., New York and Los Angeles, lack any country music format. Eight of the ten largest U.S. markets lack a dance music format. Of the ten largest markets, only New York and San Francisco have

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dance stations. Five of the ten largest markets now lack an oldies format. Finally, four of the top ten markets (Philadelphia, Houston, Detroit, and Atlanta) do not have a classical music station. One can readily imagine the situation in the great majority of traditional U.S. radio markets where there may be only four to ten quality music channels versus the 69 available on Sirius.

23. The constraints imposed by the limited number of signals interacts with the constraints imposed by the fact that terrestrial radio is advertiser driven. The types of businesses that provide the revenue backbone for terrestrial radio are led by the demographics of their best customers and by considerations of image to focus on certain music formats. For example, a single format focused on playing both alternative rock and hip-hop will likely produce listeners who are 16 to 24 year old males. In most markets, it is extremely difficult to find enough local advertisers interested in that demographic to support a financially viable local radio station. Further, music tastes for most consumers are defined during teen years and terrestrial radio is losing this audience during this critical period. This is clearly demonstrated by the declining usage of terrestrial radio by younger demographics across America. Sirius currently dedicates 10 of its music channels to younger demographics, including Sirius Hits-1, Octane, Alt Nation, Hard Attack, Faction, Hip Hop Nation, Shade 45, Hot Jamz, Revolution and Kids Stuff.

24. In all markets, and particularly in smaller markets, satellite radio provides access to music that listeners would otherwise never encounter and, hence, would have no opportunity to come to like or to purchase. Sirius thus greatly expands the musical

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opportunities of its listeners. In addition to the “young demographic” channels described above, Sirius offers numerous channels dedicated to styles of music that are typically not available on terrestrial radio, including: Classical, Reggae, Standards, Dance, Classic Country, Outlaw Country, New Age, Jazz, Jam bands, Garage Rock, Heavy Metal, Electronic, Gospel, Broadway>Show Tunes, Blues, Christian Pop and Rock, and Bluegrass. By expanding the musical opportunities of listeners in this way, Sirius provides airplay (and ultimately, sales and resulting royalty payments) for artists who likely would not be heard on terrestrial radio.

Creating and Maintaining a Sirius Music Channel

25. Each Sirius music channel starts with a distinctive format developed to attract and hold the loyalty of a viable audience segment. The format may be a particular musical era (e.g. the 50's), genre (e.g. opera or hard rock), artist (e.g. The Who, Rolling Stones), or a desired mood (e.g. romance, relaxation, or party time). In each case there is a clearly defined format, which shapes the channel in multiple ways.

- The format defines the universe of music the programmers will draw upon, for example, opera, hard rock, or show tunes.
- The format also helps define the overall energy level of the channel – whether it is edgy and energetic or laid back and mellow.
- The format suggests the appropriate hosts or DJs for the channel and guides their style of announcing. An alternative rock station calls for different personalities and styles than standards from the 40s. Sirius makes a major investment in identifying and recruiting top quality and highly experienced on-air talent, and our programmers and other creative workers support that talent.
- With two exceptions, the format of a Sirius music channel also includes production elements or interstitial pieces heard between the songs that further position and image the channel for the intended audience.

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Channels have their own station voice and slogans, while others also employ custom singing jingles that help enhance the mood of the channel.

- The format for a channel also guides the types of special programming that may be created and scheduled. Artists often participate in interviews and host special programs such as countdown shows on our more foreground formats like Top 40, modern rock, new country and hip-hop. A station with an edgy or party persona can use contests that would not work as well on a classical station.
- All of these factors work together to enhance the stationality of each station, make the listening experience more attractive to the target audience, and permit meaningful and satisfactory channel choices by the listener.

26. Selecting music to implement the format is a difficult and ongoing task carried out by our music programming specialists. It is not enough just to rotate down an alphabetical list of pieces that are within the universe defined by the concept. Nor will random play work. Instead, programmers who are deeply familiar with the universe of music bring both scientific and artistic judgment to bear to create a musical flow and mood.

- For example, tempo is important. Too many slow or fast pieces in a row often may be boring, though sometimes may create and sustain a mood. Rapid alteration may be jarring.
- Other qualities of the music also must be considered. It may be undesirable to string together a series of artists with a given characteristic – male, female, group, duets.
- The themes and story lines of songs also must be considered. Putting the wrong songs in sequence may produce unintended effects ranging from jarring to humorous.
- We utilize software called MusicMaster that helps in the rotation and sequencing of songs for each music channel. While this software helps programmers manage their music libraries and facilitates the music scheduling process, it is no substitute for the informed judgment of programmers with in-depth knowledge of the genre. In fact, every hour of music scheduled across all 64 Sirius music channels is carefully reviewed and hand massaged by a Sirius programmer before it airs.

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- We also do substantial listener research in an effort to understand how our formats are perceived and what appeals to various listener groups. For example, we regularly conduct surveys, either on-line or in person. We back that effort up with research into what is working in terrestrial radio. This includes our own review of publicly reported charts and airplay information from sources such as Mediabase. And, as I discuss below, record company promoters provide airplay and other information to our programmers on a regular basis.

27. Hosts or DJs must understand the music, the audience, and the flow of the program. Sometimes humor is called for, sometimes not. Often the needed humor is a light quip, sometimes it is a raucous rant. Some channels call for an emphasis on facts; on others the host must emote. Everything that is said must implement the format of the channel and enhance the overall listener experience. As already noted, Sirius hires top quality on-air personalities to present music and provide our listeners with additional information about each artist and song played in a passionate and engaging manner. We also give our on-air personalities extensive direction and other support to help them best communicate to their audience.

28. Special programming such as live performances, interviews, contests, and the like can be important, but must be carefully tailored to the channel and its format. Artist interview bookings and on-air promotions are handled by two distinct departments with approximately ten employees who are charged with creation and development of such programming.

29. A channel must be promoted, both to current listeners and to others who may become regular listeners if they sample the channel. This requires a variety of tactics.

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- The channel must have a short name that captures its format. For example, "Hard Attack," or "Chill."
- Typically a distinctive logo is developed that must be associated with the name so as to permit instant visual identification.
- The name and logo must be supported by additional catch phrases or similar items that are used repeatedly and that become associated with the channel. Some of these may remain in use for years. Others may become stale and be rotated out.

30. Sirius devotes resources to all of these matters because experience has shown that they are critical to satisfying listeners, and they fundamentally shape how listeners perceive and respond to the music. In the right restaurant, with the right ambiance and menu, a diner may find escargot delicious and even be motivated to try serving it at home. But in other situations, the same diner might find the same snail unappetizing or even revolting. Much the same is true of music. Sirius works with music, but that is just a small part of the experience a Sirius channel delivers.

How Sirius Benefits Recording Sales

31. Most consumers typically do not decide to purchase music based on a story in a newspaper or magazine; the music industry understands that radio airplay is the number one driver of recording sales. Of course, some artists have established followings that wait for their next release. It is also possible to sample CDs at record stores and online. Still, the simple fact is that radio airplay sells music. Certainly the record labels believe this, leading to their extensive efforts to obtain airplay that I discuss later.

32. Sirius provides all of the promotional benefits of terrestrial radio exposure, but even more so. For example:

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- Sirius displays the name of the artist and song continuously during play. If the listener is interested, he or she does not have to try to remember what the DJ said before play began or hope that it is mentioned after play ends. The information is immediately available when desired.
- Because Sirius offers 64 music channels with distinct and defined formats, it is much more likely that a listener who has chosen a given channel will be attracted to music played on that channel. By contrast, terrestrial radio typically offers fewer and less defined choices, so listeners may be much less attracted to music the station plays.
- Music within a given format is presented in an optimum setting in terms of surrounding pieces, hosting, and overall station personality. The experience will also not be preceded or followed by jarring commercials. This gives the music the best possible opportunity to appeal to the listener. Thus, the value we add provides a direct promotional benefit to the record companies, as well as to our listeners.
- Sirius' 64 different and distinct music channels allow us to go much deeper into the music catalog. A terrestrial station with a broad format has to look for material that will appeal to a relatively broad audience. By contrast, the self-selected group listening to a more focused Sirius channel is more likely to appreciate music within the format that has less general appeal.
- Similarly, our specialized channels allow us to play up and coming artists who are often not receiving airplay on terrestrial radio stations with broader formats. This exposure can give impetus to the emerging artist and lead to broader exposure. There have been situations in which Sirius airplay of an unsigned artist has led to a contract with a major recording company. For example, the band Evans Blue was signed by a major label after their self created album received airplay on Sirius' Octane channel. In such a situation, the recording company gets an artist that has already proven itself on the radio and increases the likelihood of the band receiving airplay elsewhere.
- The care and resources we devote to programming, and the specialized nature of many of our channels, augment the reputations of our DJs or hosts. As they become opinion leaders for their audiences, their favorable views of an artist or song can be very influential in motivating sales. Approval from such an opinion leader provides promotion that is likely to be more effective than paid commercial advertising by the record labels.
- Ratings by third party providers do not drive our music programming decisions, so that Sirius is free to take more chances with new music, emerging and unknown artists, and music that has not yet climbed the national music charts.

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- A Sirius subscriber typically will be someone who values Sirius broadcasts enough to pay for them and, moreover, will have money to spend for music entertainment. Such a person is an attractive potential customer.

33. Chart position has an important effect on music sales. Some customers are directly motivated to purchase highly charted music. But beyond that, many terrestrial radio stations rely on chart position to select the universe of music their station will play. The most obvious is a "Top 40" station, but other types of station formats focus on music that presently is relatively highly charted.

- Airplay on Sirius now is taken into account when weekly charts are compiled by Billboard/Radio & Records and Mediabase, the two primary sources for chart information used by record labels and radio programmers. When Sirius plays a song, its spin count increases and chart position is affected. When a song's spin count and chart position increase other programmers are more easily encouraged to play the song, and that ultimately drives greater record sales.
- Also, Sirius is recognized as a leader in music selection. SIR NSS Ex. 2 contains examples of record company advertising that emphasizes airplay on Sirius as a reason that other programmers should expose the work or artist. When our leadership causes terrestrial radio stations to play a particular song, the result is higher chart position for that song.

Promotional Efforts By Record Companies

34. Record companies are acutely aware of how important airplay is to generating record sales, and they go to great lengths to seek it. This has been going on since long before I became involved in radio. Efforts directed at Sirius have continued and intensified during my time at Sirius as our listener base expands and as the record companies become more aware of the unique benefits Sirius offers.

35. To begin with, the record companies consistently provide music recordings to Sirius for free, in the obvious hope that we will play and thereby promote

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what we have been provided. In fact, we often receive songs weeks before public release in the hope that airplay on Sirius will generate interest and demand before the album is commercially released.

36. Recording companies have divisions devoted to obtaining radio airplay for their releases. Typically these divisions are organized by region with a national operation to supervise and assist as needed. Some companies have separate “new media” promotional groups, but Sirius now is virtually always the responsibility of the radio promotion departments. Either Sirius is assigned to the national group or to the New York regional promotion person.

37. Record industry promoters aggressively communicate to our programmers their desire for us to play their music. These efforts are part of carefully calculated promotional efforts. The promoters will promote particular songs for particular channels, making a case that a given song will succeed with the channel’s audience. The record company promotional representatives are under tremendous pressure to seek airplay on radio. When a radio programmer does not agree with a record label promotion person, it is not unusual for the promotional rep to escalate the call to the programmer’s supervisor and at times to me as the head of music programming. On occasion these calls can get contentious, reflecting the high value the record companies place on radio airplay and the pressure their promoters are under to get music played on Sirius.

38. [As an experiment, I asked the programmers for six of our music channels (Left of Center, Alt Nation, The Spectrum, Octane, Hard Attack and Faction) to keep a record of promotional contacts from record companies during the week of October

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16-20. As indicated on the following table, in just one week we received 170 label promotional contacts (calls, e-mails and instant messages) and 108 mailings (consisting substantially of free CDs and singles) with respect to these six channels alone:

	10/16	10/17	10/18	10/19	10/20	Week
E-mail/Instant Message	22	25	33	28	28	136
Calls	4	8	10	9	3	34
Promo Mail (incl. CDs/ Singles/Concert Tickets)	19	29	19	23	18	108

Thus, in this one week period – which I believe to be typical in all material respects – Sirius received nearly ten promotional contacts from the record labels per day for each of these channels.]

39. Record companies often complain that terrestrial radio stations have very limited playlists. But terrestrial radio, which has to play music that appeals to relatively broad audiences, typically cannot afford to play pieces with narrow appeal. The record companies know, however, that many of our channels are more specialized. They initially will promote newer artists for more specialized stations, hoping that they will generate interest in their most likely audience and, perhaps, eventually graduate to broader formats and terrestrial radio.

40. In an effort to gain airplay, record company reps will often make their artists available to participate in special programming that will air exclusively on Sirius and also provide prizes for use in on-air promotions. For example:

**RESTRICTED – Subject to Protective
Order in Docket No. 2006-1 CRB DSTRA**

- Sirius adds value by arranging for artist interviews and live performances from our studios. The record companies regularly arrange for appearances by artists we are willing to play. For example, from January 1 through October 18 of this year, over 800 record company artists visited our studios for interviews and/or performances. These events add value for our listeners, but also gave promotional value to the record companies.
- On some stations Sirius conducts contests. Record companies will regularly provide prizes to support such contests, including CDs and concert tickets.

41. Record companies are so strongly motivated to obtain play on Sirius that we have to set limits on what is acceptable. For example, I will not approve accepting free travel to view artists in concert. In fact, over the years record companies have pushed so hard for radio airplay that legal restrictions have been adopted. The New York Attorney General, Eliot Spitzer, has recently obtained consent decrees from major labels restricting some of their promotional practices directed toward obtaining air time. On October 20, 2006, the *New York Times* carried an article entitled “CBS Radio Tightens Policies in Settlement Over Payola” that briefly summarizes some recent developments, noting that such issues arise as “music executives compete fiercely to land their songs on limited radio station playlists.”

42. Record companies typically focus their promotional efforts on new music, rather than their existing catalog. As a result, a vast array of older music is unknown, and thus effectively unavailable, to many listeners. Our specialized formats dig much deeper into the catalog, exposing older songs to the public. And, of course, the record companies benefit from resulting sales on which they expended no promotional effort.

43. The labels explicitly recognize our promotional contributions. Sirius frequently receives thanks from record companies and their artists for our contributions to

their success. Indeed, when record companies issue gold or platinum records to recognize sales milestones, they sometimes send them to radio stations, and we regularly receive such gold or platinum records at Sirius.

Conclusion

44. In short, developing and implementing a unique and compelling radio format for all 64 commercial-free Sirius music channels is a highly creative and demanding process, even after the many technical, promotional, and financial challenges have been overcome. Our expert music programmers, celebrity hosts and DJs, producers, and on-air promotion and talent executives add enormous value to our music offerings. This added value both provides our subscribers with the reason to pay our fees and makes us a tremendously valuable marketing tool for the recording industry, as evidenced by the record companies' constant and increasing promotional efforts.

Before the
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LIBRARY OF CONGRESS
Washington, D.C.

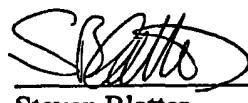
In the Matter of)

Adjustment of Rates and Terms for)
Preexisting Subscription and Satellite)
Digital Audio Radio Services)

Docket No. 2006-1 CRB DSTRA

DECLARATION OF STEVEN BLATTER

I, Steven Blatter, 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 30th day of October 2006 at New York, New York.



Steven Blatter

Before the

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LIBRARY OF CONGRESS

Washington, D.C.

In the matter of: °

Adjustment of Rates and Terms ° Docket No.

for Preexisting Subscriptions ° 2006-1

Services, ° CRB DSTRA

and °

Satellite Digital Audio Radio °

Services °

Room LM-408

Library of Congress

First and Independence

Avenue, S.E.

Washington, D.C. 20540

Monday,

June 11, 2007

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge

THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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I-N-D-E-X

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1 sports channels to single digit channels. So
 2 in meetings that I've been present in, it's
 3 never come up that this has been an issue.
 4 What I can tell you that has come up is the
 5 fact that we would like to be able to
 6 channelize our sports channels and that means
 7 put them in succession, especially when we
 8 have preemptions so it's easier for the
 9 listener to find games.

10 JUDGE ROBERTS: I know you're the
 11 Director of Sports Programming, Mr. Cohen, but
 12 do you know when Howard Stern negotiated his
 13 deal, was he promised a particular channel?

14 THE WITNESS: I'm not aware of
 15 that, your Honor. If he was promised a
 16 channel or channels during the negotiation, I
 17 wasn't part of the negotiation.

18 JUDGE ROBERTS: Well, I hope that
 19 there's somebody that is able to answer that
 20 question.

21 CHIEF JUDGE SLEDGE: Any follow-up
 22 questions from counsel?

1 please be seated.

2 MR. KIRBY: Good morning, Mr.

3 Blatter.

4 THE WITNESS: Good morning.

5 DIRECT EXAMINATION

6 BY MR. KIRBY:

7 Q What is your full name?

8 A My name is Steven Gary Blatter.

9 Q And where are you employed, Mr.

10 Blatter?

11 A I'm employed at Sirius Satellite

12 Radio.

13 Q And what is your position there?

14 A I am the Senior Vice President of
 15 Music Programming.

16 Q What did you do professionally
 17 before you came to Sirius?

18 A Immediately prior to Sirius, I was
 19 the Chief Strategist for a media consulting
 20 company called Sabo Media.

21 Q All right, and before that?

22 A Prior to that, I spent all of my

1 MS. ELGIN: No.

2 MR. DeSANCTIS: No, your Honor.

3 CHIEF JUDGE SLEDGE: Thank you,
 4 sir.

5 THE WITNESS: Thank you.

6 (The witness was excused.)

7 JUDGE ROBERTS: Mr. DeSanctis,
 8 have you rethought your desire to make a
 9 statement?

10 MR. DeSANCTIS: I think everything
 11 is sufficiently covered, thank you, your
 12 Honor.

13 MR. JOSEPH: Your Honor, Mr. Kirby
 14 will call our next witness.

15 MR. KIRBY: Your Honor, I would
 16 call Mr. Steven Blatter.

17 Whereupon,

18 STEVEN BLATTER
 19 was called as a witness and, having been first
 20 duly sworn, was examined and testified as
 21 follows:

22 CHIEF JUDGE SLEDGE: Thank you,

1 career as a programmer in terrestrial radio.

2 Q Okay, did you specialize in any
 3 particular format?

4 A Unlike most radio programmers that
 5 I've come in contact in my 20 years, I
 6 actually -- who typically specialize in one
 7 format, I've actually had the opportunity to
 8 program in a number of formats particularly
 9 country music and rock music.

10 Q When did you join Sirius?

11 A I joined Sirius just about four
 12 years ago.

13 Q Okay. And what are your
 14 responsibilities as the Senior Vice President
 15 of Music Programming?

16 A I'm responsible for the music and
 17 non-music content, including approximately 150
 18 on air host plus all the interstitial pre-
 19 produced elements you might hear in between
 20 the songs as well as the overall packaging
 21 each of our 64 commercial-free music channels.

22 Q You mentioned you have 150 music

1 hosts. Are there other people that work for
2 you or under you, I guess I should say?

3 A Yes, there are.

4 Q How many and what do they -- just
5 in general terms, what are their functions?

6 A Yeah. Well, immediately below me,
7 there's a tier of Senior Directors of
8 Programming, two of which essentially split
9 the 64 commercial-free channels among
10 themselves and they're responsible for the
11 day-to-day programming of those channels.

12 There's also a third Senior Director who
13 operates more in a operational capacity and
14 reports directly into me.

15 Below the Senior Directors are
16 Directors of Programming and they each are
17 specialists in a particular genre of music,
18 whether it be country, jazz, rock and so on.
19 And reporting into each of those Directors of
20 Programming are what we refer to as Format
21 Managers who typically oversee the programming
22 of anywhere from one to three channels.

1 Sirius, they would call the Artist and Talent
2 Relations Department and they would refer them
3 to the appropriate cohort.

4 MR. KIRBY: Your Honor, since I
5 mentioned the witness' direct testimony, I'd
6 like to have that passed out at this point and
7 if I heard correctly, and I'm looking to Mr.
8 Joseph to correct me here, I believe this
9 would be Exhibit -- Sirius Exhibit 36, Sirius
10 Exhibit 36, your Honor.

11 (Sirius Trial Exhibit 36
12 marked for identification.)

13 BY MR. KIRBY:

14 Q Mr. Blatter, do you recognize
15 Sirius Exhibit 36 as your written direct
16 testimony in this proceeding with attached
17 exhibits?

18 (Witness proffered document.)

19 A I'm sorry, could I have the
20 exhibit number again?

21 Q It should be on the cover, I
22 believe. It's Exhibit 36.

1 There's also a team of coordinators who
2 support all the programmers in the department,
3 who are responsible for handling some of the
4 nuts and bolts of producing each of our
5 commercial-free music channels.

6 Q And then is there a group -- I
7 think you mentioned in your direct testimony
8 which we'll get to in just a second, of talent
9 and industry relations.

10 A Yes, there's a separate group
11 called the Talent and Industry Relations
12 Department that is primarily responsible for
13 working directly with the music community
14 which, you know, I'm defining as consisting of
15 the record companies, the artist management
16 companies and publicity people to handle the
17 booking of artists, interviews and live
18 performances at Sirius and in some cases if
19 somebody were to call Sirius and not know who
20 a particular specialist was for a format,
21 let's say it's an independent artist who
22 wasn't familiar with the inner workings of

1 A Yes.

2 Q All right, and that is your direct
3 testimony, correct? You can trust me.

4 A Yes, it is.

5 Q If you look from the back of the
6 last tab, you will see that I believe what you
7 can identify as your signature.

8 A Yes, it is.

9 Q And that indicates that you
10 executed this document on October 30; is that
11 correct?

12 A That is correct.

13 Q Mr. Blatter, one of the trues of
14 life is that time passes and I'd like you to
15 help me perhaps bring this statement up to
16 date a little bit. Turn first, if you would,
17 to page 2, the second line down in paragraph
18 2, up at the top of the page. Now, you were
19 just testifying as to the number of employees
20 that you supervise and it says there that you
21 supervise approximately 200 employees. What
22 is the approximate number today?

1 A The approximate number today is
2 250 employees.

3 Q And that's just the result of --
4 what caused that difference in the number?

5 A Actually two things. One is
6 we've, you know, added additional staff to
7 support our growth. We've also converted a
8 number of outside contractors to become part
9 time employees over the last several months.

10 Q All right. Turn, if you would, to
11 page 7, paragraph 14, please. And paragraph
12 14, Mr. Blatter, you're listing music stations
13 devoted exclusively or almost so to music
14 recorded before 1972. Should there be -- and
15 you mention two, Sirius Gold and 60s
16 Vibrations. Should there be any additional
17 channel identified there?

18 A Yes, there's one additional
19 channel called Elvis Radio which is a channel
20 that plays all Elvis Presley.

21 Q All right, and turning over --
22 actually, beginning at the bottom of that page

1 Who?

2 A Well, both of those -- the Rolling
3 Stones channel and the Who channel were meant
4 to be limited run channels from the get-go.
5 Those channels were developed in conjunction
6 with the artists as a way to work with them to
7 promote at the time -- both bands had released
8 new albums and were touring the US and they
9 felt that having their own radio station on
10 Sirius that there were some, you know,
11 promotional benefits to that and so these
12 channels were put on the air to sync up with
13 their albums releases and US tours.

14 Q And eventually that rationale
15 evaporated?

16 A Well, their tours ended. Their
17 new releases had kind of run their course and
18 as did the channels.

19 Q All right. Moving down if you
20 would, to paragraph 18 on the same page where
21 you're talking about that Sirius has developed
22 channels and programs in conjunction with

1 in paragraph 15, we have a list appearing at
2 the top of page 8 of other music stations that
3 make substantial use of pre-'72 recordings.
4 Do you see that list?

5 A Yes, I do.

6 Q Is that list current?

7 A There are three channels listed
8 there that are actually no longer available on
9 Sirius.

10 Q Which channels are those?

11 A They're Rolling Stones Radio, the
12 Who Channel and Standard Time.

13 Q All right. Starting from the
14 bottom there, what happened to the Standard
15 Time slot?

16 A The Standard Time slot recently
17 was converted into a channel we call Siriusly
18 Sinatra, which is a Frank Sinatra branded
19 radio station that plays a substantial amount
20 of Frank Sinatra's music.

21 Q All right, and then what in the
22 world happened to the Rolling Stones and the

1 well-known artists, we talked about the Who
2 and Rolling Stones that those channels are no
3 longer functioning. Should anything be added
4 to that paragraph to bring it current?

5 A Yes, we recently announced that we
6 were going to be co-developing a radio station
7 with a band, the Grateful Dead, so a Grateful
8 Dead channel will actually be launching later
9 this summer on Sirius.

10 Q All right. And then the last of
11 these updates, if you'll take a look at page
12 9 over to page 10, paragraph 22, and there
13 you'll see you're talking about omissions
14 forced by the constraints on territorial
15 radio. Do you see that paragraph?

16 A Terrestrial radio, yes.

17 Q Terrestrial, excuse me,
18 terrestrial radio, I'm sorry. The next few
19 sentences --

20 CHIEF JUDGE SLEDGE: Are you
21 suggesting that terrestrial radio is
22 territorial?

1 MR. KIRBY: I'm suggesting, your
 2 Honor, that these glasses may not be exactly
 3 what I need. I'll have to think through the
 4 implications of the question.

5 BY MR. KIRBY:

6 Q While I'm doing that, Mr. Blatter,
 7 do any changes need to be made in the next few
 8 sentences to make this paragraph current?

9 A Yes, since this testimony was
 10 written, there is actually a country radio
 11 station in Los Angeles now. New York remains
 12 without a country radio station.

13 Q What about the classical -- work
 14 your way through the programming.

15 A Also, in the classical genre,
 16 Philadelphia, Houston and Atlanta remain
 17 without a classical station but one was
 18 recently added in Detroit.

19 Q All right.

20 A Otherwise the remainder of that
 21 paragraph is correct.

22 Q And I'm hoping with those changes,

1 Q I would ask you, sir, Mr. Blatter,
 2 to turn to page 17, paragraph -- I will see
 3 what paragraph it is, paragraph 38.

4 MR. KIRBY: Your Honor,
 5 originally, all of paragraph 38 had been
 6 designated as confidential but at this point,
 7 I'd like to focus attention simply on the
 8 first sentence of paragraph 38 in which the
 9 witness identifies six channels that kept
 10 track of the information involving contacts
 11 with the record labels that then appear in the
 12 chart on the next page.

13 The witness has indicated that the
 14 numbers on the chart need not be preserved.

15 This is on page 17 and 18, your Honor. The
 16 witness has no -- I proffer, your Honor, that
 17 the witness does not have confidentiality
 18 concerns with respect to the contents of the
 19 chart itself, but he believes it would be
 20 competitively disadvantageous to identify the
 21 particular channels that kept track of this
 22 information as appears in the first sentence

1 we believe that this written direct testimony
 2 is true as of today?

3 A Yes, it is.

4 Q All right.

5 MR. KIRBY: Your Honor, I would
 6 move that admission of Sirius Exhibit 36
 7 consisting of his written direct testimony
 8 with exhibits.

9 CHIEF JUDGE SLEDGE: Any objection
 10 to Exhibit 36?

11 MR. HANDZO: No, your Honor.

12 CHIEF JUDGE SLEDGE: Without
 13 objection, it's admitted.

14 (Sirius Trial Exhibit 36
 15 marked for identification was
 16 received in evidence.)

17 MR. KIRBY: And your Honor,
 18 various parts of this had been designated as
 19 confidential but I think we're going to pare
 20 that down substantially.

21 //

22 BY MR. KIRBY:

1 of paragraph 38, both because it would
 2 interfere with relations between those
 3 programmers and the record label people that
 4 they deal with and because it would open the
 5 door for XM to exploit the fact that Sirius
 6 has been recording and making use of these
 7 contacts in their context with these record
 8 labels.

9 So, your Honor, we would move that
 10 the first sentence of paragraph 38 be
 11 identified as confidential under the Court's
 12 order. And that is the only portion of this
 13 Exhibit.

14 CHIEF JUDGE SLEDGE: Any objection
 15 to applying the protective order to the first
 16 sentence?

17 MR. HANDZO: No, your Honor.

18 CHIEF JUDGE SLEDGE: Without
 19 objection, the motion is granted. Mr. Kirby,
 20 that's the kind of precision on the protective
 21 order that we've been seeking all along.

22 Thank you.

1 MR. KIRBY: Thank you.

2 BY MR. KIRBY:

3 Q Mr. Blatter, what qualified you to
4 be Senior Vice President of Music Programming
5 at Sirius Satellite Radio?

6 A What qualified me is not only my
7 experience in multiple numbers of music
8 formats, but also my background. For a few
9 years during my career, I was the head of
10 programming for a national radio network
11 called MJI Broadcasting which gave me exposure
12 to pretty much ever genre of music, much like
13 we have at Sirius where we offer, you know, a
14 number of genres in music as part of our
15 service. And also, you know, I had an
16 excellent track record in my time in
17 terrestrial radio and a proven ability to, you
18 know, create compelling radio stations.

19 Q Well, do you think that your
20 experience in terrestrial radio translates
21 into what you're doing at Sirius?

22 A I think my experience in

1 of all the major record labels as well.

2 Q Are there particular components or
3 units within the labels that you tend to have
4 dealings with?

5 A Typically, most of the major
6 record labels have separate departments that
7 are staffed with radio promotion executives
8 that either work in the three locations we
9 just talked about and they also have regional
10 promotion executives located throughout the
11 country calling upon radio stations within a
12 particular region.

13 Q And what are they trying -- I'm
14 sorry.

15 A And I've dealt with all types.

16 Q All right, I didn't mean to step
17 on your answer there. What are these
18 promotional executives trying to get radio
19 stations to do?

20 A Typically, one thing and one thing
21 only and that is they're seeking air play on
22 these radio stations for the artists that

1 terrestrial radio and also the relationships
2 that I've developed over the years with the
3 record industry is very helpful to me. Many
4 of the principles that I learned as a
5 programmer in terrestrial radio are applied in
6 our day-to-day programming at Sirius.
7 However, at Sirius we are able to clearly
8 offer a much greater variety of music channels
9 than what we were able to, you know, offer at
10 terrestrial radio and the mere fact that our
11 radio stations at Sirius are commercial-free
12 as well, I think, differentiate them.

13 Q All right. You mentioned your
14 dealings with the record labels. Have you
15 dealt with representatives at the record
16 labels over the years?

17 A I've had extensive relationships
18 throughout my career with record company
19 executives, both at, you know, New York based
20 record labels, Los Angeles based record labels
21 and because of my experience in country music,
22 I've dealt with the national based operations

1 they're promoting at that time.

2 Q Do these same units within the
3 record labels continue to deal with the people
4 you supervise at Sirius?

5 A Absolutely. The typical promotion
6 person that calls Sirius are the same radio
7 promotion people that are calling terrestrial
8 radio stations.

9 Q And what are they asking Sirius to
10 do?

11 A The same thing they ask
12 terrestrial stations, which is, you know,
13 "Would you be interested in playing this
14 particular artist's song", that they're
15 promoting at that time.

16 Q Now, are they primarily calling
17 you directly?

18 A No, if they were to call me
19 directly, I probably wouldn't have much time
20 to manage my staff and lead the department,
21 but I do delegate that responsibility to each
22 individual programmers that work for me.

1 Q Okay. Well, that leads me then to
 2 suggest that we turn back to that paragraph 38
 3 where we marked the first sentence as
 4 confidential. That would be -- that first
 5 sentence was on page 17, but I actually want
 6 to direct your attention to the chart
 7 contained within that paragraph that appears
 8 on page 17. Are you there, Mr. Blatter?

9 A Yes.

10 Q All right. Mr. Blatter, what is
 11 this chart -- what does this chart displaying?

12 A Well, I asked the programmers of
 13 the channels mentioned there to record the
 14 number of times they were contacted by a radio
 15 promotion person at the labels that have
 16 called upon us and you can see for this given
 17 week which began October 16th of last year,
 18 there were approximately 170 promotional
 19 contacts for that week, plus another 108
 20 mailings which included CDS and other
 21 promotional materials that were sent to us by
 22 the record companies.

1 sent to the programmers for their
 2 consideration for air play. There also are
 3 other mailings we might receive that would in
 4 some cases be advertisements for the songs
 5 that the record labels are promoting at that
 6 time. And then as one way to garner interest
 7 of our programmers, the record companies will
 8 often invite myself or my programmers to see
 9 artists perform live the songs that they're
 10 seeking air play on the radio.

11 Q All right. So when you say they
 12 might invite you, that's the reference to
 13 concert tickets down there?

14 A That's correct.

15 Q Is there another reason why record
 16 companies sometime provide concert tickets to
 17 Sirius?

18 A Yeah, there is. Sometimes the
 19 labels will supply us with concert tickets to
 20 give away on the air to our listeners as a way
 21 to further engage them in that artist's music.

22 Q All right. Do artists ever appear

1 Q Now, how did this particular week
 2 -- was there something special about this
 3 particular week?

4 A No, nothing special about that
 5 week at all. In fact, the amount of
 6 promotional activity between the record
 7 companies and Sirius has only increased since
 8 this sample was done.

9 Q Okay, and how do you know that?

10 A That's been reported to me by my
 11 programmers who keep me abreast of the
 12 activities between themselves and the record
 13 companies.

14 Q All right, now the third -- if you
 15 look at the left-hand column, you talk about
 16 e-mail and instant messages and then calls and
 17 then you see something called promo mail and
 18 CDS, singles, concert tickets. Explain what
 19 that entry means, if you would, please?

20 A Well, it includes -- you know,
 21 Sirius doesn't or rarely would ever pay for
 22 music. CDS or sometimes MP3 files will be

1 live on Sirius?

2 A Yeah, rather often.

3 Q Okay. Do the record labels play
 4 any role in that?

5 A Typically, they do. You know,
 6 like I said earlier, you know, the record
 7 labels will sometimes invite the programmers
 8 out to see these bands perform live. Other
 9 times they'll ask the programmer, "Hey, would
 10 you be interested in having this artist come
 11 up to your studies and perform live for the
 12 listeners of your channel and you know, they
 13 typically view that as another way to draw
 14 attention to their artists on Sirius besides
 15 just playing the recorded music.

16 Q From your dealings with the record
 17 company representatives and the reports you
 18 get now from the people underneath you, do you
 19 have any understanding as to why the record
 20 companies are approaching Sirius in the ways
 21 that they do?

22 A Yes, I do. Having, you know,

1 spent over 20 years in radio, it's become
 2 almost conventional wisdom in radio and the
 3 record industry that the most effective way to
 4 sell recorded music to consumers is through
 5 receiving air play on the radio.

6 Q Okay, and do you have any
 7 understanding as to why -- strike that.

8 Q Okay. Have you received any
 9 feedback through the contacts with artists or
 10 the record industry as to whether the air play
 11 by Sirius is effective in its -- in promoting
 12 record sales?

13 A Yes, I have and that feedback,
 14 particularly I think over the last six to 12
 15 months has increased pretty significantly but
 16 on a fairly regular basis now, we'll receive -
 17 - we'll have either verbal communication with
 18 record promotion people who are thanking us
 19 for their air play or they'll sometimes e-mail
 20 us with a thank you and "Without your help it
 21 wouldn't have been possible for this band to
 22 have had the success they've had to date".

1 started playing at Sirius before they had been
 2 signed to a major record label and we were
 3 told by the major label that one of the major
 4 reasons that they signed that band is because
 5 the band had already proven itself on the
 6 radio on Sirius and they felt that, you know,
 7 there was less risk in signing this band
 8 because they had already been proven to be
 9 successful for Sirius on its channels.

10 Q In the music industry we sometimes
 11 hear reference to charts or to Top 40 which I
 12 think is a reference to a chart. What are
 13 those charts?

14 A Those charts are a reflection of
 15 what a particular trade paper, in this case
 16 it's probably Radio and Records/Billboard or
 17 the Mediabase Monitoring Service. Those
 18 charts that are compiled by those companies
 19 are a reflection of what the most influential
 20 radio stations in America are doing in a
 21 particular format and the chart reflects the
 22 success of a particular song within that

1 And at times, the programmers will
 2 even receive gold and platinum records for the
 3 artists that they were supportive of and as a
 4 result of the air play and the effect we had,
 5 the record companies would sometimes reward
 6 the individual programmers of those channels
 7 with, you know, gold and platinum records.

8 Q Okay, those are those plaques that
 9 I see all around your office when I'm
 10 visiting, right?

11 A Yes.

12 Q All right.

13 A My office and pretty much the
 14 offices of all the programmers now at Sirius.

15 Q Right. Can you think of any
 16 specific examples of where air play on Sirius
 17 has had a promotional benefit to an artist?

18 A Yeah, there are a number of
 19 examples.

20 Q Give us one, if you will.

21 A One particular example is the band
 22 Evans Blue, which is one that we actually

1 format.

2 Q Okay. Now, you said it reflects
 3 what's happening on the most influential radio
 4 stations in America, I believe you said. So
 5 not every radio station is included in the
 6 data on the chart.

7 A No, not every radio station is
 8 included. The charts only represent what the
 9 -- typically the editors at these trade
 10 publications believe to be the most
 11 influential stations in America.

12 Q Is air play on Sirius included in
 13 those charts now?

14 A Air play on Sirius is included on
 15 those charts and it has been now for I think
 16 approximately a year and I should add to that,
 17 that those decisions by the editors of these
 18 trade publications are very much influenced by
 19 the record companies and their desire to want
 20 to see air play on particular channels. And
 21 I do know that the decision by the trade
 22 publications to include Sirius' air play in

1 their charts was driven, from what I was told
2 by the trade papers, primarily by the record
3 companies.

4 Q Okay. And how does chart position
5 translate to the objectives of the promotional
6 units in the various record companies? Are
7 the promotional units and the record companies
8 concerned about chart position?

9 A Absolutely. In fact, you know,
10 having spent, you know, much of my career
11 working with these promotion executives at the
12 major labels, their -- A, their performance in
13 most cases is judged more on air play than it
14 is for record sales in the promotion
15 departments, but also at least the major label
16 executives and promotion who I've come into
17 contact in my 20 years and all my colleagues
18 would say the same thing, the record
19 companies' promotion people acknowledge that
20 radio air play translates into more record
21 sales.

22 Q Now, do the record labels use play

1 of the channel on Sirius that is playing that
2 new piece of music as well as some of the
3 other terrestrial stations that might be
4 playing it as well.

5 Q Okay, and you attribute this --
6 the label's use of Sirius air play to Sirius'
7 reputation; is that right?

8 A Yeah.

9 Q Okay. Are there any other reasons
10 besides Sirius' reputation why the labels you
11 air play on Sirius is particular promotional?

12 A Well, the air play, you know, they
13 receive on Sirius, I think that is sometimes
14 used -- for instance, if we're playing a new
15 song by an artist and we're one of the earlier
16 stations on that record, that information, you
17 know, Sirius Hits 1, for instance is playing
18 this song 50, 60 times a week. That
19 information is they used by record promotion
20 people to inform other programmers around the
21 country that, "Hey, look Sirius Hits 1 has
22 jumped out. They're playing this thing 50 or

1 on Sirius for any purpose other than building
2 up their chart position and reviewing the
3 success of their promotional crews? What
4 other uses do record labels make of air play
5 on Sirius?

6 A I'm not sure, can you repeat that?

7 Q Yeah, you attached several
8 industry ads to your direct testimony as one
9 of the exhibits. What were we showing through
10 those industry ads?

11 A Right, well, you know, over the
12 years now, Sirius has built up a reputation as
13 being an outlet that has an ability to break
14 new music. I've also recruited a number of
15 fairly successful programmers in their
16 particular genres of music and as a result
17 now, Sirius playing a new song from an artist,
18 labels will often buy ads in trade
19 publications and in those ads they will list
20 some of the radio stations that have recently
21 added music from that particular artist, and
22 in many cases now they're including the name

1 60 times a week. You might want to play it,
2 too".

3 Q Do the record -- in your
4 experience, do the record labels encourage the
5 on-air host to be sure to identify the artist
6 and song when they play a song? Is that a
7 source of friction sometimes between the
8 record labels and the hosts?

9 A Well, over the years, in
10 terrestrial radio, the record companies would
11 be particularly frustrated with terrestrial
12 radio and its inability to identify the music
13 that's being played. Sometimes it's been
14 referred to in the record and radio industries
15 as "back announcing". And it's something that
16 terrestrial radio just doesn't do a very good
17 job of. Because we're a digital service, back
18 announcing not only happens on Sirius but
19 because we're a digital service, we're able to
20 display the artist and title of any song
21 that's playing on the actual screen while it's
22 playing.

1 Q So I don't have to sit there and
2 hope the DJ mentions the artist again at the
3 end of the song.

4 A Sometimes they will but if you
5 didn't happen to catch it or you wanted to
6 know what that song was immediately, you don't
7 want to wait for the DJ to announce what that
8 song was, you can see it right on the screen
9 as you're hearing it.

10 Q Does Sirius have any --

11 JUDGE WISNIEWSKI: Did it ever
12 cause any auto accidents?

13 THE WITNESS: Not that I'm aware
14 of.

15 MR. KIRBY: That's the cell phone,
16 your Honor, our competitor is the cell phone.

17 BY MR. KIRBY:

18 Q Does Sirius have any competitive
19 advantages with respect to developing new
20 artists, baby artists?

21 A Well, because of the number of
22 channels that we offer at Sirius we're able to

1 Q And I think I skipped over this at
2 the very beginning, I apologize. How many
3 such commercial free music channels does
4 Sirius have?

5 A Well, there are 64 that we produce
6 here in the US.

7 Q All right, and are there others?

8 A There are five additional
9 channels, bringing the total to 69 that are
10 produced by our partners in Canada, Sirius
11 Canada.

12 Q Okay, of that total, which ones
13 are you responsible for?

14 A I'm responsible for the 64
15 channels that originate here in the US.

16 Q Now, when you say these channels
17 are commercial free, what do you mean by
18 commercial free?

19 A By commercial free, I mean, there
20 is absolutely no commercials or any
21 sponsorships or underwriting something, you
22 know, you might hear on MPR Outlet sometimes,

1 A, devote certain music channels within a
2 particular genre, whether it be country or
3 rock, where those channels would play almost
4 all new music. So for instance, in the rock
5 genre, our Left of Center channel plays almost
6 entirely, you know, new alternative rock that
7 in most cases isn't heard you know, on
8 terrestrial radio at that stage.

9 Also because of the commercial-
10 free nature of our channels, we just
11 essentially have more time in a particular
12 hour to fill up. Terrestrial radio, as you
13 probably know, plays anywhere from, you know,
14 12 to in some cases 17, 18 minutes of
15 commercials an hour and we're able to take
16 that time and be able to play on stations that
17 play a lot of new music even more new music
18 than you might hear on terrestrial radio.

19 Q You mentioned the concept of being
20 commercial-free. Are all of the Sirius music
21 channels commercial free?

22 A Yes, they are.

1 that this hour of programming is underwritten
2 by such and such. Sirius' music channels are
3 clean. There's no commercials, no
4 sponsorships, no underwriting.

5 Q All right, and you indicated that
6 one result of that is you have more time
7 available to devote to the music and the play
8 list. Does the lack of commercials have any
9 other benefit for Sirius programming?

10 A Yes, it does. I believe that not
11 having jarring commercials come on every 15 or
12 20 minutes allows us to create a more
13 immersive experience for our subscribers and
14 further engages them in -- and garners even
15 more interest in the artists that we're
16 playing and the songs that we're playing and
17 creates more passion and ultimately, I
18 believe, you know, it results in more records
19 being sold as a result of the air play on
20 Sirius.

21 Q Does the fact that Sirius has 64
22 music channels under you and a few more from

1 Canada have any effect on Sirius' ability to
 2 reach music listeners with particular or
 3 narrow interests?

4 A Yes, it does. Sirius is able to
 5 take a genre of music and carve it up, you
 6 know, a number of different ways so for
 7 instance, in the -- I'll just use the rock
 8 genre as an example, there are rock channels
 9 on Sirius that are -- play much harder rock
 10 music and are more aggressive in sound, but we
 11 also have a second rock channel, in this case,
 12 I'm referring to Octane, which is the harder,
 13 more aggressive rock channel.

14 Then we have another rock channel
 15 which is a little bit softer in sound and not
 16 quite as aggressive called All Nation, which
 17 targets an audience that wants to hear a
 18 little, you know -- still wants to hear new
 19 music but in a much more mellow environment.
 20 And as a result of that, I think that we're
 21 able to better serve the particular audiences
 22 for those two channels and further engage them

1 music station?

2 A We actually have three classical
 3 stations or three stations that we would
 4 classify as classical. One of them is a
 5 symphonic classical channel but there are also
 6 two others. One is a pops channel with, you
 7 know, stuff like from the Boston Pops and such
 8 and then the third channel is an opera channel
 9 which in the case of Sirius is a channel that
 10 we co-produce with the Metropolitan Opera in
 11 New York City and that channel consists
 12 primarily of live recordings or live
 13 performances directly from the Metropolitan
 14 Opera in New York.

15 Q I grew up in Lake Charles,
 16 Louisiana, which is over on the western border
 17 next to Texas. What do you think the chances
 18 are that when I got up on a Monday morning, I
 19 could find a heavy classical or light
 20 classical and a full time opera channel on
 21 terrestrial radio?

22 A Slim to none.

1 in the kind of music that we're playing.
 2 Q Does Sirius have classical
 3 programming?

4 A Yes, it does.

5 Q Okay, is that something that's
 6 generally available to most Americans over
 7 terrestrial radio?

8 A Not particularly. It is
 9 available. I think I mentioned in my
 10 testimony in, I guess it would be seven of the
 11 top 10 markets, but as you start to get out
 12 into the medium and more smaller and rural
 13 sized markets, it is often difficult to find
 14 a full time classical station. You might have
 15 a weekend program dedicated to classical music
 16 for you know, blocks on the weekends but
 17 that's a genre of music that once you get
 18 outside of the big markets, it's very
 19 difficult to find on the radio today.

20 Q And classical music, I guess is
 21 one of those terms. You have a classical
 22 music station. Do you also have an opera

1 Q On the other end of life --
 2 JUDGE WISNIEWSKI: You could get
 3 Houston stations, couldn't you?
 4 MR. KIRBY: Sometimes, your Honor,
 5 it is pretty flat, but if you were getting
 6 Houston stations, how much -- I won't go
 7 there.

8 BY MR. KIRBY:

9 Q But talking about the other end of
 10 the spectrum, perhaps, Mr. Blatter, what about
 11 Bluegrass, does Sirius have a Bluegrass
 12 channel?

13 A Sirius does have a full time
 14 Bluegrass channel. That's another, you know,
 15 nitch style of music that really isn't
 16 supported by terrestrial radio. There might
 17 be, you know, a few Bluegrass stations located
 18 around the country but for the most part,
 19 that's a genre of music that just does not get
 20 air play on radio.

21 Q All right.

22 CHIEF JUDGE SLEDGE: Are you

1 considering the small AM stations?

2 THE WITNESS: Well, I think there
3 are a few small stations, yes, I think there
4 are some of those, you know, in Kentucky and
5 wherever that play Bluegrass full time but
6 that's the extent of it.

7 CHIEF JUDGE SLEDGE: Probably not
8 full time but --

9 THE WITNESS: Not even full time.

10 CHIEF JUDGE SLEDGE: -- they
11 include a lot of Bluegrass with their country
12 music.

13 THE WITNESS: It's usually
14 relegated as a speciality show on a country
15 channel in the South.

16 BY MR. KIRBY:

17 Q And since country came up, how
18 many country channels does Sirius have?

19 A Sirius has about five country
20 channels.

21 Q All right, why? Isn't country,
22 country?

1 markets?

2 A Well, having spent, you know, most
3 of my career in terrestrial radio, the goals
4 are a bit different at Sirius. At terrestrial
5 radio, the goal is to create a radio format
6 that will reach a number -- enough listeners
7 to make the station attractive to advertisers.
8 Without advertisers at terrestrial radio, you
9 don't have a business. At Sirius because our
10 music channels are commercial free, we're not
11 really concerned about what advertisers think
12 about our music channels, so we're able to
13 offer channels on Sirius that we know would
14 never -- would be very difficult to have a
15 successful business at terrestrial radio, for
16 instance with a Bluegrass channel or a reggae
17 channel or, you know, a classical jazz
18 channel, but on Sirius, like I said because we
19 don't have to meet the needs of advertisers,
20 we can offer a lot of styles of music in
21 different formats that would just never be
22 successful at terrestrial radio.

1 A No, country is not country. I
2 mean, country is a huge format. I think as
3 far as sheer number of stations, it's actually
4 the most popular format at terrestrial radio,
5 although those terrestrial stations are all
6 essentially programmed the same. At Sirius we
7 not only have a new country channel which
8 would be a similar format to what you get on
9 terrestrial radio but we also have two kind of
10 gold-based is what we refer to in the
11 industry, country channels that are more era
12 based. You know, one of them plays country
13 music from the '80s and '90s and the other
14 gold-based channel plays classic country which
15 also is a format that you probably won't find,
16 you know, the old Whalon Jennings records on
17 the radio much on terrestrial radio any more
18 but we're able to serve that audience with a
19 classic country channel.

20 Q Why is Sirius able to maintain
21 five country channels when you don't find
22 anything like that in those terrestrial radio

1 JUDGE ROBERTS: Mr. Blatter, are
2 there non-music channels offered by Sirius
3 that are commercial free?

4 THE WITNESS: Not that I'm aware
5 of.

6 BY MR. KIRBY:

7 Q Are you responsible for the non-
8 music channels, Mr. Blatter?

9 A No, I am not responsible for those
10 channels.

11 Q Okay.

12 A I should, to be correct, there is
13 one non-music channel that I do oversee called
14 Maxim Radio which is a station that we do with
15 the Maxim magazine. It's a talk station that
16 I am responsible for.

17 Q And does it have commercials?

18 A That does have commercials.

19 Q All right. Mr. Blatter, your
20 written direct talks a lot about the
21 programming process at Sirius and I'm not
22 going to go through all of that but one of the

1 terms you use there is stationality. What is
2 stationality as Sirius uses that term?

3 A Stationality is an industry term
4 that we use in the radio business to define
5 what we believe to be the overall personality
6 of that station. And when I say personality,
7 what I mean is the combination of the music
8 that that station plays but even more
9 importantly, the style of the on-air host and
10 how they communicate directly with their
11 audience. The interstitial pre-produced kind
12 of station ID's that we play in between the
13 songs, how they're written and produced, as
14 well as on the appropriate channels we may be
15 doing certain contests, the types of contests
16 we might do on a certain channel, so all of
17 that kind of wraps in -- wraps up into what we
18 refer to as the stationality for a particular
19 station.

20 Q Okay. Now, is music selection and
21 music sequencing part of what contributes to
22 stationality?

1 compatible songs within that body of music
2 that we think that audience might want to
3 hear.

4 Q And ultimately you put together
5 something called a play list; is that right?

6 A Ultimately, that body of music
7 actually is then hand-coded by the individual
8 programmers of a particular channel by
9 different characteristics such as era, the
10 gender of the person singing the song, the
11 texture of the song, and a number of other
12 characteristics that might be specific to a
13 particular genre of music.

14 Once each song is fully sound-
15 coded, is what we refer to it in the industry,
16 then those songs are put into our music data
17 base and we do use a system called music
18 master to help the programmers schedule the
19 music on a particular channel, and that system
20 really just -- you know, the programmer gives
21 it a certain set of rules to apply and the
22 computer system essentially just takes a first

1 A It's one part of it. If the
2 station is a very aggressive hard rocking
3 channel or if it's very mellow soft rock type
4 channel, the way in which we would sequence
5 and schedule those songs would be different
6 and that ultimately, yes, does contribute to
7 the overall stationality.

8 Q Well, let's start first with music
9 selection and then we'll talk about music
10 sequencing. How does Sirius go about
11 selecting the music that's going to form the
12 library for a particular channel?

13 A Well, the first thing we do is
14 first define who it is we're trying to reach
15 with that particular channel. Once we define
16 that, sometimes, we'll, you know, we'll write
17 it up on paper, you know, very specifically as
18 to who it is we're trying to reach. But once
19 we do that, we would then look at the total
20 available body of music and then from that,
21 depending on the format but in most cases, we
22 would identify the most familiar, popular and

1 swipe at sequencing the songs for a particular
2 day's worth of music but it is far from done.
3 In fact, it typically takes an average
4 programmer anywhere from you know, 45 minutes
5 to upwards of a couple of hours to hand-
6 massage the music before it actually is then
7 sent to the DJ's assuming it's not a channel
8 where the DJ's are picking their own music.

9 Q Okay, now I don't want to go into
10 great detail on this but what sort of factors
11 do you take into consideration in sequencing
12 the music?

13 A Well, when it comes to sequencing,
14 I'll just use the country format as an example
15 in this case, but in the country format there
16 are a lot of artists that tend to have slow
17 songs, you know, ballads which often do very,
18 very well, but I know from experience as a
19 country programmer, that you want to make sure
20 that if you're going to play a lot of ballads,
21 that those ballads don't play back to back and
22 there's a nice flow of music.

1 So when we sequence it, we're
 2 controlling for the flow, whether it be on
 3 tempo or if there are country artists, for
 4 instance, that have had big successes, pop
 5 artists as well, you might not want to play
 6 those two kind of artists back to back because
 7 the country artist is sometimes -- the country
 8 listener is sometimes sensitive to hearing,
 9 you know, a Shania Twain type artist or Rascal
 10 Flats who now are big pop artists as well,
 11 they don't like -- the country artists tell us
 12 they don't like when those artists come up too
 13 much together. So we'll in the hand massaging
 14 process a lot separate those artists better to
 15 make the station more appealing.

16 Q But why do you need all the fru-
 17 fru? Isn't a record song pretty much a
 18 recorded song? Why can't you just play it?

19 A Well, you can't just play it. A
 20 recorded song is not just a recorded song.
 21 It's important that our programmers stay very
 22 close in touch with what their audiences want

1 A I think it's on page 8 at the
 2 bottom.
 3 Q Okay, yes, it is, paragraph 18,
 4 page 8 at the bottom. Looking at that
 5 paragraph where you talk about having
 6 developed channels and programs in conjunction
 7 with well-known artists, describe what Sirius
 8 is doing there.

9 A Well, what we've done and I'll use
 10 the most recent case of the Grateful Dead
 11 channel, because we did just announce that
 12 channel and it will be airing later this
 13 summer as I mentioned, but the Grateful Dead
 14 is collaborating with Sirius to create their
 15 own Grateful Dead brand of channel as a way to
 16 promote the band's music and kind of keep
 17 their music alive on the radio, whether it be
 18 their recorded music or live recordings that
 19 the band has accumulated over the years.

20 On the Sirius side, we believe the
 21 artists' channels are important to us because
 22 they -- the artists' channels provide us with

1 and I found over the years as a terrestrial
 2 programmer, that when you go through and
 3 diligently code the songs as we do at Sirius
 4 and you go in and hand massage the music as we
 5 do at Sirius that you're able to provide a
 6 much more satisfactory listening experience
 7 for the intended audience of that channel.

8 Q Now, the last topic I would like
 9 to explore with you briefly, your direct
 10 testimony mentions that Sirius maintains some
 11 artists' channels; is that correct?

12 A Yes, it does.

13 Q What are the artists' channels?

14 A Can I turn to that page in the
 15 testimony? Is that okay?

16 Q Yes, you can, except I don't know
 17 which one it is but let me see if I can find
 18 it for you.

19 A I can't figure it out off the top
 20 of my head.

21 Q I wrote down paragraph 18. I
 22 wonder if that's where we have it.

1 more exclusive content that you're not going
 2 to get anywhere else. So there's no other
 3 place on the radio that you can hear an all
 4 Elvis channel other than on Sirius radio,
 5 called Elvis Radio. The same would go for a
 6 channel that we co-produce with Eminem called
 7 Shade 45 and Jimmy Buffet is another example
 8 of an artist that co-produces a channel with
 9 us called Radio Margaritaville.

10 Q And this also is done, for example
 11 with the Metropolitan Opera?

12 A Yes, it is. We have partnered
 13 with the Metropolitan Opera and have created
 14 an opera channel that when the Metropolitan
 15 Opera is live in New York, we broadcast those
 16 performances live on Sirius and when the opera
 17 is not live, we're typically playing live
 18 performances that were recorded at the
 19 Metropolitan Opera, dating back, you know, to
 20 50 -- dating back to up through 50 or 60 years
 21 ago.

22 Q Okay, so does the fact that the

1 Rolling Stones and the Who channel went away,
 2 mean that Sirius is giving up on this concept
 3 of artists' channels?

4 A No, absolutely not. I mean, the
 5 Who channel and the Rolling Stones channel
 6 were always intended to be limited run
 7 channels and we've been told by both artists
 8 that when they have something else to promote,
 9 whether it's another tour or a new album
 10 coming out, that they'd love to do it again.

11 MR. KIRBY: Your Honor, I don't
 12 recall exactly when we typically take the
 13 morning break. I'm very nearly through but if
 14 we were to take a break now, perhaps, I could
 15 let Mr. Joseph remind me of all the subjects
 16 I've overlooked and then we could continue.

17 CHIEF JUDGE SLEDGE: All right.
 18 We'll recess for 10 minutes.

19 MR. KIRBY: Thank you, your Honor.
 20 (A brief recess was taken at 11:02
 21 a.m.)

22 CHIEF JUDGE SLEDGE: We'll come to

1 just seemed to make the most sense that if we
 2 were going to add a new channel, that was non-
 3 music, that we shouldn't disrupt the order and
 4 sequencing of all the music channels to put a
 5 non-music channel within that tier.

6 Q The believe is that subscribers
 7 aren't interesting in relearning the line-up?

8 A Yes, and the subscribers become,
 9 you know, they create certain habits and they
 10 start to know certain channel members, so if
 11 we were to start putting non-music channels in
 12 the music section, that would cause a rather
 13 large disruption and would potentially have a
 14 pretty material effect on the satisfaction of
 15 our service.

16 JUDGE WISNIEWSKI: Would you talk
 17 to our local cable TV about that?

18 (Laughter.)

19 THE WITNESS: I can try.

20 MR. KIRBY: Your Honor, that
 21 concludes my direct examination.

22 CHIEF JUDGE SLEDGE: One follow-up

1 order.

2 Mr. Kirby?

3 BY MR. KIRBY:

4 Q Just one more short subject. Mr.
 5 Blatter, during the previous witness'
 6 testimony, the question was asked if Sirius is
 7 adding all this exciting new non-music
 8 content, how come your channels get all the
 9 great numbers down at the bottom of the dial?

10 Do you have any understanding of
 11 why that's so?

12 A Well, first off, I was not with
 13 the company when the decision was made to put
 14 the music channels where they are today
 15 starting at channel 1 and going up.

16 But I can say that first off, it
 17 does make sense when you have some decades
 18 type channels like 60s, 70s and 80s to put
 19 them on channels 6, 7, and 8. But with that
 20 said, I have been part of some discussions
 21 that have come up as to where we might place
 22 certain non-music channels on the dial and it

1 to what you just said. You've got 69 channels
 2 and is your bandwidth completely -- well, you
 3 said you had to pre-empt for sports
 4 programming, you haven't said, but the
 5 testimony is you have to pre-empt for extra
 6 sports programs. So all your bandwidth is
 7 used up.

8 THE WITNESS: I'm not responsible
 9 for the actual bandwidth allocations. So to
 10 the best of my knowledge, we're pretty close
 11 to maximizing --

12 CHIEF JUDGE SLEDGE: Let me just
 13 get to my question. You're not able to use
 14 the other 30 channels that haven't been used?

15 THE WITNESS: Not right now, no.

16 CHIEF JUDGE SLEDGE: Okay, thank
 17 you.

18 (Pause.)

19 CHIEF JUDGE SLEDGE: While I've
 20 interrupted, a little test. Are you familiar
 21 with the song Daniel's Parade?

22 THE WITNESS: I am not.

1 CHIEF JUDGE SLEDGE: It's an old
 2 country song. Waylon Jennings. Wondered
 3 where that would be in your five channels.
 4 THE WITNESS: That would be in our
 5 classic country channel.

6 CHIEF JUDGE SLEDGE: Any questions
 7 by XM?

8 MR. RICH: No questions.

9 CHIEF JUDGE SLEDGE: Music Choice.

10 MR. FAKLER: No, Your Honor.

11 CHIEF JUDGE SLEDGE: Cross by
 12 SoundExchange?

13 MR. HANDZO: Thank you, Your
 14 Honor.

15 CROSS EXAMINATION

16 BY MR. HANDZO:

17 Q Good morning, Mr. Blatter.

18 A Good morning.

19 Q We haven't met before, but my name
 20 is Dave Handzo and I represent SoundExchange.

21 Now Mr. Blatter, I'm going to
 22 start by asking you to turn to paragraph five

1 A Yes, they do.
 2 Q Is that survey work done under
 3 your supervision?
 4 A It would depend on the listener
 5 survey itself. There are certain surveys that
 6 yes, I do oversee the administration of those
 7 surveys. There are others that collectively
 8 among myself and the other heads of
 9 programming of Sirius, along with the research
 10 department would be responsible for those
 11 studies.

12 Q And what's sort of topics do those
 13 studies explore?

14 A Which studies are you referring
 15 to?

16 Q Well, let's start with the ones
 17 that are done under your direction?

18 A Well, the ones that are under my
 19 direction are typically researching the
 20 audience for a particular channel on Sirius,
 21 for instance, we'll just stick with the
 22 country audience as an example. So we would

1 of your written testimony which we put in the
 2 record as Sirius Exhibit 36. And at the end
 3 of that paragraph you say that you supervise
 4 and work with extensive listener research that
 5 you conduct to evaluate new formats and
 6 identify the most attractive music for those
 7 formats.

8 Do you see that?

9 A Yes, I do.

10 Q Who conducts that survey research
 11 or listener research?

12 A Well, there are many different
 13 types of listener research that we conduct and
 14 there are a number of companies that we use
 15 third parties to conduct that research for us.

16 Q Does that research typically
 17 result in written reports to you?

18 A Sometimes it does, but not always.
 19 It would depend on the nature of the study
 20 itself.

21 Q Are those studies, do those
 22 studies include formal listener surveys?

1 find a representative sample of a particular
 2 country channel. Let's say our new country
 3 channel and we would do one of two things.
 4 One is we would research the entire potential
 5 body of music that we might play on that
 6 particular channel with that representative
 7 sample, or we might take a much more narrower
 8 view of things and just research the newer
 9 songs played on that channel which is
 10 something we actually do now on a weekly basis
 11 for any of our new music-oriented channels.

12 Q Is there any other subject that
 13 you research in the research done under your
 14 direction?

15 A Solely under my direction, those
 16 are the only types of studies that come to
 17 mind right now.

18 Q I take there is research one under
 19 the direction of others that you receive in
 20 the ordinary course of business?

21 A There are other surveys which I
 22 have seen, yes.

1 Q And I take it those surveys might
 2 address things like customer satisfaction and
 3 how customers respond to the various offerings
 4 of Sirius?

5 A Some of those surveys have
 6 attempted to measure customer satisfaction and
 7 the value of certain other types of content
 8 that we offer.

9 Q Okay. Now you did not attach to
 10 your written statement any of that survey
 11 research, did you?

12 A I don't believe I did.

13 Q And you don't cite to any of that
 14 survey research in support of the opinions
 15 that you offer in your written testimony, do
 16 you?

17 A I don't think directly I did, but
 18 I think I did say in my written testimony that
 19 we do use that research and it's just one of
 20 many tools that we use to guide our instincts
 21 as programmers.

22 Q Okay, but in your written

1 record sales for the artists that we play.

2 Q But you can't quantify how much,
 3 can you?

4 A It's difficult for me to quantify
 5 how much and I think it would be for most
 6 radio programmers in America to quantify
 7 exactly how much music they're selling as a
 8 result of the airplay on that channel.

9 I think it's important to mention
 10 that as a radio programmer, I'm judged by the
 11 satisfaction and to a certain extent the
 12 listenership on our channels. My performance
 13 isn't necessarily judged by how many records
 14 we're selling. It's something that we'll keep
 15 an eye out for, but it's not something that we
 16 would closely follow in the normal course of
 17 business as a radio programmer.

18 Q Okay, so because you're judged by
 19 consumer satisfaction with the channels that
 20 you're responsible for, you're not going out
 21 and trying to figure out how many CDs or how
 22 many downloads are sold as a result of

1 testimony, you don't point to any particular
 2 research that supports the opinions that you
 3 offer, do you?

4 A I'd have to read through the
 5 entire thing to give you a total positive
 6 answer, but I don't think I cited any specific
 7 studies in this testimony.

8 Q Now Mr. Blatter, you don't track
 9 how many CDs or downloads are sold as a result
 10 of airplay on Sirius, do you?

11 A I don't. I don't regularly track
 12 that, no.

13 Q Are you able to say how many CDs
 14 or downloads are sold as a result of airplay on
 15 Sirius?

16 A It would be difficult for me to
 17 give you specific numbers. But having spent
 18 my entire career in radio as well as what my
 19 colleagues tell me at Sirius and even the
 20 conversations I have with the record community
 21 on a regular basis, it is my opinion that
 22 radio airplay on Sirius does result in more

1 programming on Sirius, are you?

2 A Not necessarily trying to figure
 3 it out, but we do have very close
 4 relationships with the record company
 5 promotion executives and work very closely
 6 with them to help them rate new artists and
 7 further established, more familiar artists
 8 that maybe have a track record already, but
 9 they're looking to take their career to the
 10 next level.

11 We spend an inordinate amount of
 12 our time actually working with those promotion
 13 executives to see how we can work, collaborate
 14 together to help further the careers of these
 15 artists.

16 Q But you can't translate any of
 17 that into numbers, can you?

18 A I don't actively track SoundScan
 19 data to measure how many records are being
 20 sold as a result of airplay on Sirius.

21 Q So the answer to my question is
 22 no?

1 A Well, it would be difficult for me
 2 to say no, only because when I talk to record
 3 executives, you know, they regularly thank us
 4 for the airplay on Sirius and I received an
 5 email just a week or so ago saying look,
 6 without your support, this band wouldn't have
 7 had the success that it had. So and they are
 8 ultimately measure success by the record,
 9 number of records that they're selling.

10 So if a high-level executive is
 11 thanking me for the airplay on Sirius because
 12 they're selling more records, then I'd have to
 13 believe that our airplay is contributing to
 14 the success of that band.

15 Q I may not have been clear in my
 16 question, Mr. Blatter.

17 My question is you can't translate
 18 any of that into dollars and sales or numbers
 19 of CDs sold, can you?

20 (Pause.)

21 A I think that's a very difficult
 22 thing for me to quantify right now.

1 that radio airplay is a driver and is the
 2 primary and number one driver of record sales.

3 Q Can you tell us what survey you've
 4 seen?

5 A One survey that I recall offhand
 6 and I have seen a number over the years, but
 7 one survey I recall offhand is a survey that
 8 was conducted by Edison Research several years
 9 ago that asked that question.

10 Q That survey doesn't address
 11 whether airplay or whether Sirius might also
 12 have the result of causing people to buy fewer
 13 CDs or fewer downloads, right?

14 A Well, I believe that survey was
 15 conducted prior to Sirius being commercially
 16 available, so it wouldn't be a fair question
 17 to ask if it weren't available.

18 Q So the survey that you're
 19 referring to doesn't address Sirius at all, is
 20 that right?

21 A It asked people, you know, what
 22 influenced them most and the number one

1 Q Mr. Blatter, you haven't seen any
 2 survey research which supports your view that
 3 consumers who get Sirius spend more money on
 4 CDs or downloads, have you?

5 A There might have been some
 6 research surveys in the past that have touched
 7 on this area, but I don't really recall the
 8 specifics of it.

9 Q So there's nothing as you sit here
 10 today that you can point us to as a survey
 11 that supports your opinion that airplay on
 12 Sirius generates record sales?

13 A I can only say that in 20 years in
 14 radio I've never come across a radio
 15 programmer in my 20 years or for that matter
 16 a radio promotion or even a record executive
 17 that doesn't believe that radio airplay
 18 translates into record sales.

19 Q And again, let me just be clear
 20 with my question. You haven't seen a survey
 21 which supports that, have you?

22 A I have seen surveys that support

1 influencer of record sales was radio airplay.

2 Q That's terrestrial radio airplay?

3 A I don't think it was defined as
 4 one or the other, it was just defined as radio
 5 airplay.

6 Q But you're saying the survey was
 7 done before Sirius was commercially available?

8 A It might have been just becoming
 9 available at that time.

10 Q And the survey did not explore
 11 whether satellite radio caused an off-setting
 12 effect of causing people to buy fewer CDs or
 13 downloads, correct?

14 A I'm sorry, can you restate that?

15 Q Sure. The survey that you are
 16 referring to didn't address whether
 17 subscribing to satellite radio would cause
 18 people to buy fewer CDs or downloads, isn't
 19 that right?

20 A Well, considering we weren't
 21 really commercially available at that time, I
 22 don't think that they'd really have any reason

1 to research that at the time.

2 Q So the survey that you're talking
3 about would have been addressing the affected
4 terrestrial radio airplay, is that right?

5 A No, it wasn't specific to any type
6 of radio airplay that I'm aware of. But it
7 just --

8 Q That's all there was at the time,
9 it sounds like, right?

10 A I couldn't speak with certainty on
11 that. I'm not sure of the exact dates of the
12 survey.

13 Q And to the best of your
14 recollection, all the survey did was ask
15 people where they heard the music they just
16 bought?

17 A I'm not sure of the precise
18 question itself, but I know that it was
19 looking to demonstrate what has the most
20 influence on the buying decision.

21 Q Okay, so the survey that you've
22 referred me to, you're not sure whether it was

1 to ask the question in a vague enough manner
2 that it didn't call for any restricted
3 information.

4 MR. KIRBY: Your Honor, I think
5 when you start describing certainly with any
6 detail the kind of music that particular
7 channels on Sirius play, it tends pretty
8 quickly to identify what channel.

9 CHIEF JUDGE SLEDGE: Objection
10 overruled.

11 BY MR. HANDZO:

12 Q Mr. Blatter, can you describe to
13 me what kinds of music these channels play?

14 A They play rock music.

15 Q Have these channels typically
16 played more recent rock music?

17 A Generally speaking, yes.

18 Q So these are not classic rock
19 channels, right?

20 A Well, one of them might play class
21 rock.

22 Q Might? You're not sure?

1 done when Sirius was even in existence and
2 you're not sure what the question was that
3 they asked, right?

4 A I didn't say I wasn't -- I said
5 that the question that was asked, I don't
6 remember specifically how it was worded, but
7 I do know what they were intending to do was
8 to demonstrate the influence that radio
9 airplay has on record sales.

10 Q Mr. Blatter, let me ask you to
11 look at paragraph 38 of your written
12 testimony.

13 (Pause.)

14 And the first sentence there you
15 list six channels, do you see that?

16 A Yes, I do.

17 Q Can you tell me what kind of music
18 those channels play?

19 A Sure.

20 MR. KIRBY: Excuse me. This is
21 the one sentence in the whole thing.

22 MR. HANDZO: I specifically tried

1 A I'm just a little uncomfortable
2 getting into the specifics of these channels
3 because I'm trying to protect the integrity of
4 my own programmers.

5 In fact, I'm not really
6 comfortable really -- I already mentioned it,
7 but I'm not comfortable even giving the genre.

8 MR. KIRBY: Your Honor, if we
9 could enforce the protective order at this
10 point and ask people that aren't entitled to
11 hear confidential information to leave.

12 CHIEF JUDGE SLEDGE: Motion is
13 denied.

14 BY MR. HANDZO:

15 Q Mr. Blatter, these are channels
16 that play a lot of new releases, right?

17 A Can you define "a lot" for me?

18 Q General play 50 percent of new

19 releases?

20 A Roughly, yes.

21 Q Maybe a little more. Some of the

22 channels play more than 50 percent new

1 releases?

2 A Yes. I think that would also
3 define how you're defining a new release.

4 Q Generally, Mr. Blatter, what the
5 record companies are trying to promote is new
6 releases, correct?

7 A ON these particular channels, they
8 are typically looking to promote newer
9 releases.

10 Q But generally, new releases are
11 what the record companies try and promote,
12 right?

13 A Generally, but not in all cases.

14 Q Well, and in fact, in paragraph 32
15 of your written testimony, Mr. Blatter, you
16 say record companies typically focus their
17 promotional efforts on new music rather than
18 existing catalog, do you see that?

19 A Yes, typically. I say generally.

20 Q And so the channels that you chose
21 to survey here are the kinds of channels that
22 are playing new releases which is what the

1 music on internet radio, right?

2 A I've heard about that, but I
3 actually haven't come into contact with too
4 many people that have learned about new music
5 through internet radio.

6 Q You're familiar with internet
7 radio, aren't you?

8 A I'm familiar with music that's
9 delivered over the internet. I'm not so sure
10 I would actually categorize it as radio.

11 Q Well, there are various types of
12 music services that operate over the internet,
13 right?

14 A Yes.

15 Q And that's another way for
16 consumers to find out about new music, right?

17 A Potentially, sure.

18 Q There are music services that
19 stream music over cell phones, right?

20 A There are some services that I've
21 become aware of. I have never come across
22 anyone that pays for that, but yes.

1 record companies would most want to promote,
2 right?

3 A Yes.

4 Q Are you the person who chose these
5 six channels to survey for the purposes of
6 your testimony in paragraph 38?

7 A I believe I was, yes.

8 Q Mr. Blatter, turning to paragraph
9 31 of your testimony, you say that most
10 consumers typically do not decide to purchase
11 music based on a story in a newspaper or
12 magazine, do you see that?

13 A Yes.

14 Q Isn't it true, Mr. Blatter, that
15 there are lots of ways for consumers to sample
16 music and learn about music?

17 A How are you defining "lots"?

18 Q Let's go through some. People can
19 go to a store, a * (11:34:51) and sample the
20 music there, right?

21 A Yes, they could.

22 Q People learn about music from

1 Q That's another way for consumers
2 to find out about new music?

3 A I'm not familiar enough with most
4 of the offerings that are out there to know
5 how much new music they're playing, so I can't
6 really comment on that.

7 Q There are internet circle networks
8 like MySpace that people use to discover new
9 music, right?

10 A People could come across a new
11 band on MySpace, yes.

12 Q People learn about new music from
13 their friends, true?

14 A They could.

15 Q People learn about new music by
16 going to concerts, right?

17 A Not typically, but you could in
18 certain cases.

19 Q People learn about new music from
20 television, right?

21 A At times that could happen, yes.

22 Q So there are at least all of these

1 other ways for people to discover music beyond
 2 listening to Sirius satellite radio, correct?

3 A There are other ways to discover
 4 new music, but what I've learned in my 20
 5 years in programming and radio, the number one
 6 driver by far of people not only learning
 7 about music, but then actually going out and
 8 buy the records is through radio airplay.

9 CHIEF JUDGE SLEDGE: Mr. Handzo,
 10 was your question about television directed to
 11 video transmissions or audio transmissions?

12 MR. HANDZO: Fair question, Your
 13 Honor. Let me go back over that.

14 BY MR. HANDZO:

15 Q You actually could learn about new
 16 music through audio transmissions over
 17 television, right? There are services that
 18 provide music over the television?

19 A Yes.

20 Q But you could also learn about it
 21 through video transmissions like some time
 22 ago, maybe still, MTV?

1 music, right?

2 A My background is in programming,
 3 but I am responsible for how each of our
 4 channels or any channel I've been responsible
 5 before is marketed on air.

6 Q But in terms of marketing and
 7 selling music, selling CDs, selling downloads,
 8 that's certainly not been something that
 9 you've ever done, right?

10 A No, I haven't been involved in the
 11 commercial aspects of selling music in my
 12 career.

13 Q Mr. Blatter, turning to paragraph
 14 32 of your testimony --

15 A Can I just go back for one second
 16 actually to add something to my response?

17 Q I'm tempted to say no, but I'm
 18 sure your counsel would bring it out on
 19 redirect anyway. So go ahead.

20 A Yes, I mean there was an instance
 21 I want to say about a year and a half or so
 22 ago where we were approached by one of the

1 A It MTV happens to be playing music
 2 video which they don't do much of these days,
 3 you might learn about something new.

4 Q There are other channels that play
 5 music videos?

6 CHIEF JUDGE SLEDGE: That's why I
 7 asked the question. I can't think of any.

8 THE WITNESS: There is one other
 9 one that I'm aware of called Hughes, but it
 10 reaches a very, very small --

11 BY MR. HANDZO:

12 Q Mr. Blatter, you are --

13 CHIEF JUDGE SLEDGE: The Dinah
 14 Shore Show is gone.

15 (Laughter.)

16 MR. HANDZO: So is Ed Sullivan, I
 17 believe.

18 CHIEF JUDGE SLEDGE: But
 19 apparently not forgotten.

20 BY MR. HANDZO:

21 Q Well, Mr. Blatter, your background
 22 is in programming, not in marketing or selling

1 major record companies to -- where they were
 2 going to create a CD which was actually more
 3 for promotional value but we did get involved
 4 with the record company in selecting songs to
 5 put on the CD that were all, I think on
 6 Universal artists and that CD was packaged as
 7 an Outlaw Country which is the channel on
 8 Sirius CD which then was included for sale in
 9 a magazine. I think it was called Paste.

10 And the label was looking to work
 11 with us because they knew the association and
 12 the promotional benefit they would receive on
 13 Sirius would be a benefit to those artists.

14 Q So that's your one experience with
 15 selling CDs?

16 A There might have been others in my
 17 career. That's one that comes to mind right
 18 now. But there have been times where radio
 19 stations have collaborated with the record
 20 labels to actually sell recorded music.

21 Q Let me take you to paragraph 32 of
 22 your written testimony, Mr. Blatter. And that

1 paragraph, as I understand it, addresses why
 2 in your view terrestrial radio, I'm sorry, why
 3 Sirius would have advantages over terrestrial
 4 radio with respect to promotion, is that
 5 right?

6 A Yes, it is.

7 Q Okay, now most of what you say
 8 there with respect to satellite radio would
 9 also be true with respect to internet radio or
 10 internet music services, right?

11 A Not all internet radio services,
 12 no.

13 Q Well, let's take a look, for
 14 example, of the first bullet point, where you
 15 say that Sirius displaced the name of the
 16 artist and song continuously?

17 A Yes.

18 Q Internet radio services do that as
 19 well, do they not?

20 A Not all internet radio services.
 21 I know by law I think they're supposed to,
 22 but I've come across a number of internet

1 question assume services that are transmitting
 2 under the license?

3 MR. HANDZO: Yes, I'm sorry.
 4 CHIEF JUDGE SLEDGE: Statutory
 5 license?

6 MR. HANDZO: Yes.

7 CHIEF JUDGE SLEDGE: That's a big
 8 assumption, other than what your question
 9 included.

10 BY MR. HANDZO:

11 Q Let me put it to you this way, Mr.
 12 Blatter, you are aware that there are internet
 13 radio stations for internet music services
 14 that do display artists and song, right?

15 A I'm aware of them. I can't speak
 16 to how many people are actually listening to
 17 that, but I'm aware that there are services
 18 out there.

19 Q And with respect to your second
 20 bullet point, you say that Sirius offers 64
 21 music channels, do you see that?

22 A Yes.

1 radio services over the years that do not
 2 display artist and title.

3 Q In fact, the ones that abide by
 4 the law and do what they're supposed to,
 5 display artist and song and album, right?

6 A I'm not sure if they display
 7 album.

8 Q You don't know?

9 A I don't think they do, actually.
 10 There might be some that do. The ones that
 11 I've had experience with, I don't recall
 12 seeing album there.

13 Q But you know that internet radio
 14 stations are required to display the same
 15 information you're talking about here?

16 A Yes.

17 CHIEF JUDGE SLEDGE: Why did you
 18 say they're required?

19 MR. HANDZO: Your Honor, I believe
 20 the performance complement does require the
 21 display of that information.

22 CHIEF JUDGE SLEDGE: Did your

1 Q There are internet radio services
 2 that offer far more music channels than 64,
 3 right?

4 A There might be. I don't really
 5 follow closely what's going on internet radio
 6 space because I don't think that any one
 7 internet radio service has reached a critical
 8 mass, per se, that it's something that we
 9 would watch that closely from a competitive
 10 standpoint.

11 Q In your fifth bullet point, you
 12 talk about having different and distinct
 13 channels that allow you to go deeper into the
 14 music catalog. The same is true of internet
 15 radio services, correct?

16 A Like I said, I really don't follow
 17 internet radio all that closely because they -
 18 - I wouldn't actually, you know -- my primary
 19 competitor is terrestrial radio today, so
 20 while I watch what's happening on internet
 21 radio passively, my primary focus is learning
 22 what's happening on terrestrial radio more so

1 than anything else that is out there.

2 Q Okay so you can't speak, for
3 example, to the care and resources that
4 internet radio services devote programming or
5 how deep into play lists they go?

6 A Well, it has been my experience
7 and it is why I hesitate to call these radio
8 stations on the internet, internet radio
9 because it's in my professional opinion that
10 those services that are available are not
11 really radio stations. They're nothing more
12 than on-line jukeboxes where there is not much
13 care given and thought given to the actual
14 selection and sequencing of the songs.

15 Q But I think you just said that you
16 don't pay that much attention to them?

17 A Well, that's one of the reasons
18 that I don't. Not only do I not feel that
19 they are reaching enough audience, but when I
20 have listened, it's just not a -- I don't
21 believe it is even a close to competitive
22 product to what we offer on Sirius.

1 A I'm not. I've never in my
2 conversations with record company promotion
3 executives have had them cite to me research
4 data provided to them by some internet radio
5 outlet that gives the consumer the ability to
6 rate a song on a certain scale.

7 Q In any event, that sort of rating
8 data is not something that Sirius can supply,
9 correct?

10 A I don't think that it is something
11 that we can supply today. I will say that we
12 are asked by, and this is typically how it
13 happens in the terrestrial radio world and in
14 the world of Sirius satellite radio is the
15 radio promotion executives that call upon
16 Sirius. They are always very interested to
17 know how a certain song might be performing.
18 And the kind of research that I have described
19 earlier where we will measure the appeal of
20 certain newer songs, what the intended
21 audience of that channel. And that is
22 information that the record companies, if we

1 Q Now are you aware that there are
2 internet radio stations that allow the
3 consumer to click on a buy button and
4 immediately buy the music that they are
5 hearing?

6 A I think I've seen that when
7 listening to internet radio, certain internet
8 radio outlets before.

9 Q That is a benefit that Sirius does
10 not offer to record companies, correct?

11 A I don't think it is a benefit that
12 we offer today. No.

13 Q And are you aware that there are
14 internet radio services that allow listeners
15 to actually rate the song that they are
16 hearing at the time of their hearing it?

17 A Yes, and I've explored that rather
18 extensively myself and don't see much value in
19 that kind of information.

20 Q Are you aware that there are
21 record companies that do value that
22 information?

1 disclose it to them. And a lot of times we
2 choose not to for confidentiality purposes,
3 but if we disclose it to them, they are
4 usually quick to share that with other radio
5 outlets as a way to influence them to get them
6 to play this new artist as well. That
7 information I hear shared and talked about a
8 lot by the record companies. I've never once
9 heard them talk about any sort of rating on an
10 internet radio outlet.

11 Q Now Mr. Blatter, the last bullet
12 point, going over to the next page, talks
13 about who values Sirius broadcasts enough to
14 pay for them. It's true, of course, that
15 consumers don't pay out of pocket for FM
16 radio, correct?

17 A No, they don't. FM radio is free.

18 Q And in many cases people don't,
19 excuse, pay money out of pocket for internet
20 radio services, right?

21 A Again, I really can't speak to
22 internet radio. I know that there are many

1 pay internet radio services. I'm sure there
 2 are many free ones, too, but I don't think you
 3 can make a blanket statement about that
 4 segment as a whole.

5 Q Isn't it entirely logical to
 6 expect that having paid \$12.95 a month out of
 7 pocket to subscribe to Sirius, a consumer may
 8 have already spent some or all of their budget
 9 on music for the month?

10 A I don't think so. I mean, if you
 11 break down the \$12.95 to, you know, 50 cents
 12 a day, I don't think the cost of a local
 13 newspaper is going to really have that much of
 14 an impact on somebody's ability to buy more
 15 music.

16 Q Are you suggesting that you think
 17 Sirius could raise its subscription price and
 18 have no effect on the number of subscribers?

19 A I didn't state that.

20 Q Well, in fact, there is some price
 21 sensitivity by consumers with respect to how
 22 much they're willing to spend on music,

1 as not being available for other music
 2 purposes, right?

3 A I've never heard that concern
 4 voiced by any of our existing subscribers that
 5 I've come into contact with and that's never
 6 been a concern that's been expressed to me by
 7 anybody I've come into contact with either in
 8 radio or the record industry.

9 Q Don't you think that's an entirely
 10 logical possibility?

11 A No, I actually believe that the
 12 radio airplay on Sirius will only generate
 13 more awareness for the artists that we're
 14 playing on Sirius and results in more record
 15 sales for those artists.

16 Q So it is your opinion, as I
 17 understand it that spending \$12.95 a month
 18 isn't going to have any effect on how much
 19 people are willing to spend on music
 20 otherwise, is that right?

21 A That's correct.

22 Q In your testimony orally today,

1 correct?

2 A Can you restate that?

3 Q Sure. How much consumers have
 4 available to spend on music is going to be --
 5 well, actually, let me state it a different
 6 way. Isn't it reasonable to expect that if
 7 consumers have already spent \$12, \$13 in a
 8 month on music, on music through Sirius or XM,
 9 that's that much less they're going to be
 10 willing to spend on buying CDs or downloads?

11 A No, I don't believe it is and I
 12 think it's important to note that many of our
 13 subscribers, I don't have the specific
 14 numbers, choose to not pay for the service on
 15 a monthly basis. They're paying either on an
 16 annual basis or on a quarterly basis. So I
 17 don't think they're looking at it in terms of
 18 the \$12.95 or as I put it earlier, the 50
 19 cents a day.

20 Q But whether they're paying
 21 monthly, semi-annually, annually, that's that
 22 much money out of their pockets that they view

1 Mr. Blatter, you mentioned on terrestrial
 2 stations you sometimes have DJs who talk about
 3 the music that they're playing. Do you recall
 4 that?

5 A Yes, I do.

6 Q And you use the phrase which I now
 7 forget, back --

8 A Back announcing.

9 Q Back announcing. Thank you. One
 10 of the things that terrestrial stations can do
 11 because they're local is to do back announcing
 12 that promotes a particular concert that's
 13 coming to a particular city or a visit by an
 14 artist to that city, correct?

15 A I've heard them do that before,
 16 but not always.

17 Q So that it's possible for record
 18 companies, for example, to build a promotion
 19 in a local market around a concert announcing
 20 by the local DJ in that area, get the artist
 21 into that local station and build a promotion
 22 locally, is that right?

1 A It's possible on terrestrial
2 radio, but that happens on Sirius radio as
3 well. I think I had mentioned in my oral
4 testimony that the Rolling Stones channel was
5 developed in conjunction with the Rolling
6 Stones to coincide with their tour as a
7 promotional vehicle to help sell concert
8 tickets for that tour.

9 Q Let me, actually that raises
10 something I wanted to ask you about. The
11 Rolling Stones channel that you talked about
12 before, I think you said was a limited-run
13 channel?

14 A Yes, it was.

15 Q And that was a limited run in
16 connection with some promotions that the
17 Rolling Stones were trying to do, is that
18 right?

19 A Yes, but I should define that the
20 limited run was initially, I think supposed to
21 be three or four months in cooperation with
22 The Band. It was extended, I think just over

1 Q Was there any agreement in that
2 between the Rolling Stones or the record
3 company and Sirius with respect to royalties
4 that would be paid for the use of the music?

5 A No, there was not other than the
6 royalties they would normally receive under
7 their current agreement.

8 Q So they weren't willing to waive
9 royalties in order to put together this
10 promotional channel, is that right?

11 A Can you be more specific? I'm not
12 sure that I follow you.

13 Q Sure. As part of the agreement to
14 put together this promotional channel for the
15 Rolling Stones, the Rolling Stones were not
16 willing to waive the royalties that they would
17 get paid for the use of that music, were they?

18 A This kind of goes a little bit out
19 of my area of expertise, but I'll try to
20 answer you. We -- they did receive or would
21 ultimately, I would hope, receive or imagine
22 that they would receive their royalties

1 a year, 12 or 13 months.

2 Q Was there an agreement entered
3 into with the Rolling Stones to put that
4 channel together?

5 A There was an agreement, I believe,
6 and I did not do the specific negotiations on
7 that deal, but I believe the agreement was
8 with the Rolling Stones, who gave us their
9 approval, as well as Virgin Records, who was
10 putting out their -- I believe owns their
11 masters now, was putting out their current
12 release at the time.

13 Q So there was an agreement with the
14 entities that were trying to promote the
15 Rolling Stones, the Rolling Stones and the
16 record company that was promoting them, right?

17 A Yes.

18 Q Was there any payment to the
19 Stones or to the record company for this
20 channel?

21 A Not that I'm aware of. I don't
22 think there was.

1 through SoundExchange as they normally would
2 for an airplay on Sirius. We did receive a
3 waiver from their record company, you know,
4 Virgin EMI, that allowed us to play an
5 unlimited amount of Rolling Stones music on
6 that particular channel, and I don't believe
7 that it was at any cost to Sirius.

8 Q So as I understand the agreement,
9 you could play as much Rolling Stones music as
10 you wanted, but they then got the royalties
11 for the playing of that music, right?

12 A Well, as would any other artist on
13 Sirius, you know, who when we play their music
14 they would get the royalties through
15 SoundExchange.

16 Q The Rolling Stones were not
17 willing to waive their royalties in return for
18 whatever promotional benefit they were getting
19 from this channel, correct?

20 A I couldn't speak to that. I
21 wasn't involved at that level of negotiation.

22 Q Okay, but you know they didn't

1 waive the royalties?

2 A I don't think they did, but I
3 don't

4 --
5 JUDGE WISNIEWSKI: Mr. Blatter,
6 your attorney can't answer the question for
7 you.

8 THE WITNESS: No, I saw him move.
9 I thought he was going to stand up. I didn't
10 think he was going to answer for me.

11 BY MR. HANDZO:

12 Q Now Mr. Blatter, you would agree
13 with me that Sirius competes for listening
14 time with other audio entertainment services,
15 right?

16 A Primarily terrestrial radio, but I
17 believe we compete with all forms of
18 entertainment for listening time.

19 Q So to the extent that somebody is
20 listening to Sirius in the car, they're not
21 listening to a CD or a download, right?

22 A Typically not. That would be

1 wanted to listen to country music, before
2 Sirius or XM, I would have had to put a CD or
3 a cassette in the stereo, right?

4 A That would be one way to listen to
5 country music, sure.

6 Q But now with Sirius I've got a
7 choice of five country music channels, right?

8 A With Sirius, you have the choice
9 of five country channels and another 100 and
10 some odd channels of a lot of other things.

11 Q Right, but if I want to listen to
12 country while I'm stuck at West 57th, I don't
13 need a CD anymore, do I?

14 A No, of course you still would want
15 a CD.

16 Q I don't need it for listening in
17 my car, do I, because I've got five country
18 music channels on Sirius?

19 A I don't believe that radio is a
20 replacement for the CD. I've never seen any
21 evidence of that either.

22 Q Well, you know that Sirius

1 difficult to listen to two sources at the same
2 time.

3 Q And isn't it just logical, Mr.
4 Blatter, that to the extent that listening to
5 Sirius displaces time that might have been
6 spent listening to CDs or downloads, people
7 are going to buy fewer CDs or downloads?

8 A If I understand what you mean,
9 Sirius listening might replace listening to
10 something else. What sort of impact it has on
11 the actual cell of recorded music, I can't
12 speak to that. It actually could still
13 contribute to more record sales as a result of
14 that airplay, regardless of how much time
15 they're listening to it.

16 Q Well, I think you mentioned before
17 that there is still no country station in New
18 York, right?

19 A No. There's no country music
20 outlet in the New York market.

21 Q So if I were driving in New York
22 and I was stuck in traffic on West 57th and I

1 replaces time spent listening to CDs, right?

2 A It could very well.

3 Q You just don't think there is a
4 connection between time spent listening and
5 the number of CDs that you buy?

6 A I do not.

7 Q And you don't think it's
8 reasonable to expect that if people are
9 listening to CDs less, they're going to buy
10 less?

11 A I do not.

12 (Pause.)

13 Q You were asked a couple of
14 questions on direct, Mr. Blatter, about pre-
15 1972 music, do you recall that?

16 A Yes.

17 Q Now some of the pre-1972 music
18 that Sirius plays has been digitally
19 remastered, right?

20 A Some of it probably has been
21 remastered, yes.

22 Q And you don't know how much of the

1 pre-1972 music has been remastered, do you?
 2 A I've never quantified that, no.
 3 Q Do you know the extent to which
 4 sound recordings are played on kids' channels?
 5 A Excuse me?
 6 Q On kids' channels?
 7 A The extent of which?
 8 Q Yes.
 9 A I can only speak to the -- we have
 10 two kids' channels on Sirius. I'm only
 11 responsible for the programming on one of them
 12 which is on Kids Stuff channel. The other is
 13 Disney Radio which is supplied to us from a
 14 third party and is not one of our commercial-
 15 free music channels.
 16 Q Are there sound recordings played
 17 on the kids' channel that you're responsible
 18 for?
 19 A Yes, there are.
 20 Q Do you know whether there are
 21 sound recordings played on some of the talk
 22 shows like Howard Stern?

1 Q Haven't you seen emails to Sirius
 2 saying they want -- consumers want less DJ
 3 chatter, not more?
 4 A I've seen those same comments
 5 consistently for my entire 20-year career as
 6 a radio programmer. What I've learned over
 7 the years, when I see that comment is when you
 8 dig further with that person that makes that
 9 comment, what they really mean is the DJ on
 10 that particular channel is not relating and
 11 communicating to me in the way I'd expect them
 12 to. So in their words, they're saying there's
 13 too much DJ chatter, but what they really mean
 14 is hey, I like this channel, but the DJ is not
 15 talking about things I want to hear about.
 16 Q But in fact, Mr. Blatter, in terms
 17 of the emails that Sirius gets from consumers,
 18 you get emails from consumers that say I want
 19 less DJ talk, I want less DJ chatter, right?
 20 A I personally get very few, if any,
 21 emails like that.
 22 Q Sirius gets such emails?

1 A I'm responsible for the 64
 2 commercial-free music channels. I can't speak
 3 too knowledgeably about how much music is
 4 played on the Howard Stern show. To the best
 5 of my knowledge, he doesn't play much music,
 6 if any at all.
 7 Q But I take then you wouldn't know
 8 how much music might be played on other
 9 channels that you're not responsible for?
 10 A If I'm not responsible for it, I
 11 wouldn't be comfortable going on record
 12 telling you how much they're playing.
 13 Q Mr. Blatter, you talked a little
 14 bit in your testimony, I believe, about the
 15 use of on-air personalities and DJs, do you
 16 recall that?
 17 A Yes.
 18 Q Now is it fair to say there are
 19 some subscribers to Sirius who don't like the
 20 DJ chatter, right?
 21 A Generally speaking, I don't think
 22 that's an issue for us, no.

1 A Like I said like any radio outlet
 2 in America, you're going to get -- if you have
 3 DJs on a channel, you're going to get certain
 4 people that might say hey look, I want less DJ
 5 chatter. But what I've learned is that --
 6 what that really means is hey look, the DJ on
 7 when I listen doesn't really relate to me. So
 8 what we do is we take that information and my
 9 programmers then coach and direct the talent
 10 to better communicate with the intended
 11 audience for that channel.
 12 When we do that, we see that the
 13 number of emails you might get about too much
 14 DJ chatter declines dramatically.
 15 Q Let me mark this as SoundExchange
 16 Trial Exhibit 37.
 17 (Whereupon, the above-
 18 referred to document was
 19 marked as SoundExchange
 20 Trial Exhibit 37 for
 21 identification.)
 22 (Pause.)

1 Mr. Blatter, this is an email to
2 you from Darren Smith, is that correct?

3 A Yes, it is.

4 Q And for the record it starts with
5 Sirius Bates Number 22992.

6 Mr. Blatter, who is Darren Smith?

7 A Darren is one of the three senior
8 directors of programming that I had mentioned
9 earlier in my testimony.

10 Q So he reports to you?

11 A Yes, he does.

12 Q And did it appear to you what Mr.
13 Smith was doing in this email to you was
14 giving you information on responses to a
15 survey?

16 A It appears as such, although it is
17 very difficult for me to say what survey this
18 is from and when it was conducted.

19 Q I'm going to ask you to turn to
20 the second to last page. Do you see there
21 there is an email that says "attached are the
22 verbatim response to foreclosed and

1 MR. KIRBY: No.
2 CHIEF JUDGE SLEDGE: Without
3 objection, Exhibit No. 37 is admitted.
4 (The document, having
5 been marked previously
6 for identification as SX
7 Exhibit No. 37, was
8 received in evidence.)

9 BY MR. HANDZO:

10 Q Mr. Blatter, looking at the first
11 page --

12 CHIEF JUDGE SLEDGE: Mr. Kirby?
13 MR. KIRBY: Yes, Your Honor. This
14 is relatively current research data concerning
15 what our customers like and don't like about
16 our service, at least that's what I understand
17 it to be., Such information, of course,
18 obviously is highly competitively sensitive
19 and I would move that it be protected under
20 the Court's confidentiality procedure.

21 CHIEF JUDGE SLEDGE: It is not
22 highly sensitive in my experience. Do you

1 questions"?

2 A Yes.

3 Q So does it appear --

4 A Sorry to have a random response to
5 a closed-ended question, but go ahead.

6 Q But in any event, this appears to
7 you to be a breakdown of the responses to a
8 survey or surveys that Sirius conducted,
9 correct?

10 A Yes.

11 Q And it breaks down what
12 subscribers like most about Sirius and what
13 their complaints about Sirius are, right?

14 A Yes.

15 Q This was provided to you in March
16 of 2006, right?

17 A Yes, it was.

18 MR. HANDZO: Your Honor, I would
19 move the admission of Sound Exchange Exhibit
20 37?

21 CHIEF JUDGE SLEDGE: Any objection
22 to the Exhibit No. 37?

1 want to pursue that further?

2 MR. KIRBY: May I voir dire the
3 witness, please, Your Honor?

4 CHIEF JUDGE SLEDGE: Yes.

5 VOIR DIRE

6 BY MR. KIRBY:

7 Q Mr. Blatter, is this information
8 the type of information that Sirius would
9 typically make available to XM?

10 A We typically, you know, in our
11 normal course of business, do not make any of
12 our internet research available to XM.

13 Q I understand. Would there be --
14 do you believe that there would be competitive
15 consequences if this information were made
16 available?

17 A Absolutely.

18 Q If you had this kind of
19 information about XM, would it help you in
20 making programming choices against XM's
21 program?

22 A I would love to get my eyes on

1 it, if I could do it legally.

2 Q Do you know of any legal way that
3 you could get this kind of information about
4 XM?

5 A No, I do not.

6 CHIEF JUDGE SLEDGE: An objection
7 to applying the protective order?

8 MR. HANDZO: No, Your Honor.

9 CHIEF JUDGE SLEDGE: Without
10 objection, the motion is granted.

11 BY MR. HANDZO:

12 Q Mr. Blatter, turning to the first
13 page of this Exhibit No. 37, if you see two
14 thirds of the way down the page there's a line
15 for DJs?

16 A Yes, I do.

17 Q And those numbers there state the
18 number and the percentage of people who said
19 they liked the DJs?

20 A I'm not sure if that's people who
21 mentioned DJs as a descriptor for them or they
22 mentioned individual DJ names.

1 sure if that DJ's total number there includes
2 individual DJ mentions or DJ mentions just as
3 a whole.

4 Q Well, if you go to the next page
5 of this, do you see down the page there's a
6 line that says "less DJ chatter"?

7 A Yes, I do.

8 Q So there's people who think the
9 best thing of Sirius has less DJ chatter?

10 A Yes, 8 out of the 2048 said they
11 want less DJ chatter, statistically
12 meaningless number.

13 Q Now if you turn to the fourth
14 page.

15 A Yes.

16 Q Do you see the category that says
17 "complaints, Sirius complaints"?

18 A Yes, I do.

19 Q And there's a list of complaints
20 that runs on for one, two, three, four,
21 carrying over to the fifth page?

22 A Yes.

1 Q Which ever one it is, this appears
2 to be people who like either DJs generally or
3 specific DJs?

4 MR. KIRBY: Your Honor, that
5 misstates the exhibit. The question appears
6 is what do they like most about Sirius,
7 instead of this response would be people who
8 liked DJs most. CHIEF JUDGE SLEDGE: Mr.
9 Handzo?

10 MR. HANDZO: I'm happy to rephrase
11 the question, Your Honor.

12 CHIEF JUDGE SLEDGE: All right.

13 BY MR. HANDZO:

14 Q Let me just ask this, Mr. Blatter.
15 The one that says DJs, you understand that to
16 be a reference either to DJs on Sirius
17 generally or specific DJs, right?

18 A No, I'm not sure if it includes
19 specific DJs rolled up into that number or
20 not. I do notice at the bottom here there is
21 a DJ mentioned, Pat St. John, and there are
22 other DJs scattered throughout here. I'm not

1 Q And it appears to be the -- the
2 responses appear to be ranked in order of the
3 number of people who made that complaint?

4 A Well, I'm not so sure if these are
5 necessarily all complaints because as I look
6 at the bottom, some of these -- while they're
7 classified as complaints, they're just asking
8 for more of something else, so more classic
9 rock or more dance channels and so on. I'm
10 not sure if complaints, I know that's the way
11 it's referred to in this document, but they're
12 not necessarily all complaints.

13 Q Okay. There's a line in the
14 fourth page of this document which says "DJs
15 talk too much"? Do you see that?

16 A Yes, that's actually what I
17 believe to be a remarkably low percentage
18 based on what I've seen in my 20 years as a
19 radio programmer having researched this
20 subject before.

21 Q It's actually one of the top
22 complaints that is listed here, isn't it?

1 A At two percent, I wouldn't
2 consider it to be a top complaint, no.

3 CHIEF JUDGE SLEDGE: You have not
4 responded to the question.

5 THE WITNESS: Well, can you
6 explain to me what you mean by top complaint?

7 BY MR. HANDZO:

8 Q Well, just looking at the list, we
9 agreed that the complaints are ranked in order
10 of the number of people who responded with
11 that complaint, right?

12 A Yes, I mean they're ranked in
13 order.

14 Q And DJs talk too much is ranked
15 very much near the top, isn't it?

16 A Well, there's a huge disparity
17 between one reception of 19 percent and DJs
18 that talk too much at 2 percent. So I think
19 it's a little bit misleading to say it's a top
20 complaint.

21 Q But it is ranked near the top,
22 right?

1 a DJ on Sirius.

2 JUDGE WISNIEWSKI: What does that
3 have to do with it being a passive media?
4 THE WITNESS: People sometimes
5 have a hard time recollecting what they heard
6 because it is a passive media.

7 BY MR. HANDZO:

8 Q Mr. Blatter, I'm going to show you
9 what was marked as SoundExchange Trial Exhibit
10 38.

11 (Whereupon, the above-
12 referred to document was
13 marked as SoundExchange
14 Trial Exhibit No. 38.)

15 (Pause.)

16 Do you recognize this document as
17 an email to you from Steve Leeds?

18 A Yes, I do.

19 Q Who is Mr. Leeds?

20 A Mr. Leeds is my Vice President of
21 Artist and Talent Relations.

22 Q What is his job? What does he do?

1 A It's ranked number six, yes, out
2 of a number of things, but like I said, to me,
3 as an industry veteran and done nothing my
4 entire career but programmed radio, two
5 percent is a remarkably low number.

6 Q And if you flip to the next page
7 you'll see a line that says "Jim Brewer"? Is
8 he a DJ?

9 A He's a talk show host. Also
10 former cast member of Saturday Night Live and
11 has appeared in a bunch of movies.

12 Q And the next page you'll see a
13 line for Rick Dees, is that a DJ?

14 A He's a DJ, but he's not on Sirius.
15 (Laughter.)

16 I think it's important to mention
17 as well that radio is generally a passive
18 medium. And when you go back and ask people
19 to respond to these types of questions, they
20 often don't give you accurate responses,
21 particularly when it comes to DJ names.

22 That's a good example. Rick Dees isn't even

1 A He's responsible for the group of
2 people I mentioned earlier in my testimony
3 that work closely with the record companies to
4 have them participate in our programming or
5 artist interviews and special programming that
6 we might be doing in some cases enhance the
7 programming of the channel. In other cases it
8 is to help that artist get some additional
9 promotion for what it is they are promoting at
10 that time.

11 Q So he is somebody who works with
12 the record companies a lot?

13 A Yes, he is.

14 Q This email was sent to you by Mr.
15 Leeds on April 9, 2006. Is that right?

16 A Yes, it is.

17 MR. HANDZO: Your Honor, I move
18 the admission of SoundExchange Trial Exhibit
19 38.

20 CHIEF JUDGE SLEDGE: Any objection
21 to Exhibit 38?

22 MR. KIRBY: No, Your Honor.

1 CHIEF JUDGE SLEDGE: Without
 2 objection, Exhibit 38 is submitted.
 3 (The document, having
 4 been marked previously
 5 for identification as SX
 6 Exhibit No. 38, was
 7 received in evidence.)

8 MR. KIRBY: May I have one moment,
 9 Your Honor, on the confidentiality issue I
 10 might explore?

11 (Pause.)

12 Thank you, Your Honor. I have no
 13 motion with respect to this document.

14 BY MR. HANDZO:

15 Q Now in this email to you, Mr.
 16 Blatter, Mr. Leeds refers to the tried and
 17 true avenues of exposure. Do you see that?
 18 That's near the top of the email?

19 A Yes.

20 Q And what he is talking about there
 21 is the tried and true avenues for exposure for
 22 new music, right?

1 A Not right there, no.
 2 Q In fact, when he does talk about
 3 satellite radio down below, what he says is
 4 right now we are offered the more newer baby
 5 acts. Do you see that?

6 A Yes, I do.

7 Q And what he's telling you there is
 8 that in terms of getting artists to perform
 9 live on Sirius, the only things that you were
 10 being offered were the baby acts, right?

11 A That was his opinion at that time.

12 Q Okay, and you weren't getting the
 13 A level acts, right?

14 A That was his opinion at that time.

15 Q But he is your guy who deals with
 16 the record companies, right?

17 A No, my entire programming team
 18 deals with the record companies. He's one of
 19 many.

20 Q But it is his job to go out and
 21 get artists to perform on Sirius, isn't it?

22 A That's part of his job, but his

1 A Well, he doesn't appear to be
 2 specific to new music.
 3 Q Well, he is talking about in the
 4 previous sentence the labels. Do you see
 5 that?

6 A Yes.

7 Q And that is a reference to the
 8 record companies, right?

9 A Right.

10 Q And in that context, you
 11 understand him to be talking about the tried
 12 and true avenues of exposure for the record
 13 companies?

14 A Appears to be, yes.

15 Q Okay, and he is saying that the
 16 tried and true avenues for exposure are
 17 television, cable, print, retail exposure, and
 18 websites, right?

19 A That appears to be his opinion,
 20 yes.

21 Q And he doesn't say anything about
 22 satellite radio though, does he?

1 department does act more as a facilitator. In
 2 a lot of cases, it is the programmers
 3 themselves where the requests come in through
 4 and then they are then referred to the talent
 5 department or the talent department will
 6 sometimes initiate that request as well. It
 7 doesn't all fall on the artists and talent
 8 department.

9 Q I think you told us at the outset
 10 of your oral testimony, Mr. Blatter, that
 11 there is a group under your supervision called
 12 the talent and industry relations group, is
 13 that right?

14 A Yes.

15 Q Is that the group that Mr. Leeds
 16 runs?

17 A Yes, and I think I've stated that
 18 group works very closely with my programmers
 19 to conduct their activities.

20 Q In terms of bringing in talent to
 21 do live concerts on Sirius, it is Mr. Leeds
 22 group, talent and industry relations group,

1 that deals with the record companies, right?
 2 A No, that is not correct. They
 3 work very closely with my programmers to book
 4 those interviews or live performance or
 5 whatever it might be.

6 Q But Mr. Leeds is talking to the
 7 record companies about those subjects?

8 A He does as well as all of my
 9 programmers.

10 CHIEF JUDGE SLEDGE: When you were
 11 responding to talent and industry, I thought
 12 you said earlier it was artist and talent.

13 THE WITNESS: Yes, they get used
 14 somewhat interchangeably or have in the past.
 15 I'm actually trying to clean that up a little
 16 bit internally in the industry. We're now
 17 referring to the department as the artist and
 18 talent relations department.

19 BY MR. HANDZO:

20 Q Now with respect to getting
 21 artists to do live concerts on Sirius, having
 22 those live concerts is a benefit to Sirius, is

1 artists to come on and do live concerts for
 2 Sirius is a two-way street. There's some
 3 benefit to the artists and there's some
 4 benefit to Sirius from that?

5 A Yes, but there are many instances
 6 where there actually is very little benefit to
 7 us, but we do it to help further our
 8 relationship with the record companies.

9 Q And there are situations where you
 10 think there is very real benefit to Sirius,
 11 correct?

12 A I don't think any one concert
 13 performance has a real benefit to Sirius. I
 14 think in aggregate, if we do a lot of live
 15 performances that our subscribers want to
 16 hear, then it is a benefit to us, but I think
 17 it's important to note that a lot of times we
 18 do these live performances, in a lot of cases
 19 it's actually a turnoff to our subscribers,
 20 but we're doing it to help the record company
 21 establish that new artist.

22 JUDGE WISNIEWSKI: Why? Are you

1 it not?

2 A In some cases it's a benefit to
 3 Sirius. In other cases, it's more of a
 4 benefit to the artists themselves.

5 Q But certainly there are well-known
 6 artists with respect to whom it is very
 7 beneficial to Sirius to have an exclusive live
 8 concert from that artist, right?

9 A I'm sorry, can you restate that?

10 Q Sure. For more popular artists,
 11 it is very beneficial to Sirius to have that
 12 artist come on Sirius and do a live, exclusive
 13 concert, right?

14 A I wouldn't say it's more
 15 beneficial to Sirius. I mean --

16 Q I didn't mean to put it in terms
 17 of relative importance. It is helpful to
 18 Sirius to have those artists come on and do
 19 concerts for you, right?

20 A We think that's something our
 21 subscribers like hearing, yes.

22 Q So is it fair to say that getting

1 just good hearted?

2 THE WITNESS: Well, it's not that
 3 we're good hearted, but we're in some ways in
 4 this for the music too and certain channels
 5 that are music oriented, we do like to take
 6 risks and work with the record companies to do
 7 whatever we can to help them break a band and
 8 sometimes having them come up to our studios
 9 and perform live while the audience for that
 10 channel might not have ever heard of this
 11 artist before, we're saying hey, check this
 12 out. We think it's good. You might like it
 13 too. A lot of times when we do that, the
 14 listeners of the channel are saying who is
 15 this new act? I don't even like them and now
 16 they're playing live on your air? Why are you
 17 doing this? We say, you know, it's a risk we
 18 take, but we do it to further our
 19 relationships with the record companies.

20 JUDGE WISNIEWSKI: When you
 21 mentioned that before -- and pardon me for
 22 interrupting Mr. Handzo, you talked about

1 spending a lot of time working with record
 2 companies to break new artists. That puzzled
 3 me. If you get no benefit out of it, why
 4 would you do it?

5 THE WITNESS: We get no benefit
 6 out of the actual recorded sale of the music.

7 JUDGE WISNIEWSKI: I understand
 8 that part, but do you get some benefit? Do
 9 you feel you get some benefit?

10 THE WITNESS: Well, on certain
 11 channels that are new music intensive, I think
 12 it's important for those channels to continue
 13 to sound fresh and bring new artists into the
 14 fold that we think the listeners to that
 15 channel might find interesting.

16 Most new artists that we actually
 17 play don't ever actually become successful, so
 18 in a given week a typical channel has three or
 19 four new songs, when the year is done, if we
 20 added 150 new songs a year on that particular
 21 channel, if ten of them really stuck and
 22 became big successes, that would be a good

1 will find that the satisfaction to that
 2 channel and ultimately the service as a whole
 3 could go down. So it's a very fine line that
 4 we tread as programmers trying to figure out
 5 how much new music to play on a particular
 6 channel. If it's not a channel that plays
 7 nothing but new music and even on there you
 8 have to have some boundaries and some limit to
 9 the amount of new music that you play, but on
 10 most of the channels that we offer, there is
 11 I guess a diminishing return when it comes to
 12 satisfaction which is ultimately what we're
 13 judged by, depending upon how much new music
 14 you play.

15 JUDGE ROBERTS: So some music is
 16 good, that drives the satisfaction level up,
 17 but there's some point out there that it
 18 starts to go down?

19 THE WITNESS: Well, if we play too
 20 much new music on a particular channel, then
 21 satisfaction could come down. Yes. And where
 22 that line is is different by channel.

1 year.

2 JUDGE WISNIEWSKI: I understand
 3 that you take a risk. That's what all
 4 businesses do. They take a risk, don't they,
 5 in order to eventually have some success and
 6 get some benefit out of taking those risks?
 7 Isn't that a fair statement?

8 THE WITNESS: There is risk in
 9 playing these new artists.

10 JUDGE WISNIEWSKI: Doesn't that
 11 work here too that you get some benefit out of
 12 if if they succeed?

13 THE WITNESS: We don't get a
 14 direct financial benefit of their success, but
 15 I think it is helpful to the radio station to
 16 help contribute to the success of that
 17 artist's career.

18 JUDGE ROBERTS: Mr. Blatter, you
 19 used the word "risk" several times. What
 20 risk?

21 THE WITNESS: Well, if we play too
 22 many new songs on a particular channel, you

1 CHIEF JUDGE SLEDGE: While we're
 2 all jumping in, the responses to Judge
 3 Roberts' questions makes me curious why you
 4 add the qualifier to Judge Wisniewski's
 5 questions that it's a benefit to have new
 6 artists if they're successful. If what the
 7 ultimate result of their career, why is that
 8 important as to whether it adds freshness to
 9 a channel and make a channel more satisfying?

10 THE WITNESS: Why is that
 11 important to us?

12 CHIEF JUDGE SLEDGE: Yes, why is
 13 it important to you?

14 THE WITNESS: Well, I think, for
 15 instance, in the country format, whether
 16 there's actually a fair amount of stability
 17 with the new artists that are exposed on
 18 country radio, but every few years a couple of
 19 new artists do break through and become very
 20 successful and for a format not to get stale,
 21 it is important to be able to introduce new
 22 artists on a fairly regular basis. Like I

1 said earlier, not all of them always stick,
 2 but we do think it's important to introduce
 3 new artists to keep the station sounding
 4 fresh.

5 CHIEF JUDGE SLEDGE: I guess I
 6 have trouble both with country artists and
 7 NASCAR drivers understanding how audio helps
 8 them since the decision of successful country
 9 artists and NASCAR drivers depends on their
 10 physical appearance more than anything else.

11 (Laughter.)

12 CHIEF JUDGE SLEDGE: And you can't
 13 portray their physical appearance.

14 THE WITNESS: No, we can't. But I
 15 will say in a country format, I think there
 16 are plenty of artists that have been
 17 successful where their physical appearance had
 18 no impact on their -- it didn't hold them back
 19 from being successful.

20 CHIEF JUDGE SLEDGE: In the last
 21 five years?

22 (Laughter.)

1 in any decision a programmer makes day to day,
 2 is will this help further satisfy the intended
 3 audience for this channel.

4 Q So the answer to my question is
 5 yes?

6 A I think you only asked it specific
 7 to music, but I'm saying it's -- there are a
 8 number of things that contribute to the
 9 satisfaction of the channel that go beyond the
 10 music.

11 Q But with respect to the decisions
 12 you make about what music to play and what
 13 live acts to put on, that's your guiding
 14 principle, right, what's going to increase
 15 subscriber satisfaction?

16 A I don't think the programmers day
 17 to day think of it in such terms, but
 18 ultimately that is our goal is to, as a whole,
 19 all of our programming should be as -- we're
 20 trying to create the most satisfactory
 21 experience that we can.

22 Q Thank you. That's all I have.

1 THE WITNESS: I can't think of any
 2 offhand, but I believe there have been.

3 CHIEF JUDGE SLEDGE: They appear
 4 to be more pin up people than they are
 5 singers.

6 Mr. Handzo?

7 MR. HANDZO: Thank you.

8 BY MR. HANDZO:

9 Q Mr. Blatter, I think you stated
 10 earlier in your testimony that in your
 11 position, you're judged by whether subscribers
 12 to Sirius are satisfied with the music
 13 channels, right?

14 A Yes.

15 Q And so when you make decisions
 16 about whether to play new music or how much
 17 new music to play or whether to get live acts,
 18 basically what you're trying to do is as much
 19 as you can increase subscriber satisfaction
 20 with the music channels that you're
 21 responsible for, right?

22 A I think that's the ultimate goal

1 CHIEF JUDGE SLEDGE: We will
 2 recess for the mid-day break for one hour.
 3 (Whereupon, at 12:30 p.m., the
 4 hearing was recessed, to reconvene at 1:30
 5 p.m.)

6 CHIEF JUDGE SLEDGE: Mr. Handzo?
 7 MR. HANDZO: Your Honor, I've
 8 completed my cross.

9 CHIEF JUDGE SLEDGE: Okay. Any
 10 redirect?

11 MR. KIRBY: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. KIRBY:

14 Q Mr. Blatter, turn back if you
 15 would to Exhibit 38, the e-mail from a Mr.
 16 Leeds. Do you have that in front of you?

17 A Yes, I do.

18 Q Okay. When was this e-mail sent?
 19 A This e-mail was sent on April 9,
 20 2006, so approximately one year and two months
 21 ago.

22 Q After you received this e-mail,

1 did you discuss it with Mr. Leeds?

2 A Yes, I do recall a discussion that
3 Mr. Leeds and I had soon after this e-mail was
4 sent to me. And we discussed what he wrote in
5 this e-mail in great detail, and I think it's
6 important to note that, like in any business,
7 certain people have really bad days. This e-
8 mail was written after Steve had a really bad
9 day. I think you can see on top there it was
10 written pretty late at night.

11 And after Steve and I had a pretty
12 in-depth conversation about what he put in
13 this e-mail, he even said to me, "You know
14 what? You're right. I think I kind of blew
15 things a little bit out of proportion, and I
16 agree with you that things in our
17 relationships with the record companies and
18 the artists they represent are a lot stronger
19 than the way they're made out to be in this
20 document."

21 Q Even though Mr. Leeds was having a
22 bad day, I direct your attention to the last

1 Q I want to talk just very briefly
2 with you about this issue of substitution of
3 Sirius for CD sales. Just looking back over
4 your 20-plus years of experience in
5 terrestrial radio and with Sirius in the
6 programming area, has any representative of
7 any music label ever said to you, "Steve,
8 you've got to stop playing our music; it's
9 killing our sales"?

10 A That has never once happened to me
11 or any colleague that I work with at Sirius,
12 or, for that matter, I don't know of any radio
13 program in America that was ever asked by a
14 record company to stop playing a particular
15 piece of music. In fact, I don't ever recall
16 speaking to a record executive that has ever
17 told me that they've asked a radio station to
18 stop playing a particular piece of music.

19 Q And what about artists? Has any
20 artist called up and said, "Steve, you're
21 giving me too much exposure here. People are
22 listening to you; they're not buying my CDs.

1 paragraph there. Did what he said in that
2 last paragraph turn out to be perceptive?
3 A Yes, it was. And as I think I
4 stated earlier in my testimony, many of the
5 Sirius music channels now are reporting radio
6 stations to the major trade publications
7 within the radio industry. As a result of
8 becoming reporting stations, the cooperation
9 that we've had from the record companies and
10 management companies and publicists has
11 increased substantially since this document
12 was written over a year ago.

13 Q And when he talks in the last
14 sentence there about, "The senior promo execs
15 will be forced into treating Sirius on a level
16 playing field," have in fact you found that
17 the senior promo execs are treating Sirius as
18 the promotional equivalent to terrestrial
19 radio?

20 A Not only as an equivalent, in some
21 cases they are treating us even better than
22 terrestrial radio.

1 You've got to take me off the air"?

2 A No. Never once in my career has
3 an artist asked us to not play their music.

4 MR. KIRBY: That's all I have,
5 Your Honor.

6 CHIEF JUDGE SLEDGE: Any other
7 questions from the services? Any further
8 cross?

9 MR. HANDZO: No, Your Honor.

10 CHIEF JUDGE SLEDGE: Any questions
11 from the bench?

12 (No response.)

13 Thank you, sir. That's all.

14 THE WITNESS: Thank you, Your
15 Honor.

16 CHIEF JUDGE SLEDGE: Mr. Joseph?
17 MR. JOSEPH: Your Honor, Mr. Sturm
18 will call our next witness.

19 CHIEF JUDGE SLEDGE: All right.

20 MR. STURM: Your Honor, Sirius
21 calls Christine Heye.

22 CHIEF JUDGE SLEDGE: Ms. Heye,

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

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

WRITTEN DIRECT TESTIMONY OF STEVEN BLATTER

(On behalf of Sirius XM Radio Inc.)

I. Introduction

1. I am Senior Vice President and General Manager of Music Programming at Sirius XM Radio Inc. (“Sirius XM”). I have worked professionally in radio, as well as in marketing, promotion and online for over 25 years. In terrestrial radio, I was responsible for the programming of local stations in New York and Los Angeles. My prior experience also includes the creation and oversight of content syndicated to hundreds of local radio stations across North America. Prior to the merger of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings, Inc. (“XM”), I was at Sirius for approximately five years.

2. I testified on behalf of Sirius in the prior proceeding before the Copyright Royalty Board (“CRB”) to set rates for the period from 2007 through 2012 (“*Satellite I*”). In my prior written testimony, which is incorporated herein (and which has been designated for inclusion in this proceeding according to the governing regulations), I covered three key areas: (1) the range and coverage of the Sirius music channels; (2) how each music channel is developed and programmed and Sirius’ creative contribution to that process; and (3) the promotional benefits of radio, including satellite radio. To the extent that there have been any material changes since the

last proceeding before the CRB, I will update each of these categories in my testimony here. In addition, I will provide testimony describing how airplay on Sirius XM channels has a direct impact on the sale of recorded music. The correlation between Sirius XM airplay and music sales – which has been repeatedly acknowledged to me and my staff by record company executives, artists, and their managers – is substantially greater than it was when I testified in the *Satellite I* proceeding five years ago.

II. Description Of Sirius XM's Music Programming And Current Music Channels

A. Sirius XM's Services And Music Programming Structure

3. As is described in more detail in the accompanying testimony of James Meyer, even after the merger of Sirius and XM, Sirius XM maintains two separate distribution platforms. For the most part, the content offerings on the two services, including the music channels, are almost identical. Although there remain “Sirius” and “XM” platforms, by illustration, a subscriber listening to the 80s on 8 channel on the Sirius platform hears the same channel as a subscriber listening to the 80s on 8 channel on the XM platform.

4. I am responsible for all of Sirius XM’s music programming operations and I have a significant role in other areas related to music programming, such as artist and talent relations. I currently supervise approximately 285 full and part-time employees, including six Music Programming heads, two Programming Operations supervisors, and one head of Production. Each Music Programming head is responsible for a genre or two of music, including Jazz, Standards, Latin, Pop, Rock, Urban/Hip Hop, and Country, and supervises the programming personnel responsible for Sirius XM’s various music channels within each genre.

5. The Sirius satellite platform offers 71 full-time music stations without commercials (64 are produced by Sirius XM in the United States; the other seven are produced

by our Canadian affiliate).¹ The XM satellite platform offers 71 full-time music stations without commercials (67 are produced by Sirius XM in the United States; the other four are produced by our Canadian affiliate).² The most current versions of the channel line-ups are attached as Sirius XM Direct Exhibit (“SXM Dir. Ex.”) 1. These line-ups do not include limited-engagement channels, which are offered for shorter periods of time and which I discuss below in paragraphs 56-58.

6. As can be seen on the channel line-ups, most of the music stations continue to be era- or genre-based. For example, our thirteen pop stations (fourteen on XM) include Sirius XM Hits 1 (Top 40 hits), '40s on 4, '50s on 5, '60s on 6, and so on. Our 22 rock channels include a wide mix of classic rock, alternative and indie rock, hard rock and heavy metal, and several more mellow, “adult” rock formats. Each of the Hip-Hop/R&B, Dance, Country, Christian, Jazz/Standards, and Classical categories likewise offers between three and seven stations covering several listening options – including a variety of niche channels (like Bluegrass, Reggae and Show Tunes) that cannot be found on terrestrial radio.

7. As I described in my *Satellite I* testimony, a number of our music channels are devoted almost exclusively to music recorded before 1972 (and thus, as I understand, not subject to the statutory license at issue in this proceeding). These include '40s on 4, '50s on 5, '60s on 6, and Elvis Radio. Other music stations on our services make substantial (though not exclusive) use of pre-1972 recordings, including Classic Vinyl, the Grateful Dead Channel, Underground

¹ Sirius XM recently introduced sixteen additional full-time music stations that are available to subscribers that purchase the latest Sirius XM radio and one of our new “SiriusXM” branded packages which come with a suite of 20+ “Xtra” channels. The required radio includes the new Sirius XM Edge and Lynx products. Over time, more and more of our subscribers will be able to access these stations.

² There are slight differences between the full-time music channels of XM and Sirius. For example, there are a few music channels offered on XM that are not available through Sirius because the XM platform is capable of hosting a few more channels than the Sirius platform, and there are a few Clear Channel-programmed radio stations available on XM that are not available on Sirius.

Garage, Siriusly Sinatra, Radio Margaritaville, On Broadway, The Bridge, '70s on 7, and Soul Town.

B. Development Of Channel Style And Identity

8. Sirius XM goes to great lengths to create an identity for each of its music channels. In many cases, our distinctive channel identities have been crafted over the course of eight or ten years. During this time, we have strategically built true national “brands” for each of these channels, as follows:

- While the era or genre will define the universe of music upon which the programmers will draw, the channel style and personality will shape the overall energy level of the channel, for example, whether it is edgy and energetic or conservative and mellow.
- The channel identity also helps determine the appropriate on-air hosts for the channel – and is in turn shaped by the personalities of those hosts.
- Each channel has a concise name that captures its format and identity such as “Octane,” (uptempo hard rock) or “BPM” (dance). Moreover, a distinctive channel logo is associated with the channel name so as to permit instant visual identification in our marketing materials and on receivers. Further, the name and logo are supported by additional positioning or attitudinal statements that are used to reinforce the brand image of the channel. For example, the slogan of our flagship Top 40 Station, Sirius XM Hits 1, is “The Sound of Generation Now.”
- Sirius XM music channels also typically include production elements or interstitial audio pieces heard between the songs that further develop the image and personality of the channel for the intended audience. Each music channel has its own station voice and slogan, and some even employ custom jingles that help enhance the mood and flow of the channel.
- Interactive contests and promotions are aired on the appropriate channels to further build listener loyalty and create an even stronger bond with the audience.
- The identity of a channel guides the types of special programming that may be created and scheduled. Artists often participate in interviews and perform live on certain rock channels, while on our pop channels artists will guest-host special programs like countdown shows and new music showcases.

9. All of these factors – which go beyond simply playing music – work together to enhance the personality of each station, make the listening experience more engaging to the

target audience, and create meaningful and satisfactory channel options for the subscriber. As a result of Sirius XM's success in building these national channel brands, our listeners develop valuable relationships with their favorite Sirius XM channels.

C. The Music Selection Process For Sirius XM Music Channels

10. Our stations are far from mere “jukeboxes” of songs from a given era or genre. Rather, each channel has a clearly defined style and identity that shapes the programming and presentation of the channel in multiple ways. As I mentioned in my *Satellite I* testimony (at paragraph 25 through 30), the creation and maintenance of a particular music channel requires a great deal of planning and resources. Selecting, sequencing and packaging music is a difficult and ongoing task carried out by our music programming specialists. It is not enough just to rotate down an alphabetical or random list of pieces that are within the universe defined by a channel’s format. Instead, trained music programming experts who are deeply familiar with the music bring to bear both scientific and artistic judgment to curate an optimal musical flow and mood on a song-by-song basis. Each Music Programmer also utilizes software called MusicMaster that helps in maximizing the rotation and sequencing of songs for each music channel. While this software assists programmers in managing their music libraries and facilitates the music scheduling process, it is no substitute for the informed judgment of programmers with in-depth knowledge of the genre. Every hour of music scheduled across all Sirius XM music channels is carefully reviewed and specially selected by a Sirius XM programmer before it is then presented to our listeners.

D. Sirius XM’s Direct Licensing Initiative

11. One additional factor that will play into our music selection going forward is Sirius XM’s recent direct licensing initiative. As discussed, the music selected and played across

the Sirius XM platform is curated by our programmers using their professional judgment, as well as proprietary and non-proprietary research data as it applies to a particular channel. Where appropriate, the programmer also takes into account the relationship that the artist and/or their representatives have with Sirius XM. This is sometimes measured by the artist's willingness to participate in our programming with specials like live performances, interviews, guest DJs sessions and other unique opportunities. Going forward, we also will take into account whether the artist's record label has a direct licensing relationship with Sirius XM.

12. Sirius XM has recently entered into a number of direct licenses with more than 60 record companies. I have reviewed the list of companies, and can attest that their catalogs include songs that are already featured on Sirius XM music channels. For example:

- The band LA Guns, whose music is now directly licensed via our agreement with Cleopatra Records, is a mainstay of our Hair Nation (hard rock) channel – we feature thirteen tracks by the band in rotation. Many other classic 80s hair metal tracks regularly played on Hair Nation, including “Turn Up the Radio” by Autograph and “Seventeen” by Winger, are likewise licensed by Cleopatra, whose Deadline Records imprint specializes in the genre.
- The band Local Natives has two songs – “Wide Eyes” and “Airplanes” – that are now covered by Sirius XM’s direct license with Frenchkiss Records. These songs have been playing on Sirius XMU and/or Alt Nation for over a year.
- Sirius XM’s direct license with Sci Fidelity Records covers more than twenty songs by the artist String Cheese Incident. These songs are actively being played on Sirius XM’s Jam On channel.
- Our direct license with PS Classic covers many soundtracks, including Sondheim on Sondheim, A Little Night Music, and Finian’s Rainbow. Currently, more than fifteen songs covered by our license with PS Classic are in active rotation on Sirius XM channels.

13. Our primary objective is to provide our subscribers with the most satisfactory listening experience possible. While the merits of the artist and song always come first, we will favor a directly licensed song when the programmer feels that it will fit just as well as other non-directly licensed tracks.

E. Sirius XM's Top Quality On-Air Talent

14. Sirius XM makes major investments in identifying and developing top quality on-air talent, and our programmers and other creative workers regularly support that talent.³ Sirius XM employs over 200 credible and authentic on-air personalities to present music and timely information about each artist and song played. The relationships that Sirius XM's hosts develop with their audience are strong and valuable, as the listeners come to trust the on-air hosts who "sell" the music they play in a passionate and engaging manner.

15. Sirius XM's 200-plus music programming hosts include well-known musicians like Tom Petty, Bob Dylan, Lou Reed, Nancy Sinatra, Peter Frampton and Steven Van Zandt. In the hip-hop genre, our hosts include DJ Sway, the Aphiliates, DJ Kay Slay, Tony Touch, and Whoo Kid – who might not be household names like Bob Dylan, but are well-known by hip-hop fans. Sirius XM is particularly influential in the electronic dance genre, where the world's most popular DJs host regular shows on Sirius XM's electronic dance channels such as Electric Area and BPM. These DJs include Avicii, David Guetta, Skrillex, Laidback Luke, Tiesto, Armin Van Buuren, Afrojack, Kaskade, Bob Sinclar, Above and Beyond, Steve Aoki, Paul Oakenfold, Ferry Corsten, Josh Wink, Eddie Halliwell, Markus Schulz, Sander Van Doorn, Carl Cox, John Digweed, Robbie Rivera, Benny Benassi, George Acosta, Adam Beyer, Dave Aude, Crystal Method, Pretty Lights, and Nervo. SXM Dir. Ex. 18 contains a full list of celebrity hosts on Sirius XM music channels.

16. Sirius XM listeners recognize that the hosts and programmers behind the stations – people whose taste the listeners have come to know, appreciate, and rely on – have hand-

³ In contrast, the largest radio operator in the United States – Clear Channel Communications – reportedly just cut a significant number of DJs from its payroll. See Brian Stelter, *Clear Channel Cuts DJs Across the Country*, N.Y. Times, Oct. 27, 2011 (attached as SXM Dir. Ex. 17).

selected the music they hear. Curation causes our listeners to take notice of and be open to the songs we select.

F. Sirius XM's Unique Artist Channels And Specialty Programming

17. We also have developed channels and programs in most of the main music categories in conjunction with well-known artists such as Jimmy Buffett (“Radio Margaritaville”), Eminem (“Shade 45”), and Steven Van Zandt (“Underground Garage”). Since I last testified in *Satellite I*, we have developed additional channels with several artists, including Pearl Jam (“Pearl Jam Radio”). Most recently, Sirius XM announced that Ozzy Osbourne will launch his own music channel to be titled “Ozzy’s Boneyard.” SXM Dir. Ex. 19. We also continue to offer channels devoted to the music of Elvis Presley (“Elvis Radio”), Frank Sinatra (“Siriusly Sinatra”), Bruce Springsteen (“E Street Radio”), and the Metropolitan Opera (“Met Opera Radio”), among others.

18. The channels that we have developed with these artists involve exclusive relationships that often entail not just lending their name to a channel, but significant contributions by the artists themselves. For example, Willie Nelson is deeply involved in Willie’s Roadhouse, and has at times asked to review and approve *every artist* whose music is played on his channel. Similarly, Jimmy Buffet also has significant involvement with his channel, Margaritaville, and Eminem’s manager, Paul Rosenberg, has daily interactions with Sirius XM regarding the programming of Eminem’s Shade 45 channel. With respect to Elvis Radio, the Presley estate is in regular contact with Sirius XM and our dedicated channel programmer, who is located at the Elvis headquarters in Memphis, Tennessee.

19. In addition to bringing their creative talents to bear on shaping the overall listening experience, these artists often make available a range of unreleased recordings that listeners otherwise could not access.

20. We also program a variety of specialty shows that play music that listeners would not typically hear elsewhere. For example, on Sirius XM's channel The Spectrum, we have a show called "Nordic Rox" that plays music by Scandinavian artists, "Celtic Crush" plays all Celtic music, and the "Cool Bobby B's Doo Wop Shop" show on our '50s on 5 channel plays exclusively Doo Wop music. A complete list of Sirius XM's 53 specialty programs is attached as SXM Dir. Ex. 20.

III. The Sirius XM Music Channels Compared To Terrestrial Radio: Promotional Benefits Of Wider Variety And More Exposure To New Music

21. In my *Satellite I* testimony, I discussed (at paragraphs 21-23) the fact that free terrestrial radio tends to be limited in its ability to offer anything other than the most mainstream music formats that appeal to adults. For example, a single format focused on playing both new alternative rock and hip-hop will likely appeal to male listeners who are 16 to 24 years-old. In most local radio markets, it is extremely difficult to find enough advertisers interested in that demographic to support a financially viable radio station. As a result, the tendency is for each local market to have several stations with musically conservative formats, supplemented, perhaps, with a few specialty formats supported by institutions such as colleges or local ethnic concentrations. Even in a major urban area such as Washington, D.C., it is difficult for most listeners to receive more than fifteen different music formats, and channel options in much of the country can be far fewer.

A. Terrestrial Radio Has Become Even More Conservative During The Past Five Years

22. Since I last testified, terrestrial radio stations have become even more conservative in embracing a range of music. Because local stations are forced to play music that appeals to relatively broad audiences and fear that listeners will change channels when unfamiliar music is played, they typically will not take the risk of playing songs with potentially narrow appeal and are less willing to introduce new songs into their limited playlists.

23. Some of the omissions forced by the constraints on terrestrial radio are striking, and the omissions have only grown more notable over the past five years. For example, two of the largest local markets in the United States, New York and San Francisco, lack any country music format. Many major markets, including New York, Los Angeles, Chicago, San Francisco, Dallas, Houston, Atlanta, Philadelphia, Washington, D.C. and Boston, have no dance music stations. Several of the largest markets, including Houston, Atlanta, Washington, D.C., and Boston, lack an oldies format.

24. A prime example of the increasingly conservative nature of terrestrial radio is the current state of rock radio. In March 2011, *Rolling Stone* published an article by contributing editor Steve Knopper titled, “Where Did the Rock Hits Go?” The article, which explored the reasons for the decline in rock music sales, attributed part of the decline to changes in radio:

Thanks to important stations switching formats in recent years, a Number One rock-radio hit reaches just 12 million listeners, compared with 81 million for Top 40. This gap is far wider than it was in 2009 than 2006, according to Nielsen SoundScan. And many of the stations that are left have seen their ratings fall.

SXM Dir. Ex. 21. Knopper wrote another article on this continuing trend in November 2011, published in *Rolling Stone* and titled “Rock Radio Takes Another Hit.” He there noted the continued presence of this gap: “[a] Number One rock hit reaches just 13 million listeners,

compared to 138 million for a Number One Top 40 hit.”⁴ SXM Dir. Ex. 22. With terrestrial radio stations changing formats to play more mainstream music, less new rock music is playing on terrestrial radio, and those stations that do play rock music are reaching fewer listeners.

B. Sirius XM Can Provide A Mix of Music That Terrestrial Radio Cannot

25. Currently, Sirius XM is reaching more than 21 million subscribers with its national reach, which, along with our broad channel capacity, allows us to support many different musical channels with distinctive formats. Even where a particular niche genre – bluegrass, for example – may not attract enough listeners in a given city to justify devoting a local station to the format on a full-time basis, the audience for the genre on a national basis is large enough, and our channel capacity great enough, to allow us to devote an entire channel to the genre. SXM Dir. Ex. 24 highlights the 40 music formats on Sirius XM that are generally not available on terrestrial radio.

26. Even where we offer “mainstream” channels comparable to those one would expect to find on the local radio dial (for example, classic rock), our national footprint, subscription model, and lack of advertising make us much less risk-averse than terrestrial radio programmers. Because our music stations are supported by subscription fees, not advertising, we provide listeners with mixes of music that often do not fit with the advertising interests of automobile dealerships, supermarkets, and other businesses that provide the core advertising for terrestrial radio stations. The absence of commercials also translates into a listening experience that is more sustained and satisfying than advertiser-supported radio. See SXM Dir. Ex. 25 at Slide 16 (study conducted by Arbitron Inc., Edison Research, and Scarborough Research

⁴ For another discussion on the decline of rock music radio, *see also* Christine Pawlak, *We Won’t Rock You*, Slate, November 15, 2011, available at, http://mobile.slate.com/articles/arts/culturebox/2011/11/alternative_rock_radio_the_sad_unwarranted_death_of_fm_rock_stations_.html (attached as SXM Dir. Ex. 23).

demonstrates that Sirius XM listeners “love” using the satellite radio in their car more than, *inter alia*, AM/FM radio). The greater variety and listener satisfaction explains why subscribers are willing to purchase Sirius XM radios and pay subscription fees when music can be heard for free on terrestrial radio.

27. Because our music channels are listener-driven (and not advertiser-driven), Sirius XM can dig much deeper into an artist’s music catalog than what is typically heard on terrestrial radio. With 71 music channels available to our subscribers, we can be more specialized and play lesser-known songs and artists that terrestrial radio would typically ignore. This music is then heard by listeners who selected a channel that is specifically committed to playing a variety of music that is wide and deep. For these reasons, listeners are much more likely to discover and purchase music when listening to Sirius XM than they are listening to terrestrial radio.

C. Sirius XM Plays And Promotes More New Music Than Terrestrial Radio

28. Because Sirius XM does not have the same constraints on its playlists as terrestrial radio stations, Sirius XM is able to place emerging songs and artists on our channels long before they might appear on terrestrial radio. For example:

- Sirius XM’s Indie Rock channel, Sirius XMU, first played Amy Winehouse’s “Rehab” on November 6, 2006. In contrast, terrestrial radio stations did not begin playing the song until January 16, 2007. “Rehab” went on to become Winehouse’s most famous song (it won three Grammy Awards in 2008), and her album “Back to Black” was a massive success.
- Sirius XM’s Alt Nation first began playing Foster the People’s song “Pumped Up Kicks” on June 18, 2010, before the song was officially released or even monitored by Mediabase. “Pumped Up Kicks” did not start playing on terrestrial radio until a few months later in August 2010. In 2011, the song became a major hit. On December 9, 2011, Foster the People will be doing a special performance for Sirius XM listeners. In connection with that performance, a member of the band stated: “Alt Nation played our music before any other radio outlet in the country—this show is a way for us to thank the SiriusXM team and do something special for our fans.” SXM Dir. Ex. 26.

29. Terrestrial radio is not exposing listeners to as much new music as does Sirius XM. To demonstrate this, I looked at Mediabase’s “Current and Recurrent vs. Gold Ratios” for twelve Alternative and Active Rock terrestrial radio stations in the Top 10 radio markets in the nation on a particular date (in this case October 19, 2011). SXM Dir. Ex. 27. As used in Mediabase’s calculations, “Current and Recurrent vs. Gold Ratios” compare the amount of Current and Recurrent music to Gold music being played on a particular station. “Current music” is generally music that is currently on a most-played chart for a particular genre. After current music falls off the chart, it is considered “recurrent” for approximately two years. “Gold” music encompasses all music in a particular genre that has been off the chart for more than two years, and hence represents older music. An examination of the ratios demonstrates that Sirius XM’s Alternative Rock station (Alt Nation) and Active Rock station (Octane) play a significantly higher percentage of Current and Recurrent music than other Alternative and Active Rock terrestrial radio stations. SXM Dir. Ex. 27. On average, 65.8% of music played on Octane and Alt Nation is Current and Recurrent music. *Id.* In contrast, the twelve terrestrial radio stations examined only play an average of 35.1% Current and Recurrent music (with the highest Current and Recurrent percentage being 59.9%, and the lowest being 16.1%). *Id.* This data set demonstrates that Sirius XM is exposing listeners to newer Alternative and Active Rock music, while terrestrial radio tends to play older music that the audience is more familiar with.

30. Steve Knopper of *Rolling Stone* has noted the importance of Sirius XM in breaking new bands in the current industry environment: “Some of those [bands] like Mumford and Sons, Vampire Weekend and the Black Keys, thrived by touring relentlessly *and breaking their singles via college stations, SiriusXM programs and ad licensing to clients from Cadillac to Tommy Hilfiger.*” SXM Dir. Ex. 21 (emphasis added).

31. Well-known artists have attested to the fact that Sirius XM (and not terrestrial radio) is where they turn to hear new music. In an interview with widely respected music journalist and filmmaker Cameron Crowe, dated October 12, 2010, pop icon Elton John made the following comments about satellite radio:

Cameron Crowe: We are here on satellite radio now – SIRIUS – which is kind of a seismic event in the way music is heard now. What is your opinion of satellite radio?

Elton John: Thank God. Thank God, you know. It's a savior of music, you know. . . . To have people who love music and love promoting people that haven't been necessarily heard of, but, you know, deserve to be heard. It's fantastic and that is the only way these people are going to get played on the radio.

Crowe: Yeah.

John: They're not gonna be played on the normal format of radio. So, Sirius is a Godsend And nobody I know listens to normal radio. I can't stand it. 'Cause you hear the same 10 songs all the time . . . You listen to [satellite radio].

SXM Dir. Ex. 28.

32. Kirk Hammett, a member of the iconic heavy metal band Metallica, had the following to say:

- “Satellite radio for me now, is what radio used to mean to me in the ‘70s, which played a lot of hard rock. You know, FM radio is still cool now, but they’re not pushing the envelope, not like satellite radio is.” SXM Dir. Ex. 29.
- “It’s great to hear metal bands I wouldn’t otherwise hear, or won’t have the time to hear, or I just don’t know about.” *Id.*
- “Satellite radio, for me, it’s like MTV was, you know, in the ‘80s. Basically, it keeps me informed. I love that.” *Id.*

33. David Draiman, a member of the platinum selling hard rock band Disturbed, said the following about Sirius XM and in particular, the channel Octane, during an interview with Sirius XM in August 2010:

- “Look, I – honestly. I mean, you can ask my girl, you can ask anybody – that’s pretty much all I listen to. . . I listen to Octane, I listen to Hair Nation, I listen to Faction, and every once in a while I listen to a little bit of Liquid Metal.” SXM Dir. Ex. 30.
- “But um, you know, I – why bother with terrestrial radio when it’s become an ipod? you know, or when it has become shuffle? When it’s this jack format nonsense? I really am much more about when I want to listen to something, that’s what I want to listen to. And, if I want to go ahead and take a break from the hard rock or heavy metal, I’ll go ahead and put on other stuff.” *Id.*
- “But when it comes to just serious back-to-back continuity of the kind of music that we want to listen to – even – I can speak for the whole band. We love it, we’re all about it.” *Id.*
- “But you know, for the newer stuff, I kinda count on you guys. We feel very at home you know, it’s a station you can count on to play the types of music you want to hear. And, it reflects our personal universe. You know, and it gives us kinda the lay of the land. In fact, to be perfectly honest with you, sometimes we’ll get ideas for new bands that we may wanna take out on tour from listening to you guys. . . . In all honesty, we’ve gotten some of our first, initial exposure to bands from hearing them on Octane.” *Id.*

34. Successful DJ Robbie Rivera has commented on satellite radio’s impact on dance music: “I think the most important thing that’s happening in America that has really brought dance music into the mainstream is probably the satellite radio shows. They have all those DJs playing their mix shows on Sirius XM. I have a mix show there, but you can listen to dance music all the time. I think that helped a lot because they put dance music all over the place, all over America.” Adam Stewart, *House Legend Robbie Rivera On The State of Music, Deadmau5 And ‘Jersey Shore’* (Apr. 7, 2010), available at, <http://newsroom.mtv.com/2010/04/07/robbie-rivera-deadmau5-jersey-shore/> (attached as SXM Dir. Ex. 34).

35. Newer artists also have recognized the role of Sirius XM in exposing their music to listeners. For example, during an interview in 2010, Elaine Bradley of the alternative band Neon Trees told Sirius XM: “I never assume that somebody has heard us before. So we play a show and then people are like ‘oh you were so great.’ And I was like, ‘oh is this your first time

hearing us?’ And surprisingly, more and more people have said: ‘No.’ And it’s like ‘wow! where’d you hear us?’ And a lot of people say ‘Alt Nation [a Sirius XM channel].’” SXM Dir. Ex. 31.

36. In a mid-2010 interview, Justin Tranter of the band Semi Precious Weapons commented: “I swear that every single time our song is played on Alt Nation I get – whether it is a Facebook message or a Tweet or a text – it’s been really amazing just to see what Alt Nation has done for us.” SXM Dir. Ex. 32.

37. As is apparent from these examples, not only do Sirius XM’s music channels expose listeners to music they otherwise would not hear; they also give emerging artists a unique opportunity to be heard.

D. Sirius XM Music Channels Efficiently Provide Other Promotional Benefits Not Typically Offered By Terrestrial Radio

38. Sirius XM’s marketing reach provides great value to artists that choose to work with us. Because Sirius XM can efficiently reach millions of listeners on a national scale, we provide marketing and promotional opportunities that are generally unique to satellite radio, as described below.

39. **Special Programming:** Sirius XM produces several different artist-specific programs that can promote artists and their music. Sirius XM produces a program called “Artist Confidential,” each episode of which focuses on a particular artist and includes a live performance and interview. A newer initiative involves a “Town Hall” broadcast, which features a particular artist or band and a question-and-answer session with fans. We also work with artists to host Guest DJ sessions that then air on appropriate Sirius XM channels. A list of artists involved in these special programs is attached as SXM Dir. Ex. 35.

40. **On-air Promotion:** Live or recorded announcements will air across multiple Sirius XM music, talk, and sports channels to promote an artist-specific special program or contest, typically revolving around a new album release.

41. **Retail Marketing:** Depending on the artist, we may offer retail marketing opportunities. For example, Sirius XM will include an artist's name and a mutually agreed-upon song title on the retail packaging for one of Sirius XM's radios, as well as on radio screens featured in marketing/advertising materials created with our retailers (Best Buy, RadioShack, etc.). Such marketing materials would include point-of-purchase materials and newspaper circulars. Further, Sirius XM may offer to use an artist's image in Sirius XM retail brochures, channel guides and other marketing materials offered by our retailers and OEMs.

42. **Direct Marketing:** Sirius XM also has the ability to promote an artist by highlighting the artist in the email newsletters sent to Sirius XM subscribers across the country. Sirius XM may offer to dedicate an email blast to Sirius XM subscribers promoting a particular artist's event (for example, an album release, tour or exclusive Sirius XM programming).

43. **Online Promotion:** Sirius XM can promote an artist through its online presence. Sirius XM can dedicate a page on the Sirius XM website to a particular artist. Sirius XM can also promote an artist through its social media presence (including Facebook and Twitter), Sirius XM's YouTube page, and ongoing viral marketing by Sirius XM.

44. **Publicity:** Sirius XM may issue a press release to announce the commencement of a special program created around a particular artist, such as an artist-hosted album preview, live performance or guest DJ session. These press releases are provided to national and local media outlets by the Sirius XM Corporate Communications group.

45. **Contests:** Sirius XM creates contests in connection with featured artists. If an artist is announcing a new tour or a special live performance exclusively for Sirius XM subscribers, Sirius XM can launch a sweepstakes on its platform and extensively promote it on air and online. SXM Dir. Ex. 39 provides examples of how the above-discussed marketing capabilities are offered to artists. Local terrestrial radio stations cannot provide similar promotional opportunities on a national basis.

IV. Record Labels And Artist Management Companies View Satellite Radio As A Powerful Promotional Vehicle

46. As discussed above in Section II, Sirius XM goes to great lengths to develop channel brands, identify meaningful music selections, and develop relationships between on-air talent and Sirius XM listeners. Because of all these factors, record companies and artists recognize the value of our channel brands and that airplay of a song on a Sirius XM channel connects with our listeners in a more engaging manner than airplay on an Internet-delivered music service with generic channel brands that lack hosts and other production elements or on a local terrestrial station that lacks the passion, credibility, and authenticity of a listening experience on Sirius XM. As a result, record labels and artists view satellite radio as a multi-faceted promotional vehicle.

A. Record Labels Aggressively Seek Airplay on Sirius XM Music Channels

47. While there are numerous ways in which consumers are exposed to music, like stories in newspapers and magazines, television appearances, blog postings, and music videos, the simple and universally recognized fact is that airplay on radio has continually proven to be

the biggest driver of record sales.⁵ The music industry understands this well, as evidenced by the major investments record companies make to secure radio airplay for their music.

48. Record companies have large marketing and promotion operations specifically charged with obtaining radio airplay, typically organized with regional operations under national direction. They also use independent record promoters to encourage radio programmers to play their music. Record labels provide Sirius XM and other radio outlets their recordings for free, often weeks before public release, in hopes of generating pre-release demand. The labels recognize that it is incredibly difficult to have success with an album or song without extensive airplay. This is why many of the most influential executives at the major labels tend to be those who have demonstrated an ability to get music played on the radio. In my career in radio programming, culminating in my position in charge of programming for the 71 Sirius XM music channels, the desire of record labels to receive airplay on radio has been a constant reality.

49. Sirius XM is recognized as a leader in music selection. Oftentimes, music first played on Sirius XM music channels ends up on the playlists of more mainstream terrestrial radio stations. This has resulted in record labels citing airplay of their artists and works on Sirius XM as a reason why other programming outlets should expose these work and artists. Record companies similarly often mention airplay on Sirius XM in their advertising as a means of promoting individual artists and songs. Examples of these advertisements are attached as SXM Dir. Ex. 36.

50. Sirius XM also receives support from artist management companies that recognize the promotional value of airplay on Sirius XM. As a result, Sirius XM has built strong

⁵ See, e.g., James N. Dertouzos, *Radio Airplay and the Record Industry: An Economic Analysis*, (June 2008), attached as SXM Dir. Ex. 37; Edison Research, *The National Record Buyers Survey* (2001), attached as SXM Dir. Ex. 38.

relationships with well-known management companies such as Red Light Management (Dave Matthews Band, Tim McGraw), Q Prime (Red Hot Chili Peppers, Muse), and Monotone Management (Vampire Weekend, Foster the People).

51. In recognition of the promotional benefits of airtime on Sirius XM's channels, artists and/or their record labels are often willing to grant waivers of certain of the Section 114 statutory license restrictions and in particular, a waiver of the number of times Sirius XM can play a song in a given time period, in order to allow Sirius XM programmers to highlight more of the music from a particular artist or new album on our channels.⁶ For example:

- In April 2011, Warner Brothers agreed to a waiver regarding certain music of Metallica from April 9, 2011 through September 7, 2011 for use on a full-time channel dedicated principally to the music of Metallica. SXM Dir. Ex. 40. The waiver permitted Sirius XM to play certain songs “without restriction as to the number of songs from the same phonorecord or by the same artist that may be played in a certain time period.” *Id.* Additionally, Sirius XM was permitted to “promote and publicize, through the use of any means,” the Metallica songs covered by the waiver. *Id.*
- In November 2009, Warner Brothers agreed to a waiver regarding certain music of Tom Petty. SXM Dir. Ex. 40. The waiver allowed Sirius XM to play music from “The Live Anthology” without restriction as to airplay from November 18, 2009 through December 31, 2009.
- In September 2010, Universal Music Group granted Sirius XM the right to play certain of Elton John’s songs from October 14, 2010 through October 22, 2010 in connection with a feature to be broadcast on Sirius XM. SXM Dir. Ex. 40. The waiver permitted Sirius XM to play certain songs “without restriction as to the number of songs . . . in a certain time period.” *Id.* Additionally, Sirius XM was permitted to promote the music, “through the use of any means,” including “announcing the dates and times of transmissions.” *Id.*

Sirius XM has received hundreds of such waivers in connection with recordings by artists including the following:

⁶ These waivers relate to the “sound recording performance complement,” which limits the number of tracks that can be played from a particular artist or album in a three-hour period.

- Katy Perry (Capitol Records)
- Eminem (Interscope Records)
- Bon Jovi (Island Def Jam Music Group)
- Vampire Weekend (XL Recordings)
- Janet Jackson (EMI Music North Americas)
- Rihanna (Island Def Jam)

SXM Dir. Ex. 40. Record companies obviously grant these waivers because they recognize the value in airplay on Sirius XM's music channels, and the ability of such airplay to generate sales.

52. Artists are often interviewed by Sirius XM personalities or perform live in our studios. These performances and interviews provide another promotional opportunity for artists. In one recent example, on June 16, 2011, Aretha Franklin recorded a track-by-track preview of her new album and sat down for an interview with Sirius XM. In connection with that appearance, Franklin granted Sirius XM the right to use her name, image, and likeness and any transcripts, audio, video, photographs, and other recordings of the interview, performance, and/or appearance. SXM Dir. Ex. 41 We have received hundreds of similar such releases from artists including Patti Smith, Carrie Underwood, Colbie Callait, Queen Latifah, Jack Johnson, Lady Antebellum, and Kings of Leon. *Id.*

B. Record Labels Recognize That Beyond Airplay, Sirius XM Music Channels Offer Unique Promotional Opportunities Through Artist-Specific Channels And “Pop-up” Channels

53. Beyond regular airplay on our music platform, there are numerous other promotional benefits that artists and record labels enjoy through arrangements with Sirius XM.

54. Record companies typically focus their promotional efforts on new music, rather than their existing catalog. As a result, a vast amount of older music remains unexposed, and thus effectively unavailable, to many listeners. As discussed above in Section II, we have

developed channels and programs in most of the main music categories in conjunction with well-known artists such as Elvis Presley and Bruce Springsteen, which focus exclusively on the music of Presley (Elvis Radio) and Springsteen (E Street Radio). Similarly, Jimmy Buffett's Radio Margaritaville plays the music of several artists with older catalogs of music, including Jimmy Buffett, Bob Marley, Paul Simon, Little Feat, The Beach Boys, and Santana. These artist-themed channels provide a unique opportunity to record labels to promote music that otherwise would have very little opportunity for new exposure to listeners.

55. Notably, and evidencing the promotional value artists see in this experience, Sirius XM does not need to pay significant amounts to these artists to use their names and likeness in conjunction with our artist-themed channels. While we made some payments at the start of some of these relationships, artist have, by agreement, in most cases been reduced significantly or eliminated.⁷

56. Record labels and artists often approach Sirius XM with an expressed interest in creating an artist-themed “pop-up” channel (these temporary channels are distinct from our long-term artist-themed channels such as Elvis Radio and Siriusly Sinatra). These limited-engagement artist channels focus exclusively on the named artist’s catalog of music, and provide a record label with the opportunity to generate sales in an older catalog of music that may not otherwise receive a lot of promotional exposure. Temporary artist channels have included arrangements with George Strait and the estate of Miles Davis, among others.

⁷ [REDACTED]

57. Similarly, there is also significant interest from record labels and artists to work with Sirius XM to develop artist-themed “pop-up” channels that do not exclusively play the named artist’s music. While these short-term channels do not exclusively play a particular artist’s music, they do have a significant focus on a particular artist’s catalog of music.

Examples of these types of artist-branded “pop-up” channels include:

- Coldplay (EMI/Capitol)
- Metallica (Warner Bros. Records)
- Linkin Park (Warner Bros. Records)
- R.E.M. (Warner Bros. Music)
- Depeche Mode (Warner Bros. Music)
- Sheryl Crow (Universal Music Group)
- Weezer (Universal Music Group)
- Duran Duran (Sony/BMG)
- Dave Matthews Band (RCA)
- Michael Jackson (Epic)
- AC/DC (Columbia)

58. Additionally, record labels with artist catalogs from the 60s and 70s have approached Sirius XM seeking ways to generate sales in these older catalogs of music, which receive play on classic rock and oldies radio stations but no focused promotional attention. In response, we have created temporary “pop-up” channels with artists like Elton John and Simon and Garfunkel.

V. Airplay On Sirius XM Leads To Increased Record Sales

59. Going back to the birth of satellite radio, artists, their managers, and record labels have always recognized that increased record sales can be attributed to airplay on Sirius and XM

channels (and now Sirius XM channels). Time and again during my tenure at Sirius and now Sirius XM, airplay of a particular song on Sirius XM’s music channels has led directly – and demonstrably – to increased sales volumes of those songs and the albums on which they appear.

A. Record Labels Frequently Acknowledge Sirius XM’s Positive Impact On Sales

60. Over the past several years, artists and record labels have increasingly become vocal in acknowledging the impact that exposure of their works on Sirius XM has had on digital sales of those works. A sampling of these communications is provided below.

Bob Schneider’s Album “A Perfect Day”

61. On May 2, 2011, [REDACTED] emailed programming executives at Sirius XM to report on the success an artist named Bob Schneider had attained by virtue of exposure on Sirius XM. While Schneider is popular in Austin, Texas, he had received only limited national exposure until we began playing his music. Reporting on Schneider’s “BEST scan week EVER,” [REDACTED] commented: “[t]he sales are pretty spread out around the nation *which I am attributing to your airplay.*” SXM Dir. Ex. 42 (emphasis added).

“Bounce” By Emphatic

62. On May 20, 2011, [REDACTED] emailed Sirius XM regarding increased sales for a song titled “Bounce” by the band Emphatic. [REDACTED] reported a “4 week trend on ‘Bounce’ = 285, 319, 328, **854!** Up 160% this week. Seems to coincide[] pretty well with your airplay. Other stations just starting to play. Just wanted to say thanks for the HUGE support on ‘bounce by Emphatic!!!’” SXM Dir. Ex. 43 (emphasis in original).

“I Am Doing Alright” By Jacob Lyda

63. On June 8, 2011, [REDACTED] emailed Mark Sebastian, Senior Director of Country Music Programming at Sirius XM (known

as “John Marks” in the industry), regarding the artist Jacob Lyda’s song “I’m Doing Alright.” He stated: “You guys re-engaged and my single sales doubled this week! It’s rare that I can directly correlate my sales like that. You’re the best!” SXM Dir. Ex. 44.

“Ultragigantor” By Red Line Chemistry

64. During the summer of 2011, the Octane and Faction channels began playing the band Red Line Chemistry’s song “Ultragigantor.” On August 3, 2011, [REDACTED] [REDACTED] emailed Jose Mangin (Music Programmer for Octane) and reported that since Sirius XM began playing “Ultragigantor,” “we have seen an explosion of sales we know it’s attributed to you since we see the reaction coming from non radio markets (album sales up 25%, single sales up 60% this week alone!) So thank you!” SXM Dir. Ex. 45.

Daniel Glass, President and CEO of Glassnote Records

65. Daniel Glass, President and CEO of Glassnote Records, has recognized the promotional aspect of Sirius XM’s music channels. In the May 2011 issue of industry trade magazine *Hits*, Glass stated “Sirius XM continues to grow and support meaningful music reaching more people than ever and we feel the impact on sales.” SXM Dir. Ex. 46.

B. Industry Sales Data Establishes That Sirius XM Promotes Sales

66. In addition to testimonials of the sort set forth above, since the *Satellite I* proceeding, we have tracked industry data from sources such as SoundScan (for sales data) and Mediabase (for airplay data) which lend further support for the proposition that airplay on Sirius XM promotes sales. I again provide several examples of this phenomenon.

“Colours” By Grouplove

67. During the first half of 2011, Alt Nation began playing the song “Colours” by the new artist Grouplove. On May 12, 2011, [REDACTED]

[REDACTED] emailed Jeff Regan, Music Programmer for Alt Nation, to report on digital single sales for Coulors. [REDACTED] wrote: “[D]igital single sales on ‘Colours’ were up again from 1,049 to 1,195. *Pretty great and because of Alt Nation. That is the only explanation.*” SXM Dir. Ex. 47 (emphasis added). [REDACTED] wrote again to various members of the Sirius XM Music Programming team on June 13, 2011: “Since you started playing Grouplove ‘Colours’ on Alt Nation we have seen our digital single sales go way up, *it can [be] directly attributed to your airplay.* Our sales went from 200 singles a week to 800 to around 1,000-1,200 a week since you started playing it.” *Id.* (emphasis added). Asking the Sirius XM team to attend the band’s launch in New York City [REDACTED] continued that “I think [it] would [be] important for you to attend, your early airplay to sales is certainly our focal point in our planning meetings on the band and very inspiring to us in our launch. We are so excited to have you leading the charge.” *Id.*

68. Industry sales data corroborates Alt Nation’s positive effect on sales of Colours. Mediabase data establishes that Alt Nation first played Colours on April 18, 2011. SXM Dir. Ex. 48. Alt Nation was not the first radio station to play the song, but the only radio station to give it more than ten spins per month prior to that time was WSUN-FM in Tampa, Florida. *Id.* For the week ending April 17, 2011 (the week before Alt Nation started playing the song), SoundScan data shows that there were a total of only 221 total digital sales of the work. SXM Dir. Ex. 49. During the second half of April (beginning on April 18, 2011), Alt Nation played Colours 69 times. SXM Dir. Ex. 48. During the first week Alt Nation played Colours (the week ending April 24, 2011), digital sales jumped to 773 – a 250% increase from the week prior. SXM Dir. Ex. 49. The following week (ending May 1, 2011), digital sales jumped again to 1,049 – a 36% increase from the prior week. *Id.* During the third week of airplay on Alt Nation (the week

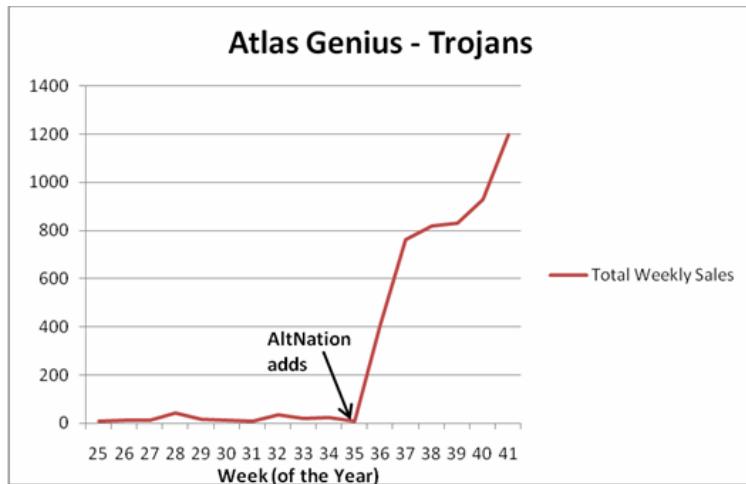
ending May 8, 2011), digital sales jumped from 1,049 to 1,195 (a 14% increase). *Id.* While WSUN-FM in Tampa continued to play the song and one other station in Little Rock, Arkansas gave the record some spins, no other radio stations were giving significant airplay to Colours during April and May 2011. SXM Dir. Ex. 48. This surge in record sales can only be attributed to Alt Nation’s airplay.

“Trojans” By Atlas Genius

69. In September 2011, Sirius XM’s Alt Nation was the only music station in America playing the music of Australian band Atlas Genius. The lead singer of the band, Keith Jeffery, wrote to Jeff Regan, Music Programmer for Alt Nation, “[p]eople from MTV and other management groups have contacted us after hearing Trojans on Alt Nation, and we’ve picked up a lot of fans.” SXM Dir. Ex. 50. Jeffery wrote to Regan again on September 29, 2011: “Just want to thank you for the continued support. We’ve been getting a crazy amount of traffic.” *Id.*

70. SoundScan and Mediabase data again demonstrate that Alt Nation’s airplay of this work had a significant impact on sales. According to Mediabase, Alt Nation first played Trojans on September 13, 2011, at which time it was the *only* radio station in the country playing the song. SXM Dir. Ex. 51. As of September 11, 2011, there were 405 digital downloads of the song. SXM Dir. Ex. 52. From September 13, 2011 through the end of September, Sirius XM’s Alt Nation played the record 88 times. SXM Dir. Ex. 51. For the week ending September 18, 2011 – representing the first week of airplay on Alt Nation – digital sales of “Trojans” jumped 88% (to 761). SXM Dir. Ex. 52. By October 2, 2011, as Alt Nation continued to feature the song, digital sales had risen even further – to a total of 829. *Id.* For the week ending October 9, 2011, digital sales rose 12% to 930. For the week ending October 16, 2011, sales continued to

rise another 29% (to 1199). *Id.* The table below illustrates the dramatic increase in digital sales of Trojans following Alt Nation’s addition of the song to its playlist.



The correlation between Alt Nation’s airplay of the song during September and October 2011 and the increase in sales of Trojans during this time period seems indisputable.

“Dancing Shoes” By Green River Ordinance

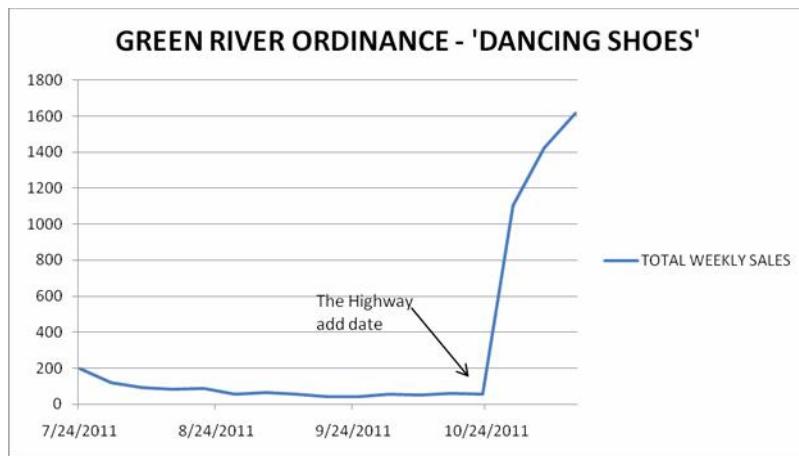
71. In November 2011, Green River Ordinance sent Sirius XM a “thank you” video message. The band stated:

Thank you so much for playing “Dancing Shoes.” It’s been crazy, just the response and the people have been hearing our music for the first time . . . thanks so much for playing the song and just taking a chance on new music . . . that’s kinda one of the coolest things that has ever happened to our band and so people are lovin’ it, a bunch of our fans are listening and just new people who have never heard of the Green River Ordinance . . . so you guys are the reason for that and we just wanted to say thanks. . .

SXM Dir. Ex. 33.

72. Industry data corroborate that The Highway’s airplay of this work had a considerable impact on sales. On October 24, 2011, Sirius XM’s The Highway became the first and only radio station to play Green River Ordinance’s song “Dancing Shoes.” SXM Dir. Ex. 53. Prior to the song’s addition to The Highway’s playlist, sales of the song were very weak.

SXM Dir. Ex. 54 The week after the song began receiving airplay (the week ending October 30, 2011) on The Highway, sales skyrocketed from 58 to 1,105 digital sales – the SoundScan data notes this increase as a 999% change from the previous week. *Id.* This trend continued during its second week of airplay on Sirius XM, as sales increased 29%. *Id.* During its third week of airplay on The Highway (the week ending November 13, 2011), sales increased again by 13%. *Id.* The dramatic increase in sales that occurred when The Highway added the song to its playlist is demonstrated in the chart below.

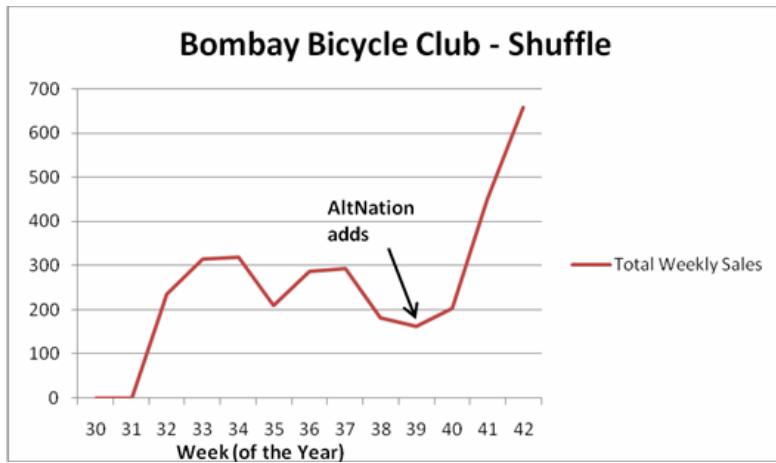


The direct correlation between airplay on The Highway and the dramatic increase in digital sales of Dancing Shoes seems apparent.

“Shuffle” By Bombay Bicycle Club

73. Another recent band that had breakout success after getting its song played on Sirius XM’s music channels is the Bombay Bicycle Club. Sirius XM’s Alt Nation began playing Bombay Bicycle Club’s song “Shuffle” on October 6, 2011. SXM Dir. Ex. 55. In the weeks prior to getting played on Alt Nation, sales of Shuffle were demonstrating a declining trend. SXM Dir. Ex. 56. During the first week of airplay on Alt Nation (week ending October 9, 2011), sales of the song improved by 25%. *Id.* During the second week of airplay on Alt Nation (week

ending October 16, 2011), sales of the song increased even more – this time by 122%. *Id.* The table below illustrates this trend and the impact of Alt Nation’s addition of it to its playlist.



VI. Conclusion

74. Sirius XM offers 71 commercial-free music channels in a wide variety of music genres. Each of these originally-produced radio channels is hand-crafted by our team of programming and production experts and are presented to more than 21 million subscribers a week. The combination of our nationally-branded music channels, our stable of talented DJs and artist partners, along with the vast array of specialty programming and unique promotional opportunities offered, creates tremendous value for the artists we play and their respective record labels and management companies. This is evidenced by the direct feedback we regularly receive from artists, their record companies, and artist managers, as well as by the airplay data and highly correlated music sales data illustrated in my testimony.

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

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

DECLARATION OF STEVEN BLATTER

I, Steven Blatter, 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 28th day of November 2011 at New York, New York.



Steven Blatter

Capital Reporting Company
RESTRICTED Subject to Protective Order in Docket No. 2011-1 CRB PSS-Satellite II

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

UNITED STATES COPYRIGHT ROYALTY JUDGES

WASHINGTON, D.C.

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In the Matter of:)
Determination of Rates and Terms) Docket No. 2011-1
for Preexisting Subscription) CRB PSS/Satellite II
Services and Satellite Digital)
Audio Radio Services) Volume IV
) Pgs. 957 - 1304
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Washington, D.C.

Friday, June 8, 2012

The following pages constitute the
continued proceedings held in the above-captioned
matter, held at the Library of Congress, Madison
Building, 101 Independence Avenue, Southeast,
Washington, D.C., before Cindy L. Sebo,
RMR/CRR/CSR/RPR/CCR/RSA of Capital Reporting Company,
a Notary Public in and for the District of Columbia,
beginning at approximately 9:39 a.m.

Capital Reporting Company

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

<p align="right">958</p> <p>1 A P P E A R A N C E S 2 Copyright Royalty Tribunal: 3 CHIEF JUDGE SUZANNE M. BARNETT 4 JUDGE WILLIAM ROBERTS 5 JUDGE STANLEY C. WISNIEWSKI 6 On behalf of SiriusXM: 7 R. BRUCE RICH, ESQUIRE 8 TODD LARSON, ESQUIRE 9 MIRANDA S. SCHILLER, ESQUIRE 10 RANDI W. SINGER, ESQUIRE 11 SABRINA A. PERELMAN, ESQUIRE 12 Weil, Gotshal & Manges LLP 13 757 Fifth Avenue 14 New York, New York 10153-0119 15 212.310.8170 16 bruce.rich@weil.com 17 todd.larson@weil.com 18 miranda.schiller@weil.com 19 randi.singer@weil.com 20 sabrina.perelman@weil.com 21 22</p>	<p align="right">960</p> <p>1 A P P E A R A N C E S (Continued): 2 On behalf of Music Choice: 3 PAUL M. FAKLER, ESQUIRE 4 MATTHEW TROKENHEIM, ESQUIRE 5 Arent Fox LLP 6 1675 Broadway 7 New York, New York 10019 8 212.457.5445 9 fakler.paul@arentfox.com 10 trokenheim.matthew@arentfox.com 11 12 13 14 15 16 17 18 19 20 21 22</p>
<p align="right">959</p> <p>1 A P P E A R A N C E S (Continued): 2 On behalf of SoundExchange: 3 DAVID A. HANDZO, ESQUIRE 4 MICHAEL B. DESANTIS, ESQUIRE 5 JARED O. FREEDMAN, ESQUIRE 6 GARRETT A. LEVIN, ESQUIRE 7 DAVID Z. MOSKOWITZ, ESQUIRE 8 Jenner & Block 9 1099 New York Avenue, Northwest 10 Suite 900p 11 Washington, D.C. 20001-4412 12 202.639.6085 13 dhandzo@jenner.com 14 mdesantis@jenner.com 15 jfreedman@jenner.com 16 glevin@jenner.com 17 dmoskowitz@jenner.com 18 19 20 21 22</p>	<p align="right">961</p> <p>1 C O N T E N T S 2 WITNESSES: 3 STEVEN G. BLATTER DIRECT CROSS REDIRECT 4 By Ms. Perelman 965 ---- 1034 5 By Mr. Moskowitz ---- 1004 --- 6 7 WILLIAM ROSENBLATT EXAMINATION DIRECT CROSS REDIRECT 8 ON QUALIFICATIONS 9 By Mr. Larson 1038 1050 ---- 1189 10 By Mr. Levin ---- ---- 1099 ---- 11 DAVID PAUL STOWELL EXAMINATION DIRECT CROSS REDIRECT 12 ON QUALIFICATIONS 13 By Ms. Schiller 1198 1202 ---- ---- 14 By Mr. Freedman ---- ---- 1245 ---- 15 16 SIRIUSXM TRIAL EXHIBITS: * MARKED ADMITTED 17 15 966 ---- 18 16 976 ---- 19 17 1038 ---- 20 18 1107 1210 21 22</p>

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<p>1 C O N T E N T S (Continued)</p> <p>2 SOUNDEXCHANGE TRIAL EXHIBITS: * MARKED ADMITTED</p> <p>3 25 1005 ----</p> <p>4 26 1007 ----</p> <p>5 27 1010 ----</p> <p>6 28 1010 ----</p> <p>7 29 1023 ----</p> <p>8 30 1105 1107</p> <p>9 31 1109 1110</p> <p>10 32 1112 1113</p> <p>11 33 1117 1118</p> <p>12 34 1123 1124</p> <p>13 35 1128 1129</p> <p>14 36 1132 ----</p> <p>15 37 1137 1139</p> <p>16 38 1138 1139</p> <p>17 39 1140 1142</p> <p>18 40 1144 1144</p> <p>19 41 1155 1156</p> <p>20 42 1159 1160</p> <p>21 43 1162 1163</p> <p>22</p>		<p>1 P R O C E E D I N G S</p> <p>2 CHIEF JUDGE BARNETT: Good morning.</p> <p>3 Please be seated. Thank you for your</p> <p>4 patience.</p> <p>5 I want to give everyone a heads up</p> <p>6 about the schedule on Monday. We will be recessing</p> <p>7 at 3:45 on Monday. And we've checked the schedule,</p> <p>8 and we believe that that time is still available on</p> <p>9 the 19th.</p> <p>10 But if you have witness scheduling</p> <p>11 issues, I wanted you to be aware we will finish up</p> <p>12 at 3:45 on Monday, and we're not going to adjust</p> <p>13 the daily schedule any other day to accommodate for</p> <p>14 that.</p> <p>15 Okay?</p> <p>16 MR. RICH: Are you ready for our next</p> <p>17 witness?</p> <p>18 CHIEF JUDGE BARNETT: Ready if you are.</p> <p>19 MR. RICH: SiriusXM calls Steve Blatter</p> <p>20 to the stand. And Mr. Blatter will be examined by</p> <p>21 my colleague, Ms. Perelman.</p> <p>22</p>	
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<p>1 C O N T E N T S (Continued)</p> <p>2 SOUNDEXCHANGE TRIAL EXHIBITS: * MARKED ADMITTED</p> <p>3 44 1164 1165</p> <p>4 45 1169 ----</p> <p>5 46 1251 ----</p> <p>6</p> <p>7</p> <p>8</p> <p>9 (* Exhibits Retained by Counsel.)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>		<p>1 WHEREUPON,</p> <p>2 STEVEN G. BLATTER</p> <p>3 called as a witness, and having been first duly</p> <p>4 sworn, was examined and testified as follows:</p> <p>5 CHIEF JUDGE BARNETT: Ms. Perelman.</p> <p>6 MS. PERELMAN: Good morning,</p> <p>7 Your Honors.</p> <p>8</p> <p>9 DIRECT EXAMINATION</p> <p>10</p> <p>11 BY MS. PERELMAN:</p> <p>12 Q. Good morning, Mr. Blatter.</p> <p>13 A. Good morning.</p> <p>14 Q. Mr. Blatter, could you please tell us</p> <p>15 by whom are you currently employed?</p> <p>16 A. SiriusXM Radio.</p> <p>17 Q. How long have you worked there?</p> <p>18 A. Approximately nine years now.</p> <p>19 Q. And since -- have you worked there</p> <p>20 since the merger and also for some time before the</p> <p>21 merger between Sirius and XM?</p> <p>22 A. Yes. I joined Sirius Radio in 2003,</p>	

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<p style="text-align: right;">966</p> <p>1 the merger was 2008, and I've been with the company 2 since. 3 Q. Prior to join Sirius, how long have you 4 been involved in the radio business? 5 A. I've been in radio for 25 years now. 6 Q. What is your current position at 7 SiriusXM? 8 A. I'm the senior vice president and 9 general manager of music programming. 10 Q. And what are your main responsibilities 11 as senior vice president and general manager of 12 music programming? 13 A. I oversee all of our commercial-free 14 music programming, including the 285 employees that 15 are responsible for the curation and presentation 16 of our channels to our 22 million subscribers. 17 Q. Mr. Blatter, you should have in front 18 of you and the Judges also have what has been 19 marked for identification as SiriusXM 20 Trial Exhibit 15. 21 (SiriusXM Trial Exhibit Number 15 was 22 marked for identification purposes.)</p>	<p style="text-align: right;">968</p> <p>1 November. It's on Page -- the top -- the top of 2 Page 15. 3 There's a reference to an exhibit that 4 should have been Exhibit 30. It was Exhibit 29. 5 So it's been corrected in the version 6 that Your Honors have, and both parties consent to 7 that correction. 8 So with that correction included, I 9 move that the written direct testimony of 10 Steven Blatter, together with the accompanying 11 exhibits, which are Exhibits 1 and then 17 12 through 56, be moved into evidence subject to the 13 protective order. 14 MR. MOSKOWITZ: Good morning, 15 Your Honors. My name is David Moskowitz 16 representing SoundExchange. 17 We have no objection to the -- to the 18 majority of these exhibits, but we do object to 19 Exhibits 25, 37 and 38 on the grounds that these 20 are -- essentially, this witness is a fact witness. 21 These are academic studies and surveys. He has no 22 knowledge or experience in these areas to talk</p>
<p style="text-align: right;">967</p> <p>1 BY MS. PERELMAN: 2 Q. Do you see that? 3 A. Yes. 4 Q. Do you recognize this document as your 5 written direct testimony in this proceeding? 6 A. Yes, I do. 7 Q. If you could turn to the last page 8 behind the first tab. 9 Do you recognize that as your 10 signature? 11 A. Yes, I do. 12 Q. And are the attached exhibits the 13 documents and other materials that you reference in 14 your written direct testimony as being 15 corroborative or illustrative of the material you 16 discuss in that document? 17 A. Yes. 18 MS. PERELMAN: Your Honors, for the 19 record, the version of SiriusXM Exhibit -- 20 Trial Exhibit 15 that we've handed up contains one 21 small correction that we've exchanged with counsel 22 as -- as compared to the version that was filed in</p>	<p style="text-align: right;">969</p> <p>1 about these studies. 2 Moreover, his testimony is not really 3 being used to even analyze or illustrate. If 4 you -- for example, the Slide 16 on Exhibit 25 is 5 cited in the testimony as explaining -- if you look 6 at Slide 16 on that, it shows, How much do you 7 enjoy using satellite radio in your car? And it's 8 cited in the testimony as saying that SiriusXM 9 users love commercial-free music. 10 In any event, with these studies, we 11 have no ability to cross-examine the witness other 12 than to -- as what is stated specifically in these 13 studies. But we can't examine the methodologies 14 with the witness or anything along those lines. We 15 think they should not be admitted. 16 JUDGE WISNIEWSKI: Mr. Moskowitz, could 17 you repeat which ones? 18 MR. MOSKOWITZ: Sure. 19 These are 25, 37 and 38. 20 JUDGE WISNIEWSKI: Thank you. 21 MR. MOSKOWITZ: And we have a few 22 additional objections as well.</p>

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1 CHIEF JUDGE BARNETT: Let's deal with 2 the exhibits. 3 Ms. Perelman, with regard to 25, 37 and 4 38, are those being offered for the truth of the 5 matter? 6 MS. PERELMAN: They're not being 7 offered for the truth of the matter, Your Honor. 8 As we discussed the other day with 9 Mr. Meyer, these exhibits could have just been 10 cited instead of attached. They're added for -- 11 for the Judges' convenience, and they're merely 12 illustrative of the kinds of things that 13 Mr. Blatter testifies to from his own personal 14 knowledge based on his 25 years of experience. 15 And, you know, the rules of evidence in 16 this proceeding is slightly more flexible than in 17 the -- in the -- under the Federal Rules of 18 Evidence. 19 Under 37 CFR 351.10(a), anything that's 20 relevant and not unduly repetitious or privileged 21 shall be admissible, and hearsay should be 22 admissible when it's appropriate.	970	972
971		973

1 And we think it's appropriate in this
2 instance not for the truth, but simply just to
3 supplement Mr. Blatter's personal knowledge.

4 JUDGE ROBERTS: Ms. Perelman, where in
5 Mr. Blatter's testimony are these exhibits
6 referenced?

7 MS. PERELMAN: Sure.
8 Exhibit 25, which is the Arbitron
9 research, is referenced in Paragraph 26 on Page 11.
10 The cite is at the bottom of Page 11 and goes on to
11 the top of Page 12.

12 JUDGE ROBERTS: Next.

13 MS. PERELMAN: Exhibit 37 is cited at
14 Paragraph 47 on Page -- in Footnote 5 on Page 19.
15 And 38 is in the same footnote.

16 JUDGE ROBERTS: What about that,
17 Mr. Moskowitz? They're providing these articles so
18 we don't have to go out and hunt them down.

19 MR. MOSKOWITZ: If this were an expert
20 witness, I think that there's no problem here, but
21 he is testifying based on his personal knowledge,
22 and it's not clear how his personal knowledge is at

1 all affected by these academic studies and surveys
2 and how we would effectively be able to
3 cross-examine him on those surveys and why they
4 should be in evidence.
5 If SiriusXM wants these to be in
6 evidence, they should provide an expert to give us
7 a study so that we can actually examine those
8 studies rather than a fact witness who doesn't know
9 anything about them.
10 JUDGE ROBERTS: Counsel said they're
11 not being offered for the truth of the assertion;
12 they're being offered as backing up what he has to
13 say about them.
14 MR. MOSKOWITZ: It does not make any
15 sense that they are not being offered for the truth
16 of the matter asserted. If the whole point is this
17 is backing up what he's saying, they are being
18 completely offered for the truth of the matter
19 asserted.
20 His assertion here is that it is
21 universally recognized -- the exact statement --
22 JUDGE ROBERTS: The simple and

1 universally recognized fact is that airplay on
2 radio has continually proven to be the biggest
3 driver of record sales.
4 MR. MOSKOWITZ: If a witness has
5 personal knowledge of this, he can testify to that,
6 but he's just using these as factually accurate to
7 say this is the facts and that's what I'm saying to
8 be the fact.
9 CHIEF JUDGE BARNETT: Well, I think
10 what he's saying is that I took certain actions
11 based upon my belief and my belief is based upon
12 this study, which --
13 MR. MOSKOWITZ: If his belief is based
14 on this study, then that's being offered for the
15 truth.
16 CHIEF JUDGE BARNETT: No, I don't think
17 so.
18 JUDGE ROBERTS: He's saying -- I read
19 this somewhere -- here's where I read it --
20 CHIEF JUDGE BARNETT: I'll tell you
21 what. The objection is overruled to those.
22 Go ahead. What's your other objection?

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<p style="text-align: right;">974</p> <p>1 MR. MOSKOWITZ: We also object to 2 Exhibit 36, which are purported to be a bunch of 3 advertisements that we don't know where they came 4 from.</p> <p>5 They're clearly altered advertisements. 6 The things have been highlighted by SiriusXM. 7 They're not the originals. They're just altered 8 advertisements from unknown sources.</p> <p>9 CHIEF JUDGE BARNETT: I'm sorry. 10 That's 36?</p> <p>11 Ms. Perelman?</p> <p>12 MS. PERELMAN: So to the extent that 13 the -- that the objection is as to authentication, 14 we can discuss with the witness where these were 15 pulled from and by whom.</p> <p>16 The alterations that Mr. Moskowitz 17 points are simply yellow highlights to point out in 18 sort of a cluttered advertisement where 19 specifically we're pointing -- the Judges and the 20 parties to what we're citing here.</p> <p>21 And these -- again, to the extent it's 22 a substantive evidentiary objection, these are</p>	<p style="text-align: right;">976</p> <p>1 that, we'll make sure not to use it on the open 2 record.</p> <p>3 CHIEF JUDGE BARNETT: The version that 4 you gave us this morning, does that include the 5 gray lined --</p> <p>6 MS. PERELMAN: It's grayed out.</p> <p>7 CHIEF JUDGE BARNETT: Okay. Thank you. 8 So 15 is admitted subject to the 9 restrictions.</p> <p>10 MS. PERELMAN: Thank you. 11 Also, just for the record, we have 12 marked but we won't distribute today what's been 13 marked as Exhibit 16, which is Mr. Blatter's 14 previously designated testimony from Satellite I, 15 which we will proffer on Monday along with 16 everything else pursuant to your order from 17 yesterday.</p> <p>18 CHIEF JUDGE BARNETT: Thank you. 19 (SiriusXM Trial Exhibit Number 16 was 20 marked for identification purposes.)</p> <p>21 BY MS. PERELMAN: 22 Q. Mr. Blatter, now that all those</p>
<p style="text-align: right;">975</p> <p>1 certainly not offered for their truth, but just for 2 the facts that these advertisements are out there 3 and to show the state of mind of the labels who put 4 them out.</p> <p>5 JUDGE ROBERTS: Where does Mr. Blatter 6 reference this in his testimony?</p> <p>7 MS. PERELMAN: This is referenced in 8 Paragraph 49 on Page 19.</p> <p>9 CHIEF JUDGE BARNETT: The objection to 10 that one is also overruled.</p> <p>11 So Exhibit 15 is admitted.</p> <p>12 (SiriusXM Trial Exhibit Number 15 was 13 admitted into evidence.)</p> <p>14 MS. PERELMAN: Thank you, Your Honor.</p> <p>15 Just a quick note. When we filed 16 what's now Exhibit 15 in evidence in November, 17 there were certain portions of it that were viewed 18 as restricted and sensitive information that were 19 grayed out and that a motion as to those portions 20 under the protective order has already been 21 granted.</p> <p>22 To the extent we need to address any of</p>	<p style="text-align: right;">977</p> <p>1 technicalities are out of the way, can you describe 2 for us how many full-time, commercial-free music 3 channels does SiriusXM offer?</p> <p>4 A. So we currently offer approximately 70 5 commercial-free music channels.</p> <p>6 Q. How does SiriusXM's music lineup 7 compare to what's available on terrestrial radio?</p> <p>8 A. So compared to terrestrial radio, there 9 are a few differences. First is we offer more 10 channels. So in a typical terrestrial market 11 across America, there's anywhere from approximately 12 five to maybe 15 music channels that are made 13 available in that local terrestrial market.</p> <p>14 SiriusXM, as I just mentioned, offers 15 far more than that with its 70 or so 16 commercial-free music channels.</p> <p>17 Another difference is the -- the number 18 of niche channels that SiriusXM offers. There 19 are -- you know, in most terrestrial markets, the 20 formats that are offered are very mainstream 21 formats, but niche formats are not really heard 22 today on terrestrial radio on a full-time basis.</p>

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<p>1 And the third is there are actually 2 certain mainstream formats in big, big cities 3 across America today that are no longer served in 4 those markets.</p> <p>5 Q. Just -- just to illustrate a little 6 bit, what are some examples of the kinds of formats 7 that you described that are not generally available 8 on terrestrial radio anywhere?</p> <p>9 A. Some examples of that -- and there are 10 many -- are music styles like reggae, bluegrass 11 music, jazz and -- and the many subgenres of jazz.</p> <p>12 Q. And you mentioned that there might be 13 certain geographic regions that might not have some 14 kind of a mainstream format that's available 15 elsewhere.</p> <p>16 Can you give us an example of that?</p> <p>17 A. Yes.</p> <p>18 One such example is country music, one 19 of the most popular music styles there is in -- in 20 America today. But country music, despite its 21 popularity, is not of -- it's not made available on 22 radio in markets -- major markets, like New York</p>	<p>978</p> <p>1 full-time basis in most, if not all, local radio 2 markets across America.</p> <p>3 Q. Have there been, to your knowledge, any 4 changes in the number or nature of formats 5 available on terrestrial radio over the last 6 five years?</p> <p>7 A. Well, terrestrial radio has, over the 8 last five years, become increasingly conservative 9 in a couple of ways. You know, I mentioned earlier 10 that there are now, you know, very mainstream 11 formats that are no longer made available on 12 terrestrial radio as they might have been five 13 years ago.</p> <p>14 And for the stations that do continue 15 to play music on terrestrial radio, they have 16 become increasingly conservative over the last 17 five years, and their ability to expose new music 18 or deeper playlists of music has -- has declined 19 pretty dramatically.</p> <p>20 Q. Mr. Blatter, switching topics for a 21 moment, are you familiar with SiriusXM's direct 22 licensing initiative?</p>
<p>1 and San Francisco.</p> <p>2 Q. In your experience, why does 3 terrestrial radio not typically make those kinds of 4 formats available?</p> <p>5 A. Terrestrial radio, you know, unlike how 6 we make decisions in -- in satellite radio, 7 decisions are often made based on the desires of 8 advertisers; while on satellite radio, our 9 decisions are made and are completely 10 listener-driven.</p> <p>11 Q. Okay. And just to illustrate, if you 12 could flip to what's marked as Direct Exhibit 24 13 appended to your testimony.</p> <p>14 A. Okay.</p> <p>15 Q. Do you recognize this document?</p> <p>16 A. Yes, I do.</p> <p>17 Q. Can you tell us what Exhibit 24 18 illustrates?</p> <p>19 A. This exhibit lists all our 20 commercial-free music channels, and highlighted in 21 yellow are the channels that we offer that have 22 formats that are generally not available on a</p>	<p>979</p> <p>1 A. Yes, I am.</p> <p>2 Q. Have you had any role in that direct 3 licensing initiative?</p> <p>4 A. I have not been involved in that 5 process directly. I've been kept abreast of the -- 6 of the -- the progress of the initiative, but I'm 7 not -- not involved firsthand.</p> <p>8 Q. Okay. Now, you speak in your written 9 direct testimony at Pages 4 and 5 about how 10 programming is developed and curated by your 11 programmers and how music is selected.</p> <p>12 And we won't go into detail on that, 13 but I just wanted to flag that for the record.</p> <p>14 But turning to Paragraph 11 after that 15 section, which is on Pages 5 and 6 of your 16 testimony, there, you state that Going forward, 17 SiriusXM will take into account whether there's a 18 direct licensing relationship between the company 19 and the record label when it makes those 20 programming decisions.</p> <p>21 What did you mean by that?</p> <p>22 A. So while the artist and song will --</p>

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<p style="text-align: right;">982</p> <p>1 will -- the merits of the artist and song will 2 always come first, the -- whether a song is 3 directly licensed or not will be yet just another 4 factor that programmers will use in helping 5 determine what songs to play and how often. 6 Q. Would you ever allow any of the 7 programmers who work with you to sacrifice the 8 quality or the integrity of the channel to benefit 9 a direct license just for that reason?</p> <p>10 A. Absolutely not. The quality of our 11 channels and the integrity of them will always come 12 first.</p> <p>13 Q. Now your written direct testimony 14 discusses what you call artist's channels.</p> <p>15 Can you describe for us what an 16 artist's channel is?</p> <p>17 A. Sure.</p> <p>18 An artist's channel is a channel that 19 we produce or coproduce in certain cases that 20 either plays music from one artist and only their 21 music, such as our Elvis radio channel plays only 22 music from Elvis Presley.</p>	<p style="text-align: right;">984</p> <p>1 benefits"?</p> <p>2 A. Well, typically, what they -- what the 3 artists that we work with find is by having their 4 own radio stations, they're able to generate more 5 interest in -- whether it be their concert tours 6 or, in other cases, their -- recorded music and the 7 sale of it.</p> <p>8 Q. Does SiriusXM also have limited run or 9 what's called pop-up channels?</p> <p>10 A. Yes, we do.</p> <p>11 Q. What are pop-up channels and how did 12 they come to be?</p> <p>13 A. So pop-up channels are also typically, 14 but not always, artist-based channels that we make 15 available on a more limited run. So while our -- 16 our existing full-time artist channels, you know, 17 have been on the air on SiriusXM in most cases for 18 multiple years, the pop-up channels are similarly 19 programmed, but they typically last anywhere from 20 three to, maybe on the high end, 30 days long.</p> <p>21 Q. And why does SiriusXM create pop-up 22 channels for artists?</p>
<p style="text-align: right;">983</p> <p>1 And then there are other artist's 2 channels that we offer that we coproduce with these 3 artists that plays a lot of that artist's music, 4 but also plays other music from similar type 5 artists.</p> <p>6 Q. Why does SiriusXM have artist-specific 7 channels?</p> <p>8 A. We have artist-specific channels 9 because it's just something else that we do that we 10 feel provides more exclusive content to our 11 listeners that you can't get elsewhere.</p> <p>12 Q. And in your experience, why would an 13 artist want to participate in an artist's channel?</p> <p>14 A. Our artists are willing to participate 15 in coproducing these types of channels for two 16 reasons: one is they see it as another creative 17 vehicle for themselves to express themselves; and 18 the other is they see the promotional value of 19 having their own radio station on a national 20 satellite network and the -- the promotional 21 benefits that come along with that.</p> <p>22 Q. And what do you mean by "promotional</p>	<p style="text-align: right;">985</p> <p>1 A. We typically create them because we -- 2 again, it's more content that is unique to 3 satellite radio. In most cases, they're actually 4 created -- the creation of them comes out of 5 discussions that we have with the artist's manager 6 and their record company who are typically seeking 7 this sort of exposure to generate more promotional 8 awareness for that artist during a given time 9 and -- and -- and doing that with the intention of 10 hopefully either selling more concert tickets or 11 selling more music.</p> <p>12 Q. Looking at Paragraph 51 of your written 13 direct testimony, which is on Page 20, you discuss 14 there the waivers that some artists have granted to 15 SiriusXM.</p> <p>16 Can you explain what those waivers are 17 for?</p> <p>18 A. Yeah. Those waivers are -- waive the 19 performance complement of the Digital Millennium 20 Copyright Act, which --</p> <p>21 JUDGE WISNIEWSKI: I'm sorry. Where 22 are we at?</p>

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<p style="text-align: right;">986</p> <p>1 MS. PERELMAN: We're on Paragraph 51, 2 which is on Page 20.</p> <p>3 JUDGE WISNIEWSKI: Fifty-one, thank 4 you.</p> <p>5 THE WITNESS: So those waivers waive 6 the performance complement of the DMCA, and -- 7 which allows us to play more music from a -- a 8 particular artist within a given period of time.</p> <p>9 BY MS. PERELMAN:</p> <p>10 Q. Just to illustrate, if you turn to the 11 tab that says Direct Exhibit 40 attached to your 12 testimony, are these a sampling of those kinds of 13 waivers that have been executed?</p> <p>14 A. Yes.</p> <p>15 Q. In your experience, why do artists --</p> <p>16 JUDGE WISNIEWSKI: Can I stop you one 17 second, Counselor?</p> <p>18 MS. PERELMAN: Oh, excuse me, I'm 19 sorry.</p> <p>20 JUDGE WISNIEWSKI: So you're -- 21 basically, the artist is granting a waiver from the 22 performance complement, right?</p>	<p style="text-align: right;">988</p> <p>1 channels and present them to our subscribers, that 2 we produce these channels not just with 3 contemporary artists, but artists who have been 4 around for a long time whose careers are probably 5 rooted back in the '60s and '70s. But they, just 6 as well as the contemporary artists, see the 7 promotional value from having these sorts of pop-up 8 channels on our platform.</p> <p>9 Q. You state in your written direct 10 testimony and you've stated here today that record 11 companies acknowledge that SiriusXM is a positive 12 impact on sales and that they aggressively seek 13 airplay.</p> <p>14 What's the basis for those statements?</p> <p>15 A. The basis for those statements is, you 16 know, a few things, but, you know, primarily, just 17 the day-to-day discussions that we have with 18 artists' managers, record companies whose employees 19 whose job it is to -- to -- to seek airplay on 20 radio, as well as the artists themselves and in our 21 communication with them, they tell us verbally and 22 sometimes on e-mail that, you know, they value the</p>
<p style="text-align: right;">987</p> <p>1 THE WITNESS: Yes.</p> <p>2 JUDGE WISNIEWSKI: But are they 3 granting a waiver for the payments of royalties for 4 the extra play?</p> <p>5 THE WITNESS: No. No.</p> <p>6 JUDGE WISNIEWSKI: Thank you.</p> <p>7 BY MS. PERELMAN:</p> <p>8 Q. In your experience, why do artists and 9 recording companies grant these waivers?</p> <p>10 A. They granted these waivers because they 11 recognize, by our ability to play more music from 12 that particular artist, it's going to subsequently 13 lead to more record sales.</p> <p>14 Q. And just turning now to Paragraph 58 of 15 your testimony, which is on Page 23, you discuss 16 there a couple of pop-up channels that were created 17 for artists from the 1960s and '70s.</p> <p>18 Why do you focus here specifically on 19 these more legacy artists' requests for pop-up 20 channels?</p> <p>21 A. I just thought it would be best to 22 fully represent that when we do these pop-up</p>	<p style="text-align: right;">989</p> <p>1 airplay on SiriusXM and often cite the subsequent 2 record sales that have come from the airplay on 3 SiriusXM.</p> <p>4 Q. Is there anything beyond the day-to-day 5 interactions that give you a sense of what the 6 artists' or record labels' view is on that?</p> <p>7 A. I'm sorry. Can you repeat that?</p> <p>8 Q. Sure.</p> <p>9 Is there anything other than the 10 day-to-day interaction and direct feedback that 11 you get from them that gives you an impression of 12 what the record labels' view is of airplay on 13 SiriusXM?</p> <p>14 A. Well, there's -- there's also -- it was 15 discussed a little earlier -- promotional 16 advertisements that record labels place in industry 17 trade publications that often cite SiriusXM in a 18 prominent position and cite the airplay on SiriusXM 19 and often will even cite the subsequent sales that 20 came from that airplay.</p> <p>21 Q. We were just looking at it a little 22 while ago, but if you flip again to Exhibit 36, are</p>

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<p style="text-align: right;">990</p> <p>1 those a sampling of those kinds of advertisements?</p> <p>2 A. Yes, they are.</p> <p>3 Q. And what's your understanding as to the</p> <p>4 reason why the record companies advertise the fact</p> <p>5 that a particular track has been played on</p> <p>6 SiriusXM?</p> <p>7 A. Well, SiriusXM's music channels have</p> <p>8 become rather influential over the years, which I</p> <p>9 think is a result of our programming. But as we've</p> <p>10 grown our subscriber base, the channels have become</p> <p>11 much more influential.</p> <p>12 And the record companies recognize how</p> <p>13 influential the stations are that we offer, and</p> <p>14 they will then include them in these advertisements</p> <p>15 to potentially influence other programmers in</p> <p>16 America to play the songs that they're marketing.</p> <p>17 Q. And if you just turn to the very last</p> <p>18 page of Exhibit 36.</p> <p>19 Is that another example of a record</p> <p>20 label describing the plays on SiriusXM?</p> <p>21 A. Yeah. This is for an artist called</p> <p>22 Plug In Stereo who are on Atlantic Records, which</p>	<p style="text-align: right;">992</p> <p>1 Q. Has there been any change over time in</p> <p>2 the level or number of promotional contacts that</p> <p>3 SiriusXM receives from these record companies?</p> <p>4 A. Yeah.</p> <p>5 I mean, we've always had relationships</p> <p>6 with the record labels across all genres of music,</p> <p>7 you know, since as long as I've been at the</p> <p>8 company. But over the last several years, those</p> <p>9 relationships have strengthened, and the amount of</p> <p>10 contact that we have with record company employees</p> <p>11 and particularly the radio promotional executives</p> <p>12 that work in these companies has increased rather</p> <p>13 dramatically.</p> <p>14 And they watch what we do very</p> <p>15 carefully, literally sometimes on an hour-by-hour</p> <p>16 basis. So if we make a change in a particular</p> <p>17 hour, there are times I will get a phone call and</p> <p>18 say, hey, Steve, what happened to this song? We</p> <p>19 were just playing on Hits 1. We noticed it's not</p> <p>20 being played anymore. What happened?</p> <p>21 So they watch us really, really</p> <p>22 closely.</p>
<p style="text-align: right;">991</p> <p>1 is part of the Warner Music Group. And you can see</p> <p>2 highlighted in yellow in the exhibit that Atlantic</p> <p>3 was communicating to other programmers that the</p> <p>4 single had already sold over 100,000 songs or</p> <p>5 singles after just 600 plays on Sirius Hits 1,</p> <p>6 which is one of our contemporary pop channels.</p> <p>7 Q. And you mentioned that you receive</p> <p>8 feedback directly from labels and artists. We're</p> <p>9 not going to go through them in the interest of</p> <p>10 time.</p> <p>11 But just if you flip towards the back</p> <p>12 of your book, if you look at Exhibits 42 through</p> <p>13 45, 47 and 50, are those a couple of examples of</p> <p>14 that kind of feedback that you've received?</p> <p>15 A. Yeah, this is just some of the e-mail</p> <p>16 communication that we've received through record</p> <p>17 label executives that are, in most cases, you know,</p> <p>18 very clearly praising the -- SiriusXM or the</p> <p>19 programmer who they sent the e-mail to, and then</p> <p>20 citing the, in most cases, pretty dramatic increase</p> <p>21 in record sales that came as a direct result of the</p> <p>22 airplay on that particular channel.</p>	<p style="text-align: right;">993</p> <p>1 Q. Mr. Blatter, do you have an</p> <p>2 understanding as to what effect, if any, SiriusXM</p> <p>3 airplay has on the sale of sound recordings?</p> <p>4 A. Yes, I do.</p> <p>5 Q. What is that view?</p> <p>6 A. The -- airplay received on SiriusXM is</p> <p>7 highly correlated with the sale of the music that</p> <p>8 we play.</p> <p>9 Q. And what supports that view?</p> <p>10 A. Well, besides being told that by the</p> <p>11 record industry employees, artists' managers and</p> <p>12 the artists themselves, we also do subscribe to</p> <p>13 SoundScan, which provides us with sales data. It's</p> <p>14 the, you know, industry resource that both --</p> <p>15 primarily record companies use, and we use it at</p> <p>16 SiriusXM as well, to gauge the impact that our</p> <p>17 airplay is having on the sale of music.</p> <p>18 Q. And did you go to any source to track</p> <p>19 the airplay of certain songs on SiriusXM and</p> <p>20 elsewhere?</p> <p>21 A. Yeah. I mean, at SiriusXM, we use a</p> <p>22 service called Mediabase. There's another one</p>

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<p style="text-align: right;">994</p> <p>1 called BDS. Those are the two primary firms that 2 monitor airplay of radio stations in America. 3 Q. Okay. And just going back to 4 SoundScan, what data specifically does SoundScan 5 show? 6 A. SoundScan specifically shows sales 7 data, both digital track sales and album sales 8 for -- for artists. 9 Q. And can you track that data on a weekly 10 basis? 11 A. We have the ability at SiriusXM to 12 track it weekly. They might offer it -- services 13 where you can do it more frequently than that. But 14 we -- we monitor or receive data from SoundScan on 15 a weekly basis. 16 Q. Does SiriusXM use SoundScan and 17 Mediabase data in the ordinary course? 18 A. Yes, we do. 19 Q. For what -- for what purposes? 20 A. Well, we use sales data now as another 21 means to give us an indication whether a song is 22 connecting with an audience. So sales data -- we</p>	<p style="text-align: right;">996</p> <p>1 this. We just cited a handful of them in my 2 testimony. 3 Q. We're not going to go through each of 4 these examples, but just for illustration and to 5 help us learn how to read the data that's attached 6 to it, if you could turn to Paragraph 71, which is 7 on Page 28. 8 Here, you talk about the song Dancing 9 Shoes by the band Green River Ordinance. 10 A. Yes. 11 Q. Which of SiriusXM's music channels 12 first played Dancing Shoes? 13 A. That would be The Highway. 14 Q. What kind of music does The Highway 15 play? 16 A. Country music, primarily. 17 Q. If we wanted to see the date on which 18 The Highway first played Dancing Shoes, what source 19 would we go to? 20 A. Well, the industry source we would use 21 for that would be Mediabase. 22 Q. For this particular song, is the</p>
<p style="text-align: right;">995</p> <p>1 also do some other proprietary research, but 2 increasingly so over the last several years, sales 3 data is now being used as a programming tool for 4 myself and the programmers that I employ to help 5 gauge the success or sometimes, you know, the 6 nonsuccess of a particular song. 7 Q. So, Mr. Blatter, if you would turn to 8 Paragraphs -- or Pages 25 through 30, generally. 9 You discuss a couple of examples of certain songs. 10 What are these examples intended to 11 illustrate? 12 A. These are examples of songs that were 13 being played exclusively on SiriusXM. And we then 14 tracked the -- our airplay data, matched it up 15 against the SoundScan sales data, and were then 16 able to demonstrate the high correlation between 17 the airplay and the records sales. 18 Q. Are these couple of examples that are 19 discussed on 25 to 30, are those the only such 20 examples that you can think of? 21 A. No. These are just actually a small 22 handful. There are numerous other stories like</p>	<p style="text-align: right;">997</p> <p>1 Mediabase data attached as Exhibit 53 to your 2 testimony? 3 A. Yes. 4 Q. And can you tell from this data the 5 first date on which The Highway started playing 6 Dancing Shoes? 7 A. Yeah. If you look all the way to the 8 bottom right, you will see that the song was first 9 played, according to Mediabase, on October 24th, 10 2011. 11 Q. And was -- according to this data, was 12 any other station in the country playing that song 13 at that time? 14 A. No. If there were other stations 15 playing it, they would be listed below The Highway 16 in this document. 17 Q. And just to confirm, is the rightmost 18 column in this -- in this page, does that show the 19 number of spins on that -- or -- what is a spin? 20 A. A spin is the play of a song. Each 21 play would be a spin. 22 Q. Does that indicate that The Highway</p>

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<p style="text-align: right;">998</p> <p>1 had -- had played that song 64 times during the 2 week that the data reflects?</p> <p>3 A. That's actually 64 times to date.</p> <p>4 Since the record was first played, it played 64 5 times.</p> <p>6 Q. Thank you.</p> <p>7 If you just turn to the second page of 8 Exhibit 53.</p> <p>9 Can you tell us what this page 10 reflects?</p> <p>11 A. This is a similar report that was just 12 run a few days later. So it looks like the initial 13 report was run on November 3rd, and this report was 14 started on November 7th.</p> <p>15 Q. And it shows an increased number?</p> <p>16 A. So you can see the spins had gone up 17 from 64 times at the -- at the time the previous 18 report was done to 112 spins a few days later.</p> <p>19 Q. Was any other radio station in the 20 country playing Dancing Shoes at that time?</p> <p>21 A. No.</p> <p>22 Q. Now, if we wanted to track the digital</p>	<p style="text-align: right;">1000</p> <p>1 says Total, and you track it across to the week 2 ending 23rd?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. And then the week during which 5 SiriusXM picked up Dancing Shoes and was the only 6 radio station playing it in the country, that would 7 have been the week ending October 30th; is that 8 right?</p> <p>9 A. That's correct.</p> <p>10 Q. Because it picked it up on the 24th, 11 right?</p> <p>12 A. Yes.</p> <p>13 Q. So can you tell us how many digital 14 tracks of Dancing Shoes were sold in that first 15 week that SiriusXM picked up the song?</p> <p>16 A. So the sales for that digital track 17 after The Highway started playing the song leaped 18 from 58 tracks the previous week to 1,105 digital 19 tracks for the week ending October 30th.</p> <p>20 Q. And just to confirm, no other radio 21 station was playing that at that time, right?</p> <p>22 A. No, there was not.</p>
<p style="text-align: right;">999</p> <p>1 track sales for that -- for these weeks, where 2 would we go next?</p> <p>3 A. We would then look at the corresponding 4 SoundScan data.</p> <p>5 Q. Which is attached to your testimony as 6 Exhibit 54; is that correct?</p> <p>7 A. Yes, it is.</p> <p>8 Q. If you could help us learn how to read 9 this, which is very small and I apologize.</p> <p>10 If we wanted to look at the digital 11 track sales data for Dancing Shoes in the week 12 before SiriusXM picked it up, what column would we 13 look at?</p> <p>14 A. That would be the week ending 15 October 23rd, 2011.</p> <p>16 Q. Okay. And can you tell how many total 17 digital tracks of Dancing Shoes were sold during 18 the week ending October 23rd, 2011?</p> <p>19 A. Sure.</p> <p>20 On a national basis, 58 digital tracks 21 were sold of that song.</p> <p>22 Q. And you can see that from the row that</p>	<p style="text-align: right;">1001</p> <p>1 Q. Just to carry it out to the end, the 2 following week in the second week of airplay of 3 that song, how many digital tracks were sold?</p> <p>4 A. 1,426.</p> <p>5 And I think it's important to just show 6 here as well that you can see that the sales of 7 this track are actually spread out across the 8 country. It's not, you know, really designated to 9 any one particular market, which I think shows the 10 national reach that SiriusXM has.</p> <p>11 Q. If you flip back to the text of your 12 written direct testimony on Page 29, you'll see a 13 graph.</p> <p>14 I'll let you get there.</p> <p>15 Page 29.</p> <p>16 A. Okay.</p> <p>17 Q. What does that graph illustrate?</p> <p>18 A. This is just a graphical depiction of 19 the sales data for the song Dancing Shoes from 20 Green River Ordinance. And you can see on the 21 bottom there -- you can see, previous to the week 22 of the 10/24/2011, the sales were, you know, in</p>

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<p align="right">1002</p> <p>1 the -- probably, you know, 50- to maybe 2 200-units-a-week range.</p> <p>3 And then, when The Highway added it on 4 October 24th, you can see the hockey sticklike 5 reaction where the sales, you know, skyrocket in 6 the weeks to follow based on the airplay from 7 The Highway.</p> <p>8 Q. Has the band Green River Ordinance had 9 anything to say about its experience on SiriusXM?</p> <p>10 A. They have.</p> <p>11 Q. What have they had to say about it?</p> <p>12 A. They've been actually very vocal. They 13 even took to recording a video, which they sent to 14 our programmers after they saw this amazing 15 reaction that this song was having after the 16 airplay on The Highway.</p> <p>17 In the video, they praise SiriusXM and 18 had commented on what a remarkable thing this has 19 been for their career.</p> <p>20 Q. We're not going to play it in the 21 interest of time, but is that SiriusXM Exhibit 33, 22 and it's transcribed here in Paragraph 71 of your</p>	<p align="right">1004</p> <p>1 manner hurting their sales. In fact, it's always 2 actually the exact opposite of that.</p> <p>3 MS. PERELMAN: Thank you, Mr. Blatter.</p> <p>4 No further questions.</p> <p>5 CHIEF JUDGE BARNETT: Mr. Moskowitz.</p> <p>6</p> <p>7 CROSS-EXAMINATION</p> <p>8</p> <p>9 BY MR. MOSKOWITZ:</p> <p>10 Q. Good morning, Mr. Blatter.</p> <p>11 A. Good morning.</p> <p>12 Q. My name is David Moskowitz. I 13 represent SoundExchange. I have a few questions to 14 ask you this morning.</p> <p>15 Could you please turn to Paragraph 12 16 of your written direct testimony?</p> <p>17 In Paragraph 12, you discuss SiriusXM's 18 direct licenses, right?</p> <p>19 A. Yes.</p> <p>20 Q. And you state that you've reviewed a 21 list of direct license labels; is that correct?</p> <p>22 A. That is correct.</p>
<p align="right">1003</p> <p>1 testimony?</p> <p>2 A. Yes.</p> <p>3 Q. Is this kind of feedback out of the 4 ordinary in your experience?</p> <p>5 A. It's not out of the ordinary when 6 you're having the sort of impact that SiriusXM is 7 now having on -- on artists' careers and our 8 ability to sell music for them and further -- 9 further their careers.</p> <p>10 Q. Okay. Mr. Blatter, last question.</p> <p>11 Your testimony talks a lot about how 12 people in the industry, artists and labels and 13 their managers, have acknowledge the airplay is 14 good for exposure, good for record sales.</p> <p>15 How about the opposite?</p> <p>16 Has anyone ever come to you and said, 17 please stop playing my music, you're killing my 18 sales?</p> <p>19 A. No. That's -- in my 25 years, I've 20 never come across anybody in the industry, whether 21 it be record label executives, artists' managers or 22 the artists themselves that felt we were in some</p>	<p align="right">1005</p> <p>1 (SoundExchange Trial Exhibit Number 25 2 was marked for identification 3 purposes.)</p> <p>4 BY MR. MOSKOWITZ:</p> <p>5 Q. Mr. Blatter, do you have in front of 6 you SoundExchange -- SoundExchange Trial 7 Exhibit 25?</p> <p>8 A. Yes, I do.</p> <p>9 Q. Is that listed also as SiriusXM Direct 10 Exhibit 14?</p> <p>11 A. Yes.</p> <p>12 Q. Does this document contain the list of 13 direct license labels that you reviewed?</p> <p>14 A. This might not have been the same list 15 I reviewed when my testimony was written, but this 16 list does look familiar.</p> <p>17 Q. When you reviewed the list of direct 18 license labels, were you familiar with all of the 19 labels?</p> <p>20 A. Can you repeat that question?</p> <p>21 Q. When you reviewed -- you stated earlier 22 that you reviewed a list of direct license labels.</p>

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<p style="text-align: right;">1006</p> <p>1 When you reviewed that list, were you 2 familiar with all of those labels?</p> <p>3 A. It's hard for me to recollect going 4 back to November when I was reviewing the list.</p> <p>5 I did -- I'm sorry -- I did -- I was 6 familiar with many of the independent labels that 7 were listed on the sheet, but not all.</p> <p>8 Q. Based on your review of the list, you 9 determined that certain songs within the catalogs 10 of some of the direct license labels were already 11 featured on SiriusXM; is that correct?</p> <p>12 A. Correct.</p> <p>13 Q. How did you determine those direct 14 license label songs were already featured on 15 SiriusXM?</p> <p>16 A. That information was not actually -- 17 the information as to what the songs were that were 18 directly licensed was -- was provided to us -- was 19 provided to me through the agent that we're working 20 with to work with us on these direct license deals. 21 And then that information was then cross-referenced 22 with the artists and the songs that we play on our</p>	<p style="text-align: right;">1008</p> <p>1 Q. And in your testimony in Paragraph 12, 2 you discuss L.A. Guns as having -- featuring 13 3 tracks in Hair Nation; is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. Does this document show the list of 6 L.A. Guns' songs that you were discussing in your 7 testimony?</p> <p>8 A. It appears to, yes.</p> <p>9 Q. Do you know roughly how frequently 10 SiriusXM plays L.A. Guns each month?</p> <p>11 A. I wouldn't know off the top of my head, 12 no. They're an important artist to the channel.</p> <p>13 Q. Are you aware that SiriusXM played 14 L.A. Guns over 200 times in August 2011?</p> <p>15 A. I'm not aware of the specific number, 16 but that wouldn't surprise me.</p> <p>17 Q. Are you aware that during the fourth 18 quarter of 2011, SiriusXM did not play a single 19 directly licensed song from L.A. Guns?</p> <p>20 A. I was not.</p> <p>21 Q. You were not?</p> <p>22 A. I am not.</p>
<p style="text-align: right;">1007</p> <p>1 music channels. 2 (SoundExchange Trial Exhibit Number 26 3 was marked for identification 4 purposes.)</p> <p>5 BY MR. MOSKOWITZ:</p> <p>6 Q. Mr. Blatter, do you have in front of 7 you SoundExchange Trial Exhibit 26, which is Bates 8 stamped SXM_CRB_DIR_00000142?</p> <p>9 A. Yes.</p> <p>10 Q. Do you know what MusicMaster is?</p> <p>11 A. Yeah, MusicMaster is a tool that my 12 programmers use to assist them in scheduling the 13 music on the channels that they're responsible for.</p> <p>14 Q. Is this document a printout from 15 SiriusXM's MusicMaster database -- or software?</p> <p>16 A. It appears to be.</p> <p>17 Q. Can you explain what this printout 18 shows?</p> <p>19 A. This printout appears to be a list of 20 songs from the band L.A. Guns that are in the 21 library for the channel that we have called 22 Hair Nation.</p>	<p style="text-align: right;">1009</p> <p>1 Q. You are -- you still are not?</p> <p>2 A. No.</p> <p>3 Q. Could you explain? You said you were 4 not.</p> <p>5 Are you saying you were not at the 6 time?</p> <p>7 A. I'm not aware that the -- that we were 8 not playing directly licensed songs at that time.</p> <p>9 Q. But are you confident that SiriusXM did 10 play L.A. Guns during the fourth quarter of 2011?</p> <p>11 A. Well, I'm -- I'm -- I'm -- I'm basing 12 what's in my testimony based on the data that was 13 provided to me by the firm that we're working with 14 to determine what songs are directly licensed.</p> <p>15 Q. On this printout, you see a year 16 listed, right?</p> <p>17 A. Um-hum.</p> <p>18 Q. And that is the year that the song was 19 released; is that correct?</p> <p>20 A. Typically, it's a song that is released 21 or, in certain cases, it's the year that the song 22 peaked on a chart at that time.</p>

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<p style="text-align: right;">1010</p> <p>1 Q. Are you aware that the masters for each 2 of the original recording tracks listed in SiriusXM 3 Exhibit -- Trial Exhibit 26 are not, in fact, owned 4 by Cleopatra Records?</p> <p>5 A. I am not.</p> <p>6 (SoundExchange Trial Exhibit Number 27 7 was marked for identification 8 purposes.)</p> <p>9 (SoundExchange Trial Exhibit Number 28 10 was marked for identification 11 purposes.)</p> <p>12 BY MR. MOSKOWITZ:</p> <p>13 Q. Mr. Blatter, do you have in front of 14 you SiriusXM Trial Exhibits 27 and 28, which are 15 Bates stamped -- SiriusXM [sic] Trial Exhibit 27 16 has Bates Stamp SXM_CRB_DIR_000088882, and 17 SiriusXM -- or SoundExchange Trial Exhibit 28, 18 which is Bates stamped SXM_CRB_DIR_000088668?</p> <p>19 A. Yes.</p> <p>20 Q. Are you familiar with these documents?</p> <p>21 A. No. This is the first time I've seen 22 these documents.</p>	<p style="text-align: right;">1012</p> <p>1 Q. And are you aware that during the 2 fourth quarter of 2011, SiriusXM did not play any 3 versions of those songs that were owned by 4 Cleopatra Records?</p> <p>5 A. That might very well be. Like I said, 6 when -- when the information was provided to us, we 7 were -- we had the understanding that the songs 8 that are listed in this MusicMaster document were 9 directly licensed through Cleopatra.</p> <p>10 Q. In your role as general manager of -- 11 as a general manager of music programming, is part 12 of your responsibility to implement the increase of 13 plays of direct license labels?</p> <p>14 A. I don't think we said we would increase 15 plays. We said there's the potential for that if 16 all things are treated equal.</p> <p>17 Q. How do your programmers know that a 18 song is directly licensed?</p> <p>19 A. So we're actually in that process right 20 now of working with our third party to match the 21 data that's in MusicMaster against the information 22 that's going to be provided to us that shows what</p>
<p style="text-align: right;">1011</p> <p>1 Q. Did you request anything from your 2 agent regarding the plays of L.A. Guns from 3 Cleopatra Records?</p> <p>4 A. No, no. The airplay data was procured 5 by my team at SiriusXM, not by an outside party.</p> <p>6 Q. So did your team examine which label 7 owned the recordings that you researched?</p> <p>8 A. Like I said, we were informed by 9 our agent that those songs were directly licensed 10 through Cleopatra.</p> <p>11 Q. So it was your opinion -- or your -- 12 strike that, please.</p> <p>13 It was your understanding that 14 Cleopatra Records owned all of the L.A. Guns songs?</p> <p>15 A. That's correct.</p> <p>16 Q. And was it -- in Paragraph 12, you 17 reference two additional songs from Cleopatra, Turn 18 Up the Radio by Autograph and Seventeen by Winger. 19 Was it also your understanding that 20 Cleopatra owned all of the recordings of those 21 songs?</p> <p>22 A. Yes, it was.</p>	<p style="text-align: right;">1013</p> <p>1 songs that we have in our systems that are directly 2 licensed. That process has been underway for -- 3 for several weeks and we're hoping, actually, in 4 the next few weeks that we'll -- we'll -- we'll 5 finish that process.</p> <p>6 Q. In Paragraph 12, you highlighted 7 four -- four particular labels that are -- their 8 songs are featured on SiriusXM; is that correct?</p> <p>9 A. Yes.</p> <p>10 Q. Are you aware that for the four labels 11 you highlighted, SiriusXM played a combined total 12 of roughly 1300 transmissions in the fourth quarter 13 of 2011?</p> <p>14 A. I wouldn't -- I wouldn't know that 15 number offhand and have never, you know, calculated 16 that number myself.</p> <p>17 Q. Are you aware that SiriusXM transmitted 18 about 4.2 million plays during the fourth quarter 19 of 2011?</p> <p>20 A. I would have no reason to really be 21 calculating a number like that myself for what I'm 22 responsible for.</p>

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<p align="right">1014</p> <p>1 Q. So you're not aware that for those four 2 labels, their plays amounted to 0.03 percent of 3 your transmissions during the fourth quarter of 4 2011?</p> <p>5 A. I -- I don't -- I don't really know 6 what relevancy that number is. I mean, we program 7 SiriusXM not as a -- as an entire platform; we 8 program our channels on a channel-by-channel 9 basis.</p> <p>10 So there are artists that are listed 11 here (indicating) that are key artists for the 12 channels that play them. And -- and -- and I think 13 that's -- that's, you know -- you know, worth 14 noting.</p> <p>15 I mean, there's a channel we have 16 called Jam_ON, where a band that's cited here, 17 String Cheese Incident -- I mean, String Cheese 18 Incident is a core artist to that channel and one 19 of the most important artists that we can play on a 20 channel like Jam_ON.</p> <p>21 Q. Are you aware that for this String 22 Cheese Incident label, that that label was played a</p>	<p align="right">1016</p> <p>1 A. I'm sorry. Can you say that again?</p> <p>2 Q. Paragraph 61 to 65.</p> <p>3 -- you offer what you call testimonials 4 from five labels as to the promotional benefits of 5 SiriusXM, right?</p> <p>6 A. I wouldn't refer to them as 7 testimonials, no.</p> <p>8 Q. Communications from the five labels?</p> <p>9 A. Sure.</p> <p>10 Q. Sure.</p> <p>11 Isn't it true that none of these labels 12 have signed direct license deals with SiriusXM?</p> <p>13 A. That could be. We're in the process 14 of -- you know, from what I understand, we're in 15 the direct licensing process. So I'm not involved 16 in it directly, so it could very well be, between 17 the time this testimony was written and today, a 18 direct license was signed with one of these labels. 19 I might not know that as of today.</p> <p>20 Q. As of the time of your testimony, had 21 SiriusXM signed any of those labels to direct 22 licenses?</p>
<p align="right">1015</p> <p>1 total of less than 400 times during the entire 2 fourth quarter of 2011?</p> <p>3 A. I don't know what relevancy that is or 4 what context, you know -- that -- I can tell you 5 that String Cheese Incident is -- is a major act 6 for us on Jam_ON, one that we actually use in 7 describing the channel.</p> <p>8 We describe all of our channels by 9 five, six, seven artists. We may play hundreds of 10 them on that channel. String Cheese Incident is so 11 important to us that it's one of the five or six 12 artists we use to define Jam_ON. That's how 13 important they are to us.</p> <p>14 Q. But you just don't play them?</p> <p>15 A. No. We do play them. 400 times is a 16 lot of space.</p> <p>17 Is that what you just said? I wouldn't 18 know offhand, but if you say 400 times, that's a 19 lot of play for one artist.</p> <p>20 Q. That's for the entire label.</p> <p>21 But anyway, moving to -- in 22 Paragraph 61 to 65 --</p>	<p align="right">1017</p> <p>1 A. No, but nor would I expect them to be. 2 When my testimony was done, we had just 3 started the direct licensing process. And from 4 what I understand about the process, it's a long 5 race and -- and we have maybe gone around the track 6 one time in a 500-lap race. 7 So it's wouldn't be all that surprising 8 if these -- if these examples cited here were not 9 directly licensed at that time.</p> <p>10 Q. In Paragraphs 66 to 73, you provide 11 four examples that you say purport to show 12 empirical evidence of promotional benefits, 13 correct?</p> <p>14 A. Correct.</p> <p>15 Q. Isn't it true that as of the time of 16 your testimony, SiriusXM has not directly licensed 17 any of the four tracks that you discussed?</p> <p>18 A. To the best of my knowledge, these have 19 not been directly licensed, but I'm really not sure 20 what relevancy that would be.</p> <p>21 It's just showing -- this was put here 22 to demonstrate the -- the promotional value of</p>

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<p style="text-align: right;">1018</p> <p>1 SiriusXM and how it leads to more record sales. 2 Q. In your view, your primary objective is 3 to satisfy the listener; is that correct? 4 A. Yes. 5 Q. If a direct license label has a 6 recording that doesn't fit on SiriusXM or that 7 would reduce listening satisfaction, you wouldn't 8 play that label, right? 9 A. We would not. Not that label, but 10 maybe that particular song on that label. 11 Q. Just briefly in Paragraph 51, you 12 mentioned that labels sometimes grant performance 13 complement waivers to SiriusXM? 14 A. Yes. 15 Q. And you testified that those waivers 16 don't include waivers of the royalties; is that 17 correct? 18 A. Correct. 19 Q. And so when these record labels agree 20 to allow you to play more of their songs, they 21 receive more royalties? 22 A. I would think that would be the case,</p>	<p style="text-align: right;">1020</p> <p>1 Q. How did you find this study? 2 A. You know, I don't actually recall where 3 we came across this study offhand. 4 Q. Who provided you this study? 5 A. I don't recall. 6 Q. You used the term "we." 7 Who are you referring to with "we"? 8 A. I'm sorry. Which -- how did I use the 9 word "we"? 10 Q. You said, I don't know how we found 11 this study. 12 A. So -- well, in preparing my testimony, 13 when there's research -- and I did have the 14 assistance of people who work with me on my staff 15 to identify, you know, documents that I thought 16 could be useful for my testimony. 17 Q. Did you search for other studies? 18 A. Did I search for other studies? 19 Q. Um-hum. 20 A. Meaning outside of this one here? 21 Q. Yes. 22 A. Yes.</p>
<p style="text-align: right;">1019</p> <p>1 yeah. 2 Q. Could you turn to Paragraph 47? 3 A. Forty-seven, you said? 4 Q. Yes. 5 In Paragraph 47, you assert that the 6 simple and universally recognized fact is that 7 airplay on radio has continually proven to be the 8 biggest driver of record sales, right? 9 A. Correct. 10 Q. And you cite two studies for this point 11 in Footnote 5? 12 A. Yep. Yes. 13 Q. Would you turn to SiriusXM Direct 14 Exhibit 37 that was attached to your testimony? 15 A. Okay. 16 Q. Is this a copy of the first study 17 listed in Footnote 5? 18 A. Yes. 19 Q. Have you read this study previously? 20 A. I have. 21 Q. Who commissioned the study? 22 A. The study was commissioned by the NAB.</p>	<p style="text-align: right;">1021</p> <p>1 Look, as part of my job, I'm constantly 2 looking at -- at, you know, whatever sources, you 3 know, I think would be useful for me to be 4 reviewing and learning from to do the job to the 5 best of my abilities. 6 Q. Isn't it true the NAB commissioned this 7 study to fight against the enactment of a 8 performance fee on terrestrial radio? 9 A. I -- I couldn't tell you what the 10 background was on this study. I don't know. 11 Q. Could you turn to Page 5, please? 12 And the last paragraph reads, As a 13 record industry advocates for the direct payment 14 from radio stations to music labels and artists 15 through a new performance fee, it should be noted 16 that disturbing the current symbiotic relationship 17 that is found to exist between radio and the record 18 industry could actually harm, not help, all 19 parties. 20 A. Okay. 21 Q. But you have no idea if this is -- 22 A. This is just a statement. It doesn't</p>

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<p align="right">1022</p> <p>1 state that's why the study was conducted. 2 Q. Could you turn -- actually -- does this 3 study explicitly acknowledge that there is actually 4 conflicting evidence on whether airplay increases 5 music sales? 6 A. I'm sorry. Can you restate that? 7 Q. Does this study explicitly acknowledge 8 that there is conflicting evidence on whether 9 airplay increases music sales? 10 A. I don't specifically remember that in 11 reading through the study. 12 Q. Could you turn to Page 11, please? 13 Reading a couple of sentences in, it 14 says, Again, conventional wisdom is that radio 15 airplay stimulates record sales. This belief is 16 consistent anecdotal evidence, including the fact 17 that record labels pay large sums to promote their 18 releases and garner radio airplay. Unfortunately, 19 there has been previous -- precious little 20 scholarly research on this topic, and the two most 21 recent contributions to the literature have 22 contrasting conclusions.</p>	<p align="right">1024</p> <p>1 you're saying? 2 Q. Page 74? 3 A. Page 74. 4 Q. And do you see that there is one 5 Liebowitz 2007 article listed in the references, 6 correct? 7 A. Actually, it looks like there's two 8 Liebowitz articles. 9 Q. From 2007? 10 A. Yes. 11 Q. Yes, there's one. 12 And does that -- is the -- 13 SoundExchange Trial Exhibit 29, does that appear to 14 be the article referenced -- the Liebowitz 2007 15 article referenced in this study? 16 A. It appears to be based on the cover 17 page. 18 Q. Have you reviewed this study 19 previously? 20 A. This Liebowitz study? 21 Q. Yes. 22 A. I have not.</p>
<p align="right">1023</p> <p>1 And at the bottom, it goes on and says, 2 A second more recent study by Liebowitz examines 3 aggregate sales of albums in the top 100 designated 4 market areas. He examines changes between 1998 and 5 2003 in album sales and estimates the impact of 6 changes in Arbitron ratings for the stations with 7 music formats. 8 In contrast to the Montgomery and Moe 9 findings, Liebowitz finds a large negative effect 10 at the industry level. 11 Mr. Blatter -- 12 (SoundExchange Trial Exhibit Number 29 13 was marked for identification 14 purposes.) 15 BY MR. MOSKOWITZ: 16 Q. Mr. Blatter, do you have before you 17 SoundExchange Trial Exhibit 29? 18 A. Yes, I do. 19 Q. And if you turn to -- I'm sorry to go 20 back -- Page 74 of the study that you referenced in 21 SXM Direct Exhibit 37? 22 A. I'm sorry. What section was that</p>	<p align="right">1025</p> <p>1 Q. Did you do anything to search for 2 studies against what your belief was? 3 A. I've -- I've been searching for studies 4 my entire career that -- that show the correlation 5 between radio airplay and record sales. I've never 6 come across a study that showed the negative impact 7 that you're stating this study evidently shows. 8 Q. But it is actually referenced in the 9 article that you said you read and saw, and you 10 couldn't find it? 11 A. So I reviewed this research study and 12 saw those conclusions. I did not go through every 13 reference and every study that's mentioned as a 14 reference in this study. 15 Q. Doesn't -- if you just look at the 16 abstract of Mr. Liebowitz' article, he says, This 17 paper undertakes an econometric investigation of 18 the impact of radio play on sales of sound 19 recordings using a sample of American -- 20 MS. PERELMAN: Objection, Your Honor. 21 This document is not in evidence, and 22 counsel is reading it directly into the record.</p>

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<p align="right">1026</p> <p>1 MR. MOSKOWITZ: I'm not reading into 2 the evidence for the truth; I'm reading it into the 3 evidence to impeach Mr. Blatter's statement that it 4 is universally recognized fact, based on his 5 research, that radio airplay increases ad sales -- 6 or music sales.</p> <p>7 CHIEF JUDGE BARNETT: Overruled.</p> <p>8 BY MR. MOSKOWITZ:</p> <p>9 Q. The results indicate that radio play 10 does not have the positive impact on record sales 11 normally attributed to it and, instead, appears to 12 have an economically important negative impact 13 implying that overall radio listening is more of a 14 substitute for the purchase of sound recordings 15 than it is a complement.</p> <p>16 It goes on at the bottom. It says, 17 This research also exposes a fallacy of composition 18 in applying to an entire market a generally 19 accepted positive relationship that holds for 20 individual units.</p> <p>21 Is it still your view that it is a 22 universally accepted fact that radio airplay</p>	<p align="right">1028</p> <p>1 Q. The studies that you cited in your 2 testimony are concerning terrestrial radio; is that 3 correct?</p> <p>4 A. It depends what studies.</p> <p>5 I mean, you know, how are you defining 6 a study. I mean, there's a study that's very 7 specific not just to satellite radio, but specific 8 channels on satellite radio. So be more specific 9 if you can, please.</p> <p>10 Q. I'm specifically referring to the two 11 studies you cited in Footnote 5, SiriusXM Direct 12 Exhibit 37 and SiriusXM Direct Exhibit 38.</p> <p>13 Are these not studies about terrestrial 14 radio?</p> <p>15 A. Those two studies might not have -- 16 might not have been specific as to the type of 17 radio in which they were researching.</p> <p>18 Q. They might not have been?</p> <p>19 A. I mean, I can go back through and be 20 more specific for you, but they might not have 21 mentioned specifically satellite radio.</p> <p>22 I think what I said was that radio</p>
<p align="right">1027</p> <p>1 increases music sales?</p> <p>2 A. Absolutely.</p> <p>3 And I will tell you since we started 4 subscribing to SoundScan at SiriusXM a year ago, I 5 believe that more than I ever have in my 25 years 6 in radio.</p> <p>7 Q. But apparently, Mr. Liebowitz disagrees 8 with you; is that correct?</p> <p>9 A. So I don't know who Mr. Liebowitz is. 10 I don't know this study. I've never seen this 11 study before. So I can't really speak to it.</p> <p>12 I can speak to my experience of 13 25 years in the radio industry working very, very 14 closely, intimately, with the artists and the songs 15 that we play and the representatives of those 16 artists at the record companies and their managers 17 and the artists themselves. And they all tell me 18 the same thing: radio airplay leads to record 19 sales.</p> <p>20 Q. Am I right that these studies you have 21 cited do not concern satellite radio?</p> <p>22 A. What studies are you referring to?</p>	<p align="right">1029</p> <p>1 airplay is -- it's universally accepted that radio 2 airplay leads to more record sales.</p> <p>3 Q. Could you turn to Paragraphs 66 to 73?</p> <p>4 CHIEF JUDGE BARNETT: Are you referring 5 to paragraphs in the testimony?</p> <p>6 BY MR. MOSKOWITZ:</p> <p>7 Q. I'm sorry. Back in your testimony, 8 please.</p> <p>9 Here, you purport to show anecdotal 10 empirical evidence of the impact of SiriusXM on the 11 sale of four songs; is that right?</p> <p>12 A. You're starting at Paragraph 66?</p> <p>13 Q. Yes.</p> <p>14 A. Yes.</p> <p>15 Q. In your analyses, you examined only 16 terrestrial and satellite radio airplay, right?</p> <p>17 A. The analysis might have been inclusive 18 in some other channels that are not satellite and 19 terrestrial airplay, such as, you know, the --</p> <p>20 Mediabase also monitors video play on MTV and some 21 other video sources.</p> <p>22 And I think it actually includes some</p>
<p align="right">1026</p> <p>1 MR. MOSKOWITZ: I'm not reading into 2 the evidence for the truth; I'm reading it into the 3 evidence to impeach Mr. Blatter's statement that it 4 is universally recognized fact, based on his 5 research, that radio airplay increases ad sales -- 6 or music sales.</p> <p>7 CHIEF JUDGE BARNETT: Overruled.</p> <p>8 BY MR. MOSKOWITZ:</p> <p>9 Q. The results indicate that radio play 10 does not have the positive impact on record sales 11 normally attributed to it and, instead, appears to 12 have an economically important negative impact 13 implying that overall radio listening is more of a 14 substitute for the purchase of sound recordings 15 than it is a complement.</p> <p>16 It goes on at the bottom. It says, 17 This research also exposes a fallacy of composition 18 in applying to an entire market a generally 19 accepted positive relationship that holds for 20 individual units.</p> <p>21 Is it still your view that it is a 22 universally accepted fact that radio airplay</p>	<p align="right">1028</p> <p>1 Q. The studies that you cited in your 2 testimony are concerning terrestrial radio; is that 3 correct?</p> <p>4 A. It depends what studies.</p> <p>5 I mean, you know, how are you defining 6 a study. I mean, there's a study that's very 7 specific not just to satellite radio, but specific 8 channels on satellite radio. So be more specific 9 if you can, please.</p> <p>10 Q. I'm specifically referring to the two 11 studies you cited in Footnote 5, SiriusXM Direct 12 Exhibit 37 and SiriusXM Direct Exhibit 38.</p> <p>13 Are these not studies about terrestrial 14 radio?</p> <p>15 A. Those two studies might not have -- 16 might not have been specific as to the type of 17 radio in which they were researching.</p> <p>18 Q. They might not have been?</p> <p>19 A. I mean, I can go back through and be 20 more specific for you, but they might not have 21 mentioned specifically satellite radio.</p> <p>22 I think what I said was that radio</p>
<p align="right">1027</p> <p>1 increases music sales?</p> <p>2 A. Absolutely.</p> <p>3 And I will tell you since we started 4 subscribing to SoundScan at SiriusXM a year ago, I 5 believe that more than I ever have in my 25 years 6 in radio.</p> <p>7 Q. But apparently, Mr. Liebowitz disagrees 8 with you; is that correct?</p> <p>9 A. So I don't know who Mr. Liebowitz is. 10 I don't know this study. I've never seen this 11 study before. So I can't really speak to it.</p> <p>12 I can speak to my experience of 13 25 years in the radio industry working very, very 14 closely, intimately, with the artists and the songs 15 that we play and the representatives of those 16 artists at the record companies and their managers 17 and the artists themselves. And they all tell me 18 the same thing: radio airplay leads to record 19 sales.</p> <p>20 Q. Am I right that these studies you have 21 cited do not concern satellite radio?</p> <p>22 A. What studies are you referring to?</p>	<p align="right">1029</p> <p>1 airplay is -- it's universally accepted that radio 2 airplay leads to more record sales.</p> <p>3 Q. Could you turn to Paragraphs 66 to 73?</p> <p>4 CHIEF JUDGE BARNETT: Are you referring 5 to paragraphs in the testimony?</p> <p>6 BY MR. MOSKOWITZ:</p> <p>7 Q. I'm sorry. Back in your testimony, 8 please.</p> <p>9 Here, you purport to show anecdotal 10 empirical evidence of the impact of SiriusXM on the 11 sale of four songs; is that right?</p> <p>12 A. You're starting at Paragraph 66?</p> <p>13 Q. Yes.</p> <p>14 A. Yes.</p> <p>15 Q. In your analyses, you examined only 16 terrestrial and satellite radio airplay, right?</p> <p>17 A. The analysis might have been inclusive 18 in some other channels that are not satellite and 19 terrestrial airplay, such as, you know, the --</p> <p>20 Mediabase also monitors video play on MTV and some 21 other video sources.</p> <p>22 And I think it actually includes some</p>

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<p style="text-align: right;">1030</p> <p>1 Music Choice channels as well.</p> <p>2 Q. But, for example, you never looked at</p> <p>3 plays on noninteractive Internet radio?</p> <p>4 A. We follow closely what happens on -- in</p> <p>5 Internet radio, as do the -- you know, our industry</p> <p>6 contacts at record labels and managers. And based</p> <p>7 on their desire and others, those Internet radio</p> <p>8 outlets are not factored into Mediabase airplay or</p> <p>9 BDS airplay for that matter as well.</p> <p>10 Q. So the answer is you did not; is that</p> <p>11 correct?</p> <p>12 A. We did not, but we did not because the</p> <p>13 reason they're not included in Mediabase or BDS is</p> <p>14 because the industry as a whole has determined that</p> <p>15 the airplay on those Internet outlets at this point</p> <p>16 has not been demonstrated to have any impact -- any</p> <p>17 meaningful impact on record sales.</p> <p>18 Q. And you've also never looked at plays</p> <p>19 on interactive on-demand services; is that correct?</p> <p>20 A. I would give you the same response.</p> <p>21 And I asked this question rather pointedly in my</p> <p>22 discussions with record label executives and</p>	<p style="text-align: right;">1032</p> <p>1 communication -- e-mail communication that's in</p> <p>2 here (indicating) where our airplay is cited and --</p> <p>3 and we're getting communication back from the</p> <p>4 record company executive, it's pretty clear that</p> <p>5 what they're seeing is the airplay on SiriusXM, and</p> <p>6 the subsequent record sales is a direct relation to</p> <p>7 our airplay.</p> <p>8 Q. Mr. Blatter, you're not aware of any</p> <p>9 empirical evidence as the promotional or</p> <p>10 substitutional effect of SiriusXM on overall music</p> <p>11 sales, right?</p> <p>12 A. I've never -- I've never heard of -- of</p> <p>13 radio airplay being a substitute for record sales</p> <p>14 anywhere.</p> <p>15 Q. And you're not aware of any empirical</p> <p>16 evidence as to whether SiriusXM is more or less</p> <p>17 promotional or substitutional than other music</p> <p>18 services, right?</p> <p>19 A. Can you repeat that?</p> <p>20 Q. You're not aware of any empirical</p> <p>21 evidence as to whether SiriusXM is more or less</p> <p>22 promotional or substitutional than other music</p>
<p style="text-align: right;">1031</p> <p>1 artists' managers.</p> <p>2 And I ask them regularly: Are you</p> <p>3 seeing any impact from some of these interactive</p> <p>4 services on your artists' careers? Are you seeing</p> <p>5 any record sales come from these interactive</p> <p>6 services? And I get the same answer every time I</p> <p>7 ask that question. It's no, we're not seeing any</p> <p>8 impact whatsoever today.</p> <p>9 Q. So your analyses just assume there's no</p> <p>10 impact based on your anecdotal information?</p> <p>11 A. I wouldn't -- I think that goes beyond</p> <p>12 anecdotal. So when I'm asking some of the most</p> <p>13 respected figures in the music industry and the</p> <p>14 artists themselves, are you seeing any resulting</p> <p>15 airplay?</p> <p>16 Are you seeing any -- any -- any impact</p> <p>17 of the exposure you might have gotten on an</p> <p>18 interactive service? Are you seeing more record</p> <p>19 sales as a result of that? And the response I</p> <p>20 always get is no, not yet, at least not today.</p> <p>21 I just want to mention if -- if that</p> <p>22 was the case, I think if you look at some of the</p>	<p style="text-align: right;">1033</p> <p>1 services?</p> <p>2 A. I think it depends how you want to</p> <p>3 define empirical. I think the exhibits that I show</p> <p>4 here with the examples of the Mediabase airplay</p> <p>5 data and the subsequent SoundScan airplay data</p> <p>6 is -- to me, that's empirical data, and it shows</p> <p>7 that correlation.</p> <p>8 And it's proven out by the record</p> <p>9 company executives who sent us this communication</p> <p>10 saying, hey, appreciate the airplay, look at these</p> <p>11 record sales as a result of it.</p> <p>12 MR. MOSKOWITZ: Thank you. No further</p> <p>13 questions.</p> <p>14 CHIEF JUDGE BARNETT: Thank you,</p> <p>15 Mr. Moskowitz.</p> <p>16 Pardon me, Counsel for Music Choice --</p> <p>17 I'm sorry -- introduce yourself again today.</p> <p>18 MR. FAKLER: Sure, Your Honor.</p> <p>19 Paul Fakler of Arent Fox.</p> <p>20 CHIEF JUDGE BARNETT: Mr. Fakler, any</p> <p>21 questions for this witness?</p> <p>22 MR. FAKLER: No, Your Honor.</p>

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1 CHIEF JUDGE BARNETT: Ms. Perelman, 2 redirect? 3 MS. PERELMAN: I'll be very brief. 4 5 REDIRECT EXAMINATION 6 7 BY MS. PERELMAN: 8 Q. Mr. Blatter, Mr. Moskowitz was 9 directing you to the portion of your testimony and 10 the attached exhibit at Exhibit 37, which is, for 11 the record, an article called Radio Airplay and 12 Record Industry: An Economic Analysis. 13 Do you recall that? 14 A. Yes. 15 Q. And Mr. Moskowitz pointed you to the 16 portion of that exhibit that references a study by 17 someone by the name of Liebowitz; is that right? 18 A. Yep. 19 Q. And that study examined changes between 20 1998 and 2003 in album sales, according to the 21 article, right? 22 A. Yes.	1034	1036 1 studies -- referring to the Montgomery and Moe 2 study and the Liebowitz study -- Although both 3 studies suffer from certain flaws, the Montgomery 4 and Moe study is the more reliable of the two. The 5 data errors and methodological choices made in the 6 Liebowitz study are problematic. He does not 7 adequately account for population and/or audience 8 distributions across DMAs or station coverage 9 areas. Further, the Liebowitz approach is inferior 10 under the wide range of conditions likely to 11 prevail with the results dubious because of some 12 unfounded assumptions about the pattern of 13 regression errors. 14 Did you read that portion of the 15 article when you attached it to your testimony? 16 A. Yes. 17 MS. PERELMAN: Nothing further. 18 MR. MOSKOWITZ: No further questions, 19 Your Honor. 20 CHIEF JUDGE BARNETT: Judge? 21 JUDGE WISNIEWSKI: No. 22 CHIEF JUDGE BARNETT: May this witness	1035
1 Q. In your view, is the impact of record 2 sales now in any way different from the impact 3 of -- on record sales during that period as a 4 result of airplay on SiriusXM? 5 A. Well, if this study was citing 1998 to 6 2003, neither Sirius or XM were really on the air 7 at that point. We might have just come to market 8 in 2003, but it was at the very earliest stages of 9 our -- of our existence. 10 Q. And Mr. Moskowitz was directing you to 11 portions of the Liebowitz study, but in reviewing 12 what's attached to your testimony as Exhibit 37 and 13 deciding to attach it to your testimony, did you 14 also -- and Mr. Moskowitz was referring you to 15 portions on Pages 11 and 12 of Exhibit 37 -- did 16 you also continue to read into the following 17 paragraph that starts, Although both studies? 18 A. I had read this study a while back. I 19 did not reread it while we were sitting here just 20 now. 21 Q. I'll just read that portion for the 22 record. And it says, quote, Although both	1035	1037 1 be excused? 2 MS. PERELMAN: Yes, Your Honor. 3 THE WITNESS: Thank you. 4 CHIEF JUDGE BARNETT: Thank you, 5 Mr. Blatter. 6 I think this is a good time for us to 7 take our morning recess, and we will do so. 8 (Whereupon, a brief recess was taken 9 from 10:55 a.m. to 11:07 a.m.) 10 CHIEF JUDGE BARNETT: Good morning. 11 Please be seated. 12 Mr. Larson. 13 MR. LARSON: Thank you. 14 SiriusXM calls as its next witness 15 William Rosenblatt. 16 WHEREUPON, 17 WILLIAM REISS ROSENBLATT 18 called as a witness, and having been first duly 19 sworn, was examined and testified as follows: 20 21 22	1037