

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Consolidated Application for Authority to) MB Docket No. 07-57
Transfer Control of XM Satellite Radio)
Holdings Inc. and Sirius Satellite Radio Inc.)

REPLY COMMENTS OF SIRIUS XM RADIO INC.

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SUMMARY

The record of this proceeding provides no basis for the Commission to continue to impose a price cap on Sirius XM. The record demonstrates robust and rapidly growing competition for audio entertainment services. Internet-based services in particular have made dramatic gains in popularity since the time of the Sirius-XM merger, in large part due to the advent of smartphone “apps,” which allow users to stream Internet-based music services in their cars. Commenters also overwhelmingly agree that Sirius XM’s pricing is constrained by the variety of market competitors, making a price cap unnecessary. Moreover, the Administrative Procedure Act requires an agency to offer a factual basis for any regulation it promulgates, and the record in this proceeding contains no information sufficient to support imposing a cap on Sirius XM’s rates after July 28, 2011.

The comments filed by the WCS Coalition and the plaintiffs’ counsel in the *Carl Blessing et al v. Sirius XM Radio Inc.* litigation represent an attempt to use this proceeding to leverage decisions in unrelated proceedings. The WCS Coalition’s comments argue that the FCC should impose a price cap on Sirius XM unless and until the Coalition gets its way in an unrelated proceeding on WCS service rules. The *Blessing* counsel ask the Commission to withhold action in this proceeding until the Commission reviews a myriad of documents relating to irrelevant issues in a wholly unrelated litigation. The Commission should flatly reject the efforts of both the WCS Coalition and the *Blessing* counsel.

No basis exists for imposing a new price cap after July 28, 2011, and the Commission should allow the existing cap to expire as scheduled.

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Sirius XM Radio Inc. (“Sirius XM”), by counsel, replies to comments filed in response to the Media Bureau’s Public Notice asking whether the FCC should allow Sirius XM’s price cap to expire on July 28, 2011, consistent with Sirius XM’s voluntary commitment in connection with its merger application filed four years ago.¹ Nothing in the record responding to the Public Notice supports continuing this price cap in any form. Sirius XM respectfully requests that the Commission close this proceeding and take no further action affecting the rates for satellite radio service.

I. THE RECORD OF THIS PROCEEDING PROVIDES NO BASIS FOR IMPOSING A FURTHER PRICE CAP BUT INSTEAD DEMONSTRATES ROBUST COMPETITION FOR AUDIO ENTERTAINMENT.

The existing price cap arose from a voluntary commitment Sirius XM made in the context of its 2007 merger application and applied only to specific Sirius XM

¹ Public Notice, *Media Bureau Seeks Comment on Extension, Modification or Removal of Cap on Sirius XM Retail Prices*, MB Docket No. 07-57 (rel. Jan. 25, 2011) (“*Public Notice*”). Sirius XM voluntarily committed to a price cap in the context of the merger of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. *Applications for Consent to the Transfer of Control of Licenses From XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12433-41, Appendix B-C (2008) (“*Sirius XM Merger Order*”).

programming packages for three years, expiring July 28, 2011.² To impose a continuing price cap, the Commission would need to find that record evidence justifies imposing such a cap, even before it establishes the appropriate price, extent, and duration of any cap.³ The record in this proceeding provides no such evidence. The comments demonstrate that competition and consumer choice dictate Sirius XM's rates.

The record evidences a market for audio entertainment that is highly competitive and growing, with new entrants emerging on an almost daily basis. Just as the United States Department of Justice predicted when it closed its investigation of the Sirius-XM merger nearly three years ago,⁴ Sirius XM today faces intense competition from an array of services including AM/FM radio, HD radio, and iPods—all of which are available to consumers with no subscription charges.⁵

² The *Public Notice* questioned whether any new price cap should apply to fees clearly not included in the voluntary price cap, including “rates charged for online access, additional outlets, or any other fees related to Sirius XM’s service.” *Public Notice* at 2. None of the comments addressed this issue, and the Commission should decline to extend a price cap to these services for the same reasons it should decline to extend the voluntary price cap.

³ The Commission acknowledged in the *Sirius XM Merger Order* that a price cap of more than three years “is not part of Applicants’ voluntary commitment.” *Sirius XM Merger Order* at ¶ 108, n. 328. Any price cap beyond July 28, 2011 would not represent an “extension” of a voluntary price cap but rather the imposition of an entirely new price cap by the FCC, the adoption of which would be governed by the requirements of the Administrative Procedure Act (the “APA”). Necessarily, then, the agency requires record evidence to justify the imposition of a cap, the choice of a particular price and the selection of a specific time period. *See infra* at 7-8.

⁴ Press Release, Department of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc.*, (Mar. 24, 2008) available at http://www.justice.gov/opa/pr/2008/March/08_at_226.html.

⁵ Letter from Robert L. Pettit, Counsel for Sirius XM Radio Inc., to William Lake, Chief, Media Bureau, MB Docket No. 07-57 (filed Jan. 20, 2011) (“Sirius XM January 20, 2011 Letter”).

Increasingly, however, this competition also includes new Internet-based radio services. While some of these applications were available on computers prior to the Sirius-XM merger in July 2008, their tremendous growth—and their increasing availability in automobiles and on smartphones—has been driven by the advent of smartphone “apps.”⁶ These “apps” allow smartphone users to stream Internet-based music services on the go, including in their cars, through a cellular data network or WiFi network. Among others, these include:

- **Pandora Media, Inc.** Pandora is a leader in Internet radio in the United States.⁷ The Pandora “app” for iPhone, released in 2008, became the fourth most popular free “app” on iTunes after only one week.⁸ Pandora still has one of the top five most popular “apps” across all smartphone platforms,⁹ and, “[t]hanks to the iPhone, Pandora now has 80 million listeners.”¹⁰

⁶ The Apple “app” store was launched in July 2008 and the Android Market was launched in October 2008. iPod+iTunes Timeline, <http://www.apple.com/pr/products/ipodhistory/> (last visited Mar. 8, 2011); Android Market: Now Available for Users, Android Developers Blog, Oct. 22, 2008, <http://android-developers.blogspot.com/2008/10/android-market-now-available-for-users.html>.

⁷ Pandora, launched in 2005, offers music content both on a free and a paid subscription basis. Pandora Media, Inc., Registration Statement (Form S-1), at 1-2 (Feb. 11 2011) (“Registration Statement”).

⁸ Fred Krueger, *Pandora is the Killer Music App*, AppCraver, July 25, 2008, <http://www.appcraver.com/pandora/>; Jason Kincaid, *Pandora Usage Stats Prove It's iPhone's Killer App*, TechCrunch, July 15, 2008, <http://techcrunch.com/2008/07/15/pandora-usage-stats-prove-its-iphones-killer-app/#>; Apple recently listed its most downloaded app and found Pandora to be number one among the free apps for iPad and number two for iPhone. Additionally, Pandora added 35 million listeners in 2010. Jefferson Graham, *Pandora Radio App Cruises Into Cars*, USA Today, Jan. 26, 2011 *available at* http://www.usatoday.com/money/industries/technology/2011-01-26-pandora26_ST_N.htm.

⁹ Registration Statement at 1-2.

¹⁰ Jefferson Graham, *Pandora Radio App Cruises Into Cars*, USA Today, Jan. 26, 2011 *available at* http://www.usatoday.com/money/industries/technology/2011-01-26-pandora26_ST_N.htm. Pandora’s recent Registration Statement, related to an expected

- **Rhapsody International Inc.** Rhapsody is another streaming on-demand music subscription service offering unlimited access to a library of digital music for a monthly fee.¹¹ Rhapsody launched its smartphone “app” in 2009.¹²
- **Slacker, Inc.** Slacker offers both free and subscription services accessible over the web and on portable devices and has offered the Slacker Radio “app” since January 2009.¹³
- **Last.fm Ltd.** Last.fm offers free and paid subscription streaming radio and delivers music recommendations. A Last.fm “app” for the iPhone was first released in July 2008.¹⁴
- **iheartradio.** iheartradio delivers AM and FM stations from across the country and exclusive digital stations to subscribers.¹⁵ By the end of 2009, iheartradio had “apps” available for iPhone, Blackberry and Android platforms.¹⁶

Competition with Sirius XM will continue to increase as automakers, including

Ford, Toyota, MINI, GM, Mercedes-Benz, and Hyundai, introduce features that integrate

initial public offering, notes that Pandora competes against a variety of audio entertainment sources, including satellite radio. Registration Statement at 14.

¹¹ Eliot Van Buskirk, *Rhapsody Shrugs Off Real, Viacom to Become a Startup*, *Wired*, Apr. 6, 2010, available at <http://www.wired.com/epicenter/2010/04/rhapsody-shrugs-off-real-viacom-to-become-a-start-up/#>.

¹² John Cook, Tech Flash, *Rhapsody App Off to a “Good Start” With 200,000 iPhone Downloads*, Oct. 1, 2009 available at http://www.techflash.com/seattle/2009/10/real_unveils_rhapsody_app_for_android_updates_iphone_numbers.html.

¹³ Press Release, Slacker, *Slacker Introduces Personalized Radio Everywhere*, Mar. 15, 2007, <http://www.slacker.com/company/pressreleases/03152007.jsp>.; *Slacker iPhone App Now Available, Users Go Wild*, Orbitcast, January 14, 2009 available at <http://www.orbitcast.com/archives/slacker-iphone-app-now-available-users-go-wild.html>.

¹⁴ Posting of Jono Cole to Last.fm—the Blog, <http://blog.last.fm/2011/03/03/lastfm-30-for-the-iphone> (Mar. 3, 2011).

¹⁵ FAQ, Help With iheartradio, <http://www.iheartradio.com/faq/> (last visited Mar. 8, 2011). Press Release, Clear Channel Radio, *iheartradio App Sees One Million iPhone Downloads; Blackberry is Next*, Mar. 16, 2009, <http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=2378>.

¹⁶ Andrew Kameka, *Clear Channel’s iheartradio App Coming to Android by Christmas*, *Androinica*, Dec. 4, 2009 available at <http://androinica.com/2009/12/clear-channels-iheartradio-app-coming-to-android-by-christmas/>.

Internet-based services in vehicles.¹⁷ One of the latest dashboard innovations is the development of vehicles with their own LTE data connections to enable functions such as a WiFi hotspot and various Internet applications without relying on a mobile phone for the in-car data connection.¹⁸ This enables drivers to choose traditional radio, satellite radio, or Internet radio simply by pushing a dashboard button.

This increasingly competitive landscape for audio entertainment eliminates any competitive concern.¹⁹ Sirius XM's pricing is constrained by a wide variety of market

¹⁷ Press Release, Ford, Openbeak, Pandora and Stitcher Are First to Use Ford Sync API, Bringing Twitter, Internet Radio Control Into Vehicles (Jan. 7, 2010), http://media.ford.com/article_display.cfm?article_id=31712; Press Release, Toyota Vehicles, Toyota Entune Receives Two Prestigious Awards at 2011 Consumer Electronics Show (Jan. 31, 2011), <http://pressroom.toyota.com/pr/tms/toyota/toyota-entune-receives-two-prestigious-191474.aspx>; Radio, You-ified, <http://www.miniusa.com/#/play/pandora-m> (stating Pandora now available in all 2011 MINI models) (last visited Mar. 7, 2011); The collaboration between Pandora and MINI is also highlighted on the front page of the MINI website, <http://www.miniusa.com/#/MINIUSA.COM-m> (last visited Mar. 8, 2011); Kevin Krolicki, *General Motors Co Will Launch a New System to Stream Online Radio from Pandora in Upcoming Chevrolets Starting with the Volt and Equinox*, Reuters, Feb. 17, 2011; Mercedes Benz Media Interface Plus, http://www.mbusa.com/mercedes/service_and_parts/accessories (last visited Mar. 7, 2011) (describing plug and play entertainment solution that enables Pandora streaming); Press Release, Hyundai, Hyundai Revolutionizes the Coupe with the All-New Veloster at the Detroit International Auto Show (Jan. 10, 2011), http://www.hyundaiusa.com/about-hyundai/news/Veloster_at_detroitautoshow-20110110.aspx.

¹⁸ Wayne Cunningham, *Alcatel-Lucent Puts Big Data Pipes in Prius*, CNET, Jan. 9, 2010, http://ces.cnet.com/8301-31045_1-10431713-269.html; Christopher Hammerschmidt, *Audi, Alcatel-Lucent demo LTE-equipped car*, EE Times, Feb. 20, 2011, <http://www.eetimes.com/electronics-news/4213311/Audi--Alcatel-Lucent-demo-LTE-equipped-car>.

¹⁹ As the Department of Justice stated in 2008:

Any inference of a competitive concern was further limited by the fact that a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio. Most notable is the expected introduction within several years of next-generation wireless networks capable of streaming Internet radio to mobile devices.... [A] significant number of consumers in the future are likely to consider one or more of these platforms as an attractive alternative to satellite radio.

competitors. This conclusion is borne out anecdotally by comments filed by consumers in this proceeding.²⁰ One commenter stated that the price cap on Sirius XM interferes with the free market, harms the public interest, and “serves no legitimate purpose when Sirius XM competes in a marketplace rife with free services provided by other competitors”²¹ In the words of another consumer, if Sirius XM were to raise prices, subscribers and the marketplace would “decide a fair price with a continued subscription, or cancel and use one of the many other up and coming services.”²² One commenter summarized the pricing reality: “[i]n the end, consumers themselves will dictate a fair market value for their Satellite Radio service. With a growing number of free alternatives available, consumers have the final say.”²³ Indeed, even those public commenters favoring a continued price cap do not dispute their ability to cancel their satellite radio service or select an alternative listening option.²⁴

Press Release, Department of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc.*, Mar. 24, 2008 available at http://www.justice.gov/opa/pr/2008/March/08_at_226.html. Three years later, the Department’s prediction has become a reality.

²⁰ A total of 37 separate consumer comments were filed in response to the *Public Notice*; 32 of the commenters opposed any continued price cap.

²¹ Comments of Patrick Sharpless at 3, MB Docket No. 07-57 at 1 (filed Feb. 24, 2011).

²² Comments of John Lynch, MB Docket No. 07-57 at 1 (filed Feb. 23, 2011). *See also* Comments of Zafar Sharif, MB Docket No. 07-57 at 1 (filed Feb. 23, 2011) (“If it’s too expensive consumers have a free choice to just drop the subscription.”); Comments of Vincent Brumfield, MB Docket No. 07-57 at 1 (filed Feb. 23, 2011) (“Any consumer that can’t afford a long-term contract or is not willing to pay more for this service is free to cancel their subscription at any time. I feel the board of directors will keep this in mind when deciding if, or how much, to raise prices.”).

²³ Comments of Dr. Alan Diaz, MB Docket No. 07-57 at 1 (filed Feb. 23, 2011).

²⁴ *See* Comments of Edmund Harris, MB Docket No. 07-57 at 1 (filed Jan. 27, 2011); Comments of Virginia Houser, MB Docket No. 07-57 at 1 (filed Feb. 14, 2011);

Moreover, any decision to impose a continued price cap based on this record would be legally infirm. First, as Sirius XM has shown, the FCC fundamentally lacks authority to impose a cap on Sirius XM's rates. Congress has not conveyed authority, express or ancillary, to the FCC to regulate the rates of the satellite radio services offered by Sirius XM.²⁵ Moreover, the APA requires an agency to offer a factual basis for any regulation it promulgates. When reviewing the factual basis for an agency's action under the APA's arbitrary and capricious standard,²⁶ the "lodestar is the question whether the record as a whole provides substantial evidence to support the agency action."²⁷ "[T]he court must be able to conclude that the agency examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made."²⁸ The record contains no information sufficient to support imposing a cap on Sirius XM's rates after July 28, 2011.²⁹

Comments of John Pavlica, Jr., MB Docket No. 07-57 at 1 (filed Feb. 24, 2011);
Comments of Albert Morris, MB Docket No. 07-57 at 1 (filed Jan. 31, 2011).

²⁵ See Sirius XM January 20, 2011 Letter at 6, n. 13.

²⁶ Judicial review of agency action includes scrutiny of the agency's asserted factual predicate because, as the D.C. Circuit has explained, "review would be a relatively futile exercise in formalism if no inquiry were permissible into the existence or nonexistence of the condition which the Commission advances as the predicate for its regulatory action. A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago v. Fed. Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1972). See also *ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) ("We cannot defer to the Commission's selection of a precise point on a scale when the scale itself has no relationship to the underlying regulatory problem.") (internal quotation marks omitted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (same).

²⁷ *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005); *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 606 (D.C. Cir. 2007) ("In sum, because the agency's decision . . . finds no support in the evidence the agency considered, we find it arbitrary and capricious.").

²⁸ *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dept. of Health & Human Servs.*, 396 F.3d 1265, 1276 (D.C. Cir. 2005) (internal quotation marks and alterations omitted). See also *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. Aug. 28, 2009) ("We conclude the Commission has failed to examine the relevant data and

II. THE COMMISSION SHOULD NOT ALLOW THE WCS COALITION AND PLAINTIFFS' COUNSEL IN THE *BLESSING* CASE TO USE THIS PROCEEDING TO LEVERAGE DECISIONS IN UNRELATED PROCEEDINGS.

Two parties invite the FCC to help them use this proceeding to leverage the outcomes in two unrelated proceedings. The Commission should flatly reject their efforts.

First, some members of the WCS Coalition³⁰ argue that the FCC should impose a price cap on Sirius XM unless and until the Coalition gets its way in an unrelated proceeding seeking to revamp the WCS service rules in a manner that would cause interference to satellite radio customers.³¹ The issues in the WCS Interference Decision have nothing to do with those addressed in the Public Notice. The former proceeding involves modifying the WCS service rules and how to minimize the likelihood these

articulate a satisfactory explanation for its action, and hold the 30% subscriber cap is arbitrary and capricious.”) (quotation, citation, and alterations omitted).

²⁹ Even if the record could support extending a rate cap in the abstract, which it cannot, given the paucity of facts in the record there is no basis on which the Commission could make a principled decision about where to set that cap, which services it should apply to, or how long to keep the cap in place. A typical rate case involves detailed information about a company’s costs and what rate of return on those costs is reasonable, *see, e.g., Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1235-36 (D.C. Cir. 1993) (discussing rate of return and cost data in determining reasonableness of interim rates); it is obvious that no such data exists in this proceeding. Thus, any rate cap imposed by the Commission would be arbitrary and capricious in the purest sense of that term, because it would be based on nothing more than guesswork and supposition, rather than actual facts in the record.

³⁰ Comments of the WCS Coalition, MB Docket No. 07-57 at 3 (filed Feb. 24, 2011) (“Coalition Members’ Comments”). According to this pleading, WCS Coalition member AT&T “did not participate in the preparation of, and does not join in . . . these comments.” *Id.* at note 1.

³¹ *Communications Services in the 2.3 GHz Band, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, RM-8610, Report and Order and Second Report and Order, FCC 10-82 (May 20, 2010); (“WCS Interference Decision”).

changes will interfere with the reception of satellite radio. The issues, which are technically complex and have the potential to affect tens of millions of Sirius XM listeners, were addressed in the WCS Interference Decision, which remains the subject of petitions for reconsideration by both Sirius XM and WCS licensees.³²

Sirius XM will not burden the record of this proceeding with extended comment on the unrelated WCS interference proceeding.³³ Throughout that proceeding, Sirius XM has urged the Commission to modify its rules to allow mobile use of WCS frequencies only if such changes could be justified through sound engineering analysis, and Sirius XM continues to do so here. The Commission should reject the WCS Coalition

³² Public Notice, *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Report No. 2917 (Sept. 22, 2010).

³³ As the Commission is aware, WCS licensees acquired their spectrum nearly 14 years ago and, with the exception of AT&T, have largely let the spectrum lie fallow. By contrast, Sirius XM has invested billions of dollars to develop the satellite radio spectrum, which now serves over 20 million customers. The Reply Comments filed on March 9, 2011 by Patrick Sharpless extensively detail the actions of WCS Coalition members:

poaching the adjacent bandwidth to SDARS, squatting on the bandwidth for 14 years, refusing to construct mandatory buildouts as required by the substantial service requirements embedded within the license agreements, lying in wait until the sequestered SDARS bandwidth was fully deployed before executing a strategic response which just happens to employ a new technology (WIMAX) and requires the Commission to modify their technical rules for WCS operations in the 2.3 GHz band from fixed terrestrial operations to allow mobile broadband services in 25 MHz of the WCS band (and increasing the interference on adjacent SDARS in the process). . . And now the WCS Coalition argues continuing the price cap scheme is necessary until the WCS Coalition is successful launching their service? A service the WCS Coalition had the opportunity to launch for 14 years now, but squandered every opportunity to do so? . . . And now the WCS Coalition wants the Commission to punish competitors who delivered consumer driven products and services that satisfied the public interest because those competitors (Sirius XM) timely executed an effective business plan, and consumers (over 20 million) are rewarding the company by subscribing to their service.

Reply Comments of Patrick Sharpless, MB Docket No. 07-57 at 2, 7, 9 (filed March 9, 2011).

members' self-serving attempt to induce the FCC to resolve the reconsideration petitions of the WCS Interference Decision on anything other than the merits of the interference potential at issue there. To the extent the WCS Coalition members urge the Commission to promptly address those petitions, Sirius XM agrees.

As further detailed above, with or without whatever services the WCS licensees finally decide to offer, Sirius XM currently faces significant competition from Internet-based service providers and will face increasing competition in the future.

Moreover, the 25 MHz of WCS spectrum that the FCC has made available for mobile broadband use in the WCS Interference Decision is a relatively small component of available spectrum compared to the hundreds of megahertz allocated to the commercial mobile services, much of which is farther along in its commercial development than WCS spectrum.³⁴

Second, two letters have been filed by interim lead plaintiffs' counsel in *Carl Blessing et al v. Sirius XM Radio Inc.*³⁵ The *Blessing* case involves claims that certain price increases by Sirius XM, particularly the pass-through of performance rights fees, violated various state and federal statutes. Sirius XM has vigorously contested this

³⁴ In addition to the hundreds of megahertz of existing allocations, more spectrum is on the way. The National Broadband Plan tasked the Commission with making 500 MHz newly available for broadband use within the next ten years, and President Obama recently set the goal of freeing up 500 MHz of spectrum for everything from smartphones to wireless broadband connectivity for laptops to new forms of machine-to-machine communication within the next decade. *Connecting America: The National Broadband Plan*, Federal Communications Commission, at Chapter 5 (March 2010); Press Release, the White House, President Obama Details Plan to Win the Future Through Expanded Wireless Access, Feb. 10, 2011, *available at* <http://m.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>.

³⁵ Comments of Paul F. Novak, James J. Sabella, Christopher B. Hall, MB Docket No. 07-57 (filed Feb. 24, 2011); Letter from Paul F. Novak, James J. Sabella, Christopher B. Hall to William Lake, Chief, Media Bureau, FCC, MB Docket No. 07-57 (filed Mar. 3, 2011) ("*Blessing* Counsel Comments").

allegation and will continue to do so. Now, the *Blessing* counsel essentially ask the Commission to provide leverage to the plaintiffs in the litigation by withholding action in this proceeding until the Commission reviews various documents related to the *Blessing* case.³⁶ Such litigation documents are not germane to the Bureau's request for comments on "whether to extend, modify, or remove the price cap,"³⁷ and the *Blessing* counsel offer no reason for delaying a resolution of the issues raised in the *Public Notice*.

The *Blessing* counsel letters also illustrate why the Commission, through long-standing precedent, has refused to allow its regulatory processes to advance private commercial goals. As the FCC has stated repeatedly, the agency "has consistently refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum for resolving such disputes."³⁸ The *Blessing* case should not be litigated at the FCC in the guise of a proceeding regarding the Sirius XM rate cap. As with the Coalition Members' Comments, the Commission should reject the transparent attempt by the *Blessing* counsel to use the agency's processes to influence the outcome of unrelated litigation.

³⁶ In the first letter, the *Blessing* counsel ask the FCC to hold the Sirius XM rate proceeding in abeyance while they seek the right to disclose to the Commission documents filed under seal in the *Blessing* litigation. In the second letter, *Blessing* counsel, reminded that they would be prevented by a protective order that they sought from sharing any of the documents with anyone, backed off of their original offer, but nonetheless "invite[d]" the Commission "to review the public filings in connection with this matter." *Id.*

³⁷ *Public Notice* at 1; see *Blessing* Counsel Comments.

³⁸ *Vodafone AirTouch, PLC, and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 16507, 16515 n. 37 (WTB, IB 2000) (citing *Applications of WorldCom and MCI Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 18,148 ¶ 214; *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1691 (1997) (citing *United Tel. Co. of Carolinas v. FCC*, 599 F.2d 720, 732 (D.C. Cir. 1977)).

III. CONCLUSION

For all these reasons, Sirius XM respectfully submits that there is no basis for imposing a price cap of any kind after July 28, 2011 and that the FCC should close this proceeding and take no action to impose a the price cap beyond that date.

Respectfully submitted,

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