TABLE OF CONTENTS
FOR THE
DIRECT STATEMENT OF XM SATELLITE RADIO INC.

TAB	DESCRIPTION
Volume 1: Documents	
1	Introductory Memorandum
2	Proposed Rates
3	Index of Witness Testimony
4	Index of Exhibits
5	Certificate of Service
Volume 2: XM Witness Testimonies	
1	Testimony of Gary M. Parsons
2	Testimony of Anthony J. Masiello
3	Testimony of Eric Logan
4	Testimony of Stephen R. Cook
5	Testimony of Mark J. Vendetti
Volume 3: XM Witness Exhibits	
Volume 4: Witness Testimony and Exhibits Jointly Submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc.	
1	Expert Testimony of Roger J. Rusch
2	Expert Testimony of J. Armand Musey
3	Expert Testimony of John R. Woodbury

TAB 1

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	)	
	)	

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

XM Satellite Radio Inc. ("XM") hereby submits its written direct statement, pursuant to Rule 351.4 of the Copyright Royalty Board, 37 C.F.R. § 351.4. XM is a pre-existing satellite digital audio radio service as defined in 17 U.S.C. § 114(j)(10).

ROYALTY RATE CLAIM

Under Section 114(f)(1)(B) of the Copyright Act, the reasonable copyright royalty rates to be set in this proceeding shall be calculated to achieve the objectives set forth in Section 801(b)(1)(A)-(D). XM requests that this Honorable Board promulgate in this proceeding a combined rate for the Section 114(f) sound recording performance license and for the Section 112(e) ephemeral recordings license of 0.88 percent (0.88 %) of gross revenue received by XM. XM also proposes jointly with Sirius Satellite Radio additional license terms.

SUMMARY OF TESTIMONY

As set forth in the summaries of testimony below, XM believes that its proposed rate will—

- recognize both XM's contributions to creating an entirely new medium that showcases and promotes copyrighted works, and the extraordinary financial risks incurred by XM and its investors in order to develop and build this new medium to promote creative expression;
- ensure fair income to XM to sustain its operations and make progress toward profitability, and afford copyright owners fair and substantial royalty payments;
- minimize disruption to the potential success of satellite radio, while expanding traditional business avenues available to sound recording copyright owners and performers to promote their works to the public; and,
- maximize the availability of creative works to the public, because XM gives copyright owners and performers new and valuable opportunities to expose and promote their sound recordings across a wide spectrum of genres.

Fact Witnesses

XM will present in its Direct Case the testimony of the following fact witnesses:

Gary M. Parsons

Gary Parsons is the Chairman of the Board of XM, and has held that position since May 1997. Mr. Parsons provides an overview of XM's history, the new media service that it developed, and the challenges ahead to make XM a successful business. His testimony explains how XM designed, manufactured, and marketed every aspect of its satellite radio service, from "end-to-end." He describes the billions of dollars placed at risk by XM's strategic investors to create this new industry from before the service officially launched in November 2001, through the present. Mr. Parsons testifies how, in return, these investors demanded compensation and returns commensurate with their risks. Mr. Parsons explains that XM is not yet cash-flow positive, and that analysts do not expect XM to become profitable for several years. His testimony further describes the roles of both non-music and music channels in the acquisition

and retention of subscribers, and how XM provides an important platform for the exposure and promotion of sound recordings. Finally, Mr. Parsons discusses why the proposed rate of 0.88 percent of gross revenue provides a fair income to XM while generating very substantial royalty payments to copyright owners and performers; why the proposed rate appropriately recognizes the technological and promotional contributions of XM; and why a higher rate could threaten serious disruption to the future of the satellite radio industry.

Anthony Masiello

Anthony Masiello, XM's Senior Vice President of Operations, provides an overview of the technological innovation, capital, and risk required for XM to develop from scratch its new satellite and radio technology, and the scale of this effort. He details how XM designed and built every aspect of its service, including one of the largest and most sophisticated digital broadcast facilities in the world; high-powered communications satellites constructed specifically to receive and retransmit the XM signal; a nationwide network of repeaters to retransmit the signal in challenging reception environments; and the XM radios themselves that use sophisticated chipsets, software, and antennas in form factors suitable for automobiles (referred to often as mobile), home and portable use. He explains how, through innovation and investment, and despite unanticipated setbacks and risks, XM offers more than 170 channels of high quality audio and new data services with better than 99 percent availability nationwide, including in urban areas where satellite signals are often blocked. Mr. Masiello's testimony also discusses how XM's delivery system and its consumer equipment are designed to prominently display the name of the artist and the recording, to facilitate listeners buying the artists' recordings.

Eric Logan

Eric Logan, XM's Executive Vice President of Programming, explains XM's content strategy of aggregating a diversity of news, talk, sports, family and music programming onto a single media platform. Mr. Logan describes how XM uses diversity of content, nationwide carriage, exclusive content, commercial-free music channels, and compelling programming produced and created by XM, to convince consumers initially to subscribe to XM, and then to remain subscribers. He explains the importance of carrying programming that is exclusive to XM and the satellite radio platform, including talk programming created for XM, national carriage of play-by-play sporting events, branded news and talk programming, and music performances and programming produced by and available only on XM. Mr. Logan explains how XM combines live performances, and music expertise with on-air experience to create music programming that far surpasses programming available on AM and FM radio. Mr. Logan describes how this exposure benefits and is valued by recording artists and the record industry.

Stephen Cook

Stephen Cook, XM's Executive Vice President, Automotive (and previously the Executive Vice President of Sales and Marketing), describes how XM established a marketing and distribution system for a new and unproven satellite radio medium that requires end users to buy both equipment and service. Mr. Cook explains how XM has spent, and expects to continue to spend, hundreds of millions of dollars on product development, advertising, and incentives and subsidies to manufacturers, distributors, and consumers. Mr. Cook also discusses why an increase in subscriber service fees to compensate a rate higher than the proposed rate may not be a viable option.

Mark Vendetti

Mark Vendetti is XM's Senior Vice President of Corporate Finance. He sets forth in detail the enormous financial commitments that XM and its investors have made in bringing this new service to market. Mr. Vendetti also testifies about the continuing financial risks of XM's venture. His testimony describes the costs incurred by XM in each aspect of its business, and the losses incurred to the present. Mr. Vendetti explains the company's financial expectations for the next five years, the substantial amount of royalties that would be paid under the proposed rate, and the impact of the proposed rate on XM's ability to achieve profitability.

Expert Witnesses

In addition, XM and Sirius Satellite Radio jointly sponsor the testimony of the following experts:

Roger J. Rusch

Roger Rusch has been active in the management and design of broadcast satellite and communications systems since 1965, working for TRW Space Vehicles Division, Hughes Aircraft Company (working on INTELSAT IV and COMSTAR I), and Ford Aerospace (multiple satellite projects). He presently is president of Tel/Astra, Inc., a consulting firm. His industry expertise has been recognized by the National Academy of Sciences, the United States government, and many tribunals and clients for whom he has provided testimony and consulting advice. Mr. Rusch will describe the serious technical, regulatory, and business risks that Sirius and XM have overcome and the many remaining challenges they face as they attempt to develop their still nascent businesses. He will explain how such risks have proved fatal to other satellite ventures, and address the continuing threat to XM and Sirius (and their investors) posed by any increased costs.

J. Armand Musey, CFA

J. Armand Musey is the president of Near Earth, LLC, a specialty investment banking firm that focuses on the satellite industry and related sectors. Previously, he was head of satellite equity research at Salomon Smith Barney, having had similar positions with Bank of America and other brokerage firms. Using publicly available materials of the type customarily relied on by investors, Mr. Musey will present the historic and present "Wall Street view" of XM, Sirius and the satellite radio industry. He will address the serious risks perceived by investors and the need for high rates of return to induce such risky investments. He will explain that, at both today's valuations and those expected in 12 to 18 months (both of which reflect expected earnings), equity investors are far behind the returns necessary to justify their risky investments. He will explain why XM and Sirius must meet such milestones as becoming cash positive and then profitable, and will discuss how even minor changes in royalty payments can disrupt investment and how far Sirius and XM are from producing the returns necessary to justify the huge investments and risks they represent.

John Woodbury, Ph.D.

Dr. John R. Woodbury, a Vice President at CRA International, will testify that he has estimated a range of reasonable rates for XM and Sirius to pay when these services transmit performances of sound recordings to subscribers. He will further testify that in this kind of rate-setting proceeding the identification of useful benchmarks provides a sound starting point for determining the appropriate payment a rate negotiated between the parties for the sound recording performance right in accordance with section 801(b) of the Act.

Dr. Woodbury will conclude that the best starting benchmark is the rate paid by digital cable radio services for the sound recording performance right. He will explain that this rate was originally established under the very legal standard applicable to this case by the Librarian of Congress in 1998, at 6.5%, for Music Choice, DMX, and Muzak, the three pre-existing subscription services ("PSS") offering a music service to subscribers of cable television systems, and that this 6.5% rate was renegotiated in 2003, in the shadow of that standard, to 7.25%.

He will testify, however, that the PSS Rate must be adjusted in two ways to account for fundamental differences in the nature of the services provided by the PSSs and the SDARS. He will explain that the subscription music offerings of the three PSS consist of a suite of commercial-free, unenhanced, music channels for in-home listening sold to third-party television service providers who then deliver the music to consumers bundled with their television offerings. He will also testify that, in contrast, XM and Sirius provide both non-music and extensively enhanced music channels in a complete, end-to-end package for mobile, nationwide listening (including in-vehicle and in-home listening) directly to subscribers. Dr. Woodbury evaluates these two adjustments and concludes that they lead to a comparable SDARS rate of between 0.88% and 1.04% of applicable gross revenue. Dr. Woodbury will further testify that this range is conservative because it does not give Sirius and XM full credit for the value of their talk programming, does not give them any credit for their enhancements to the music programs, and does not account for a needed return to equity investors

Dr. Woodbury will also testify that he evaluated, as a second possible benchmark, the payments made by XM and Sirius to ASCAP, BMI, and SESAC for the musical works rights that underlie the public performance of a sound recording, the proceeds of which are distributed to music publishers and composers. Notably, however, he also will testify that this benchmark

overstates a reasonable royalty rate in this proceeding and he offers the resulting benchmark (2.35% of gross revenue) as a firm upper bound to his analysis.

Dr. Woodbury will then evaluate how accounting for the section 801(b) factors would affect what a reasonable rate should be. Among other things, he will conclude that XM and Sirius generally outperform the PSS with respect to enhancing the availability of music, have made more significant creative and technological contributions, have made greater investments, have incurred greater costs and risk than the PSS, and do more to open new markets in providing their services. He will make similar observations with respect to XM and Sirius relative to the record labels. Additionally, he will conclude that on balance and given the data available, his approach more likely than not is very conservative and likely overstates the appropriate rate. As a result, Dr. Woodbury will testify that a reasonable royalty rate under the Act is one that would be at the lower end of the range he has identified.

CONCLUSION

For these reasons, and on the basis of the testimony of the XM Fact Witnesses and Expert Witnesses, XM requests that this Honorable Board promulgate in this proceeding a combined rate for the Section 114(f) sound recording performance license and for the Section 112(e) ephemeral recordings license of 0.88 percent (0.88 %) of gross revenue received by XM,[1] and the additional license terms proposed jointly by XM and Sirius.

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[1] Pursuant to Section 804(b)(3)(B) and the Notice issued January 9, 2006 by this Honorable Board, this proceeding will "determine reasonable terms and rates of royalty payments under sections 114 and 112 for the activities of preexisting subscription services." This rate proposal was derived from benchmarks, including the historical and current rate paid by pre-existing services. 37 C.F.R. § 260.2. By making this rate proposal, XM does not imply either that a § 112(e) ephemeral recordings license is required or that such a license has any economic value independent of the value of the performances themselves.

Date: October 30, 2006

Respectfully submitted,

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Counsel for XM SATELLITE RADIO INC.

TAB 2

Rates and Terms

PART 26_-- RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES

Sec.
26_.1 General.
26_.2 Definitions.
26_.3 Royalty fees for public performance of sound recordings and the making of ephemeral recordings.
26_.4 Administrative provisions.
26_.5 Confidential information and statements of account.
§ 26_.6 Notice and Recordkeeping.

§ 26_.1 General.

(a) Scope. This part 26_ establishes rates and terms of royalty payments for the public performance of sound recordings and the reproduction of multiple ephemeral recordings by preexisting satellite digital audio radio services in accordance with the provisions of 17 U.S.C. §§ 112(e) and 114 for the period from January 1, 2007 through December 31, 2012.

(b) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

§ 26_.2 Definitions.

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

(a) "Copyright Owner" is a sound recording copyright owner who is entitled to receive royalty payments under 17 U.S.C. § 112(e) or 114(g).

(b) A "Designated Agent" is any agent designated by the Librarian of Congress for the receipt and distribution of royalty payments made pursuant to this part.

(c) "GAAP" shall mean generally accepted accounting principles in effect from time to time in the United States.

(d) (1) "Gross Revenues" shall mean revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS, and shall be comprised of the following:

(i) revenue recognized by Licensee in accordance with GAAP directly from Residential U.S. subscribers for Licensee's SDARS; and

(ii) Licensee's advertising revenues, or other monies received from sponsors, if any, attributable to advertising on Music Channels, less advertising agency and sales commissions.

(2) Gross Revenues shall include such payments as set forth in paragraphs (c)(1) (i) and (ii) of this section to which Licensee is entitled but which are paid to a parent, wholly-owned subsidiary or division of Licensee.

(3) Gross Revenues shall exclude:

(i) revenues attributable to the sale and/or license of equipment and/or technology, including bandwidth, including but not limited to sales of devices that receive the Licensee's SDARS and any taxes, shipping and handling fees therefor;

(ii) royalties paid to Licensee for intellectual property rights;

(iii) monies or other consideration received by Licensee from the sale of phonorecords and digital phonorecord deliveries;

(iv) sales and use taxes, shipping and handling, credit card and fulfillment service fees paid to third parties; and

(v) revenues recognized by Licensee for the provision of

(A) Current and future data services (e.g., weather, traffic, and other telematics services);

(B) Channels, programming, products and/or other services offered for a separate charge other than channels that perform sound recordings (e.g., premium channels including news, talk, sports, and information content, and that may use only incidental performances of sound recordings);

(C) Channels, programming, products and/or other services provided outside of the United States; and,

(D) Channels, programming, products and/or other services for which the performance of sound recordings and/or the making of ephemeral recordings is exempt from any license requirement or is separately licensed, including by a statutory license, and including, for the avoidance of doubt, webcasting, audio services bundled with television programming, interactive services, and transmissions to business establishments.

(e) "Licensee" means an owner or operator of a preexisting satellite digital audio radio service (as defined in 17 U.S.C. § 114(j)(10)) and its parent, subsidiaries and divisions.

(f) "Music Channel" means a channel on a Licensee's SDARS on which sound recordings are performed under the provisions of 17 U.S.C. § 114(d)(2)(B), and on which such performances constitute 50% of more of the programming.

(g) "Residential" means, with respect to a service, a service that may be licensed under the provisions of § 114(d)(2)(B); and, with respect to subscribers, subscribers to such a service.

(h) "SDARS" means satellite digital audio radio service.

(i) "Term" means the period commencing January 1, 2007 and continuing through December 31, 2012.

§ 26_.3 Royalty fees for public performances of sound recordings and the making of ephemeral recordings.

(a) Royalty. Commencing January 1, 2007 and continuing through December 31, 2012, the quarterly 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 phonorecords to facilitate such performances pursuant to 17 U.S.C. § 112(e) shall be 0.88 % of such Licensee's quarterly Gross Revenues resulting from Residential services in the United States.

(b) Payments. Payments made by a Licensee shall be due 60 days after the close of each calendar quarter for which the payment is being made.

(c) Late Fee. If a Licensee fails to make any payment under this part when due and following ten days after receipt of written notice from a Designated Agent, the Licensee shall pay a late fee on any overdue amount of 0.50% per month, or the highest lawful rate, whichever is lower, from the date of receipt of written notice until the date full payment is received by a Designated Agent.

(d) Weekends and Holidays. In the event the deadline for any payment due under this part falls on a day which is not a business day, payment shall be due on the next business day.

§ 26_.4 Administrative provisions.

(a) Audit.

(i) A Designated Agent may audit compliance by the Licensee with the royalty payment provisions of these regulations. If there is more than one Designated

Agent, all Designated Agents shall mutually retain a single auditor to perform a single audit on a Licensee.

(ii) An audit pursuant to this section may be conducted no more than once every three (3) years, and no more than once in any given year. An audit of any year in the Term may be conducted only once. Audits shall be conducted during regular business hours, at a mutually agreeable time; provided that an audit shall commence no later than 90 days following a written request for audit.

(iii) Audits shall be performed by an independent auditor according to generally accepted auditing standards.

(iv) If as a result of the audit the parties agree or, in the absence of such agreement there is a final determination, that a Licensee has underpaid royalties by 10 or more percent, within 60 days of such determination the Licensee shall pay the amount of the underpayment with interest at the rate provided in 28 U.S.C. § 1961, plus reasonable out-of-pocket costs incurred by the auditor.

(v) If as a result of the audit the auditor determines that a Licensee has overpaid royalties, the Licensee may credit against future royalty payments the amount of such overpayment plus interest accrued at the rate provided in 28 U.S.C. § 1961, and shall pay the Licensee's reasonable out-of-pocket costs incurred from the audit.

§ 26_.5 Confidential information and statements of account.

(a) For purposes of this part, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the Licensee filing the statement. Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a Licensee and an interested party, or between one or more interested parties; *provided* that all such information shall be made available, for the verification proceedings provided for in §§2__.4 of this part.

(b) Licensees shall submit quarterly statements of account on a form provided by the agent designated to collect such forms and the royalty payments.

(c) A statement of account shall include only such information as is necessary to compute the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty shall not be required or included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(i) Those employees, agents, consultants and independent contractors of the Designated Agent, subject to an appropriate confidentiality agreement, who are engaged

in the collection and distribution of royalty payments hereunder and activities directly related hereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

(ii) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(e) The Designated Agent or any person identified in paragraph (d) of this section shall implement procedures to safeguard all confidential financial and business information, including, but not limited to royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the Designated Agent or such person.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with GAAP for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

§ 26_.6 Notice and Recordkeeping.

(a) General. This Exhibit prescribes rules under which Licensees shall serve copyright owners with notice of use of their sound recordings, what the content of that notice should be, and under which records of such use shall be kept and made available.

(b) Definition. A "*Report of Use of Sound Recordings Under Statutory License*" (sometimes referred to as a "*Report of Use*") is the sole report of use required to be provided by a Licensee under this Agreement.

(c) Service. Reports of Use shall be served upon SoundExchange. Licensees shall have no obligation to provide Reports of Use for any period prior to January 1, 2006. Licensees shall serve Reports of Use on SoundExchange by no later than the ninetieth day after the close of each month. Reports of Use shall be served, by certified or registered mail, or by other means provided in SoundExchange's "File and Reports of Use Delivery Specifications" filed in the Copyright Office in Docket No. RM 2002-1B or agreed upon by a Licensee and SoundExchange.

(d) Content.

(1) A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include a Licensee's intended or actual playlist for each channel and each day of the reported month,

except that no reporting requirement shall apply to channels reasonably classified as news, talk or sports. Subject to paragraph (d)(2) of this Exhibit, each intended or actual playlist shall include a consecutive listing of every recording scheduled to be or actually transmitted, as the case may be, and shall contain the following information in the following order:

(A) The name of the service or entity;

(B) The channel;

(C) The sound recording title;

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

(E) The retail album title;

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

(i) albums or other products commercially released after 2002; and

(ii) albums or other products commercially released before 2003, except that such information need only be provided for 90 percent of a Licensee's digital audio transmissions of such pre-2003 releases for the period through May 31, 2005;

(G) The catalog number for

(i) albums or other products commercially released after 2002; and

(ii) albums or other products commercially released before 2003, except that such information need not be provided for a Licensee's digital audio transmissions of such pre-2003 releases prior to June 1, 2004, and such information need only be provided for 50 percent of a Licensee's digital audio transmissions of such pre-2003 releases during the period beginning on June 1, 2004, and ending on May 31, 2005;

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

(i) albums or other products commercially released after 2002; and

(ii) albums or other products commercially released during the period beginning on January 1, 1998, and ending on December 31, 2002, except that such information need not be provided for a

Licensee's digital audio transmissions of such 1998-2002 releases prior to June 1, 2004, and such information need only be provided for 50 percent of a Licensee's digital audio transmissions of such 1998-2002 releases where the ISRC is available and its reporting feasible during the period beginning on June 1, 2004, and ending on May 31, 2005;

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

(i) albums or other products commercially released after 2002; and

(ii) albums or other products commercially released before 2003, except that such information need not be provided for a Licensee's digital audio transmissions of such pre-2003 releases prior to June 1, 2004, and such information need only be provided for 50 percent of a Licensee's digital audio transmissions of such pre-2003 releases during the period beginning on June 1, 2004, and ending on May 31, 2005;

(J) The date of transmission;

(K) The time of transmission; and

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

(i) albums or other products commercially released after 2002; and

(ii) albums or other products commercially released before 2003, except that such information need not be provided for a Licensee's digital audio transmissions of such pre-2003 releases prior to June 1, 2004, and such information need only be provided for 50 percent of a Licensee's digital audio transmissions of such pre-2003 releases during the period beginning on June 1, 2004, and ending on May 31, 2005.

(2) Notwithstanding paragraph (d)(1) of this Exhibit –

(A) In the case of programming provided to a Licensee by a third party programmer –

(i) if such programming is provided to the Licensee under a contract entered into before the Execution Date and not thereafter amended or renewed, then the Licensee shall have no obligation to provide Reports of Use with respect to that programming; and

(ii) the Licensee shall use commercially reasonable efforts to include in any new contract for programming, or any amendment or renewal of such a contract, a requirement that the provider of programming provide the Licensee the information required by paragraph (d)(1) of this Exhibit, or in the case of programming consisting of simultaneous retransmission of an over-the-air terrestrial AM or FM radio broadcast by a broadcaster that also transmits such programming over the Internet, such information as may from time to time be required by Copyright Office regulations relating to the broadcaster's transmissions over the Internet, and the Licensee shall provide SoundExchange Reports of Use containing the information provided by the third party programmer.

In any case in which a Licensee does not provide Reports of Use for programming provided to a Licensee by a third party programmer, the Licensee shall report to SoundExchange the relevant channel and the reason it is unable to provide such Reports of Use.

(B) Licensees only shall be required to provide the information identified in paragraph (d)(1)(C) through (I) and (L) of this Exhibit to the extent that such information can be provided using commercially reasonable efforts.

(C) Licensees shall not be required to provide information with respect to an incidental performance that both: (i) 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 (ii) 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).

(e) Signature. Reports of Use shall include a signed statement by the appropriate officer or representative of the Licensee attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the Service in its

ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(f) Other Media. If a Licensee makes digital audio transmissions of sound recordings in any medium other than through its SDARS, reports containing the elements set forth in paragraph (d) of this Exhibit shall be deemed to satisfy the Licensee's obligations to identify the sound recordings used in such transmissions (in contrast to any obligations the Licensee may have under applicable regulations to provide information concerning matters other than the identity of such sound recordings).

(g) Format. Reports of Use shall be provided in accordance with SoundExchange's "File and Reports of Use Delivery Specifications" filed in the Copyright Office in Docket No. RM 2002-1B.

(h) Confidentiality.

1.1 (1) Definition. "Confidential Information" means information submitted by a Licensee to SoundExchange in a Report of Use that is uniquely specific to Licensee, including without limitation, the number of performances made by the Licensee and the identification of particular sound recordings as having been performed by the Licensee, but not any information that at the time of delivery to Sound Exchange is generally known to the public or subsequently becomes generally known to the public through no fault of SoundExchange, including without limitation, information identifying sound recordings themselves.

1.2 (2) Use of Confidential Information. SoundExchange shall not use any Confidential Information for any purpose other than royalty collection and distribution, determining and enforcing compliance with statutory license requirements and the requirements of this Agreement, and activities directly related to the foregoing; provided that SoundExchange may report Confidential Information to its members in a form in which information pertaining to both Licensees is aggregated with information pertaining to other statutory licensees such that Confidential Information pertaining to Licensees, either individually or collectively, cannot readily be identified.

1.3 (3) Disclosure of Confidential Information. Access to Confidential Information shall be limited to those employees, agents, attorneys, consultants and independent contractors of SoundExchange, subject to an appropriate confidentiality agreement, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to Confidential Information. SoundExchange also may disclose Confidential Information to a successor or assignee permitted by this Agreement.

(i) Documentation. Licensees shall, for a period of at least three years from the date of service of the Report of Use, keep and retain a copy of the Report of Use.

(j) Regulation. If the Copyright Royalty Board, the Librarian of Congress, or other judicial body, or administrative or regulatory agency adopts regulations for Notice and Recordkeeping or Reports of Use, applicable to Licensees or other services under the § 114(d) statutory license, that are considered by a Licensee to be in the aggregate more favorable than those set forth in this section, Licensee shall inform SoundExchange within 90 days thereafter if Licensee determines to provide Reports of Use pursuant to such other regulations.

TAB 3

Index to the Written Direct Statement of XM Satellite Radio Inc. :
Fact Witnesses

Tab	Witness	Title
1	Gary M. Parsons	Chairman of the Board, XM Satellite Radio Inc.
2	Anthony J. Masiello	Senior Vice President of Operations, XM Satellite Radio Inc.
3	Eric Logan	Executive Vice President of Programming, XM Satellite Radio Inc.
4	Stephen R. Cook	Executive Vice President, Automotive, XM Satellite Radio Inc.
5	Mark J. Vendetti	Senior Vice President of Corporate Finance, XM Satellite Radio Inc.

Index to Written Direct Statements
Volume 4: Expert Witnesses

Tab	Witness	Title
1	Roger J. Rusch	President, Tel/Astra, Inc.
2	J. Armand Musey, CFA	President, Near Earth, LLC
3	John R. Woodbury, Ph.D.	Vice President, CRA International

TAB 4

INDEX OF FACT WITNESS EXHIBITS OF XM SATELLITE RADIO INC.

EXHIBIT LIST FOR GARY PARSONS

Exhibit No.	Description
1	XM's Current Channel Line-Up
2	Chart Describing XM's Content Strategy
3	Greystone Communications Report
4	Announcements Reflecting Recognition of XM's Innovative Radio Products

EXHIBIT LIST FOR ANTHONY J. MASIELLO

Exhibit No.	Description
1	Floorplan of XM's D.C. Studio Complex (Confidential)
2	Photograph of XM's Lincoln Center Studio
3	Photograph of XM's Nashville Studio
4	Photograph of XM's Chicago Studio
5	Photograph of XM's D.C. Broadcast Center
6	Photograph of XM's D.C. Control Center
7	Photograph of an XM Satellite
8	Photograph of an XM Repeater
9	Photograph of an XM Parabolic Satellite Dishes Used in XM Uplinks
10	Photograph of an Early XM Radio
11	Photograph of an Early XM Radio Antenna
12	Photograph of a First Generation "Plug and Play" Radio
13	Photograph of a SKYFi Radio
14	Photograph of an XM2Go (with integrated antenna) Radio
15	Photograph of an MyFi (with integrated antenna) Radio
16	Photograph of an XM Mini-Tuner
17	Photograph of an Inno Radio
18	Description of XM's WX Satellite Weather Service
19	Description of XM's NavTraffic Service

EXHIBIT LIST FOR ERIC LOGAN

Exhibit No.	Description
1	XM's Current Channel Line-Up
2	Chart Describing XM's Content Strategy
3	Chart Describing XM's Sports Programming Strategy
4	Chart Describing Oprah & Friends Channel
5	Chart Describing XM's Talk, News and Entertainment Strategy
6	Chart Describing XM Women's Content Strategy
7	Chart Describing XM-Created Music Programming
8	Chart Describing XM's Specialty Programming

9	Articles Concerning Bob Dylan's "Theme Time Radio Hour" Show
10	List of Artist Confidential Performances
11	Web Page Describing XM's Artist Confidential Series
12	Web Page Describing XM's Then…Again…Live! Series
13	Web Page Describing XM's Artist 2 Artist Series
14	Web Page Describing XM's Offstage Series
15	Web Page Describing XM's Mainstage Series
16	Web Page Describing XM's SRO Series
17	October 15, 2006 Article from The Washington Post Regarding XM's Sonic Sound Salutes Series
18	List of XM Channels Known for Exposure of New Artists
19	List of Radio Formats Carried on XM That Are Not Found in Major Media Markets
20	Chart Comparing Weekly Listenership of Certain XM Music Channels to Print Media and Radio Stations
21	Compact Disc of Testimonials by Various Artists
22	E-Mail from Labels, Artists and Managers (Confidential)
23	E-Mail from XM Radio Listeners (Confidential)

EXHIBIT LIST FOR STEPHEN R. COOK

Exhibit No.	Description
1	Flow of Marketing Costs of the Automotive Distribution Channel
2	Flow of Marketing Sales Costs of Retail Distribution Channels
3	Rate Increase Impact on XM Subscriber Churn (Confidential)
4	Automotive Trial Conversion Impact Following Rate Increase (Confidential)
5	The Breadth of XM Radio's Appeal Creates Challenges for a Limited Marketing Budget (Confidential)
6	XM Program Guide
7	XM Advanced Capabilities – Beyond Audio
8	NavTraffic
9	Description of Services Under Development (Confidential)
10	Description of Services Under Development (Confidential)
11	Description of Services Under Development (Confidential)

EXHIBIT LIST FOR MARK J. VENDETTI

Exhibit No.	Description
1	Resume
2	XM's Cumulative Revenue and Investment
3	XM's Debt (as of 6/30/06)
4	XM's Annual Profit and Loss
5	Form 10K for Year Ending 31 December 1999
6	Form 10K for Year Ending 31 December 2000

7	Form 10K for Year Ending 31 December 2001
8	Form 10K for Year Ending 31 December 2002
9	Form 10K for Year Ending 31 December 2003
10	Form 10K for Year Ending 31 December 2004
11	Form 10K for Year Ending 31 December 2005
12	XM's Proposed SoundExchange Payments
13	XM's Annual Costs and Revenue (2005)
14	XM's Capital Spending vs. Depreciation and Amortization
15	XM's Marketing and Sales Costs (2005)
16	XM's Programming and Broadcast Costs (2005)
17	XM's Other Costs (2005)
18	XM's General Corporate Costs (2005)
19	XM's Revenue (2005)
20	XM's Cost Per Gross Addition (CPGA)
21	XM's Profit Performance per Subscriber per Month
22	XM's Payback Period per Subscriber (# of Months)

INDEX OF EXPERT WITNESS EXHIBITS OF XM SATELLITE RADIO INC.

EXHIBIT LIST FOR ROGER J. RUSCH

Exhibit No.	Description
1	Resume
2	Satellite Radio Growth Rates
3	Satellite Radio Subscriber Growth

EXHIBIT LIST FOR J. ARMAND MUSEY

Exhibit No.	Description
1	Resume
2	Information Considered In Developing Analysis

EXHIBIT LIST FOR JOHN WOODBURY

Exhibit No.	Description
Ex. 1	John Woodbury Curriculum vitae
Ex. 2	List of Documents and Materials Reviewed
Ex. 3	XM Radio Channels by Format
Ex. 4	Sirius Radio Channels by Format
Ex. 5	Diagram of "How Satellite Radio Works"
Ex. 6	Music Choice, XM Satellite Radio, and Sirius Satellite Radio Music Channels by Format
Ex. 7	Music Choice, XM Satellite Radio, and Sirius Satellite Radio Non-Music Channels by Format
Ex. 8.a	Number of Music and Non-Music Channels on XM, 1999-2005
Ex. 8.b	Number of Music and Non-Music Channels on Sirius, 2000-2005
Ex. 9.a	XM Expenditures on Music and Non-Music Programming and Content, 2004 to 2006 (Confidential)
Ex. 9.b	Sirius Expenditures on Music and Non-Music Programming and Content, 2004 to 2006 (Confidential)
Ex. 10.a	Relative Importance of Music and Non-Music Channels on Sirius using Attachment Index (Confidential)

Ex. 10.b	Summary of Relative Importance of Music and Non-Music Channels on Sirius using Attachment Index (Confidential)
Ex. 11	In-Vehicle Listening Habits Before and After Subscribing to Sirius (Confidential)
Ex. 12	Diagram of "How Music Choice Works"
Ex. 13	XM Functionality Adjustment: Hand-Off Provider ("HOP") Costs and Subscriber Distribution and Acquisition ("SDA") Costs (Confidential)
Ex. 14	Sirius Functionality Adjustment: Hand-Off Provider ("HOP") Costs and Subscriber Distribution and Acquisition ("SDA") Costs (Confidential)
Ex. 15	Functionality Adjustments for Sirius and XM Based on 7.25% PSS Rate (Confidential)
Ex. 16	Functionality Programming Adjustments for Sirius and SM Based on 7.25% PSS Rate (Confidential)
Ex. 17	Functionality Programming Adjustments for Sirius and SM Based on 5.29% PSS Rate (Confidential)
Ex. 18	Music Channels by Format for XM, Sirius, and the Five Largest Over-the-Air Radio Markets
Ex. 19.a	List of XM Patents
Ex. 19.b	List of Sirius Patents
Ex. 19.c	List of Music Choice Patents
Ex. 20	Sirius Expenditures on Engineering, Design, and Development and XM Expenditures on Research and Development
Ex. 21	Sirius and XM Capital Expenditures (Confidential)
Ex. 22	Sirius and XM Expenditures on Satellites (Confidential)
Ex. 23	Sirius and XM Net Losses Since Inception

TAB 5

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2006, in Docket No. 2006-1 CRB DSTRA, the following has been served on the List of Participants for Docket No. 2006-1 CRB DSTRA as published by the Copyright Royalty Board: a copy of the public version of XM Satellite Radio Inc.'s Direct Case as filed with the Board; a copy of the public version of XM Satellite Radio Inc.'s written direct statements without exhibits and without any designated testimony via electronic mail by 5:00 pm. In addition, one copy of XM Satellite Radio Inc.'s Direct Case in restricted and unredacted form has been served on lead outside counsel for each party via overnight delivery.

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