

Before the
COPYRIGHT ROYALTY BOARD
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 DSTR

**WRITTEN DIRECT STATEMENT
OF SIRIUS SATELLITE RADIO INC.**

**INTRODUCTORY MEMORANDUM, INDEX TO
TESTIMONY AND EXHIBITS, RATE PROPOSAL**

VOLUME 1 OF 4

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

Sirius Satellite Radio Inc. (“Sirius”) submits this introductory memorandum of its written direct statement for the convenience of the Copyright Royalty Judges. Sirius will present the Copyright Royalty Judges with a comprehensive picture of its business to demonstrate the extraordinary investments it has made, costs it has incurred, creativity it has applied, and risks it has faced to make its service a reality – investments, costs, creativity and risks that are not incurred or provided by Sirius’ terrestrial radio competitor, which is not required to pay for the sound recordings it uses.

Sirius will propose a sound recording fee for the rights at issue in this proceeding based on the only sound recording fee ever set under the applicable section 801(b) standard (the “Section 801(b) standard”). That fee was set by the Librarian of Congress in 1998 for pre-existing subscription services (“PSSs”), and then renegotiated in the shadow of the Section 801(b) standard in 2003 (the “PSS Rate”).

As with any benchmark, the PSS Rate must be adjusted to account for differences between the two types of service. That is particularly true in the context of a fee based on a

percentage of revenue, because revenues must cover all of the functions performed by and costs incurred by a business. First, the PSS Rate must be adjusted to account for critical differences in the source of PSS revenues and the source of Sirius' revenues, including differences arising from the fact that Sirius must perform many more functions in order to deliver its programming directly to the consumer than PSSs (who simply hand off their programming to cable and satellite television systems). Each of these added functions performed by Sirius must be covered by its share of Sirius' revenue, and an apples-to-apples comparison does not permit inclusion of that revenue in the fee paid to sound recording copyright owners and performers. To assist the Copyright Royalty Judges in making this adjustment, Sirius will provide detailed testimony about its business, and the functions it must perform to create an entirely new medium.

In addition, the PSS Rate must be adjusted to account for the extraordinary differences in the programming offered by Sirius and that offered by the digital cable radio services for which the PSS Rate was set. To assist the Copyright Royalty Judges in making this adjustment, Sirius will present evidence demonstrating that:

- Sirius created a technology; a transmission system (stretching literally from the earth to outer space and back); new radios and antennas; a distribution system for those radios; a sales, marketing, and customer care organization; and a new consumer brand – that, in the words of section 801(b), opened a brand new market for creative expression and a brand new medium for its communication;
- the creation of this new market and new medium required an enormous investment of capital, technology, time, and creativity;
- Sirius faced extraordinary risks creating this new market and new medium, including:
 - the risk that the Federal Communications Commission (the “FCC”) would not authorize the satellite radio service in the face of opposition from the established terrestrial radio industry, that Sirius would not win the auction for one of two satellite radio licenses, and that the FCC or other regulators would impose limitations or restrictions on the service that impaired Sirius' ability to function and to compete.

- the risk that the technology would not work with sufficient reliability using low power satellite transmissions and small antennas to support a consumer service; that its satellites would be destroyed or damaged in the stresses of a launch, be rendered useless by insertion into a misaligned orbit, or fail while in orbit;
- the risk that Sirius could not obtain sufficient financing to build a multi-billion dollar infrastructure years before the company would see its first dollar in revenue;
- the risk that the public would not be willing to pay for an entirely new radio in a world where consumers buy cars and clocks that already have radios and to pay to receive radio services, given that terrestrial radio is available for free;
- the risk that Sirius would not be able to compete with the well-established terrestrial radio industry, which has opposed satellite radio at every turn, and which has the advantage that it pays nothing for the sound recording public performance right;
- the risk that the music industry itself would seek excess compensation from Sirius leaving it at a competitive disadvantage and impairing its ability to earn an adequate return on capital;
- the risk that consumer electronics retailers would not promote an entirely new type of radio, and that automakers would not include in their vehicles an entirely new type of radio that adds costs, in an environment where they are seeking to squeeze every drop of cost out of their vehicles; and
- the risk that new competing products and technologies, such as Internet Wi-Max and HD Radio, would emerge before satellite radio has a chance to become an established, profitable industry;
- Sirius is, in effect, many businesses in one, each of which imposes substantial costs that must be covered by Sirius' revenues. Sirius is:
 - a provider of compelling radio programming that must "compete with free" – a \$20 billion per year industry that 95% of the adult population in the United States listens to every week – for the audience's ear and for the best in on-air talent, by offering exclusive satellite radio and original programming with a large and ever-growing emphasis on talk, sports and non-music entertainment programming that has required Sirius to seek out and obtain the best radio personalities, including Howard Stern and Martha Stewart, and the best-known brands, such as CNN, Fox, Bloomberg, NPR and others; and with music-related programming that features enormous value added by Sirius, including the best on-air talent, interviews, discussions, and live performances;
 - a satellite and terrestrial transmission system that delivers programming to people in their cars, homes, other vehicles, and to portable radios;

- a consumer electronics business that must design and have manufactured innovative new radios that customers must specifically decide to buy;
- an automotive electronics business that must design, fund the development of, and fund the installation of new radios and must further convince automakers to include in their cars;
- a sales and marketing business that must convince consumers to buy something to replace that which they are used to getting for free, and that must build the Sirius brand from an unknown start-up to a recognized name in entertainment; and
- a customer service business, that must keep customers happy, turn on their radios, and provide billing and collection services;
- Sirius has learned that simply playing music or having the right to play music will not be sufficient to drive the required number of consumers to buy a radio or a subscription;
 - music performances are ubiquitous and the public is not, generally, willing to pay a significant subscription fee to hear them;
 - Sirius has been required to spend large sums of money to produce and obtain compelling and exclusive content, particularly talk, entertainment and sports programming, that cannot be heard elsewhere, and to hire major radio personalities;
 - even when Sirius programs music, it must incur substantial costs to make its music programming compelling and interesting;
- in short, the sound recording performance right is just one input to Sirius' radio programming, which in turn is just one of many businesses that Sirius' revenues must cover; and
- an unreasonable sound recording performance fee will cause serious disruption to the satellite radio industry.

Sirius' direct case will analyze the PSS Rate and its proper application to Sirius. In particular, Sirius' direct case will compare and contrast the functions performed by Sirius with those performed by the PSSs, and will demonstrate how the great majority of Sirius' revenues are properly attributable to functions not performed by the digital cable radio services for whom the PSS Rate was set. These fundamental differences mean that the PSS Rate must be adjusted before it can be applied to Sirius. Sirius will then demonstrate that the PSS Rate must be further adjusted before it can be applied to satellite radio, to account for the significant differences in

programming between that offered by the PSSs and that offered by Sirius. An appropriate apples-to-apples comparison, following these two necessary adjustments, results in a rate of .88% of Sirius' applicable gross subscription revenue.

The testimony of economist John Woodbury, on behalf of Sirius and XM, will analyze the satellite radio businesses and will conclude that between [[]] of the revenues of Sirius and XM are properly attributed to functions not performed by the digital cable radio services. Accordingly, based on the first adjustment alone, the applicable rate, as a percentage of Sirius and XM revenue, must be reduced to between [[]] of the PSS Rate in order to have the rate apply to comparable functions. Dr. Woodbury further explains why this adjustment is likely very conservative (in that it overstates the percentage of Sirius revenue applicable to functions performed by the digital cable radio services).

As discussed above, Sirius' direct case will demonstrate how the programming provided by Sirius differs dramatically from terrestrial radio and the programming heard on digital cable radio services, which is predominantly programmed music to which sound recording rights apply. Again, because (i) the PSS Rate is based on a percentage of revenue, (ii) PSS revenue, unlike Sirius' revenue, is generated entirely from sequential programmed performances of musical recordings, and (iii) the record companies and performing artists are not entitled to compensation for revenues attributable to programming that does not use their sound recordings, or for revenues attributable to the value added to even that programming by Sirius, it is imperative that a further adjustment be made in the PSS Rate before it is applied to Sirius' revenues.

Dr. Woodbury thus performs a further adjustment on the PSS Rate to allocate satellite radio revenues between those attributable to music (and recorded comedy) and those attributable

to talk, entertainment and sports programming not heard on PSSs and for which sound recording copyright owners and performers are not entitled to compensation. Dr. Woodbury performs this adjustment on two separate bases. The first uses listening data provided by both Sirius and XM.

However, as Sirius will demonstrate, listening data do not provide the best measure of revenue generation or value and likely overstate the importance of music programming. The primary driver of Sirius' revenue is not what subscribers may listen to on the service, but rather what causes them to subscribe to Sirius in the first place and what causes them to continue to subscribe. In a subscription business, gaining and keeping the subscriber is what matters, not how the subscriber actually uses the service.

To capture this important principle, Dr. Woodbury uses data developed by a survey conducted by Sirius in the ordinary course of its business to determine how strongly subscribers feel about the various channels offered by Sirius, and whether, if Sirius terminated any channel, the subscriber would cancel his or her subscription. These data demonstrate the importance of the talk, entertainment, sports and other non-music channels to the generation of Sirius' revenues and support a conclusion that approximately [] of Sirius' revenues are attributable to news, sports, talk and entertainment programming that does not rely on the use of sound recordings. This is a fundamental difference from PSS revenues.

Dr. Woodbury explains why this adjustment is likely very conservative, because it does not address the extensive costs incurred by Sirius to add value to its music programming and the differences between that programming and the programming for which the PSS Rate was set. Like other costs, those costs have a claim on Sirius' revenues and add to those revenues; like the costs for talk, sports, news and entertainment programming, sound recording copyright owners have no claim on the revenues attributable to those costs.

Based on the combined adjustments recommended by Dr. Woodbury, Sirius proposes a sound recording performance and ephemeral recording fee under the applicable section 114 and section 112 statutory licenses equal to 0.88% of its gross subscription revenue¹ plus its revenue from advertising, if any, on its music channels.²

Sirius' direct case includes the testimony of Sirius' Chief Executive Officer, Chief Financial Officer, Senior Vice President of Engineering, Senior Vice President of Music Programming, and other senior executives. It also includes the testimony of three expert witnesses, including Dr. Woodbury, Roger Rusch, a satellite communications industry expert, and Armand Musey, a financial analyst who has followed the satellite communications industry for years.

Sirius' witnesses will testify as follows:

Witnesses Providing an Overview of Sirius, its Business and its Financial Condition

Mel Karmazin, Sirius' Chief Executive Officer, will present an overview of Sirius and its business and will discuss the investment, costs and risks that Sirius has incurred over an extended period of time in order to create and offer a new audio entertainment service. He will describe the extraordinary risks faced by Sirius to make satellite radio a reality, including risks inherent in the development of a new technology; risks inherent in the launch and deployment of satellites; regulatory risks related to obtaining U.S. and international approvals; investment risk that Sirius could not finance the many years between the inception and profitability (16½ years and counting); and market risks that Sirius' service might not be acceptable to consumers at a

¹ Not including revenue from commercial background subscribers; commercial background transmissions are not subject to the section 114 statutory license and the fee for the section 112 statutory license applicable to those transmissions is to be set in a different proceeding starting next year.

² Sirius currently does not have advertising on its music channels.

price that would support the costs and provide a reasonable return on investment. Mr. Karmazin will describe the competition Sirius faces, including fierce competition from terrestrial radio, which does not have the burden of paying any sound recording royalties.

Mr. Karmazin will describe the many functions that Sirius must perform in order to carry on its business. He will explain that Sirius' revenues must be allocated to all of those functions and cover all of the costs of those functions.

Mr. Karmazin also will discuss Sirius' conclusion that music programming will not drive a sufficient number of people to pay the subscription fees necessary to keep Sirius alive. He will explain that music, and the right to play music, is ubiquitous, and that the public generally is not willing to pay substantial subscription fees for programming it can obtain for free. He will explain that Sirius has had to invest large sums in compelling content, particularly talk, entertainment and sports, and on radio personalities, and that even when Sirius programs music, it incurs substantial costs to add significant value to that music.

David Frear, Sirius' Executive Vice President and Chief Financial Officer, will provide financial details describing the huge costs Sirius has incurred and the investments it has made to create a new medium of radio entertainment for the public. He will explain the costs Sirius has incurred to develop its system. He will also describe the enormous costs Sirius must incur to cause retailers to sell its radios and automakers to build its radios into their vehicles. Mr. Frear will describe the tremendous costs Sirius must incur to create and develop both the talk, sports, news and entertainment programming that drives people to subscribe, and the compelling music programming that it must create.

Mr. Frear will provide detailed financial information about Sirius, including information used in Dr. Woodbury's analysis. He will then discuss Dr. Woodbury's analysis and why Sirius

believes the analysis is exceedingly conservative and leads to a range of fees that overstates the appropriate fee for the sound recording rights at issue. He will then will describe Sirius' fee proposal and proposed terms.

Terrence Smith, Sirius' Senior Vice President of Engineering, has overall responsibility for all of Sirius' engineering activities and technological development, including the major elements of the Sirius system. Mr. Smith will testify about the enormous engineering challenges that faced Sirius in developing a reliable digital satellite audio system. He will explain the technology that makes Sirius work and the need for continuing development in order to remain competitive. He will also describe some of the awards that Sirius has received for its industry leading technology.

Witnesses Describing the End-to-End Functions that Sirius Must Perform

John Douglas Wilsterman, Vice President and General Manager of the Original Equipment Manufacturing Division of Sirius, will describe Sirius' relationship with the automakers and their suppliers (collectively "OEMs"). Mr. Wilsterman has more than 20 years' experience in the consumer electronics industry and has been with Sirius since 1999. Because people generally listen to radio more in the car than anywhere else, and because satellite radio requires dedicated hardware to receive the signal from the satellites, is essential for Sirius to persuade OEMs to make satellite radios available in as many vehicles as possible. Mr. Wilsterman will testify that achieving this necessary goal requires both an intense engineering effort and an enormous monetary commitment by Sirius. Sirius engineers must work with OEM engineers (both the vehicle manufactures and their audio suppliers) to ensure that the Sirius radio integrates seamlessly with the rest of the vehicle, from both a functional and an aesthetic perspective. This engineering effort must be funded by Sirius, because the OEMs have no

incentive to spend their own engineering funds on radios. Moreover, particularly in return for exclusive relationships, OEMs demand significant additional compensation in the form of activation fees, revenue sharing, and marketing support. Sirius also is required to provide support at the dealer level, as well as training so that dealer personnel can explain the operation and advantages of Sirius radios. Thus, while participation in the OEM market is essential to Sirius' success, it is extremely costly.

Robert Law, Senior Vice President and General Manager of the Consumer Electronics Division of Sirius, also is a long-time veteran of the consumer electronics industry. He has principal responsibility for the non-OEM lines of Sirius, including sales of Sirius radios at large consumer electronics retailers as well as other major national retailers. Mr. Law will testify that the consumer electronics business is intensely competitive, requiring continuous product development and innovation. He will also testify that consumer electronics is generally a low margin business and that radio manufacturers and retailers in the consumer electronics business make demands for marketing and engineering support that are comparable to those made by the OEMs. Mr. Law will testify that participation in the consumer electronics marketplace is an essential source of subscribers for Sirius and that, to participate, Sirius must, among other things, pay for the cost of the proprietary chipsets that are used in Sirius radios, pay for the design and development of radios, and pay retailers for selling the radios, both by providing marketing support and, in some cases, sharing the revenues received from subscriptions.

Michael J. Moore is Vice President, Customer Care, at Sirius. He has spent many years involved in customer care operations. Sirius' more than 5 million subscribers require extensive support. He will testify that, because Sirius is a subscription business that requires complex, dedicated hardware, Sirius is required to have a large customer care operation to ensure that

subscribers receive adequate service. Mr. Moore will testify that he expects that Sirius will respond to more than 13 million subscriber calls and emails during the course of 2006.

Customer care representatives must respond to a wide range of issues that may be raised by subscribers, including activations, billing and account management, operation of the system, and hardware and warranty issues. Responding to this volume of inquiries successfully requires a complex subscriber management system ("SMS") as well as multiple customer care centers. In 2005 Sirius received a customer service award from JD Powers & Associates, confirming its success managing this endeavor.

Witnesses Describing Sirius' Programming and its Investment in that Programming

Jeremy M. Coleman is Vice President, Talk, Entertainment and Information Programming at Sirius. He has been involved in the radio industry for approximately 20 years. He oversees programming on most of Sirius' 54 news, talk and other non-music, non-sports entertainment channels. Mr. Coleman will discuss the reasons that highly desirable, exclusive talk and entertainment programming is critical to attracting paying subscribers to Sirius, and will describe that programming and the effort and creativity involved in providing it to Sirius subscribers, including the Howard Stern channels, Martha Stewart Living Radio, the Discovery Radio channel, and more. He will testify that the Howard Stern channels are, by far, the two most popular channels on Sirius, and will describe the effort and creativity involved in creating those channels.

Mr. Coleman will also identify and discuss the other entertainment channels that Sirius provides, including E! Entertainment Radio, Maxim Radio, Court TV Radio, Radio Disney, and Radio Classics. He will discuss the creative efforts that have been undertaken by Sirius to create new talk and entertainment channels, sometimes starting with a brand (e.g., Cosmopolitan Radio)

and sometimes starting with just a concept (e.g., Sirius Left and Sirius Patriot, left and right oriented talk channels; and OutQ, the first gay and lesbian channel on radio; and Sirius Stars, Sirius' flagship talk station). He will also discuss Sirius' efforts to obtain well-known branded news, talk and entertainment content, such as Fox News, CNN, Bloomberg and NPR, some of which is obtained on a non-exclusive basis and some of which is exclusive to Sirius on satellite radio.

Steve Cohen is Vice President, Sports, of Sirius. He has spent his entire career in the radio industry, with a focus on sports. He will testify on the critical importance of sports programming on Sirius, including Sirius' exclusive satellite radio relationship with the NFL and upcoming relationship with NASCAR. Mr. Cohen will describe not only the importance that these major brands have in attracting subscribers to Sirius, but also to the creative efforts that Sirius is undertaking to build full time radio channels that will appeal to fans even in the off season, when there is no live, play-by-play coverage, such as NFL Radio. Mr. Cohen will also discuss the importance of other sports programming that is included in the Sirius service, including ESPN, the NBA, the NHL, college football and basketball, including March Madness, the championships at Wimbledon, and others. Mr. Cohen will testify that this programming, much of which is exclusive to Sirius for satellite radio, allows Sirius to provide more comprehensive and in-depth coverage of sports than terrestrial radio and is a major point of distinction when competing for subscribers with XM.

Steve Blatter is Senior Vice President for Music Programming at Sirius, supervising employees who create and maintain the 64 Sirius music channels. His 20+ year career has been in radio programming and marketing at the local and national levels. He has had extensive dealings with record companies as they seek radio air time to promote their sales. He will testify

that Sirius is part of the radio industry, but its music channels (i) face additional and unique challenges, (ii) provide enormous added value to listeners, and (iii) confer valuable promotional benefits on record companies. He will explain what Sirius must do to select, develop, test, market, and implement its 64 music channels, showing that the Sirius presentations are highly creative in themselves and make available a great deal of music that listeners otherwise would never encounter via the inherently limited play lists of ordinary terrestrial radio. He also will discuss how record companies covet the promotional benefits of Sirius air time and make extensive efforts to persuading Sirius to play their music – which they provide to Sirius for free.

Christine Heye is Vice President, Research, at Sirius and has an extensive background in consumer research. She will testify concerning the semi-annual customer satisfaction monitor and listener survey conducted on behalf of Sirius and reflecting the opinions of thousands of Sirius subscribers. This research demonstrates, among other things, the overwhelming importance of exclusive talk, sports and entertainment programming to attract and retain subscribers. The survey responses will show that Howard Stern is unique in attracting subscribers to Sirius and making them want to continue their subscriptions. However, Ms. Heye will also testify that other talk, sports and entertainment programming, including the NFL, are important to subscribers. Ms. Heye will explain that channels developed independently by Sirius, such as OutQ, are immensely important to subscribers despite having smaller audiences. Ms. Heye will explain that on the basis of the research, exclusive talk, entertainment and sports programming is essential to attracting subscribers to Sirius, whereas simply playing music would not do so.

Expert Witnesses

In addition to its officers, Sirius joins with XM Satellite Radio, Inc. to present three expert witnesses. Two will discuss the satellite industry from different perspectives. The third, Dr. John Woodbury, will analyze Sirius' and XM's businesses to recommend a rate for the sound recording fees at issue in this proceeding.

Roger J. 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, 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 also 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., 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 rate 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 same legal standard applicable to this case by the Librarian of Congress in 1998, at 6.5%, for the three pre-existing subscription services ("PSS") offering a music service to subscribers of cable television systems, Music Choice, DMX, and Muzak, 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 consists 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

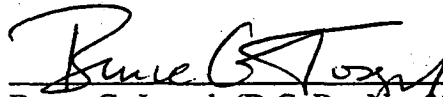
offerings. He will also testify that, in contrast, XM and Sirius provide both non-music and extensively enhanced music channels in a complete, end-to-end package for mobile, nationwide listening (including in-vehicle and in-home listening) directly to subscribers. Dr. Woodbury will evaluate these two 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 where in this range the rate should be set. 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.

Respectfully submitted,



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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) subscription revenue recognized by Licensee 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 (d)(1) 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) monies or other consideration attributable to the sale and/or license of equipment and/or other technology, including but not limited to bandwidth, 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, invoice, and fulfillment service fees;

(v) bad debt expense, and

(vi) revenues recognized by Licensee for the provision of

(A) Current and future data services (e.g., weather, traffic, destination information, messaging, sports scores, stock ticker information, extended program associated data, video and photographic images, and such other telematics and/or data services as may exist from time to time);

(B) Channels, programming, products and/or other services offered for a separate charge other than Music Channels (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, 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% or 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 §§26_.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 released and available album or other product on which the sound recording is found;
- (G) The catalog number for albums or other products commercially released;
- (H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible, for albums or other products commercially released after 1998;
- (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 commercially released albums or other products;
- (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 commercially released albums or other products.

(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.

Index of Witness Testimony

Witness	Title
Mel Karmazin	Chief Executive Officer, Sirius Satellite Radio Inc.
Terrence Smith	Senior Vice President, Engineering, Sirius Satellite Radio Inc.
John Douglas Wilsterman	Senior Vice President and General Manager of the Original Equipment Manufacturing Division, Sirius Satellite Radio Inc.
Robert Law	Senior Vice President and General Manager of Consumer Electronics, Sirius Satellite Radio Inc.
Michael J. Moore	Vice President, Customer Care, Sirius Satellite Radio Inc.
Jeremy M. Coleman	Vice President, Talk, Entertainment, and Information Programming, Sirius Satellite Radio Inc.
Steve Cohen	Vice President, Sports, Sirius Satellite Radio Inc.
Steven Blatter	Senior Vice President for Music Programming, Sirius Satellite Radio Inc.
Christine Heye	Vice President, Research, Sirius Satellite Radio Inc.
David J. Frear	Executive Vice President and Chief Financial Officer, Sirius Satellite Radio Inc.

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Sponsored By:	Description
Roger J. Rusch	President, TelAstra, Inc.
J. Armand Musey	President and Partner, Near Earth LLC
John Woodbury	Vice President, CRA International

Index of Exhibits for Sirius Satellite Radio Inc.

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SIR Ex. 1	Mel Karmazin	Excerpt from Sirius' 2005 Form 10-K describing risk factors
SIR Ex. 2	Mel Karmazin	Printouts from www.hdradio.com: A. What is HD Radio? B. Radio Companies Kick off First Phase of \$200 Million Ad Campaign for HD Digital Radio (Feb. 21, 2006)
SIR Ex. 3	Mel Karmazin	Sirius press releases: A. Sirius Broadcasting New Political Talk and News Shows (Jan. 8, 2003) B. Sirius and NBA Team Up To Offer NBA Games Nationwide Through Satellite Radio (Jan. 21, 2003) C. Sirius Hits One Out of the Park With 2003 Major League Baseball Playoff and World Series coverage (Sept. 22, 2003) D. Sirius Scores With Delivery of NHL Games and NHL Corporate Partnership (Oct. 2, 2003)
SIR Ex. 4	Mel Karmazin	Sirius press releases: A. Sirius and NFL Announce Multi-Year Broadcast and Marketing Agreement (Dec. 16, 2003) B. Sirius and National Football League Execute Definitive Multi-Year Broadcast and Marketing Agreement (Feb. 4, 2004) C. Sirius NFL Radio Goes Live August 2, Marking Launch of First 24/7 Radio Channel Dedicated to the NFL (Aug. 2, 2004)
SIR Ex. 5	Mel Karmazin	Sirius press releases: A. SIRIUS Satellite Radio Adds EWTN Global Catholic Radio to Programming Lineup (Jan. 5, 2004) B. SIRIUS Satellite Radio To Provide Traffic and Weather Information For Top 20 Markets (Feb. 27, 2004) C. SIRIUS Satellite Radio Provides the Ultimate Choice:

Ex. No.	Sponsored By:	Description
		<p>Three Full-Time Channels of Liberal and Conservative Talk Programming (Apr. 5, 2004)</p> <p>D. SIRIUS Satellite Radio Expands Lineup of Talk Programming with New Conservative Channel, Sirius Patriot (July 7, 2004)</p> <p>E. SIRIUS Satellite Radio Kicks Off College Football Season With Broadcast of USC-Virginia Tech Game (Aug. 24, 2004)</p> <p>F. SIRIUS Satellite Radio And CSTV: College Sports Television Launch 'SIRIUS College Sports Radio' SIRIUS To Broadcast Sports From 23 Universities (Aug. 31, 2004)</p>
SIR Ex. 6	Mel Karmazin	Sirius press release: Howard Stern and SIRIUS Announce the Most Important Deal in Radio History (Oct. 26, 2004)
SIR Ex. 7	Mel Karmazin	<p>Sirius press releases:</p> <p>A. SIRIUS Satellite Radio Brings NCAA March Madness® to College Hoops Fans Nationwide (Nov. 29, 2004)</p> <p>B. The NBA and SIRIUS Satellite Radio Score with Extension of Multi-Year Programming and Marketing Agreement (Jan. 21, 2005)</p> <p>C. NASCAR Selects SIRIUS as New Home on Satellite Radio (Feb. 22, 2005)</p> <p>D. Sirius Satellite Radio To Launch Exclusive Martha Stewart Channel (Apr. 18, 2005)</p> <p>E. SIRIUS Satellite Radio To Launch Cosmopolitan-Branded Women's Channel (Sept. 2, 2005)</p> <p>F. SIRIUS Satellite Radio and the NBA Announce Multi-Year Broadcast and Marketing Agreement (Dec. 13, 2005)</p> <p>G. SIRIUS Satellite Radio To Launch New Playboy Channel (Jan. 5, 2006)</p> <p>H. SIRIUS Satellite Radio To Broadcast Every Game of the 2006 NCAA Division I Men's Basketball Tournament (Mar. 9, 2006)</p> <p>I. COSMO Radio Channel Debuts Today Exclusively on</p>

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SIR Ex. 8	Mel Karmazin	<p>A. Earnings release: SIRIUS Satellite Radio Reports Strong First Quarter 2006 Results (May 2, 2006)</p> <p>B. Earnings release: SIRIUS Reports Strong Second Quarter 2006 Results (Aug. 1, 2006)</p> <p>Press releases:</p> <p>C. Deepak Chopra, World Renowned Mind and Body Expert and Author, To Host Weekly Show on SIRIUS Satellite Radio (May 4, 2006)</p> <p>D. NASCAR Driver Tony Stewart To Host Live Talk Show Exclusively on SIRIUS Satellite Radio (May 19, 2006)</p> <p>E. NFL Legend Jerry Rice To Host Exclusive Show on SIRIUS Satellite Radio (June 12, 2006)</p> <p>F. Barbara Walters To Launch 'Best of the Very Best' on SIRIUS Satellite Radio Early Next Year (June 26, 2006)</p> <p>G. SIRIUS and Variety Will Launch Radio News Bureau (June 29, 2006)</p>
SIR Ex. 9	Mel Karmazin	<p>Sirius press releases regarding:</p> <p>A. Eminem, Shady Records, Interscope and SIRIUS Satellite Radio To Launch Exclusive Radio Channel (July 12, 2004)</p> <p>B. Skateboarding Icon Tony Hawk To Host New Radio Show on SIRIUS Satellite Radio (July 16, 2004)</p> <p>C. Champion Surfer Kelly Slater's "Radio K-Os" To Debut August 22 On SIRIUS Satellite Radio (Aug. 2, 2004)</p> <p>D. Olympic Athlete Kerri Walsh To Provide Reports From Athens For SIRIUS Satellite Radio (Aug. 11, 2004)</p> <p>E. Professional Skateboarder and "Viva La Bam" Host Bam Margera To Host Show on SIRIUS Satellite Radio (Aug. 17, 2004)</p>

Ex. No.	Sponsored By:	Description
		<p>F. Beach Volleyball Icon Sinjin Smith Added to SIRIUS Satellite Radio Lineup (Oct. 1, 2004)</p> <p>G. The Hype Is Real: Eminem's 'Shade 45' Radio Channel To Debut October 28 on SIRIUS Satellite Radio (Oct. 14, 2004)</p> <p>H. Lance Armstrong Joins SIRIUS Satellite Radio (Oct. 25, 2004)</p> <p>I. Double World Champion Skier Bode Miller To Host New Radio Show on SIRIUS Satellite Radio (Dec. 2, 2004)</p> <p>J. Jimmy Buffett To Bring Radio Margaritaville Exclusively To SIRIUS Satellite Radio (May 10, 2005)</p> <p>K. Rolling Stones Take Over SIRIUS Satellite Radio Music Channel (Aug. 22, 2005)</p> <p>L. SIRIUS Satellite Radio to Launch 'E Street Radio' – World's First 24/7 Bruce Springsteen Music Channel (Oct. 25, 2005)</p> <p>M. 'The Who Channel' to Launch September 21 Exclusively on SIRIUS Satellite Radio (Sept. 14, 2006)</p> <p>N. The Metropolitan Opera and SIRIUS Satellite Radio To Create Historic New Radio Channel (Sept. 20, 2006)</p>
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SDARS-Woodbury Ex. 5	John Woodbury	Diagram of "How Satellite Radio Works"
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SDARS-Woodbury Ex. 22	John Woodbury	Sirius and XM Expenditures on Satellites
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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2007, I caused copies of the Public Version of Sirius Satellite Radio Inc.'s Written Direct Statement in Docket No. 2006-1 CRB DSTRA, without exhibits, previously served in its entirety on October 30, 2006, to be served via overnight courier on the following parties:

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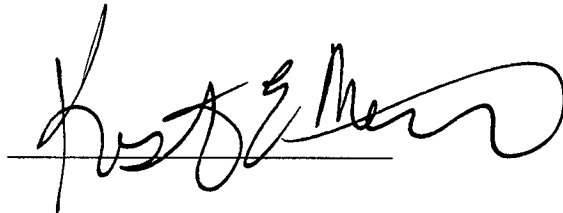
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A handwritten signature in black ink, appearing to read "Kurt E. Merriam", is written over a horizontal line. The signature is fluid and cursive.