



## Broadcasting Decision CRTC 2011-240

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Route reference: 2011-6

Ottawa, 11 April 2011

### **Canadian Satellite Radio Inc.**

Across Canada

### **Sirius Canada Inc.**

Across Canada

*Applications 2010-1723-6 and 2010-1769-0, received 30 November 2010*

*Public Hearing in the National Capital Region*

*7 March 2011*

## **Canadian Satellite Radio Inc. and Sirius Canada Inc. – Change in effective control**

*The Commission **approves** applications by Canadian Satellite Radio Inc. (CSR) and Sirius Canada Inc. (Sirius) for authority to change the effective control of CSR and Sirius to Canadian Satellite Radio Holdings Inc.*

*In Broadcasting Decision 2011-241, also issued today, the Commission has administratively renewed the broadcasting licences for the Sirius Canada and XM Canada satellite subscription radio services from 1 September 2011 to 31 August 2012. The Commission will discuss the implementation of the terms and commitments set out in this decision as well as the licensees' compliance with its conditions of licence as part of the licence renewal proceeding.*

### **The applications**

1. The Commission received applications by Canadian Satellite Radio Inc. (CSR) and Sirius Canada Inc. (Sirius) (collectively, the applicants) for authority to change the effective control of CSR and of Sirius to Canadian Satellite Radio Holdings Inc. (CSRHI).
2. Sirius is a corporation controlled by its board of directors. The voting shares of Sirius are held by the Canadian Broadcasting Corporation (CBC) (40%); Slaight Communications Inc. (Slaight), a corporation controlled by J. Allan Slaight (40%);

and Sirius XM Radio Inc. (Sirius XM), a non-Canadian corporation (19.99%). Sirius is the licensee of the satellite subscription radio (SSR) service Sirius Canada.<sup>1</sup>

3. CSR is a wholly owned subsidiary of CSRHI, a publicly traded corporation controlled by John Bitove. XM Satellite Radio Inc., a non-Canadian corporation, holds 10.82% of the voting interest in CSRHI.<sup>2</sup> CSR is the licensee of the SSR service XM Canada.<sup>3</sup>
4. As contemplated by the Securities Purchase Agreement dated 24 November 2010, CSRHI would acquire 100% of the shares of Sirius in exchange for shares in the capital of CSRHI to be issued to Sirius's shareholders.
5. Following the closing of the proposed transactions, the voting interest of CSRHI would be held by the following: CSRI Inc., a corporation owned and controlled by Mr. John Bitove (30.3%)<sup>4</sup>; the CBC (20.4%); Slaight (20.4%) and Sirius XM (25%). The remaining shares, representing approximately 4% of the voting interest, would continue to be held publicly. The board of directors of CSRHI would exercise effective control of both CSR and Sirius.
6. The applicants submitted that the transactions are necessary to improve the competitive position of the SSR business in the audio entertainment market. They noted that regulated and unregulated competition, combined with the investment requirements of the SSR business, have proven challenging to their business models. They further submitted that the U.S. merger between XM and Sirius has made it more difficult to maintain distinct competing services in Canada.
7. Finally, the applicants submitted that they face significant financial challenges, given that they have lost money since the commencement of operations of their respective services. They argued that the proposed merger would accelerate their ability to achieve positive long-term cash flow and profitability. In this regard, they estimated that synergies in their operations would amount to \$20 million within 18 months of the close of the transaction.
8. For each of the applications, the Commission received numerous interventions, including interventions in support, interventions offering general comments and one intervention in opposition. The complete record for this proceeding is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."

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<sup>1</sup> Sirius Canada was approved by the Commission in Broadcasting Decision 2005-247 and launched in December 2005.

<sup>2</sup> In February 2007, XM Satellite Radio Inc. and Sirius Satellite Radio Inc. announced plans to merge their operations. As a result, XM Satellite Radio Inc. now operates as a wholly owned subsidiary of the combined entity, re-named Sirius XM Radio Inc. (Sirius XM).

<sup>3</sup> XM Canada was approved by the Commission in Broadcasting Decision 2005-246, and launched in November 2005.

<sup>4</sup> This figure includes shares to be held directly by Mr. Bitove.

## **Commission's analysis and determinations**

9. After examining the applications in light of applicable regulations and policies, and taking into account the interventions, the Commission considers that the issues to be addressed in making its determinations are the following:

- application of the tangible benefits policy;
- intangible benefits;
- corporate governance;
- Canadian talent development contributions;
- technical plans; and
- the independent programming committee.

### **Application of the tangible benefits policy**

10. The Commission's tangible benefits policy was first announced in Public Notice 1989-109. This policy makes it possible for the market to govern changes in effective control of broadcasting licences while simultaneously ensuring that the public interest is served through the allocation of a percentage of the value of the transaction to incremental spending that will benefit audiences in the market(s) served and the Canadian broadcasting system as a whole.

11. As set out in Public Notice 1993-68 and affirmed in Public Notice 1998-41 and Broadcasting Public Notice 2006-158, the Commission has exempted unprofitable radio undertakings from this requirement. In Public Notice 1998-41, the Commission indicated that it would measure profitability according to the average profit before interest and taxes (PBIT) of an undertaking over the three years preceding the filing date of the application, and that it would not systematically apply this exemption to stations in the first five years of operation.

12. The applicants submitted that no tangible benefits are payable on the proposed merger. They noted that their services have been in operation for more than five years, and that the average PBIT of each service over the past three years has been negative. They therefore submitted that the proposed transactions should fall within the exemption provided for by the Commission's tangible benefits policy. In addition, at the public hearing, the applicants indicated that the combined cumulative losses of both licensees amount to more than \$400 million.

### **Interventions**

13. L'association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) submitted that the applicants, based on the launch dates for their respective services, barely qualify for exemption from the payment of tangible benefits. ADISQ

requested that the Commission be flexible in its application of the tangible benefits policy and question the applicants on the possibility of requiring tangible benefits as part of the approval of this transaction.

Commission's determinations

14. The Commission notes that both licensees are undergoing a change in effective control as a result of the merger. As such, for the purpose of applying the exemption to the tangible benefits policy, the Commission considers the average profitability of each undertaking separately. In this regard, the Commission notes that the average PBIT of both applicants over the last three years has been negative. Although the Commission recognizes the concerns expressed by ADISQ that the services in question barely qualify for the tangible benefits exemption based on their respective launch dates, the Commission nonetheless considers that an exemption to its tangible benefits policy is appropriate for both transactions.

#### **Intangible benefits**

15. Certain interveners, including ADISQ and Newcap Inc. (Newcap) noted that approval of the transactions would result in a reduction in the number of entities providing SSR services to Canadians to one. They asserted that this reduction may warrant attention, and as such could necessitate long-term measures to prevent abuse of CSRHI's dominant position in the market.
16. The applicants made the following commitments that they would implement if the proposed transaction were approved. Specifically, the applicants offered to:
  - provide a substantial amount of Aboriginal programming on at least one service before the expiration of the current licence term;
  - implement no increase to the undiscounted monthly rate for their basic subscription packages prior to 31 December 2011, and any increase in this rate would not apply to existing customers as of that date until 31 August 2012;
  - make available the same "best of" package of audio programming as is currently offered by Sirius XM in the U.S. to enable subscribers of either XM Canada or Sirius Canada to receive popular programming from the service to which they do not subscribe, subject to the negotiation of successful amendments to their agreements with Sirius XM and any necessary revisions to subscriber management systems;
  - make reasonable efforts to offer subscribers of either service the ability to subscribe to the content on the existing online media player of either company. The service would be offered at the incremental cost that is incurred to provide the service;

- make reasonable efforts to import interoperable radios capable of receiving both the XM and Sirius services, and offer those for sale as soon as practicable.

Commission's determinations

17. While the number of SSR service providers would be reduced to one, the Commission considers the applicants compete in a broader marketplace. The potential for significant public detriment stemming from the proposed merger is mitigated by the availability of alternative sources of audio programming and content, including pre-recorded digital audio, terrestrial radio, and the increasing availability of content from Internet sources delivered to smartphones, in-vehicle entertainment systems, Internet radios, personal computers and other networked devices.

18. The Commission does not, therefore, consider that specific measures to guard against the exercise of market power by a sole SSR provider are required. The Commission considers, however, that approval of the proposed merger should result in unequivocal benefits to the Canadian broadcasting system as well as to Canadian consumers. In addition, the Commission notes that both applicants will benefit from the synergies resulting from the approval of the proposed transaction. As such, the Commission has considered each of the commitments and sets out the following requirements.

*a) Aboriginal programming*

19. The *Broadcasting Act* states that “programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose.” In the view of the Commission, the advantages to the broadcasting system of providing such programming by means of SSR are considerable. The Commission therefore directs the applicants, by **condition of licence**, to make this programming available by 1 September 2011. **Conditions of licence** providing the applicants considerable flexibility in the implementation of this commitment are included in the appendix to this decision. These conditions relieve the applicants from the necessity of providing only original programming for the Aboriginal channel only. This would enable them to provide a potpourri of existing Aboriginal stations if they so choose.

*b) Rate freeze*

20. The Commission considers that pricing is a crucial area in which the merger must demonstrate clear advantages to Canadian consumers, and acknowledges the significant commitment made by the applicants with regard to the maintenance of their current pricing plans. As such, the Commission directs the applicants to implement the commitment as offered: current pricing must be maintained until 31 December 2011 and existing customers as of 31 December 2011 must be price protected until 31 August 2012.

*c) Programming packages*

21. The Commission considers that the ability to access programming from both services is a significant advantage of the merger. The applicants have proposed to offer the same “best of” package as currently offered by Sirius XM (which may or may not have Canadian channels included), and requested exemptions from their conditions of licence permitting reduced Canadian content on this package. However, the Commission considers that the provision of Canadian programming is the cornerstone of the Canadian broadcasting system as well as of the framework under which the SSR undertakings were licensed in 2005. As such, the Commission directs the applicants to offer a “best of” package to its customers. However, to conform to conditions of licence 1(c) and 1(d), this package must respect the current 1:9 ratio of Canadian to non-Canadian channels.
22. With regard to online services, the Commission accepts the commitment made by the applicants to offer customers of Sirius the ability to access the service of XM, and vice versa, but directs the applicants to offer this at no additional cost to the consumer. In addition, the Commission directs the applicants to extend this commitment on the same terms to service on mobile devices.
23. Finally, the Commission directs the applicants to maintain the present number of distinct Canadian channels offered by the two services until the end of their licence terms.

*d) Interoperable receivers*

24. The Commission considers that the commitment made by the applicants will give new and existing subscribers the ability to switch services without buying a new receiver, and as such, the commitment represents a significant advantage for the Canadian consumer. The Commission directs the applicants to implement the commitment as offered, namely to import and make available interoperable receivers in Canada.

Conclusion

25. The Commission considers that these commitments offer clear benefits to the Canadian broadcasting system and to Canadian consumers. The Commission therefore directs the applicants to implement these commitments in accordance with the terms set out above. The applicants’ progress will be monitored by Commission staff and considered in the context of the next licence renewal hearing.

**Corporate governance**

26. The Commission has identified the following issues relating to corporate governance:
  - independent directors; and
  - veto rights.

#### Independent directors

27. As indicated above, following the transactions, the board of directors of CSRHI will exercise effective control of both licensees. The board will be composed of directors nominated by shareholders (shareholder nominees) as well as three independent directors. The shareholder nominees will be selected by John Bitove (2), Sirius XM (2), CBC (1) and Slaight (1). The independent directors must meet the definition of independence established in National Instrument 52-110 *Audit Committees*, an instrument enforced by the Ontario Securities Commission.
28. The initial independent directors are to be nominated by CSRHI and Sirius. These two directors will select the third independent director. The applicants clarified that these nominations will take place before the transaction, and as such, they will be at arm's length from the merged CSRHI. Subsequent independent directors will be selected by the corporate governance committee. This committee is to be composed of independent directors who are free of any relationship that would jeopardize their independence from the company. The Governance Agreement (the Agreement) provides that at least two of the independent directors must be Canadian.
29. During the public hearing, the Commission expressed concern that under the proposed definition, shareholder nominees – specifically directors nominated by Sirius XM – could qualify as independent and therefore serve on the governance committee. The Commission also noted that the composition of the governance committee is not explicitly established. Finally, the Commission questioned the applicants on the possibility of a deadlock between independent directors in the event that the third independent director resigns or is removed.<sup>9+</sup>
30. The applicants stated that it was not their intention to have shareholder nominees that qualify as independent directors. In addition, they submitted that the governance committee would likely be composed of the three independent directors, with shareholders being granted observer status. In the reply phase of the public hearing, the applicants submitted that they would amend the Agreement to provide that no director nominated by a shareholder holding more than 10% of the voting interest in CSRHI will qualify as independent. They also proposed that, in the event of a deadlock in the nomination of an independent director, the three largest Canadian shareholders holding more than 10% of the voting interest will, by majority vote, nominate an independent director.

#### *Commission's determinations*

31. The Commission considers that the proposed revision to the definition of independence will limit the influence of Sirius XM over the nomination of independent directors. The procedures proposed by the applicants with regard to the resolution of a deadlock are also acceptable to the Commission. The Commission considers that these modifications should be included in the revised Agreement to be filed following the transactions, as set out in paragraph 70.

32. In their letter dated 14 December 2010, the applicants agreed to amend the Agreement to require a Canadian majority to achieve quorum at a reconvened meeting of the board of directors. In addition, the Commission directs the applicants to include quorum provisions in section 3.5 of the Agreement to ensure that all committees require a Canadian majority in order to transact business.

#### **Veto rights**

33. Article 4 of the Agreement provides that, where Sirius XM's equity interest is greater than or equal to 22.6% and its voting interest is less than its equity interest, Sirius XM's prior written consent will be required for certain decisions. The specific decisions are enumerated in Schedule A to the Agreement. In addition, section 3.3 of the Agreement provides that, where the above conditions are satisfied and Sirius XM's nominees have not been elected to the board of directors, the operating plan shall be subject to Sirius XM's approval.

34. The Commission evaluates the appropriateness of the vetoes accorded to non-Canadian shareholders in the context of the particular facts of the case. Vetoes and required approvals are standard in the context of shareholders' agreements, as they provide shareholders with a measure of security for their investment. However, in the case of an entity operating as a Canadian broadcaster, the Commission's role is to ensure that shareholder rights do not undermine control of that entity by its Canadian management team or board of directors.

35. At the public hearing, the Commission questioned the applicants on their definition of the "ordinary course of business" as it applies to Sirius XM's special consent rights. Specifically, the Commission suggested that use of the definition of the ordinary course of business from Broadcasting Decision 2008-69 would be consistent with precedent. The applicants were also questioned on their use of monetary thresholds for certain vetoes, most importantly relating to the incurrence of indebtedness. In this regard, the Agreement stipulated that Sirius XM must approve any indebtedness over \$50 million. The Commission also requested clarification on the implementation of Sirius XM's veto over the annual operating plan.

36. The applicants submitted that the proposed definition of the ordinary course of business would be acceptable if the clause "historically have not generally been subject to approval by such Person's board of directors (or equivalent governing body)" were removed. At the public hearing, the applicants explained that the removal of this clause was necessary because certain decisions were previously subject to approval of the board of directors.

37. The applicants submitted that the monetary thresholds were negotiated by all parties and that these thresholds grant the Canadian shareholders sufficient latitude to manage the business. The applicants submitted that those thresholds that fall below 5% of enterprise value relate only to the making of loans and non-arms length transactions. In their reply, the applicants presented a revised list of consent rights which carves out all other activities either within or outside the ordinary course, using

their amended definition. The revised consent right related to the incurrence of debt also explicitly excludes current debt, including refinancing of such debt, from the \$50 million threshold. In addition, the applicants proposed modifications to the Agreement to ensure that Sirius XM cannot exercise its veto over the operating plan by withdrawing their board nominees.

Commission's determinations

38. In recent decisions,<sup>5</sup> the Commission has stressed consistency in the way that it assesses elements relevant to control in fact, providing certainty to the industry and establishing clear precedents that can be helpful to licensees and other stakeholders. As such, these decisions have often relied upon a common definition of the ordinary course of business and the use of 5% of enterprise value as an appropriate monetary threshold for key vetoes.
39. Nonetheless, as stated above, questions relating to shareholder rights must always be considered in the context of a specific application or review. The Commission considers that the amendment to the definition of ordinary course is acceptable in this instance, as it expands the discretion of the Canadian board of directors. Similarly, while certain monetary thresholds do fall below the 5% of enterprise value set out in previous decisions, the Commission does not consider that those vetoes have an undue impact on governance and Canadian control in this case.
40. Significant discussion at the hearing centred on the veto over the incurrence of indebtedness. The Commission noted that the \$50 million threshold had already been exceeded, given the \$120 million of current CSRHI debt. However, the amendments made by the applicants, specifically excluding current debt from the veto, allay this concern. As such, the Commission considers that the revised consent rights, as proposed by the applicants during the reply phase of the public hearing, are acceptable and provide adequate protection for shareholder investments while ensuring that control is firmly in the hands of the Canadian shareholders.

#### **Canadian talent development contributions**

41. In the original licensing decisions for XM Canada and Sirius Canada,<sup>6</sup> the Commission imposed the following condition of licence relating to contributions to Canadian talent development<sup>7</sup> (CTD):

7. (a) During each broadcast year, the licensee shall contribute a minimum of 5% of gross revenues from its satellite subscription radio undertaking to eligible third

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<sup>5</sup> See, for example, Broadcasting Decisions 2007-429 and 2008-69, as well as Telecom Decisions 2009-678, 2010-226 and 2010-264.

<sup>6</sup> As noted above, Broadcasting Decisions 2005-246 and 2005-247, respectively.

<sup>7</sup> The term "Canadian talent development" was replaced by "Canadian content development" for terrestrial radio stations in December 2006, when a new definition of eligible initiatives was adopted. However, SSR licensees continue to be regulated under the CTD regime.

parties directly connected to the development of Canadian musical and other artistic talent or other initiatives approved by the Commission. For purposes of this condition of licence, “eligible third parties” shall have the definition set out in *Contributions by radio stations to Canadian talent development – A new approach*, Public Notice CRTC 1995-196, 17 November 1995, as amended from time to time by the Commission.

(b) Fifty per cent of the licensee’s total annual contribution to Canadian talent development shall be allocated to initiatives for the development of Canadian French-language talent, and fifty percent shall be allocated to initiatives for the development of Canadian English-language talent.

(c) The licensee shall file a report on the fulfilment of its commitments with respect to Canadian talent development with each annual return. The report shall set out the initiatives that the licensee has supported, the amount spent on each initiative, as well as the total amounts devoted to initiatives for the development of French-language and English-language talent.

42. The Commission notes that CSR acknowledged in correspondence prior to the hearing its apparent non-compliance in regard to the amount of its required contributions to CTD, as well as the division of contributions between English-language and French-language initiatives. The public record also contains correspondence concerning Sirius’ apparent non-compliance with its required contributions to CTD.
43. At the hearing, the Commission questioned the parties on the reasons for their apparent non-compliance, their methods for calculating their revenues (on which their CTD contributions are based) and their plans for making up past shortfalls.

#### CSR’s reply

44. In a letter dated 27 November 2009 (which accompanied its 2009 Annual Return), CSR stated that during the 2008-2009 broadcast year it needed “to pursue a cautious approach to managing its operating and liquidity risk,” mainly due to effects of the stagnant economy at that time and an adverse Copyright Board decision.
45. CSR also reported a shortfall in a letter accompanying its 2010 Annual Return. It referred to its 2009 letter outlining the reasons and re-affirmed its commitment to bring itself into full compliance at the closing of the proposed transactions. At the public hearing, CSR stated that it is difficult to maintain the 50/50 split in each broadcast year rather than over the licence term.

#### Sirius’ reply

46. Sirius did not agree that it is in non-compliance with its conditions of licence for CTD for any broadcast year. In a letter dated 26 January 2011, Sirius presented two arguments in this regard.

47. First, Sirius contended that even though its CTD expenditures do not represent 5% of its revenues each year, it has carried these shortfalls forward and paid them in the following broadcast year, thereby remaining in compliance. It argued that the shortfalls arose from difficulties inherent in the wording of the condition of licence. It acknowledged that there is no provision in its condition of licence for carrying underspending and overspending forward into the next broadcast year, but argued that it has always identified a carry-forward amount in its Annual Returns and “believed that the Commission found its approach acceptable.”
48. Second, Sirius argued that activation revenues and other service charges should not be included in its gross revenues. Sirius based its position on Broadcasting Decisions 2007-133 and 2007-134, noting that these decisions help to clarify the types of revenues that must be included when calculating CTD contributions.
49. In the reply phase of the public hearing, the applicants requested the following amendments to their current CTD condition of licence: (i) calculation of CTD requirements based on the previous year’s revenues; (ii) an allowance of up to 5% over or under payment to be carried forward into the next broadcast year; and (iii) calculation of the 50/50 split between English- and French-language initiatives over the entire licence term, rather than each broadcast year. The applicants noted that these amendments would harmonize their conditions of licence with those of other licensees. They also requested that activation revenues be excluded from the calculation of gross revenues for both licensees.

#### Interventions

50. Interveners that commented on CTD contributions generally requested that the Commission require compliance as soon as possible. Based on the CTD plan filed by CSR following its licensing decision, MUSICACTION/Fonds RadioStar submitted that CSR is approximately \$700,000 in arrears to each of the two organizations. They requested that the Commission make complete payment of these arrears a condition of approval of the transactions. In regard to Sirius, interveners noted that it presented a plan at the time of its licensing to dedicate 1.25% of its gross revenues to MUSICACTION, but that this organization has not been able to verify the licensee’s compliance, since Sirius’ financial statements are not made public.

#### Commission’s determinations

51. While the Commission recognizes that other types of licensees are afforded certain flexibility in their payment schedules, all licensees are required to respect their current conditions of licence. In the case of CSR and Sirius, these conditions of licence require that the 50/50 split between English- and French-language initiatives be satisfied on a yearly basis.
52. The Commission also notes that, in Broadcasting Decisions 2007-133 and 2007-134, it denied condition of licence amendments that were specifically designed to permit overpayments and underpayments. Accordingly, the Commission considers that

Sirius and CSR should not have concluded that the practice of using carry-forward amounts would be acceptable to the Commission.

53. In regard to the calculation of gross revenues, the Commission notes that the *Radio Regulations, 1986* defines “total revenues” as “the total broadcast revenues reported by an A.M. licensee, F.M. licensee or digital radio licensee in its annual returns for the previous broadcast year.” In addition, Circular No. 426 defines “gross revenues derived from broadcasting activities” for BDU licensees as “total revenues...that are earned directly or indirectly for the distribution of any broadcasting service on an undertaking.” This includes subscription revenues, equipment sales and rentals as well as revenues and fees from installation.
54. Furthermore, in Decision 2001-729, the Commission stated that “in imposing conditions of licence on broadcasters that are based on a calculation of their gross revenues, the Commission’s intent has been that broadcasters include all of their revenues in their calculations.” As such, the Commission considers that activation fees are part of the revenues earned by CSR and Sirius and should be included in their gross revenues for the purposes of calculating their CTD payments.
55. On this basis, the Commission considers that Sirius is in non-compliance with its condition of licence related to CTD. The Commission therefore directs Sirius to submit a revised account of its gross revenues and CTD contributions for broadcast years 2005-2006 to 2009-2010 within 30 days of the date of this decision. Commission staff will verify this information and determine the total shortfall for these years. The Commission directs Sirius to pay this shortfall to eligible CTD initiatives before 31 August 2011.
56. As requested by the Commission at the public hearing, CSR filed, in confidence, its proposed plan to come into compliance with its total CTD contributions by 30 April 2011. In the event that the Commission determines that additional payments are necessary, it directs that these payments be made before 31 August 2011 so that CSR’s obligations with respect to CTD are fully satisfied. Implications of the non-compliance of both licensees relating to CTD will be discussed further during the licence renewal process.
57. Going forward, the Commission is prepared to modify the licensees’ conditions of licence relating to CTD contributions, as set out in the appendix to this decision. The modification will allow both licensees to base their CTD contributions for the 2010-2011 and 2011-2012 broadcast years on their previous year’s revenue. The Commission considers that this grants sufficient flexibility to the licensees and as such, denies their requests for further modifications.

#### Technical plans

58. At the public hearing, the Commission reviewed the applicants’ current and future technical plans, including the compatibility of the receivers for both satellite radio services and the satellite coverage of the two networks. The Commission also questioned the applicants on the development of interoperable receivers and terrestrial

repeaters that could receive signals from either satellite. Finally, the Commission discussed the optimization of spectrum resources as well as the use of new delivery technologies including mobile devices.

59. CSR and Sirius stated that, at this time, they have no intention either to add or remove satellites or to adopt a common satellite network. They added that they both use Sirius XM's satellite infrastructure. While Sirius XM has publicly discussed the benefits of moving to a common satellite platform, it intends to continue to distribute programming from both satellite networks for at least the next ten years. They submitted that the proposed merger would have no effect on the current service coverage and that Canadian services will continue to be available on both networks.

#### Interventions

60. Newcap stated that a significant impediment to providing additional Canadian channels was the bandwidth available from the American satellite providers. It proposed that the Commission explore with the applicants what capacity will become available to them because of the merger. Other interveners submitted that the merger should strengthen the infrastructure of satellite radio in Canada.

#### Commission's determinations

61. The Commission notes that the applicants license the technology from the American company Sirius XM, which owns the satellites and manages technical research and planning. Nonetheless, at their next licence renewal, the Commission expects the applicants to present their technical plans for the next licence term.

#### **Independent programming committee**

62. The *Direction to the CRTC (ineligibility of non-Canadians)* (the Direction) establishes that where a licensee is owned by a holding corporation in which:  
a) Canadians own less than 80% of the issued and outstanding voting shares of the parent corporation and less than 80% of the votes, and b) less than 80% of its directors are Canadians, the holding corporation (or its directors) is not to exercise control or influence over any programming decisions of the licensee corporation.
63. The Commission has ensured compliance with this principle by requiring that, where a licensee is owned by a holding corporation that is less than 80% Canadian, it must establish an independent programming committee (IPC). Presently, only CSR is required to have an IPC. However, based on the post-transaction ownership, both licensees will be required to have IPCs. Consequently, as part of its application, Sirius filed a draft by-law which it proposed to implement in order to maintain compliance with the Direction.
64. At the public hearing, the Commission questioned the applicants on differences between CSR's current by-law and the proposed by-law for Sirius and requested details on the membership of the committee.

65. The applicants submitted that one programming committee (or two committees with identical membership) would allow the IPC to consider all of the programming across the two services, and thus make better informed decisions. Further, they expressed the view that the Chief Executive Officer (CEO) of both licensees should be able to participate on the committee.
66. In the reply phase of the public hearing, the applicants presented a revised by-law, to be adopted by both licensees. The revised by-law will allow the CEO of CSR and Sirius to participate while explicitly preventing directors, officers and current or former employees of Sirius XM from participating on the committee.

#### Interventions

67. ADISQ submitted that the two IPCs must be independent of each other, arguing that this independence would create greater musical diversity and flexibility in the programming of the two licensees. ADISQ submitted that this would provide protection against possible abuse of CSRHI's market position.

#### Commission's determinations

68. The Commission notes that the revised by-law follows a precedent set in previous Commission decisions, including Broadcasting Decision 2008-69 and Broadcasting Decision 2007-429. Specifically, the by-law clearly defines the scope of the programming decisions, provides that all members of the IPC will be Canadian, and prevents the non-Canadian shareholder in CSRHI from exercising influence over the committee. The Commission notes ADISQ's concerns but considers that one IPC will be able to make decisions that reflect the different programming offered on each service.
69. The Commission therefore accepts the revised by-law and directs both licensees to implement this by-law within 30 days of the close of the transactions.

#### Ownership information

70. The Commission directs CSRHI to file with the Commission, within 30 days of the close of the transactions, the complete updated ownership information for the various corporations involved, and executed copies of any revised agreements between the licensees and Sirius XM. This filing shall include copies of the Governance Agreement executed by all shareholders that include the revisions discussed in paragraphs 31, 32 and 40. As well, the filing shall include a revised IPC by-law executed by both licensees as discussed in paragraph 68.

#### Conclusion

71. In light of all of the above, the Commission **approves** the applications by Canadian Satellite Radio Inc. and Sirius Canada Inc. for authority to change the effective control of CSR and of Sirius to Canadian Satellite Radio Holdings Inc.

72. In Broadcasting Decision 2011-241, also issued today, the Commission has renewed the broadcasting licences for the Sirius Canada and XM Canada SSR services from 1 September 2011 to 31 August 2012. The Commission will discuss the implementation of the terms and commitments set out in this decision as well as the licensees' compliance with its conditions of licence as part of the licence renewal proceeding.

Secretary General

#### **Related documents**

- *Administrative renewals*, Broadcasting Decision CRTC 2011-241, 11 April 2011
- *Data & Audio-Visual Enterprises Wireless Inc. – Ownership and control review*, Telecom Decision CRTC 2010-264, 7 May 2010
- *Public Mobile Inc. – Ownership and control review*, Telecom Decision CRTC 2010-226, 22 April 2010
- *Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, Telecom Decision CRTC 2009-678, 29 October 2009
- *Transfer of effective control of BCE Inc. to a corporation to be incorporated and a consequential change in ownership of CTVglobemedia Inc.*, Broadcasting Decision CRTC 2008-69, 27 March 2008
- *Transfer of effective control of Alliance Atlantis Broadcasting Inc.'s broadcasting companies to CanWest MediaWorks Inc.*, Broadcasting Decision CRTC 2007-429, 20 December 2007
- *Licence amendment for Sirius*, Broadcasting Decision CRTC 2007-134, 11 May 2007
- *Licence amendment for XM Radio Canada*, Broadcasting Decision CRTC 2007-133, 11 May 2007
- *Commercial Radio Policy 2006*, Broadcasting Public Notice CRTC 2006-158, 15 December 2006
- *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-247, 16 June 2005
- *Satellite subscription radio undertaking*, Broadcasting Decision CRTC 2005-246, 16 June 2005
- *Licence renewal for MusiquePlus*, Decision CRTC 2001-729, 29 November 2001

- *Commercial Radio Policy 1998*, Public Notice CRTC 1998-41, 30 April 1998
- *Guidelines respecting financial contributions by the licensees of broadcasting distribution undertakings to the creation and presentation of Canadian programming*, Circular No. 426, 22 December 1997
- *Contributions by radio stations to Canadian talent development – A new approach*, Public Notice CRTC 1995-196, 17 November 1995
- *Application of the Benefits Test at the Time of Transfers of Ownership or Control of Broadcasting Undertakings*, Public Notice CRTC 1993-68, 26 May 1993
- *Elements assessed by the Commission in considering applications for the transfer of ownership or control of broadcasting undertakings*, Public Notice CRTC 1989-109, 28 September 1989

*\*This decision is to be appended to each licence.*

## Appendix to Broadcasting Decision CRTC 2011-240

The licences for the Sirius Canada and XM Canada satellite subscription radio services will be subject to the conditions set out in the current licences with the following changes:

The Commission adds the following condition of licence:

4(c) By 1 September 2011, the licensee shall distribute an Aboriginal channel. An Aboriginal channel is a channel where at least 60% of the programming in a week consists of audio programming that is directed toward Aboriginal persons, and includes original or previously broadcast programming by, about, or including Aboriginal persons. This channel may consist partly or wholly of programming from other broadcasters. The Aboriginal channel will be considered an “original Canadian-produced channel” and that channel shall be exempted from the calculation set out in condition of licence 4(b).

Condition of licences 7(a), 8 and 9 are replaced by the following. The changes are in bold.

7(a) During each broadcast year, the licensee shall contribute a minimum of 5% of gross revenues from its satellite subscription radio undertaking **reported in its annual returns for the previous broadcast year** to eligible third parties directly connected to the development of Canadian musical and other artistic talent or other initiatives approved by the Commission. For the purposes of this condition of licence, “eligible third parties” shall have the definition set out in *Contributions by radio stations to Canadian talent development – A new approach*, Public Notice CRTC 1995-196, 17 November 1995, as amended from time to time by the Commission.

**8. Except for an Aboriginal channel**, the licensee shall not broadcast any original local programming on a Canadian-produced channel. For the purposes of this condition of licence “original local programming” means programming produced by the licensee for broadcast on the satellite subscription radio undertaking that targets a particular demographic community and includes, but is not limited to, commercial messages, news, weather and traffic information.

**9. Except for an Aboriginal channel**, the licensee shall broadcast not more than six minutes of national commercial messages during any clock hour on any Canadian-produced channel. For the purposes of this condition of licence a “national commercial message” is a commercial message that is purchased at a national rate and receives national distribution on the service.