

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL HARTLEIB, et al.	)	
Petitioners,	)	
	)	
v.	)	Nos. 08-1289 &
	)	08-1290
FEDERAL COMMUNICATIONS COMMISSION	)	
and UNITED STATES OF AMERICA,	)	
Respondents.	)	

**MOTION TO DISMISS AND TO DEFER THE FILING  
OF THE CERTIFIED LIST OF ITEMS IN THE RECORD**

In these consolidated cases, Michael Hartleib and U.S. Electronics, Inc. (hereinafter, “Petitioners”) seek review of three separate orders of the Federal Communications Commission: (1) the “*XM-Sirius License Transfer Order*,”<sup>1</sup> which approved the transfer of control of radio licenses associated with the merger of the nation’s two satellite radio providers; (2) the “*XM Consent Decree Order*,”<sup>2</sup> which terminated the agency’s investigation into certain alleged statutory and regulatory violations by XM Radio, Inc. (“XM”); and (3) the “*Sirius Consent*

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<sup>1</sup> *Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008) (Appendix A hereto).

<sup>2</sup> *XM Radio, Inc.*, File Nos. EB-06-SE-148 & EB-06-SE-356, Order, 23 FCC Rcd 12327 (2008) (Appendix B hereto).

*Decree Order*,”<sup>3</sup> which terminated the agency’s investigation into certain alleged statutory and regulatory violations by Sirius Satellite Radio, Inc. (“Sirius”). The Court should dismiss Petitioners’ challenge to all three orders because Petitioners have failed to show that they have standing. Petitioners’ challenge to the *XM* and *Sirius Consent Decree Orders* should be dismissed for two additional reasons.

First, Petitioners are not entitled to seek review of the consent-decree orders because they did not participate in the agency proceedings that culminated in those orders. Second, dismissal is warranted because the Commission’s decision to terminate its enforcement action by entering into consent decrees with XM and Sirius is an exercise of discretion by the agency that is not subject to judicial review. The Court should defer the deadline for filing the certified list of items in the record in these consolidated cases until it resolves this motion to dismiss.

## **BACKGROUND**

In 2006, the FCC’s Enforcement Bureau (“Bureau”) opened separate enforcement proceedings against XM and Sirius to investigate allegations that these companies had violated certain provisions of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and the Commission’s rules by (1) providing customers with satellite-radio receivers that allegedly caused harmful interference with FM radio signals and (2) operating “terrestrial repeaters” (*i.e.*, devices that

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<sup>3</sup> *Sirius Satellite Radio Inc.*, File Nos. EB-06-SE-250 & EB-06-SE-386, Order, 23 FCC Rcd 12303 (2008) (Appendix C hereto).

receive, amplify, and retransmit radio signals) that the Commission had not authorized or that failed to conform to authorized specifications. *XM Consent Decree Order*, Attachment ¶¶ 3-4; *Sirius Consent Decree Order*, Attachment ¶¶ 2-3. Although the Commission received complaints from third parties about these alleged infractions, Petitioners did not file a complaint or otherwise participate in the Bureau's investigation of XM's and Sirius's conduct.

In February 2007, XM and Sirius entered into a merger agreement. One month later, they filed an application with the Commission requesting approval to transfer control of certain radio licenses in conjunction with their proposed merger. *XM-Sirius License Transfer Order* ¶¶ 1, 20. The Commission established a new agency proceeding (MB Docket No. 07-57) to consider the merits of the proposed license transfers,<sup>4</sup> and numerous parties (including Petitioners) submitted comments and other filings in that proceeding. The license transfer proceeding was never consolidated with the Bureau's investigation into XM's and Sirius's alleged misconduct.

On August 5, 2008, the Commission released the *XM-Sirius License Transfer Order* and the *XM and Sirius Consent Decree Orders*. The *XM-Sirius License Transfer Order* approved the transfer of control of certain licenses from

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<sup>4</sup> *XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. Seek Approval to Transfer Control of Licensee Entities Holding FCC Licenses and other Authorizations*, Public Notice, 22 FCC Rcd 5548 (2007).

XM to Sirius with conditions and repealed a Commission rule that would have prevented consummation of the transaction. In each of the two consent-decree orders, the Commission adopted a consent decree negotiated by the agency and each of the companies. *XM Consent Decree Order* ¶ 2; *Sirius Consent Decree Order* ¶ 2. Under the terms of the consent decrees, the Commission agreed to terminate its investigation into XM's and Sirius's conduct in "express reliance on the covenants and representations" made by XM and Sirius in the consent decrees and "to avoid further expenditure of public resources." *XM Consent Decree Order*, Attachment ¶ 8; *Sirius Consent Decree Order*, Attachment ¶ 7. XM and Sirius, in turn, each agreed, among other things, to take steps to ensure compliance with certain FCC rules and to make a "voluntary contribution" to the U.S. Treasury of \$17,394,375 and \$2.2 million, respectively. *XM Consent Decree Order*, Attachment ¶¶ 9-15; *Sirius Consent Decree Order*, Attachment ¶¶ 9-14. The consent decrees specify that each "shall constitute a final settlement between the Parties" and that it "does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Order." *XM Consent Decree Order*, Attachment ¶ 20; *Sirius Consent Decree Order*, Attachment ¶ 19.

In its orders adopting the two consent decrees, the Commission concluded that its “investigations raise[d] no substantial or material questions of fact as to whether [XM and Sirius] possess[] the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.” *XM Consent Decree Order* ¶ 4; *Sirius Consent Decree Order* ¶ 4. The Commission reiterated that conclusion in the *XM-Sirius License Transfer Order* at ¶ 172.

## ARGUMENT

### I. THE COURT SHOULD DISMISS THESE CASES FOR LACK OF JURISDICTION BECAUSE PETITIONERS HAVE FAILED TO SHOW THAT THEY HAVE STANDING TO CHALLENGE THE THREE FCC ORDERS AT ISSUE

Because Article III of the U.S. Constitution extends the judicial power only to “Cases” and “Controversies,” a party invoking the jurisdiction of the federal courts must demonstrate that it has standing to bring the case under Article III.

*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006). To satisfy Article III, a party must demonstrate an “injury in fact”; a causal connection between the injury and the conduct of which the party complains; and that it is “likely” that a favorable decision will provide redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This showing “is an essential and unchanging predicate to any exercise of [the Court’s] jurisdiction.” *American Chemistry Council v. Department of Transp.*, 468 F.3d 810, 814 (D.C. Cir. 2006) (internal quotations omitted).

This Court has made clear that a party seeking review of an agency order has the burden of establishing that it has standing. *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002). To implement that requirement, Circuit Rule 15(c)(2) provides that “[i]n cases involving direct review in this court of administrative actions, the docketing statement must contain a brief statement of the basis for the appellant’s or petitioner’s claim of standing.” Thus, under Rule 15(c)(2), Petitioners had an obligation to explain in their docketing statements how they have standing to challenge the *XM-Sirius License Transfer Order* and the *XM and Sirius Consent Decree Orders*.

Petitioners here have failed to carry their burden of demonstrating that the elements of Article III standing have been met in this case. Each Petitioner’s docketing statement (Line 6.e) states that standing is predicated on: “Sections 402(b)(6) and 402(b)(3) of the Communications Act of 1934, 47 U.S.C. Sections 402(b)(6) and 402(b)(3), as amended (1996).” Petitioners’ reliance on § 402(b)(3) and (b)(6) is misplaced. Section 402(b)(3) provides a right of appeal to “any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.” Section 402(b)(6) provides a right of appeal to “any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2),

(3), (4), and (9)” of § 402(b). These provisions thus give certain parties the right to appeal certain FCC orders; they do nothing, however, to show that Petitioners here have been injured by the FCC orders that they have asked this Court to review or that a favorable ruling by this Court would redress any alleged injury. Because Petitioners have offered no other basis upon which this Court can conclude that they have standing, the Court lacks jurisdiction to hear these cases and should therefore dismiss Petitioners’ challenge to the *XM-Sirius License Transfer Order* and the *XM and Sirius Consent Decree Orders*.

**II. EVEN IF THE COURT DOES NOT DISMISS PETITIONERS’ CHALLENGE FOR LACK OF STANDING, IT SHOULD DISMISS THEIR CHALLENGE TO THE *XM AND SIRIUS CONSENT-DECREE ORDERS***

**A. Petitioners may not challenge the consent-decree orders because they did not participate in the agency proceedings that resulted in those orders**

The Communications Act sets forth two mutually exclusive methods for challenging FCC orders. *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 655 (D.C. Cir. 2004). First, under 47 U.S.C. § 402(a), “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this [Act] (except those appealable under [47 U.S.C. § 402(b)]) shall be brought as provided by and in the manner prescribed in” the Hobbs Act. The Hobbs Act, in turn, vests exclusive jurisdiction in the courts of appeals to adjudicate petitions for review of an FCC order filed by a “party aggrieved.” 28 U.S.C. § 2344. Second, the Act provides

that certain licensing decisions must be challenged exclusively in this Court through an appeal brought under 47 U.S.C. § 402(b).

Regardless of whether a case is brought as a petition for review under § 402(a) and the Hobbs Act or as an appeal under § 402(b), this Court has held that review may be sought only by a litigant that had participated (or had attempted to participate) in proceedings before the agency. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983) (a Hobbs Act challenge may be brought only by a “‘party aggrieved,’” which refers to an entity that participated in proceedings before the agency) (quoting 28 U.S.C. § 2344); *Southwestern Publishing Co. v. FCC*, 243 F.2d 829, 833 (D.C. Cir. 1957) (dismissing appeal brought by non-party subsidiary). Thus, regardless of whether challenges to the consent-decree orders are governed by § 402(a) or 402(b),<sup>5</sup> Petitioners may seek judicial review of those orders only if they participated (or attempted to participate) in the agency

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<sup>5</sup> Each Petitioner initiated its case by filing a single document styled a “petition for review” invoking the Hobbs Act’s venue provision (28 U.S.C. 2343) but also invoking 47 U.S.C. § 402(b)(6). On October 7, 2008, U.S. Electronics filed both an “amended” petition for review that invoked § 402(a) and the Hobbs Act to challenge the *XM-Sirius License Transfer Order* to the extent it eliminated the FCC’s rule barring the XM-Sirius transaction and a new “appeal” (No. 08-1323) that invoked § 402(b)(6) to challenge other aspects of the *XM-Sirius License Transfer Order* and the two consent-decree orders. On October 22, 2008, this Court issued an order to show cause why U.S. Electronics’ appeal in No. 08-1323 should not be dismissed as untimely. We express no view at this time as to whether Petitioners’ various filings invoke the proper jurisdictional statutes and whether they are timely filed under those statutes. We reserve the right to address these issues at the appropriate time.

proceeding that resulted in the Commission's adoption of the consent-decree orders. To our knowledge, however, they did not do so; they submitted comments only in the license transfer proceeding, which does not make them parties to the separate agency proceedings investigating XM's and Sirius's alleged infractions. *See Simmons*, 716 F.2d at 45. Accordingly, their challenge to the *XM* and *Sirius Consent Decree Orders* must be dismissed.

**B. The Court lacks jurisdiction to review consent decrees that resolve an administrative agency's enforcement action**

Even if Petitioners had been parties to the agency proceedings that resulted in the *XM* and *Sirius Consent Decree Orders*, the Court would still lack jurisdiction over their challenges to those orders. It is well settled that “an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding the FDA's decision not to take enforcement action against the use of drugs employed in administering the death penalty was judicially unreviewable). That is because “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise”—for example, “the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether

the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Ibid.* Agencies are “far better equipped than the courts to deal with the many variables involved in the proper ordering of [their] priorities.” *Id.* at 831-32.

Relying on *Chaney*, this Court has held that the FCC’s decision “to settle an enforcement action once begun” is likewise nonreviewable. *New York State Dep’t of Law v. FCC*, 984 F.2d 1209, 1213-15 (D.C. Cir. 1993).<sup>6</sup> In *New York State Dep’t of Law*, as in this case, the Commission terminated a pending enforcement action by entering into a consent decree with the companies under investigation. On review, the Court held that “the FCC’s . . . decision to enter into the Consent Decree [was] committed to the agency’s nonreviewable discretion.” *Id.* at 1211. The Court explained that the Commission was “best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency (including financial and opportunity costs) and the likelihood of success,” and that, in acting by consent decree, the agency was “not exercising coercive power over an individual.” *Id.* at 1213. Moreover, the Court held, the presumption of nonreviewability attaching to the FCC’s decision to enter into the consent decree

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<sup>6</sup> *Accord Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460-62 (D.C. Cir. 2001); *Association of Irrigated Residents v. EPA*, 494 F.3d 1027, 1031-33 (D.C. Cir. 2007); *see also Parents Television Council, Inc. v. FCC*, 2004 WL 2931357 (D.C. Cir. Dec. 17, 2004) (in an unpublished order, dismissing a challenge to consent decree on nonreviewability and standing grounds) (Appendix D hereto); *Smith v. FCC*, No. 06-1381 (D.C. Cir. Mar. 29, 2007) (same) (Appendix E hereto).

was “not rebutted by the FCC’s substantive statute,” because the Communications Act “provides the agency broad discretion in enforcement decisions.” *Id.* at 1215.<sup>7</sup>

So too here. The FCC’s decision “to settle with” XM and Sirius, “and its consequent decision not to see its enforcement action through to fruition, is a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion.” *Baltimore Gas & Elec.*, 252 F.3d at 460. Just as in *N.Y. State Dep’t of Law*, the FCC here exercised its discretion to resolve pending enforcement actions by means of a consent decree according to which XM and Sirius agreed to undertake certain actions—including collectively paying almost \$20 million to the U.S. Treasury and adhering to a multi-year compliance plan—in return for dismissal of enforcement proceedings and an agreement by the FCC not to institute any new enforcement proceedings based on the same set of facts.

Compare *N.Y. State Dep’t of Law*, 984 F.2d at 1212 with *XM Consent Decree Order*, Attachment ¶¶ 8-15 and *Sirius Consent Decree Order*, Attachment ¶¶ 7-14.

As with the common-carrier provisions at issue in *N.Y. State Dep’t of Law*, nothing in the FCC’s governing statute rebuts the presumption of nonreviewability

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<sup>7</sup> In *Baltimore Gas & Elec. Co.*, this Court stated that there were two possible bases (other than where the governing statute limits the agency’s discretion) for overcoming the presumption of nonreviewability that applies to an agency’s enforcement decision: “where the agency refuses ‘to institute proceedings based solely on the belief that it lacks jurisdiction’ and where the agency ‘has conspicuously and expressly adopted a general policy so extreme as to amount to an abdication of its statutory responsibilities.’” 252 F.2d at 460 (quoting *Chaney*, 470 U.S. at 833 & n.4). Neither of those bases applies here.

that attaches to the agency's enforcement decisions concerning alleged violations of the Commission's licensing and interference rules. The Court's reference there to the Communications Act is equally pertinent here: "[C]ertainly the statute does not lay out any circumstances in which the agency is required to undertake or to continue an enforcement action." *N.Y. State Dep't of Law*, 984 F.2d at 1215.

In this case, the parties recognized in the consent decrees that, even if the agency were ultimately successful, adversarial enforcement proceedings against XM and Sirius would involve "further expenditure of public resources." *XM Consent Decree Order*, Attachment ¶ 8; *Sirius Consent Decree Order*, Attachment ¶ 7. The consent-decree orders permitted the Commission to obtain from XM and Sirius agreements to take certain remedial actions as well as to make a substantial monetary payment without further expenditure of agency enforcement resources.

To be sure, the Commission agreed in return to dismiss pending enforcement proceedings against XM and Sirius and not to institute enforcement proceedings based on a similar set of facts. *XM Consent Decree Order*, Attachment ¶ 8; *Sirius Consent Decree Order*, Attachment ¶ 7. But these undertakings "simply represent[] the *quid pro quo* that the agency found necessary" to induce XM and Sirius to enter into the consent decrees. *See N.Y. Dep't of Law*, 984 F.2d at 1214 (quoting *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985)). There are no judicially administrable standards by which the courts are empowered to

“question the soundness of this bargain.” *Ibid.* (quoting *Schering Corp.*, 779 F.2d at 687). Accordingly, “the FCC’s decision to enter into the [c]onsent [d]ecree[s] . . . is nonreviewable under *Chaney*.” *Id.* at 1215. And because nonreviewability of agency enforcement decisions is jurisdictional, *Baltimore Gas & Elec.*, 252 F.3d at 458; *Association of Irrigated Residents*, 494 F.3d at 1030, the Court must dismiss Petitioners’ challenge to the *XM* and *Sirius Consent Decree Orders*.

### **III. THE COURT SHOULD DEFER THE DEADLINE FOR THE FILING OF THE CERTIFIED LIST OF ITEMS IN THE RECORD UNTIL IT RESOLVES THIS MOTION TO DISMISS**

The Court established October 23, 2008, as the deadline for filing the certified index to the record in the *Hartleib* case (No. 08-1289), and October 30, 2008, as the deadline for filing the certified index in the *U.S. Electronics* case (No. 08-1290). Grant of this motion to dismiss (whether in whole or in part with respect to the two consent-decree orders) would make it unnecessary to prepare and file the certified list of items in the administrative record in the relevant agency proceedings. Accordingly, to avoid a waste of resources and to prevent any confusion about the filings that comprise the record on review, we respectfully request that the Court defer the deadline for filing the certified list of items in the record in these consolidated cases until the Court resolves this motion to dismiss.

## CONCLUSION

For the foregoing reasons, the Court should dismiss these consolidated cases because Petitioners have failed to meet their burden of demonstrating standing. Alternatively, the Court should dismiss Petitioners' challenge to the *XM Consent Decree Order* and the *Sirius Consent Decree Order*. The Court should also defer the deadline for filing the certified list of items in the record in these consolidated cases until it resolves the motion to dismiss.

Respectfully submitted,

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