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

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| In the Matter of | ) | |
| | ) | File Nos. 29/30-DSS-LA-93 |
| Primosphere Limited Partnership | ) | 16/17-DSS-P-93 |
| | ) | |
| Application for Authority to Construct, | ) | |
| Launch and Operate Satellite in the | ) | |
| Satellite Digital Audio Radio Service | ) | |

**XM SATELLITE RADIO INC.'S**
**REPLY COMMENTS IN SUPPORT OF MOTION TO STRIKE**

XM Satellite Radio Inc. ("XM") hereby submits these Reply Comments in support of the Motion to Strike filed by Sirius Satellite Radio, Inc. ("Sirius")[1] in response to three recent filings by Primosphere Limited Partnership ("Primosphere"): (i) a February 23, 2007 letter seeking to withdraw Primosphere's April 16, 2004 "Motion to Withdraw Application for Review" ("Withdrawal Letter"), (ii) a March 19, 2007 "Supplement to Application for Review" ("Supplement"), and (iii) a May 8, 2007 "Opposition To Motion to Strike" ("Opposition"). These opportunistic and frivolous filings should be dismissed without further waste of Commission or third party resources.

## I. OVERVIEW

The background surrounding Primosphere's unsuccessful attempts to acquire a satellite radio license is summarized thoroughly in the Motion to Strike and is incorporated herein by

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1 *See Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Sirius Satellite Radio Inc.; Motion to Strike, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, at 3 (filed April 23, 2007) ("Motion to Strike").

reference. To recap briefly: nearly ten years ago, the International Bureau dismissed Primosphere's pre-auction application for a satellite radio license as moot once satellite radio licenses had been awarded at auction to XM and Sirius (Primosphere was also an unsuccessful bidder in that auction).[2] Primosphere attempted to keep its dismissed application alive and "non-final" by lodging an Application for Review of the dismissal with the full Commission,[3] even as it proceeded to file separate challenges against the two successful satellite radio licensees.

Primosphere unsuccessfully litigated its challenges to the XM and Sirius license grants for years, first to the full Commission and then to the D.C. Circuit. The court of appeals affirmed the Commission's license grants to XM and Sirius without qualification.[4] And having always conceded that "Primosphere's SDARS application should remain pending" *only* for "as long as Primosphere's appeals of the License Orders are pending,"[5] Primosphere did the logical thing in the wake of the D.C. Circuit's decision: it notified the Commission that it was

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2 *Digital Satellite Broad. Corp.; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.; Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Order & Authorization, 13 FCC Rcd 8976 (1997) ("*Primosphere Dismissal Order*").

3 *See Primosphere Ltd. P'ship; Application for Auth. to Construct, Launch & Operate Satellites in the Satellite Digital Audio Radio Serv.*, Application for Review, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, at 3 (filed Dec. 27, 2001) ("*2001 Application for Review*").

4 *See Primosphere Ltd. P'ship v. FCC*, Nos. 01-1526, 01-1527, 2003 U.S. App. LEXIS 18577 (D.C. Cir. 2003) (*per curiam*).

5 *Primosphere Limited Partnership*, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, Primosphere Reply to Opposition to Application for Review (Feb. 7, 2002), at 4.

"voluntarily and unilaterally" withdrawing its Application for Review of the Bureau's dismissal of its moot application.[6]

Now, three years later, in the midst of the proposed merger between XM and Sirius, Primosphere has changed its mind and wants to withdraw its withdrawal – evidently in the belief that seeking to resurrect its pending satellite radio application will improve its ability to extract a concession or benefit during the Commission's merger review.

## II. THE DISMISSAL OF PRIMOSPHERE'S SATELLITE RADIO APPLICATION HAS LONG SINCE BECOME FINAL, AT PRIMOSPHERE'S OWN URGING

The Withdrawal Letter's sole basis for now alleging that the *Primosphere Dismissal Order* is non-final is the fact that "to counsel's knowledge, the Commission has never acted on" the *2004 Withdrawal Motion*.[7] Thus, Primosphere concludes that its *2001 Application for Review* is "still pending."[8] This reasoning is flawed and disingenuous.

The *2004 Withdrawal Motion* was, by its own terms, self-executing. By "voluntarily and unilaterally" withdrawing its Application for Review, Primosphere acknowledged explicitly that there was no need for the Commission to take any further action. On the merits, of course, this acknowledgement made perfect sense – Primosphere had repeatedly observed in Commission filings that its Application for Review of the *Primosphere Dismissal Order* would be mooted once the license grants to XM and Sirius were ultimately affirmed on appeal. In fact, that was the entire point of Primosphere's filing the *Primosphere 2004 Withdrawal Motion*.

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6 *Primosphere Limited Partnership*, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93, Primosphere Motion to Withdraw Application for Review (April 16, 2004), at 1 ("2004 Withdrawal Motion").

7 Withdrawal Letter at i.

8 *Id.*

As for process, there is no Commission rule that required it to take any action on the *2004 Withdrawal Motion*. Indeed, in the absence of any such rule, as the Motion to Strike notes, the D.C. Circuit has held that a party's withdrawal of its request for administrative review renders the underlying decision final for purposes of appeal, without the need for any further affirmative agency action.[9]

In its Opposition filed last week, Primosphere provides no response to the above points. Primosphere instead mischaracterizes two additional FCC rules to argue that agency action was required before its voluntary withdrawal could become effective. Neither attempt is availing.

Section 25.152(a) of the Rules, 47 C.F.R. § 25.152(a) states that "[a]ny application *may* be dismissed without prejudice *as a matter of right* if the applicant requests its dismissal prior to final Commission action."[10] Notwithstanding the highlighted language, Primosphere claims that this rule, which governs satellite applications, is "clear" that "a request for dismissal is not effective immediately upon filing."[11] XM agrees that the rule is indeed "clear" – but for precisely the opposite premise. The language highlighted above plainly delineates a discretionary choice by the "applicant" that implicates no further action by the agency. Indeed, by setting forth an applicant's "right" to voluntarily dismiss its own application, this rule actually *limits* the Commission's discretion to further consider or act upon a dismissal request.

The second rule cited by Primosphere is a complete *non sequitur*. Section 1.1208 of the Rules, 47 C.F.R. § 1.1208, is part of the Commission's *ex parte* rules and does not address the

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9 *See LA SMSA Ltd. P'ship v. FCC*, 70 F.3d 1358, 1359-60 (D.C. Cir. 1995).

10 47 C.F.R. § 25.152(a) (emphasis supplied).

11 Opposition at 2.

withdrawal of applications at all.[12] The fact that the public was not notified that Primosphere had withdrawn its Application for Review is irrelevant to the subject matter at issue here.

The relief that Primosphere seeks would also undermine important principles of finality in administrative proceedings. The decisions affecting Primosphere's unsuccessful efforts as a satellite radio applicant, and the decisions granting satellite radio applications to XM and Sirius, are now all "beyond review in light of the strong policy favoring administrative finality set forth by Congress" in the Communications Act.[13] The Commission and the courts have acknowledged "a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or court's processes, or unless the result is manifestly unconscionable."[14] Primosphere has demonstrated no such circumstances here.

The bottom line is that Primosphere's satellite radio application is long dead and buried. There is no logical or legal way for Primosphere to exhume it now.

## III. THE SUPPLEMENT SUPPORTS NO LIVE PROCEEDING AND IN ANY EVENT IS IMPROPERLY FILED

For the reasons stated above and in the Motion to Strike, there is no longer any live proceeding with which the Supplement can be associated. There is thus no reason for the Commission to consider it, and, like the Withdrawal Letter, it should be dismissed.

XM also agrees with Sirius that the Supplement is fatally flawed as a procedural matter, even if the Commission could somehow find a basis for keeping the *2001 Application for Review*

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12 *See id., citing* 47 C.F.R. § 1.1208.

13 *San Francisco IVDS, Inc.,* 18 FCC Rcd 724, 726 n.24 (2003).

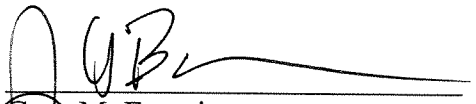
14 *Id.* (*citing Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944); *Greater Boston Television Corporation v. FCC*, 463 F.2d 268 (D.C.Cir. 1971); *KIRO, Inc. v. FCC*, 438 F.2d 141 (D.C. Cir. 1970); Radio Para La Raza, *Memorandum Opinion and Order*, 40 FCC 2d 1102, 1104 (1973)).

alive. The Supplement is untimely filed by five years, raises new issues of fact and law that were not originally presented to the International Bureau, and does not plead with particularity any reviewable error, each in violation of Section 1.115 of the Commission's Rules.[15] These reasons support dismissal as well.

## IV. CONCLUSION

The Withdrawal Letter, the Supplement, and the Opposition are frivolous pleadings that are not associated with any pending Commission proceeding or active docket. They should be dismissed in accordance with the Motion to Strike.

Respectfully Submitted,



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15 *See Motion to Strike* at 11-15; 47 C.F.R. Sec. 1.115 (d), 1.115(c), 1.1115(b)(2).

## CERTIFICATE OF SERVICE

I, James H. Barker, hereby certify that copies of the foregoing Reply Comments in Support of the Motion to Strike were served upon the following today, May 21, 2007, in the fashion indicated.

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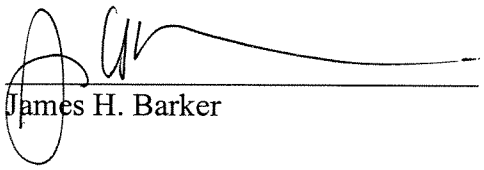

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