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

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

To: The Commission

SUPPLEMENT TO APPLICATION FOR REVIEW

Primosphere Limited Partnership ("Primosphere"), by its attorneys, hereby submits this supplement to its pending Application for Review regarding the dismissal of Primosphere's above-captioned application.

On December 27, 2001, Primosphere submitted an Application for Review of the International Bureau's dismissal of Primosphere's application for authority to construct, launch and operate two satellites in the Satellite Digital Audio Radio Service ("SDARS"). Primosphere stated therein that the Bureau's dismissal of its application was predicated solely on the Commission's affirmation of its grants of SDARS licenses to XM Radio, Inc. ("XM Radio") and Sirius Satellite Radio, Inc. ("Sirius") (the "License Orders").[1] Primosphere further stated that it had filed with the U.S. Court of Appeals for the District of Columbia Circuit Petitions for Review/Notices of Appeal seeking review of the License Orders. Primosphere noted, therefore, that in the event the Court of Appeals overturned or remanded either License Order and Primosphere's challenge to the grant of either Sirius's or XM Radio's license application were

[1] *Satellite CD Radio, Inc.* (Memorandum Opinion and Order), FCC 01-335, released November 30, 2001; *American Mobile Radio Corporation* (Memorandum Opinion and Order), FCC 01-315, released November 30, 2001.

successful, Primosphere would be eligible for grant of its above-referenced application so long as the dismissal of its application was not final. Thus, Primosphere submitted its Application for Review to preserve its standing as an SDARS applicant while the Court of Appeals considered Primosphere's two appeals.

On February 21, 2003, the Court of Appeals denied Primosphere's appeals and affirmed the Commission's decisions. On April 16, 2004, Primosphere submitted a Motion to Withdraw Application for Review, requesting that its Application for Review be dismissed. However, the Commission never dismissed Primosphere's Application for Review, and Primosphere's Application for Review therefore remains pending before the Commission. On February 22, 2007, Primosphere withdrew its Motion to Withdraw Application for Review.

The Commission has expressly stated, with regard to SDARS, that "[i]f the winning bidder fails to submit the balance of the winning bid or the license is otherwise denied, we will assess a default payment as set forth below and <u>re-auction the license among the other existing applicants</u>."[2] Since Primosphere's Application for Review is still pending, Primosphere remains an existing applicant for authorization to launch and operate satellite systems in the SDARS.

On February 19, 2007, XM Radio and Sirius announced a proposed "merger of equals." The Commission explicitly prohibited any such merger when it allocated spectrum for the SDARS in 1997, stating that "after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license."[3] The Commission specifically refused to permit a monopoly satellite radio service because "licensing at least two service

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[2] *Establishment of Rules and Polices for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 12 FCC Rcd 5754, 5820 (1997) (emphasis added) (*Satellite DARS Report & Order*).

[3] *See Satellite DARS Report & Order*, at 5823.

providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices."[4]

Allowing the combined XM/Sirius to hold the entire available spectrum allocated to satellite DARS would create the incentive and ability of the merged company to increase its subscriber rates, to the detriment of consumers. In addition, the merger would decrease programming diversity, also to the detriment of consumers. Now, two companies choose/produce the programming available via SDARS, but after the merger there will be only one. Therefore, to allow the proposed merger and create an SDARS monopoly without allocation of a portion of the SDARS spectrum to another entity would be contrary to the public interest, as well as inconsistent with the Commission's order establishing this service and with the Commission's long-standing policy of establishing spectrum-based commercial services with no fewer than two participants per service.[5]

Primosphere hereby asks the Commission to authorize a portion of the SDARS spectrum to Primosphere if the Commission approves the proposed XM/Sirius merger. If the Commission authorizes a portion of the SDARS spectrum to Primosphere, Primosphere will construct and launch its own satellite(s) for SDARS and market its own service. (Primosphere already has paid its launch fees for the two satellites it proposed in its original application.) Primosphere estimates that it will take five years to accomplish this.

A better way to avoid the anticompetitive effects of the proposed XM/Sirius merger would be to have a new competitor in the SDARS who could begin operating immediately. The

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[4] *Id.* at 5786.

[5] See *Order* in ET Docket No. 00-258 and WT Docket No. 02-353, DA 07-1120 (released March 8, 2007), at para. 4 ("[T]he Bureau concluded that the benefits of having two or more clearinghouses outweigh any disadvantages because offering participants a choice increases the incentive ... to operate in an efficient manner, thus benefiting the consumers of these services.").

Commission can achieve this by granting Primosphere an authorization to use a portion of the SDARS spectrum now used by XM and Sirius and requiring the merged XM/Sirius to enter into an agreement with Primosphere whereby Primosphere could deliver its programming to its subscribers by means of XM's and Sirius's existing satellite systems. Without such a requirement, the combined XM/Sirius would have an even longer competitive head-start and be able to operate as a monopoly in SDARS for a longer period.

The Commission has previously authorized a similar type of agreement for one satellite provider to lease to another provider transponder capacity on an existing satellite. In 1999, the Commission granted Dominion Video Satellite, Inc. ("Dominion") authority to provide direct broadcast satellite service using transponders leased from EchoStar Satellite Corporation and Echosphere Corporation (collectively, "EchoStar").[6] The lease agreement between Dominion and EchoStar has allowed Dominion to use EchoStar's DBS platform to begin delivering its programming immediately to its subscribers without having to build or launch a satellite. The Commission found that it would serve the public interest to authorize Dominion to use the EchoStar satellite "in order to facilitate quick deployment of DBS service to the public to increase choices to U.S. consumers, and to increase competition in the multi-channel video programming distribution market."[7] Dominion's "Sky Angel" currently offers more than 30 channels of video and audio programming via DBS for $14.99 per month (see www.skyangel.com). This offering is a significant programming and price alternative to the only other two DBS services, Echostar (Dish) and DirecTV.

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[6] *Dominion Video Satellite, Inc.*, Order and Authorization, 14 FCC Rcd 8182 (IB, 1999).

[7] *Id.*, at 8187.

CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, hereby certify that on this 19th day of March, 2007, a true and correct copy of the foregoing "Supplement to Application for Review" has been mailed first-class, postage prepaid mail to the following:

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