

COPY

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

In the Matter of)
)
Primosphere Limited Partnership)
)
Application for Authority to Construct,)
Launch and Operate Satellites in the)
Satellite Digital Audio Radio Service)

File Nos. 29/30-DSS-LA-93
16/17-DSS-P-93

FILED/ACCEPTED

MAY - 8 2007

Federal Communications Commission
Office of the Secretary

To: The Commission

OPPOSITION TO MOTION TO STRIKE

Primosphere Limited Partnership (“Primosphere”), by its attorneys, hereby submits this Opposition to the Motion to Strike submitted on April 23, 2007 by Sirius Satellite Radio Inc. (“Sirius”) regarding Primosphere’s February 23, 2007 letter and March 19, 2007 Supplement to Application for Review in the above-captioned proceeding.

Sirius claims that Primosphere’s withdrawal of its December 27, 2001 Application for Review was effective immediately upon filing and did not require subsequent Commission action in order to effectuate the request contained therein. To support this claim, Sirius cites to D.C. Circuit precedent and further claims that no Commission rule requires agency action under these circumstances. Contrary to Sirius’s claim, the Commission’s rules and practices require that the Commission affirmatively act on an application for review – to deny, grant or dismiss it – and that until the Commission does so an application for review is considered pending. Because the Commission has not acted on Primosphere’s December 27, 2001 Application for Review, it is still pending and Sirius’s Motion to Strike is without merit.

Primosphere submitted its Motion to Withdraw Application for Review on April 16, 2004. Pursuant to Part 25 of the Commission's rules, which covers satellite communications, "any application **may** be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to Commission action."¹ The Commission's rule is clear: a request for dismissal is not effective immediately upon filing; Commission action is necessary to make such dismissal effective.

To further demonstrate that Commission action is necessary, Section 1.1208 of the Commission's rules (part of the Commission's ex parte rules) states that ex parte presentations are restricted "until the proceeding is no longer subject to administrative reconsideration or review or judicial review."² Because no Commission action was taken and no public notice was issued, the public had no opportunity to learn that Primosphere's Application for Review was no longer pending and that the ex parte rules no longer apply.

Thus, Primosphere's December 27, 2001 Application for Review is still pending; and, therefore, Primosphere's original SDARS application is also pending because it is still subject to agency review.

At any point the Commission could have made effective the dismissal of Primosphere's Application for Review and its original SDARS application, but the Commission did not take any action to that effect. On July 9, 2004, Primosphere filed a request for refund of its launch and operation authority application fees. When the Office of Managing Director rejected Primosphere's request for refund, Primosphere filed an Application for Review of that decision

¹ 47 C.F.R. 25.152(a) (emphasis added).

² 47 C.F.R. 1.1208.

on June 22, 2005. That Application for Review stated that Primosphere's December 27, 2001 Application for Review of the dismissal of its SDARS application is still pending. To date, the Commission has not acted on Primosphere's June 22, 2005 Application for Review regarding its fee refund request.

On February 23, 2007, Primosphere submitted a letter to the Commission which reiterated that the Commission never acted on Primosphere's Motion to Withdraw Application for Review and stated that Primosphere was withdrawing its Motion to Withdraw.

On March 19, 2007, Primosphere submitted a Supplement to Application for Review which requested that since Primosphere remains an existing applicant for authorization to launch and operate an SDARS system, the Commission can authorize a portion of the SDARS spectrum to Primosphere if the Commission approves the proposed merger between Sirius and XM Radio, Inc. ("XM"). Primosphere's Supplement also noted that Primosphere already has paid its launch fees for the two satellites it proposed in its original application. Alternatively, Primosphere requested that the Commission grant Primosphere an authorization to use a portion of the SDARS spectrum now used by XM and Sirius and require the merged XM/Sirius to enter into an agreement with Primosphere whereby Primosphere could begin immediately to deliver its programming to its subscribers by means of XM's and Sirius's existing satellite systems. Primosphere proposed this as a better way to have a new competitor in the SDARS that could begin operating immediately, which would help avoid the anticompetitive effects of the proposed XM/Sirius merger.


Because Primosphere's December 27, 2001 Application for Review is pending and the Commission has not disposed of the proceeding, Sirius's Motion to Strike is without merit and the Commission should consider Primosphere's Supplement to Application for Review. Sirius

goes on for several pages in its Motion to Strike, citing cases that do not involve the Commission, arguing that somehow Primosphere's December 27, 2001 Application for Review disappeared on its own once Primosphere asked that it be withdrawn. However, the Commission's rules and practices are that until the Commission acts on an application for review, it is pending and subject to action by the Commission.

Based on the foregoing, Primosphere respectfully requests that Commission deny Sirius's Motion to Strike and consider the merits of Primosphere's Supplement to Application for Review.

Respectfully submitted,

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May 8, 2007

CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, hereby certify that on this 8th day of May, 2007, a true and correct copy of the foregoing "Opposition to Motion to Strike" has been mailed first-class, postage prepaid mail to the following:

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