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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

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

To: The Commission

REPLY IN SUPPORT OF MOTION TO STRIKE

Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby submits this Reply in Support of its Motion to Strike Primosphere's February 23, 2007 letter and March 19, 2007 Supplement to Primosphere's Application for Review in the above-referenced docket. For the reasons stated in Sirius' Motion to Strike[1] and stated below, Primosphere's filings should be stricken from the record immediately.

I. PRIMOSPHERE'S APPLICATION WAS VOLUNTARILY WITHDRAWN AND THAT WITHDRAWAL IS FINAL.

The factual background of this case was discussed in Sirius' Motion and will not be repeated here. Suffice it to say that Primosphere, having sat on the sidelines for years, now seeks to withdraw its withdrawal of its Application for Review. However, Primosphere's voluntary withdrawal of its Application for Review was effective upon

[1] Sirius Satellite Radio, Inc., Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (Apr. 23, 2007).

filing, without any need for Federal Communications Commission ("Commission" or "FCC") action, and the Application for Review cannot be resurrected now.

Primosphere's Opposition erroneously claims that two FCC rules require agency action before a voluntary withdrawal is effective.[2] Section 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."[3] In this Rule, "may" refers to the applicant's choice, not any potential action by the FCC. Indeed, the plain terms of the rule state that an applicant has the *right* to voluntarily dismiss its own application, suggesting that the FCC has no discretion in response to a dismissal request and that an order would be superfluous. Section 1.1208 does not address Commission action at all,[4] and merely sets forth the effect of finality on the ex parte rules. It is silent as to the steps necessary to lead to finality.[5] Clearly, neither rule requires agency action on a withdrawal.

Primosphere's Opposition does not respond to Sirius' showing that the D.C. Circuit views voluntary withdrawals as final upon filing,[6] that Rule 1.935 is inapplicable

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[2] Primosphere Ltd. P'Ship Opposition To Motion to Strike, FCC File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (May 8, 2007), at 2, citing 47 C.F.R. §§ 24.152(a); 1.1208.

[3] 47 C.F.R. § 25.152(a) (emphasis added).

[4] 47 C.F.R. § 1.1208.

[5] Primosphere's claim that agency action is required to advise the public that a proceeding is final and the ex parte rules no longer apply is not supported by the terms of the rules or precedent. It also strains logic to suggest that the public must be informed that ex parte rules no longer apply to a proceeding that has been withdrawn and is no longer pending; no ex parte discussions are necessary once the application has been withdrawn.

[6] Motion to Strike at 7-8. The Opposition's claim that the Motion to Strike goes on for "several pages...citing cases that do not involve the Commission," Opposition at 4, is both incorrect and irrelevant. All of the administrative authority in the Motion to Strike comes from the FCC, and the seminal D.C. Circuit case cited in the Motion to Strike also involves an FCC decision. *See* Motion to Strike at 7 nn. 20,

to this matter,[7] and that under the doctrine of *expressio unius* the presence of a requirement for Commission action in Rule 1.935 means that no such requirement exists elsewhere.[8] Primosphere's Opposition is also devoid of any rebuttal to Sirius' showing that Primosphere's application and Application for Review were mooted once the XM and Sirius licenses became final[9] and that a mooted application for a license that does not exist cannot be "pending" under any circumstances.[10] Finally, the Opposition acknowledges that Primosphere filed a request for a refund of its application fees,[11] but does not explain how such a refund request would be appropriate if the license was still pending.[12]

II. THE OPPOSITION DOES NOT ADDRESS THE DEFECTS WITH THE PRIMOSPHERE'S UNTIMELY "SUPPLEMENT."

Sirius' Motion also asks the Commission to strike the attempted "Supplement" because it is fatally defective, both procedurally and substantively.[13] Primosphere's

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22, quoting *L.A. SMSA Ltd. P'ship v. FCC*, 70 F. 3d 1358, 1359-60 (D.C. Cir. 1995). Regardless, general principles of administrative law apply to all administrative agencies, including the FCC.

7 *Id.* at 8.

8 *Id.* The fact that the Commission included a specific requirement for agency action for certain withdrawals in Rule 1.935 shows that the FCC knows how to impose such a requirement when it wishes to do so and contradicts Primosphere's contention that Section 25.152(a) imposes such a requirement through inference.

9 Motion to Strike at 10.

10 *Id.*

11 Opposition at 2.

12 As Primosphere recognized at the time, "[r]efunds are . . . premature until the dismissal or denial of the unsuccessful bidder's application is final and it can no longer challenge the winning bidder's basic qualifications," which occurs only once "the denial of the losing bidder's application... *is final*." *Primosphere Ltd. P'shp; Application for Refund of Satellite Launch & Operation Auth. Application Fees*, Application for Review, Fee Control No. 9301158160318001 (filed June 22, 2005), quoting *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15,920, 15,957 ¶ 102 [*sic*—15,958 (¶ 104)] (1998); *see also* Motion to Strike at 6 n. 18.

Opposition does not even acknowledge, let alone attempt to refute, these defects. Accordingly, Sirius reiterates that the FCC, in accordance with its own rules, must strike the Supplement because it is untimely,[14] raises new issues of fact and law in contravention of the Commission's Rules,[15] and does not and cannot point to any reversible error on the part of the Bureau (since it relies entirely on circumstances that the Bureau could not have considered).[16]

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Motion to Strike, Primosphere's two filings in the above-referenced docket should be stricken.

Respectfully Submitted,
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[13] Motion to Strike at 11-15.

[14] *Id.* at 11-12. Primosphere has still not even *requested* a waiver of Section 1.115(d), which mandates that "any supplement[]" to an application for review must be filed with the Commission within 30 days of the decision for which review is sought, 47 C.F.R. § 1.115(d), let alone attempted to justify such a waiver under the Commission's "good cause" standard, 47 C.F.R. § 1.3.

[15] *Id.* at 12-13.

[16] *Id.* at 13-15.

CERTIFICATE OF SERVICE

I, Joshua S. Turner, hereby certify that copies of the foregoing Reply in Support of the Motion to Strike were served upon the following today, May 18, 2007.

Joshua S. Turner

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