

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Sirius Satellite Radio Inc.)	
)	File No. SAT-MOD-199981211-00099
Application to Modify Authorization)	Fee Control No. 0107038345114001
To Launch and Operate a Non-Geostationary)	
Satellite DARS System)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2003

Released: June 19, 2003

By the Commission:

1. This memorandum opinion and order denies the Application for Review filed March 15, 2002 by Sirius Satellite Radio Inc. and its subsidiary Satellite CD Radio, Inc. (Sirius). Sirius seeks review of the Managing Director's letter ruling rejecting Sirius's "Petition for Waiver of Application Fee" in connection with modification of Sirius's space station license.

BACKGROUND

2. The Commission adopted rules for the satellite digital audio radio service ("SDARS") in 1997. At that time the Commission authorized Sirius to launch and operate a two-satellite geostationary satellite (GSO) system to provide such radio service. *See Satellite CD Radio Inc.*, 13 FCC Rcd 7971 (1997). Thereafter, in an order released March 9, 2001, the International Bureau (IB) granted Sirius's application to modify its license to increase the number of satellites to three and to launch a three-satellite, non-geostationary orbit (NGSO) system in order to offer better quality service. *See Sirius Satellite Radio Inc.*, 16 FCC Rcd 5419 (IB 2001).¹ IB determined, however, that Sirius had not submitted the appropriate fee with its application and, pursuant to Section 1.1116(b) of the Commission's rules, 47 C.F.R. § 1.1116(b),² it directed Sirius to pay the

¹ Sirius filed the application December 11, 1998. It launched all three of its satellites pursuant to special temporary authority granted by the Bureau December 20, 1999. *Id.* at 5420 n. 4.

² Section 1.1116(b) provides in pertinent part:

Applications or filings accompanied by insufficient fees or no fees which are inadvertently forwarded to Commission staff for substantive review will be billed

fee for authority to launch and operate an NGSO system. On June 4, 2001, the Office of Managing Director (OMD) issued Sirius a Bill For Collection in the amount of \$286,095, which represented the difference between the \$308,105 fee for authority to launch and operate an NGSO system and the \$22,010 fee for modification of an NGSO system paid by Sirius. *See* 47 C.F.R. § 1.1107(10).

3. At the same time as it paid the amount billed on July 2, 2001, almost four months after IB's decision, Sirius filed a petition for waiver or, if appropriate, reconsideration, and refund with OMD. It argued that it was unlawful for the Commission to charge an initial launch and operate fee when granting permission to modify an existing license, that the fee was excessive in relation to the cost of processing the application, and that a waiver would be consistent with precedent. OMD denied Sirius's request principally on the ground that Sirius was re-arguing issues already resolved by IB for which Sirius had not sought timely reconsideration or filed a timely application for review with the Commission. To the extent portions of Sirius's petition properly raised fee waiver matters within OMD's authority, it also found Sirius's allegations with regard to processing costs and Commission precedent to be without merit.

4. In its Application for Review Sirius argues that OMD erred in refusing to reconsider the appropriateness of the launch and operate fee. First, it contends that the Commission's rules delegate exclusive authority to issue fee determinations and to reconsider them to OMD, not IB, and that OMD made its fee determination in this case in its June 4, 2001 billing. Sirius argues that it thereupon properly sought reconsideration of that ruling in a timely filed waiver request after it paid the disputed fee, in accordance with Section 1.1118(b) of the rules, 47 C.F.R. § 1.1118(b).³ This rule, Sirius maintains, did not allow it to challenge the fee earlier by seeking reconsideration of IB's order because it did not yet know the amount due and thus could not pay and at the same time preserve its right to reconsideration until it was billed by OMD. Second, Sirius asserts that its application was miscategorized because it did not seek or receive new authority to launch and operate, but only a modification of its license. Sirius contends that both its application and IB's order expressly describe and treat the application as one to modify Sirius's space station authorization. Moreover, Sirius maintains, it was too late to apply for authority to launch and operate a new SDARS system because the auction that selected the SDARS licensees was completed in 1997. Finally, Sirius argues that even if the Commission concludes that the launch and operate fee applies to Sirius's application, good cause exists for a fee waiver because of unusual circumstances. Specifically Sirius asserts that the Commission has never before considered an application to modify a GSO system to an NGSO system, and the fee rules do not directly address this situation. Sirius concludes that a waiver is also warranted in order to avoid putting it at a competitive disadvantage.

DISCUSSION

for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing at the Commission.

³ Section 1.1118(b) states in pertinent part that:

Actions taken by Financial Operations staff are subject to the reconsideration and review provisions of §§ 1.106 and 1.115 of this part, EXCEPT THAT reconsideration and/or review will only be available where the applicant has made the full and proper payment of the underlying fee as required by this subpart.

5. We conclude that the Managing Director correctly denied Sirius's waiver request. To begin with, we affirm OMD's principal conclusion that Sirius's claim that the Commission could not lawfully impose the fee was an untimely and misdirected effort to re-argue or appeal IB's decision. Sirius does not dispute that it did not seek reconsideration of IB's order or file for Commission review within thirty days, as required by our rules. *See* 47 C.F.R. §§ 1.106(f); 1.115(d). It argues, however, that the relevant fee ruling was made subsequently by OMD and that IB lacked authority to decide this matter. We disagree with Sirius's analysis for a number of reasons.

6. First, Sirius's characterization of IB's fee ruling as "preliminary" and "thus, not ripe for reconsideration" (Application for Review at 8 n. 23) is erroneous. As OMD noted, the issue was squarely presented to the Bureau by the parties. XM Satellite Radio, Inc., the other SDARS licensee, filed comments with IB challenging Sirius's fee submission, and Sirius responded. The Bureau directly addressed the parties' arguments at ¶¶ 23-24 of its order, where it explained the reasons for its fee determination, and specifically ordered compliance by Sirius at ¶ 35.⁴

7. Second, OMD's subsequent issuance of a Bill For Collection was not a fee ruling, as Sirius describes it. Rather, presentation of the actual bill was a ministerial act implementing the Bureau's prior decision. OMD's Bill thus referenced the Bureau's order and expressly stated: "In the course of reviewing the application and comments filed in the proceeding, it was determined [by IB] that Sirius had filed the incorrect fee." Accordingly, as provided by 47 C.F.R. § 1.1116(b), OMD remitted a bill for the amount due. Moreover, despite its contention otherwise, Sirius could have readily ascertained the amount it owed earlier from IB's order by subtracting the payment it had submitted with its application from the correct fee specified in 47 C.F.R. § 1.1107(10). Therefore, Sirius was not precluded from taking timely action by 47 C.F.R. § 1.1118(b).⁵

⁴ We also disagree with Sirius that XM's comments were procedurally improper (Application for Review at 3-4) because they violated the requirement of 47 C.F.R. § 1.1117(c) that requests for fee determinations be "filed as a separate pleading" and directed "to the attention of the Managing Director." This language was added to Section 1.1117(c) in 2001, *see Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, 16 FCC Rcd 13525, 13537 ¶ 40 (2001), two years after XM's comments were filed. IB also had full authority to rule on this matter and to consider the views of the parties in doing so. *See* 47 C.F.R. § 0.261(a)(4) (IB delegation includes "without limitation" specific authority "to act upon applications for international and domestic satellite systems and earth stations"). Moreover, in this regard, an integral element in IB's evaluation of the application is its determination whether the applicant did, in fact, tender the appropriate fee. *See* 47 C.F.R. § 25.110(f) ("Each [satellite] application shall be accompanied by the appropriate fee, specified by, and submitted in accordance with, subpart G of part 1 of this chapter."). In any event, if Sirius believed that IB's action exceeded its delegated authority, the proper course was to seek timely reconsideration or review of IB's decision, not to seek a new ruling from OMD.

⁵ Sirius's assertion that it could not anticipate whether OMD would impose a late penalty is of no moment because 47 C.F.R. § 1.1118(b) only requires full payment of the "underlying fee" before an applicant may seek reconsideration of actions taken by Financial Operations staff.

8. Additionally, notwithstanding its insistence that OMD should have considered the merits of its waiver petition, we agree that, for the most part, Sirius's arguments were a belated challenge to IB's prior conclusion regarding the proper fee category. To the extent that Sirius presented arguments that properly could be deemed a request for waiver, those matters were addressed by OMD. In sum, we agree with OMD that much of Sirius's petition was an untimely attempt to further contest a final Bureau order concerning the proper fee payment by seeking a new ruling from OMD on the same question.

9. Even if Sirius had filed a timely application for review of IB's order, however, we would have affirmed IB's fee determination. The Bureau's order stated that "because this [application] is Sirius's first request to construct, launch, and operate an NGSO system, it is appropriate that Sirius should pay the application fee for such a system." *Sirius Satellite Radio Inc.*, 16 FCC Rcd at 5428 ¶ 24. We agree. It was erroneous for Sirius to pay the fee for modification of an NGSO system with its application because, as explained below, it had not previously been authorized to launch and operate an NGSO system.

10. In 1997 the Commission granted Sirius a license to construct, launch, and operate an SDARS system consisting of two geostationary satellites. Sirius's assertion that the Bureau only granted a modification of that license is technically correct under Section 309 of the Act. But for the first time, as IB correctly held, Sirius also sought and was granted authority to launch three satellites into non-geostationary orbits, which properly placed it in the specific fee category governing authority to launch and operate an NGSO system. *See* Section 1.1107(10) (application for authority to launch and operate per system of technically identical [NGSO] satellites). The application at issue did not "modify" either the GSO system previously approved or a previously approved NGSO system (as contemplated under the statutory fee provisions governing modification of these two types of satellite systems), but asked the Commission to approve an entirely new NGSO system, wholly different in its technical and operational aspects.

11. We perceive no unfairness in the Bureau's decision to consider this an NGSO application under the fee rules and its decision is fully consistent with the language and policy of the statutory and rule provisions governing fees.⁶ As to waiver issues, it is not surprising, given the relatively short history of this service and small number of licensees, that this situation is unusual if not unique, as Sirius asserts, but this alone does not provide good cause for a waiver. *See Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 958 ¶ 70 (1987) (Commission construes waiver authority narrowly and requires showing of "extraordinary and compelling circumstances"). Nor can we accept Sirius's argument that it should not have to pay the correct fee associated with its application because this will assertedly advantage its competitor. We collect fees based on a schedule established by Congress to recover a portion of the expenses we incur in processing applications. These fees are incidental to system implementation and, as a practical matter, are unlikely to affect marketplace competition. All licensees incur fee-filing expenses. Sirius is no exception. Moreover, our fee structure is designed such that all licensees who build a particular type of satellite system pay the same fee.

⁶ *See* 47 U.S.C. § 158(g) (Schedule of Application Fees, Common Carrier Services, Item 22); 47 C.F.R. § 1.1107(10). The OMD decision noted, for example, that:

[T]he work of reviewing the modification included substantial international coordination, the overall effort of which was comparable to efforts expended in the review of entirely new applications.

12. In this case, Sirius could have avoided the additional fees associated with NGSO systems by continuing to pursue its originally proposed GSO system configuration. Instead, Sirius chose to pursue a new system configuration and, as a result, incurred additional fees consistent with the obligation imposed on other NGSO applicants. Absent such treatment, licensees would have every incentive to apply for the system with the smallest fees and then “modify” for another small fee in order to avoid the expense of applying for the more expensive system in the first instance. That is the competitive and public policy harm we seek to avoid here. We note that Sirius paid only \$39,600 when it filed its original geostationary application on May 18, 1990. Three days later, the statutory fee schedule for geostationary systems was changed to \$72,030 per satellite (as opposed to the \$19,800 per satellite paid by Sirius). *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3559, 3631 (1990). A separate fee category for LEO satellites was enacted in 1993, which provided for a fee of \$210,000 to launch and operate NGSO systems. *See Revised Fees Established Pursuant to the Telecommunications Authorization Act of 1992*, 8 FCC Rcd 903, 905 (1993). Thus, we do not think that Sirius has suffered any unique competitive disadvantage as a result of its fee payment; other satellite applicants may have suffered similar disadvantages resulting from changes in the statutory fee schedule and matters of timing. Each applicant is expected to pay the statutory filing fee appropriate to the type of application at issue. In short, we agree with OMD that Sirius’s arguments do not justify a fee waiver.

13. ACCORDINGLY, IT IS ORDERED That the application for review filed March 15, 2002 by Sirius Satellite Radio Inc. and its subsidiary Satellite CD Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary