

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

In the Matter of	)	
	)	
Primosphere Limited Partnership	)	Fee Control No. 9301158160318001
	)	
Request for Refund of Satellite Launch	)	
And Operation Authority Application Fees	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 23, 2009**

**Released: November 24, 2009**

By the Commission:

1. By this order, we grant to the extent indicated below an application for review (AFR), filed June 22, 2005, by Primosphere Limited Partnership (Primosphere). Primosphere seeks review of a letter ruling by the Office of Managing Director (OMD) that denied Primosphere's request for a refund of \$140,000 in application fees that it paid in 1993 for authority to launch and operate satellites in the digital audio radio service (DARS).<sup>1</sup> OMD ruled that Primosphere had not shown legal or equitable grounds for a refund. We disagree and, consistent with OMD's treatment of another applicant in the same service, refund 90 percent or \$126,000 of Primosphere's application fee.

**I. BACKGROUND**

2. The circumstances underlying Primosphere's refund request are as follows. In 1992, the Commission proposed to allocate 50 MHz of spectrum (2310-2360 MHz) for satellite DARS operations.<sup>2</sup> Also in 1992, the Commission accepted for filing Satellite CD Radio Inc.'s (CD Radio) application for DARS authority and opened a cutoff window for additional DARS satellite applications.<sup>3</sup> The Commission established a cutoff date of December 15, 1992, for filing applications to be considered concurrently with the pending application and directed applicants to submit fees for both construction permit authority as well as launch and operation authority by January 15, 1993.<sup>4</sup> The Commission ultimately accepted for filing five additional applications that were filed pursuant to the cutoff notice (making a total of six, including CD Radio's application). The applicants included Primosphere,<sup>5</sup> which

<sup>1</sup> Letter from Mark A. Reger, Chief Financial Officer to Howard M. Liberman, Esq. (May 23, 2005) ("Reger Letter Order"). At the relevant time, the fee was \$70,000 per satellite. Primosphere sought authority to launch two satellites.

<sup>2</sup> *Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, 7 FCC Rcd 7776 (1992).

<sup>3</sup> *Public Notice*, DA 92-1408 (Oct. 13, 1992), 7 FCC Rcd 6763 (1992).

<sup>4</sup> *Public Notice*, DA 92-1666 (Dec. 9, 1992), 7 FCC Rcd 8594 (1992). At the time, satellite operators filed separate applications for a construction permit and for launch and operation authority. The per satellite fee for a construction permit was \$2,030 per satellite and the per satellite fee for launch and operation authority was \$70,000. *Id.* Today satellite operators file only a single application and pay a single application fee. *See Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures*, 11 FCC Rcd 21581, 21584-85 ¶ 8 (1996).

<sup>5</sup> *Public Notice*, DA 93-179 (Feb. 19, 1993), 8 FCC Rcd 986 (1993).

paid the required \$140,000 in application fees by the established fee cutoff date. Shortly thereafter, one of the applicants, Sky-Highway Radio Corp. (Sky-Highway), requested dismissal of its application and requested and received a refund of its launch and operation authority fees.<sup>6</sup> A second applicant, Loral Aerospace Holdings, Inc. also withdrew, leaving four applicants.

3. In 1995, the Commission allocated 50 MHz of spectrum to DARS<sup>7</sup> and, in a subsequent order, proposed service rules for DARS.<sup>8</sup> In the latter order, the Commission indicated that it was considering three approaches to licensing DARS: (1) making the band available to only the four pending applicants; (2) making part of the band available to the pending applicants while opening the rest of the band to new applicants; and (3) accepting new applications for the entire band.<sup>9</sup> The Commission also explained that the four pending applications, as filed, appeared to be mutually exclusive, since granting all four would require more than 50 MHz of spectrum.<sup>10</sup> However, the Commission noted that the four applicants had attempted to formulate a sharing arrangement, and the Commission tentatively concluded that all four applications could be granted by giving each applicant a 10 MHz spectrum block.<sup>11</sup> The Commission further indicated that in the event it accepted additional applications under option (2) or (3), it would consider using competitive bidding to select the DARS licensees.<sup>12</sup>

4. The Commission adopted service rules for DARS in 1997.<sup>13</sup> An intervening event, however, required the Commission to modify its proposed approaches to licensing DARS. The Omnibus Consolidated Appropriations Act, 1997<sup>14</sup> directed the Commission to reallocate 25 MHz of the DARS spectrum to wireless services. Accordingly, the Commission adopted a licensing plan for the remaining 25 MHz of spectrum that it described as a “logical outgrowth of Option Two,” above.<sup>15</sup> Specifically, the Commission concluded that the reduced DARS band could support two viable 12.5 MHz grants and decided to conduct an auction for the two licenses that would be restricted to the four pending applicants.<sup>16</sup> In the ensuing auction held in April 1997,<sup>17</sup> CD Radio and American Mobile Radio Corp.

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<sup>6</sup> See *Fee Decisions of the Managing Director Available to the Public*, 9 FCC Rcd 2223, 2240-41 (OMD 1994) (also denying refund of construction permit application fee).

<sup>7</sup> *Amendment of the Commission’s Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, 10 FCC Rcd 2310 (1995).

<sup>8</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 11 FCC Rcd 1 (1995).

<sup>9</sup> *Id.* at 11-13 ¶¶ 33-39.

<sup>10</sup> *Id.* at 24-25 ¶ 77.

<sup>11</sup> *Id.* at 24-25 ¶¶ 77-78.

<sup>12</sup> *Id.* at 29-30 ¶¶ 94-96.

<sup>13</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 Mhz Frequency Band*, 12 FCC Rcd 5754 (1997).

<sup>14</sup> Pub. L. No. 104-208, 110 Stat. 3009, Title III, Sec. 3001.

<sup>15</sup> 12 FCC Rcd at 5771 ¶ 39.

<sup>16</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd at 5772-76 ¶¶ 40, 49, 5782-84 ¶¶ 66-70, 5785-86 ¶¶ 73, 78 (1997).

<sup>17</sup> See *Public Notice*, DA 97-656 (Apr. 2, 1997).

(American Mobile) filed the winning bids and received grants.<sup>18</sup> The applications of Primosphere and Digital Satellite Broadcasting Corporation (DSBC) were thus dismissed.<sup>19</sup>

5. DSBC thereupon, on January 21, 1999, requested a refund of its launch and operation application fees, which OMD granted in part.<sup>20</sup> Because some processing of DSBC's application had already taken place, OMD returned only \$63,000 or 90 percent of the fees paid by DSBC. Unlike DSBC, Primosphere continued to prosecute its application. Primosphere appealed the grant of the CD Radio and American Mobile applications to the Commission and then to the United States Court of Appeals for the District of Columbia Circuit. Primosphere also appealed the dismissal of its own application to the Commission. After the D.C. Circuit affirmed the CD Radio and American Mobile grants on February 21, 2003,<sup>21</sup> Primosphere, in April 2004, asked for leave to withdraw its application for review of the dismissal of its own application.<sup>22</sup> Then, on June 9, 2004, Primosphere requested a refund of its launch and operation authority application fees.<sup>23</sup>

6. OMD denied Primosphere's request.<sup>24</sup> As an initial matter, OMD held that Primosphere's refund request was untimely because Primosphere did not request a refund until nearly seven years after the dismissal of its application.<sup>25</sup> Turning to the merits, OMD concluded that Primosphere had not shown good cause for granting a refund. OMD noted that under established Commission policy refunds will be granted only upon a showing of extraordinary and compelling circumstances and that it was not sufficient to argue that the Commission's cost for processing a particular application did not correspond to the fee paid.<sup>26</sup> OMD also found that the circumstances of Primosphere's request were not comparable to those of the request by Sky-Highway, which had withdrawn its application before the Commission had adopted service rules for DARS or begun processing its launch and operation application and long before the Commission conducted the auction.<sup>27</sup> OMD then went on to disavow the reasoning of the DSBC refund letter and held that, in retrospect, DSBC's request, like Primosphere's, did not present extraordinary and compelling circumstances.<sup>28</sup> Specifically, OMD pointed out that the Commission in other rulemaking proceedings uniformly indicated that refunds would be available only to applicants who chose not to

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<sup>18</sup> See *Satellite CD Radio, Inc.*, 16 FCC Rcd 21458 (2001); *American Mobile Radio Corp.*, 16 FCC Rcd 21431 (2001). CD Radio and American Mobile are also known as Sirius Satellite Radio and XM Radio, Inc., respectively.

<sup>19</sup> See *Digital Satellite Broadcasting Corp.*, 13 FCC Rcd 8976 (IB 1997), *recon. denied sub nom. Primosphere Limited Partnership*, 16 FCC Rcd 21175 (IB 2001), *application for review pending*.

<sup>20</sup> Letter from Mark A. Reger, Chief Financial Officer to Cheryl A. Tritt, Esq. (Feb. 15, 2000). See also *Fee Decisions of the Managing Director Available to the Public*, 15 FCC Rcd 8636 (OMD 2000).

<sup>21</sup> *Primosphere Limited Partnership v. FCC*, No. 01-1526 (D.C. Cir. Feb. 21, 2003), *reported*, 2003 WL 472239.

<sup>22</sup> June 22, 2005 Application for Review at 5.

<sup>23</sup> Letter from Howard M. Liberman to Mr. Andrew S. Fishel, Managing Director (Jul. 9, 2004).

<sup>24</sup> See Reger Letter Order, *supra*.

<sup>25</sup> See *id.* at 3. The International Bureau dismissed Primosphere's application on October 28, 1997; Primosphere filed its refund request on July 9, 2004.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 4-5.

<sup>28</sup> *Id.* at 5-6.

participate in the auction process.<sup>29</sup> Additionally, OMD concluded that the congressional legislation that reduced the DARS allocation from 50 MHz to 25 MHz did not trigger a refund obligation under 47 C.F.R. § 1.1113(a)(4). That section provides for refunds “[w]hen the Commission adopts new rules that nullify applications already accepted for filing, or new law or treaty would render useless a grant or other positive disposition of the application.” OMD observed that Primosphere’s application could have been granted, despite the legislation, if it had prevailed in the auction.<sup>30</sup>

7. In its application for review, Primosphere argues that its refund request was not untimely because Primosphere should not be expected to request a refund until the dismissal of its application became final, which did not occur until the expiration of Primosphere’s various appeals.<sup>31</sup> As to the merits, Primosphere asserts that it is entitled to the same treatment as Sky-Highway and DSBC, since, Primosphere argues, they received refunds under circumstances that were similar to those applicable to Primosphere. According to Primosphere, it also would be consistent with Commission practice in other services to grant a refund here.<sup>32</sup> Primosphere further asserts that the congressional legislation implicates section 1.1113(a)(4) of the Commission’s Rules because, by effectively reducing the number of DARS licenses from four to two, Congress made two of the applications ungrantable, although the identity of the two ungrantable applications could not be determined until after the auction.<sup>33</sup> Finally, Primosphere contends that it is unfair for the Commission to retain the application fees for the applicants that lost the auction, since the Commission’s auction process does not utilize non-refundable application fees.<sup>34</sup>

## II. DISCUSSION

8. In accordance with the Communications Act and our rules, the Commission will waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby.<sup>35</sup> As OMD correctly noted, our policy in applying the statute and the rule has been to grant waivers on a case-by-case basis only upon a showing of “extraordinary and compelling circumstances.”<sup>36</sup> In this regard, we do not consider it extraordinary or compelling that the cost of processing a particular application does not

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<sup>29</sup> See *id.* at 5. OMD cited *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15958 (1998) (no reason to refund fees to broadcast applicants choosing to participate in auction because they “have continued to prosecute their applications”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 7387 (1994) (if the Commission used competitive bidding procedures for cellular applications, those applicants indicating no desire to participate would be entitled to a refund of application processing fees); and *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act- Competitive Bidding*, 10 FCC Rcd 9589 (1995) (if the Commission used competitive bidding for pending MDS applicants, those applicants indicating a desire not to participate may be entitled to refunds).

<sup>30</sup> Reger Letter Order. at 6-7.

<sup>31</sup> AFR at 5-6.

<sup>32</sup> *Id.* at 7-9.

<sup>33</sup> *Id.* at 10-11.

<sup>34</sup> *Id.* at 11-12.

<sup>35</sup> 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.1117(a).

<sup>36</sup> See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 958 ¶ 70 (1987).

correspond to the associated application fee.<sup>37</sup> We do not expect that the application fee will necessarily reflect the work done on a particular application.<sup>38</sup> Thus, Primosphere's argument that "the Commission would not undertake the work covered by the fees until after the auctions, and then only for the auction winners"<sup>39</sup> does not warrant a refund unless a consideration of the overall circumstances discloses compelling equities in Primosphere's favor.

9. In this regard, we agree with Primosphere that, as a matter of fairness, we treat similarly situated parties alike unless there is adequate justification for disparate treatment.<sup>40</sup> Accordingly, we address the fact that OMD denied Primosphere a refund despite granting refunds to Sky-Highway and DSBC in the same proceeding.

10. We find Sky-Highway's situation readily distinguishable from Primosphere's. Sky-Highway sought dismissal of its application and a refund of its application fees very early in the proceeding before the Commission had even authorized DARS or promulgated service rules. Only the preliminary processing of its construction permit applications had occurred, and any processing of its launch and operation applications had not begun, because DARS service rules had not yet been adopted.<sup>41</sup> Under these circumstances, OMD allowed Sky-Highway to withdraw from the proceeding and to recover the expense of filing its launch and operation application before further processing of its applications or deliberations in the DARS rulemaking proceedings occurred. The Commission, however, denied Sky-Highway a refund of its construction permit application fees, since the construction permits were in a preliminary processing stage at the time it withdrew. Here, by contrast, Primosphere prosecuted its application throughout the entire DARS proceeding, including the auction, during which time significant consideration of its applications occurred and the pendency of Primosphere's application had a significant impact on the overall resolution of the DARS proceeding. We find that this difference in circumstances adequately justifies OMD's disparate treatment of Sky-Highway and Primosphere.<sup>42</sup>

11. On the other hand, we find little difference between the circumstances associated with the Primosphere and DSBC refund requests and that, ordinarily, both requests should have been treated the same way. However, we agree with OMD's determination that, in retrospect, DSBC's refund request was wrongly decided. OMD originally based its conclusion that DSBC's request was extraordinary and compelling on "the unique situation in which DSBC was placed when the decision to auction the DARS licenses occurred during the processing of its application."<sup>43</sup> Although OMD did not elaborate on its meaning, this language appears to refer to the possibility that DSBC may not have anticipated that it would be subject to an auction before the congressional legislation reduced the DARS allocation from 50

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<sup>37</sup> See, *Panamsat Corp.*, 19 FCC Rcd 18495, 18497-98 ¶ 7 (2004); *Lockheed Martin Corp.*, 16 FCC Rcd 12805, 12806-07 ¶ 5 (2001); *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987, 5987 ¶ 5 (1988).

<sup>38</sup> *Id.*

<sup>39</sup> AFR at 8-9.

<sup>40</sup> See *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994).

<sup>41</sup> *Fee Decisions of the Managing Director Available to the Public*, 9 FCC Rcd at 2241.

<sup>42</sup> We agree with OMD, moreover, insofar as the Sky-Highway letter found the fees were "unduly excessive" or bore "scant relationship" to the costs of processing, that these factors are not, in themselves, sufficiently compelling or extraordinary to justify a refund. See paragraph 8 and note 37, *supra*.

<sup>43</sup> See note 20, *supra*.

MHz to 25 MHz, especially since the Commission had made a tentative determination that all four pending applications could potentially be granted within the 50 MHz of spectrum originally allocated.

12. We find, however, that, in its Primosphere ruling, OMD correctly recognized that its reasoning with respect to DSBC's request was flawed. Specifically, although DSBC and Primosphere may have anticipated that all four applications would be granted, this was never a foregone conclusion. As the Commission clearly stated, its determination in this regard was merely tentative.<sup>44</sup> DSBC and Primosphere were on notice that the Commission was considering the possibility of opening a further application window and subjecting all pending applications to an auction.<sup>45</sup> And, as we noted in paragraph 4 and note 16, *supra*, the Commission's auction decision was a logical outgrowth of one of the licensing options under consideration.

13. Moreover, even assuming that DSBC and Primosphere did not anticipate the auction, we find that it would ordinarily be unwarranted to permit applicants to participate in the auction and then to obtain a refund only after losing. It might have been reasonable – and consistent with the approach taken with respect to other services, such as ITFS, cellular, and MDS<sup>46</sup> – to have permitted DSBC and Primosphere to receive a refund of their filing fees *before* they participated in the auction on the ground that they might not have filed applications if they had known they would be subject to an auction.<sup>47</sup> But that is not the case here. Having elected to participate in the auction, they took their chances that they would lose. For

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<sup>44</sup> See note 11, *supra*. The Commission stated: “Based on preliminary technical analysis, we believe that the four pending applicants should be able to operate over 40 MHz of the available spectrum, with each assigned to a minimum spectrum block of 10 MHz . . . we seek comment on whether our tentative conclusion is correct. . . .” *Id.* at 25 ¶ 78.

<sup>45</sup> See note 9, *supra*.

<sup>46</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920, 15957-58 ¶¶ 101-04 (1998) (with respect to applications that had been frozen prior to decision to auction certain broadcast licenses, the Commission announced its intent to refund filing fees paid by applicants that elected not to participate in auction, but stated: “There is . . . no reason to refund previously paid filing fees” to unsuccessful bidders because they “have continued to prosecute their applications.” *Id.* at ¶ 103). We recognize that in the broadcast ITFS auction, the Commission announced its policy prior to the auction. While this is preferable, it is not required, since that announcement was consistent with past Commission practice. In the same order, the Commission refunded hearing fees paid by unsuccessful bidders in any auction, in view of the Commission's decision not to conduct hearings. *Id.* at ¶ 101; see also 12 FCC Rcd 22363, 22370 (1997). The Commission thus treated filing and hearing fees differently, since applications would continue to be processed if applicants participated in an auction. We, therefore reject Primosphere's suggestion that launch and operation application fees are somehow analogous to hearing fees. See *AFR* at 8.

<sup>47</sup> Primosphere misapprehends the reasons two other cases were cited in the Reger Letter Order. See *AFR* at 9. OMB cited *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 7387 (1994) and *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd 9589 (1995) for the proposition that if the Commission decided to use competitive bidding to resolve applications after the applications were filed, those applicants indicating no desire to participate in the auction would be or might be entitled to refunds. The cases are relevant because they indicate that any refunds would be limited to those applicants who chose not to participate in the auction. That the Commission chose not to use auctions in those proceedings does not make reliance upon them “misplaced,” as Primosphere suggests.

these reasons, if the DSBC and Primosphere refund requests were both before us in the first instance, we would deny each of them.<sup>48</sup>

14. As a result, we have the legal authority to affirm OMD's ruling here and deny Primosphere's request. We note in particular that we would not be barred from taking this action even though it would result in the disparate treatment of DSBC and Primosphere. This is because we are not bound by OMD's treatment of DSBC, which we find to have been erroneous.<sup>49</sup>

15. Nevertheless, we are mindful that the disparate treatment of similarly situated parties may be regarded as inequitable depending on the circumstances.<sup>50</sup> We therefore conclude that, under the circumstances here, it is appropriate for us to exercise our discretion and hold, as a matter of fairness, that DSBC and Primosphere should be treated in a similar manner. Because DSBC requested a refund immediately after the auction, OMD's partial grant of its request has long been final. Moreover, if Primosphere had also requested a refund at the same time, OMD would likely have granted it on similar terms and that action would also have become final. Thus, the only reason that Primosphere does not presently have at least a portion of its requested refund in hand is that it elected to pursue appeals of the auction results, while DSBC did not, and we find that it would be inequitable to treat Primosphere differently for exercising its appeal rights.<sup>51</sup> Under these circumstances, we find that it would be fair to treat DSBC and Primosphere in the same manner and to give Primosphere the same 90 percent refund that OMD granted DSBC. Accordingly, we will grant Primosphere's AFR in part and give Primosphere a refund of \$126,000.<sup>52</sup>

### III. ORDERING CLAUSE

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<sup>48</sup> In this regard, we reject two additional arguments that Primosphere presented in its AFR. We find that OMD correctly interpreted section 1.1113(a)(4) in finding that it did not apply here. Section 1.1113(a)(4) applies where a law or treaty makes the grant of a pending application a "legal nullity." See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 950 ¶ 17 (1987). No applicant has a vested right that its application will be granted where the filing of mutually exclusive applications is possible. The congressional legislation here did not render Primosphere's application a nullity, but only reduced the probability that Primosphere's application would be granted. We also disagree with Primosphere's argument that the Commission should not be permitted to retain both the four applicants' filing fees and the proceeds of the auction. At the time Primosphere filed its application and paid its fees, the treatment of DARS was in a state of flux. The Commission could not reasonably have foreseen how the DARS licensees would ultimately be selected and could not have reasonably been expected to process the applications as if an auction had been decided upon from the beginning. Thus, it is beside the point that generally "The Commission's auction process does not require application fees . . . ." AFR at 12.

Primosphere also challenges OMD's decision that its fee refund request was untimely. We need not reach the question of whether a fee reduction request made so long after an the application has been dismissed should generally be considered untimely, because we conclude, for the reasons discussed below, that Primosphere's request should be entertained and partially granted. We note, in particular, that Primosphere filed its request here within a reasonable time after it withdrew its application for review of the dismissal of its application. See *supra* para. 5.

<sup>49</sup> See *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004) (The Commission is not required to adhere to an OMD fee refund policy that it never endorsed).

<sup>50</sup> See *Adams Telcom, Inc. v. FCC*, note 40, *supra*.

<sup>51</sup> See *In re American President Lines, Inc.*, 779 F.2d 714, 718 (D.C. Cir. 1985) (disapproving orders that might impermissibly encumber the right to appeal).

<sup>52</sup> \$140,000 x 90% = \$126,000.

16. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed June 22, 2005, by Primosphere Limited Partnership IS GRANTED to the extent indicated and otherwise IS DENIED, and the Office of Managing Director IS INSTRUCTED to issue a refund of \$126,000 to Primosphere.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary