

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

In the Matter of)	
)	
Primosphere Limited Partnership)	IBFS File Nos. SAT-L/A-19930113-00004;
)	SAT-L/A-19930113-00005;
Application for Authority to Construct,)	SAT-A/O-19921215-00040;
Launch, and Operate Satellites in the)	SAT-A/O-19921215-00043
Satellite Digital Audio Radio Service)	
)	29/30-DSS-LA-93;
)	16/17-DSS-P-93
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 2010

Released: March 15, 2010

By the Commission:

I. INTRODUCTION

1. For the reasons stated herein, we dismiss the Application for Review filed by Primosphere Limited Partnership (Primosphere) of the denial of its application for a license in the Satellite Digital Audio Radio Service (SDARS). We find that Primosphere's Application for Review was resolved in 2003 when the United States Court of Appeals, District of Columbia Circuit (D.C. Circuit) affirmed the Commission's decision to grant the only two available SDARS licenses to Sirius Satellite Radio Inc. (Sirius) and XM Satellite Radio, Inc. (XM).¹ Accordingly, the filings made by Primosphere in 2007 seeking to revive the Application for Review are moot and are hereby dismissed.

II. BACKGROUND

2. Primosphere submitted an application in 1993 to provide SDARS in the United States and participated in the Commission's April 1, 1997 auction of available SDARS spectrum.² Sirius and XM submitted the winning bids for the only two available SDARS licenses.³ Subsequently, both companies filed to conform their applications to the technical rules that the Commission adopted for SDARS. Primosphere petitioned the International Bureau (Bureau) to deny both filings. The Bureau denied each of Primosphere's petitions⁴ and dismissed Primosphere's license application because there was no SDARS license remaining to grant.⁵

¹ At the time of licensing, Sirius was called Satellite CD Radio, Inc., and XM was called American Mobile Radio Corp. For the sake of clarity, we shall uniformly refer to the companies as Sirius and XM in the text of this Order.

² Primosphere Application for Review at 1.

³ Public Notice, "*FCC Announces Auction Winners for Digital Audio Radio Service*," DA 97-656 (Apr. 2, 1997).

⁴ Satellite CD Radio, Inc. Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service, *Order and Authorization*, 13 FCC Rcd 7971 (Int'l Bur. 1997); American Mobile Radio Corporation Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service, *Order and Authorization*, 13 FCC Rcd 8829 (Int'l Bur. 1997).

⁵ Primosphere Limited Partnership, *Order*, 13 FCC Rcd 8976 (Int'l Bur. 1997).

3. Primosphere sought review by the Commission of the Sirius and XM license grants. It also petitioned the Bureau to reconsider the dismissal of Primosphere's application for an SDARS license, arguing that the Bureau's dismissal of Primosphere's SDARS license application was premature prior to Commission review of the grant of the Sirius and XM licenses. In 2001, the Commission affirmed the grant of licenses to Sirius and XM.⁶ In light of this action, the Bureau denied reconsideration of the dismissal of Primosphere's license application.⁷

4. Primosphere subsequently petitioned the D.C. Circuit to review the Commission's grant of licenses to Sirius and XM. On December 21, 2001, Primosphere also filed an Application for Review of the dismissal of its SDARS license application. In 2003, the D.C. Circuit denied Primosphere's petitions and affirmed the Bureau's grant of licenses to Sirius and XM.⁸ Primosphere did not challenge the appellate court's decision, which is now final. In light of the D.C. Circuit's decision affirming the license grants to Sirius and XM, Primosphere filed a motion with the Commission in 2004 withdrawing its Application for Review.⁹

5. Three years later, in February 2007, Primosphere filed a letter seeking to withdraw its 2004 motion and stating its intent to continue to prosecute its Application for Review.¹⁰ In March 2007, Primosphere filed a "supplement" to its 2001 Application for Review, asserting that because the Commission did not formally dismiss the Application for Review, it remains pending. Primosphere reasons that it remains an applicant for an SDARS license in the event one becomes available as a consequence of the then pending merger request of Sirius and XM.¹¹ In April 2007, Sirius filed a motion to strike Primosphere's February 2007 withdrawal letter and the March 2007 supplement as late filed and inconsistent with the Commission's rules.¹² Primosphere opposed the motion to strike.¹³ XM Satellite Radio Inc. and Sirius filed reply comments in support of the motion to strike.¹⁴ On July 3, 2007, Primosphere filed a motion to consolidate this proceeding with the Commission's review of the merger of Sirius and XM as well as a petition requesting other actions in the Sirius/XM merger proceeding.¹⁵ The Commission denied both the motion and the petition in the Order approving the merger.¹⁶

⁶ Satellite CD Radio, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 21458 (2001); American Mobile Radio Corporation, *Memorandum Opinion and Order*, 16 FCC Rcd 21431 (2001).

⁷ Primosphere Ltd. Partnership, *Order*, 16 FCC Rcd 21175 (Int'l Bur. 2001).

⁸ *Primosphere Ltd. Partnership v. FCC*, Case Nos. 01-1526 and 1527, 2003 WL 472239 (C.A.D.C. Feb. 21, 2003) (per curiam).

⁹ Primosphere Ltd. Partnership, Motion to Withdraw Application for Review (filed Apr. 16, 2004).

¹⁰ Letter from Howard M. Liberman to Marlene Dortch, Secretary, FCC, dated Feb. 23, 2007.

¹¹ Primosphere Ltd. Partnership, Supplement to Application for Review (filed Mar. 19, 2007).

¹² Sirius Motion to Strike (filed Apr. 23, 2007).

¹³ Primosphere Opposition to Motion to Strike (filed May 8, 2007).

¹⁴ XM Satellite Radio Inc.'s Reply Comments in Support of Motion to Strike (filed May 21, 2007); Sirius Reply in Support of Motion to Strike (filed May 18, 2007).

¹⁵ Primosphere Ltd. Partnership, Motion to Consolidate, MB Docket 07-57, (filed July 3, 2007); Sirius Opposition to Primosphere's Motion to Consolidate, MB Docket 07-57, (filed July 18, 2007); Primosphere Ltd. Partnership, Petition of Primosphere Limited Partnership, MB Docket 07-57, (filed July 3, 2007).

¹⁶ Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc., MB Docket No. 07-57, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12427-28 (para. 176) (2008).

III. DISCUSSION

6. Primosphere's filings seeking to revive its Application for Review are moot. When the appellate court affirmed the Commission's license grants to Sirius and XM, the Application for Review became moot. Thus, no legal basis for Primosphere's Application for Review existed after the D.C. Circuit's decision affirming the Commission's grant of SDARS licenses to Sirius and XM. Furthermore, any subsequent action by the Commission either denying or dismissing the Primosphere's Application for Review in 2004 would have been a purely ministerial act. In order to provide clarity, however, we will perform this ministerial act and formally dismiss Primosphere's Application for Review, as moot, based on the reasoning set forth in this paragraph.

7. Accordingly, the Application for Review and any filings related to that filing submitted by Primosphere ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary