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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
PRIMOSPHERE LIMITED PARTNERSHIP)
)
Request for a Pioneer's)
Preference In the Licensing)
Process for the Satellite)
Digital Audio Radio Service)
)
Supplement to Pioneer's)
Preference Application under)
47 CFR § 1.402(i)(1995))

PP-87
GEN Docket No. 90-357
IB Docket No. 95-91

To: The Commission

**SUPPLEMENT TO REQUEST FOR
PIONEER'S PREFERENCE OF
PRIMOSPHERE LIMITED PARTNERSHIP**

Pursuant to Sections 1.402(a) and (f)-(i) of the Commission's rules, as adopted in the Third Report and Order in ET Docket No. 93-266, 95 FCC 218 (released June 8, 1995), Primosphere Limited Partnership ("Primosphere") hereby submits a supplement to its pending application for a pioneer's preference in the above-captioned proceeding. The Third Report and Order requires pioneer's preference applicants to supplement their pending requests to conform to these new rules as adopted in that proceeding and in the earlier Second Report and Order and Further Notice of Proposed Rule Making in ET Docket 93-266, 10 FCC Rcd 4523 (1995).

I. INTRODUCTION

For the most part, the rules adopted in the above-mentioned proceedings set forth procedures for evaluating preference

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requests and for determining how payment is to be made for a license awarded pursuant to a pioneer's preference in a proceeding where licenses are awarded by competitive bidding. These provisions do not require a supplement to Primosphere's pioneer's preference application.

Also, pioneer's preference applicants are required to explain the technical feasibility of the technology they have developed. Primosphere has met this requirement through its license application and pioneer's preference request.

It appears that under the Commission's new rules, Primosphere's pioneer's preference application need only be supplemented to meet the requirements of new 47 CFR § 1.402(i), under which Primosphere must demonstrate that the Commission's processes inhibit it from capturing the economic rewards of its innovation in the absence of an award of a pioneer's preference.

II. BACKGROUND

Primosphere's pioneer's preference request was filed with the Commission on June 2, 1993. Primosphere proposes a new and innovative non-subscription satellite digital audio radio service (SDARS) using advanced technology. Primosphere's service would be advertiser-supported and available to anyone with a receiver.

The Commission has tentatively found that the SDARS applications pending in IB Docket 95-91 are not mutually exclusive. Primosphere recognizes that, under these circumstances, assuming that the pending four applicants receive licenses, a pioneer's preference determination will be unnecessary to safeguard Primosphere's investment in its

intellectual property interests. Additionally, Primosphere recognizes that under the Commission's rules, a showing regarding the nature of Primosphere's intellectual property interests is only required in the event the licenses are awarded by auction.

III. THE NATURE OF PRIMOSPHERE'S INTELLECTUAL PROPERTY INTERESTS

Primosphere's proposed SDARS system incorporates advanced, innovative technology which makes the most efficient use of the electromagnetic spectrum and allows the provision of digital, high quality radio programming on a non-subscription basis. This technology, implemented as proposed, will incorporate both Primosphere's proprietary technology and trade secret know-how which, although not patented, are of great value to Primosphere.

A. Primosphere's Efforts to Protect Its Valuable Intellectual Property

Primosphere's interest in its proprietary technology and trade secret know-how is protectable under applicable legal standards because Primosphere uses the information for commercial purposes and has taken reasonable measures to maintain the secrecy of the information. See Rest. Unfair Comp. (3d) § 39 (1995). For example, Primosphere monitors dissemination and use of its proprietary knowledge. This allows Primosphere to maintain the value of its investment by retaining exclusive control over its innovative technology.

Additionally, consultants of Primosphere who deal with this proprietary information enter into non-disclosure agreements and agreements not to take information to competitors. (So will employees, but for now Primosphere has no employees.) These

measures demonstrate the value Primosphere places on its trade secrets and the reasonable efforts taken to maintain trade secret status for proprietary technology.

B. Loss of Value in Intellectual Property as a Result of Commission Processes

Participation in Commission licensing practices has and will continue to result in the loss of much of Primosphere's valuable intellectual property. The disclosure and public dissemination of Primosphere's innovative satellite DARS technology would compromise the efforts made by Primosphere to control and protect the use of technical information for the proprietary portions of Primosphere's proposed system.

Any disclosures made by Primosphere in support of its license application are necessarily part of the Commission's public records and allow Primosphere's competitors to make use of these proprietary technologies without compensation to Primosphere for the value inherent in the information used. Without a technology licensing agreement or arrangement for technology exchange, the methods used to implement the Primosphere satellite DARS would not be immediately apparent to competitors. In the absence of the full public disclosure occasioned by Commission proceedings, these competitors would be able to make use of this proprietary technology only after costly, legitimate reverse engineering efforts or not at all. Without mandatory public disclosure, competitors would not have a "free-ride" at the expense of Primosphere's investment in research and development and Primosphere's reasonable efforts to maintain secrecy.

IV. LOSS OF PRIMOSPHERE'S RIGHTS WILL BE MORE SIGNIFICANT THAN IN OTHER CONTEXTS

It has been recognized that the disclosure of trade secret information to a government entity without a reasonable expectation of continued confidentiality divests the disclosing entity of trade secret rights in the information. See Ruckelshaus v. Monsanto, 467 U.S. 986 (1984). However, in many contexts in which proprietary information must be submitted in order to effectuate a statutory scheme, confidentiality is maintained by the receiving agency. See 37 CFR § 1.14 (all patent applications are maintained in secrecy until the patent issues and patent protection attaches to the disclosures therein). In contemplation of the public disclosure required to gain a license from the FCC, an pioneering applicant must make the hard choice between retaining intellectual property protection for its proprietary and trade secret technology or seeking a license to implement a new and valuable service.

Failure to obtain a license in this instance not only leaves the applicant unable to implement its service but also deprives the applicant of licensing revenues which may have been available had the applicant chosen to retain the proprietary nature of its pioneering technology.

V. LICENSING REVENUES WILL BE INADEQUATE TO COMPENSATE PRIMOSPHERE

In the event Primosphere does have the opportunity to obtain licensing revenues, despite its disclosure in the FCC public files, the potential market for licensees of Primosphere's technology is extremely small, if not non-existent. No other

applicant is proposing a non-subscription service for satellite DARS and the spectrum allocated to the service is limited. This limited spectrum allocation serves to limit the number of market entrants and thus the number of potential purchasers of Primosphere's technology.

Successful implementation of satellite DARS is conditioned on the adoption and implementation of consumer equipment on a widespread basis. In conjunction with its satellite DARS development, Primosphere is actively developing innovative and novel technologies in the related areas of antennae and receivers for vehicles. Primosphere is actively involved in enhancing the efficiency of its satellite design. The motivation for developing this innovative equipment is premised on Primosphere's ability to provide non-subscription SDARS service. If Primosphere does not obtain an operating license for SDARS, this nascent technology may be valueless if Primosphere is not able to adapt it for use on a subscription basis, so that Primosphere could sell the technology to the operators of the other proposed systems.

VI. CONCLUSION

As discussed above, Primosphere's intellectual property interests will be impaired or lost entirely through the public nature of the Commission's licensing procedures. This loss in value will be more significant than the loss which would be incurred in other contexts in which information would be submitted to an agency of the government, such as the Patent and Trademark Office. Loss of these valuable interests will prevent

Primosphere from capturing fully the economic rewards of the innovative technology proposed for Primosphere's satellite DARS. Grant of a license in a non-mutually exclusive proceeding or of a pioneer's preference, should the Commission determine that applications before it are mutually exclusive, will allow Primosphere to more fully recoup the loss in its intellectual property rights.

Primosphere is taking the risk of being the initial implementor of non-subscription SDARs and, in connection with licensing proceedings, losing trade secret status of much of the relevant technology. Grant of a pioneer's preference is a significant factor in encouraging and rewarding early disclosure and implementation of this valuable new service and its related technology.

For the reasons described above, and in Primosphere's pending pioneer's preference application, the Commission should grant Primosphere a pioneer's preference to receive a SDARS license.

Respectfully submitted,

PRIMOSPHERE LIMITED PARTNERSHIP

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