

ORIGINAL

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

FILED/ACCEPTED

AUG 27 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)
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XM Satellite Radio Holdings, Inc.,)
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 Transferor)
)
and)
)
Sirius Satellite Radio Inc.,)
)
 Transferee)
)
Consolidated Application for Authority to)
Transfer Control of XM Radio Inc. and Sirius)
Satellite Radio Inc.)

MB Docket No. 07-57

To: The Commission

**REPLY COMMENTS OF
PRIMOSPHERE LIMITED PARTNERSHIP**

Primosphere Limited Partnership ("Primosphere"), by its attorneys, hereby submits this reply to the comments submitted in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding, FCC 07-119 (released June 27, 2007) ("NPRM"). This NPRM is one aspect of the pending application of XM Satellite Radio Holdings, Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") for consent to merge and thereby reduce the number of licensees in the Satellite Digital Audio Radio Service ("SDARS") from two to one.

Primosphere submitted comments in the earlier phase of this proceeding. See Petition of Primosphere Limited Partnership, submitted July 3, 2007, and Motion to Consolidate, also submitted on July 3, 2007.

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Primosphere was one of the original applicants for SDARS authorization. At one point in the process, the SDARS spectrum was to have been 50 MHz and the four then-remaining applicants reported jointly to the Commission that each had agreed to receive authorization for any 12.5 MHz portion of that spectrum, so the four applications were no longer mutually-exclusive. However, the Commission subsequently determined that only 25 MHz of the available spectrum would be available for SDARS and that the four applicants would have to participate in an auction in order to obtain an SDARS authorization.¹ Thus, the Commission decided that there would be only two SDARS licenses instead of four. However, at the same time, the Commission announced the policy at issue in this phase of the XM/Sirius proceeding – that because the Commission was going to issue only two SDARS authorizations, the two parties that prevailed at the auction would not be permitted to merge.²

Thus, when the SDARS auction took place on April 1, 1997, the participants were *bidding on one out of two authorizations* with an understanding that the two winners would not be permitted to merge. It was perfectly clear to all four applicants/bidders that there was no possibility of the two SDARS licensees merging. Primosphere bid accordingly, as did XM and Sirius.

If there had been any possibility or hope at that time that the two winning bidders could have merged in the future, Primosphere definitely would have bid more. And it can be presumed that XM and Sirius would have as well. Therefore, if there had been any thought among the applicants/bidders that the two winners could merge in the future, the U.S. Treasury would have received more money from the SDARS auction than it ultimately received from XM and Sirius.

¹ *Digital Audio Radio Satellite Service*, 12 FCC Red 5754 (1997) (“SDARS Report and Order”).

² *Id.* at 5823.

Of course, circumstances sometimes change and it is now more than ten years later. If the Commission decides to approve the XM/Sirius merger, the Commission should require some compensation from XM/Sirius in consideration that XM and Sirius will be obtaining much more than they anticipated when they bid at the SDARS auction.

Primosphere put forth a solution to this issue in its July 3, 2007 Petition in the earlier phase of this proceeding. If the Commission approves the proposed merger of XM and Sirius, it should do so only on condition that the combined XM/Sirius make available to Primosphere a portion of the SDARS spectrum so that Primosphere can offer a competing SDARS service. In addition, Primosphere asked that the Commission require the merged XM/Sirius to enter into an agreement with Primosphere whereby Primosphere can deliver its programming to its subscribers by means of XM's and Sirius's existing satellite systems. In this manner the merged XM/Sirius will have a competitor immediately and the public will benefit by having more than one provider to choose from for SDARS service.³

Primosphere's proposal is consistent with the policy the Commission stated in 1997 that is the subject of the present NPRM – that at all times there should be at least two SDARS providers. It is also consistent with *Dominion Video Satellite, Inc.*, 14 FCC Rcd 8181 (IB 1999), in the video DBS context.⁴ The Commission stated in 1997 that “licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a

³ As Primosphere described in its July 3, 2007 Petition in this proceeding and in its March 19, 2007 Supplement to Application for Review attached thereto, Primosphere's original SDARS application is still on file with the Commission and the Commission has retained Primosphere's application and launch fees.

⁴ Today, as a result of that decision, Dominion's “Sky Angel” offers a competing DBS package of more than 30 family-friendly channels for only \$14.99 per month.

diversity of programming voices.”⁵ Much has changed since 1997, but that Commission statement is still very much true.

Respectfully submitted,

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⁵ SDARS Report and Order at 5786.

CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, hereby certify that on this 27th day of August, 2007, a true and correct copy of the foregoing Reply Comments of Primosphere Limited Partnership has been mailed first-class, postage prepaid mail to the following:

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