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Via Hand Delivery

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
The Portals, TW-A325  
445 Twelfth Street, SW  
Washington, DC 20554

FILED/ACCEPTED

MAR 21 2008

Federal Communications Commission  
Office of the Secretary

Re: Ex Parte Presentation in MB Docket No. 07-57

Dear Ms. Dortch:

I am writing on behalf of Primosphere Limited Partnership ("Primosphere"), with regard to the above-referenced pending application of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc. for consent to a merger of these two companies. Primosphere is a party in this proceeding, having submitted a "Petition of Primosphere Limited Partnership" on July 3, 2007, a "Motion to Consolidate" on July 3, 2007 (requesting that the Commission consolidate the present proceeding with a separate proceeding involving Primosphere's pending application for authority to construct, launch and operate satellites in the Satellite Digital Audio Radio Service ("DARS")), and "Reply Comments of Primosphere Limited Partnership" on August 27, 2007.

Because of the amount of time that has transpired since comments and reply comments were submitted in this proceeding, and because there have been so many subsequent ex parte submissions that relate to the points Primosphere has raised, Primosphere is taking this opportunity to remind the Commission of Primosphere's previous filings and respond to some of the subsequent ex parte submissions.

A number of parties have agreed in principle with Primosphere that, if the Commission approves the XM/Sirius merger, the Commission should make available, or require XM/Sirius to make available, to a third party (or parties) some portion of the DARS spectrum. As Primosphere pointed out in its comments and reply comments, Primosphere was one of the original applicants for DARS authorization and was one of the four bidders in the 1997 DARS auction. For various reasons, described in Primosphere's prior submissions, Primosphere's application is still pending and, under the Commission's policies, a pending applicant for DARS authorization has a priority if DARS spectrum subsequently becomes available.<sup>1</sup> Thus, while Primosphere agrees with

<sup>1</sup> See *Establishment of Rules and Policies for the Digital Audio Radio Service*, 6 CR 978, 1017 (1997).

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the concept raised by a number of *ex parte* submissions – that if the Commission allows XM and Sirius to merge, there should be competition in DARS from another provider – that provider should be Primosphere because Primosphere was and remains a “cut-off” applicant for a DARS authorization.<sup>2</sup>

It is ironic that the main argument of XM and Sirius in favor of their proposed merger is that the merger would result in savings of certain redundant or duplicative expenses. Clearly, that is the argument for a monopoly. Of course programming costs would be lower when anyone who has programming to sell to XM or Sirius will have only one combined XM/Sirius customer to deal with after the merger. For the same reason that many television program producers and syndicators have argued that consolidation in the television programming industry has affected their ability to even exist, likewise producers of audio content desirous of national satellite distribution of their programming either will have to agree with terms dictated by the combined XM/Sirius or they will not have national satellite distribution.

DARS was created on the premise of a national satellite footprint/service. Part of the Commission’s rationale for allowing the creation of DARS, over the objection of broadcasters, was the fact that DARS would not compete with local radio. In particular, DARS operators would not sell local advertising and could not have truly local programming content. Now, XM and Sirius, in an attempt to justify their proposed merger, argue just the opposite – that DARS competes with local radio and vice versa; and, therefore, that there is sufficient competition to DARS to justify a merger of the only two DARS licensees. In fact, DARS is a unique business and service. It offers consumers a service that no one else does – satellite-delivered (i.e., mobile), commercial-free, multiple channels of music.

The rules the Commission originally adopted for DARS require interoperability of receiving equipment – that is, if a person buys an XM receiver and decides subsequently to change to Sirius service, he/she should not have to purchase a new receiver. In fact, neither XM nor Sirius has complied with this rule and now, evidently without embarrassment, they argue that a merger will result in the ability of the merged company to serve customers with either receiver. This is like a person convicted of murdering his parents asking the court for mercy because he is an orphan. In fact, what the Commission should do is deny the proposed merger and mandate immediate interoperability.

Finally, there are differences between and XM and Sirius that have not been highlighted by parties submitting comments in this proceeding but which Primosphere believes are important to point out. Although both XM and Sirius have music channels

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<sup>2</sup> See *Ashbaker Radio Corp. v. FCC*, 362 U.S. 327, 330-31 (1945); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986).

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that are similar in a broad sense (for example, a jazz channel, a 70s channel, an 80s channel), XM uses much wider music play lists on its channels than does Sirius. A merger will eliminate "redundant" channels, so that XM's current subscribers will wind up hearing fewer songs on their favorite channels and/or Sirius subscribers will hear more. In fact, Primosphere believes that subscribers choose which service to subscribe to at least in part because of these differences (perhaps based on reports in consumer publications). One way or the other, a merger will eliminate these differences and choices now available to consumers.

Thus, for the reasons stated herein and in Primosphere's earlier submissions in this proceeding, Primosphere urges that if the Commission approves the proposed XM/Sirius merger, the Commission should include a condition that Primosphere receive authorization for a portion of the DARS spectrum and a condition that the combined XM/Sirius make available to Primosphere transponder and uplink facilities so that Primosphere can compete with the combined XM/Sirius and provide an alternative for consumers of satellite radio.

Very truly yours,



Howard M. Liberman  
Counsel for Primosphere Limited Partnership

cc (by e-mail): Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
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Commissioner Deborah Taylor Tate  
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