# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 01-1526** **September Term, 2002**

Filed On: February 21, 2003 [733357]

Primosphere Limited Partnership,
Appellant

v.

Federal Communications Commission,
Appellee

Sirius Satellite Radio Inc. and
Satellite CD Radio, Inc.,
Intervenors

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**01-1527**

Primosphere Limited Partnership,
Appellant

v.

Federal Communications Commission,
Appellee

XM Radio, Inc.,
Intervenor

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Appeals of Orders of the
Federal Communications Commission

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Before: HENDERSON and ROGERS, *Circuit Judges,* and SILBERMAN, *Senior Circuit Judge*.

**J U D G M E N T**

These appeals were considered on the record from the Federal Communications Commission and on the briefs filed by the parties. Accordingly, it is

**ORDERED AND ADJUDGED** that the decisions of the Commission

be affirmed for the reasons stated in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

*Per Curiam*

**FOR THE COURT:**
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

Attachment

**MEMORANDUM**

Primosphere Limited Partnership appeals two orders of the Federal Communications Commission, the first rejecting Primosphere's challenge to the grant of a license for digital audio radio satellite service ("DARS") to Satellite CD Radio, a\k\a Sirius Satellite Radio ("Sirius") (Appeal No. 01-1526), *In re Satellite CD Radio, Inc.*, 16 F.C.C.R. 21,458 (2001); and the second, rejecting Primosphere's challenge to the grant of a license for satellite radio service to XM Radio, Inc., formerly American Mobile Radio Corporation ("AMRC") (Appeal No. 01-1527), *In re Am. Mobile Radio Corp.*, 16 F.C.C.R. 21,431 (2001). We affirm the Commission's decisions.

**I.**

**Appeal No. 01-1526**: In the First Order on Review, the Commission denied Primosphere's application for review and affirmed a decision of the International Bureau giving Sirius authority to construct, launch, and operate two satellites in the DARS market. *In re Satellite CD Radio*, 16 F.C.C. at 21,458. Having made no challenge to the Commission's interpretation of Section 310(b) of the Communications Act, 47 U.S.C. § 310(b), Primosphere only contests the Commission's application of that interpretation. In reviewing Primosphere's contentions, the court defers to the Commission's reasonable interpretation of its own rules and precedents and its application of the relevant statutes, regulations, and precedents. *United States Telecom Ass'n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002).

Commission precedent establishes that a subscription-based service is not a broadcast service subject to the foreign ownership restrictions of 47 U.S.C. § 310(b)(4). *In re MCI Telecomms. Corp.*, 14 F.C.C.R. 11,077, 11,082 (1999); *In re Subscription Video*, 2 F.C.C.R. 1001 (1987). It is

undisputed that Sirius proposed to offer its DARS service on a subscription-only basis. Hence, there is no merit to Primosphere's contention that the Commission acted arbitrarily and capriciously. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). With respect to Primosphere's claim that the FCC improperly failed to acknowledge an ongoing rulemaking proceeding on direct broadcast satellite ("DBS") foreign ownership rules, the rulemaking did not involve the statutory provision at issue here and was resolved in favor of excluding subscription-service DBS from foreign-ownership requirements; hence, the Commission's decision here would not have changed. *See In re Policies & Rules for the Direct Broad. Satellite Serv.*, 17 F.C.C.R. 11,331, 11,347 (2002).

Primosphere's contention that the Commission erred by equating DBS and DARS for regulatory purposes is the exact opposite of the position that it took before the Commission and therefore it is not properly before the court, never having been presented to the Commission. *See Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1460 (D.C. Cir. 1996). In any event, the Commission responds, both "fall squarely within" the Commission's long–used definition of non-broadcast. Respondent's Br. at 10 (citing *Subscription Video*, 2 F.C.C.R. at 1005).

Moreover, the Commission reasonably interpreted its regulations to require that if Sirius were to switch to non-subscription service it would have to seek Commission approval, 47 C.F.R. § 25.117, at which time Sirius' foreign ownership could be reviewed. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Of course, any claim now that the Commission will not enforce this rule in the future

would not be ripe. *See Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

Finally, Primosphere presents no basis for the court to overturn the Commission's regulatory order because of delay in rendering that order. See 5 U.S.C. § 706(2)(A); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340–42, 343–46 (D.C. Cir. 1980); *see also Gray v. OPM*, 771 F.2d 1504, 1513 (D.C. Cir. 1985); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1035 (D.C. Cir. 1983). First, Primosphere has not pointed to any statutory language that establishes a mandatory deadline for Commission decisions. *See Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994). Second, overturning the order because of delay would be a meaningless exercise; the Commission has released its order and vacation of that order would only add to the delay. Third, Primosphere's reliance on *United States v. Popovich,* 820 F.2d 134, 138 (5th Cir. 1987), is misplaced; that court declined to dismiss a government lawsuit based on delay, refusing to incorporate the equitable doctrine of laches into judicial review of agency action, *id.* Fourth, to the extent that Primosphere's claims of prejudice may be relevant, they are insufficiently established. Primosphere does not claim it did or did not do anything at all as a result of the delay. In light of the responsibilities delegated to the Commission, Primosphere's suggestion that the Commission was unable to render a fair judgment in light of the money that Sirius had spent in commencing operations is unwarranted. *See Eagle-Picher Indus., Inc. v. United States Envtl. Prot. Agency*, 822 F.2d 132, 148 (D.C. Cir. 1987); *cf. United States v. FCC*, 652 F.2d 72, 95 (D.C. Cir. 1980).

**II.**

**Appeal No. 01-1527**: In the Second Order on Review, the Commission denied Primosphere's application for review and affirmed a decision of the International Bureau giving AMRC authority to construct, launch, and operate two DARS satellites. *See In re Am. Mobile Radio Corp.*, 16 F.C.C.R. at 21,431. Essentially, Primosphere argued that the Bureau erred by not analyzing whether another company (WorldSpace) is the real-party-in-interest controlling AMRC, and that WorldSpace's participation in AMRC is an attempt to circumvent the Commission's cut-off rules for its satellite application proceedings. The Commission concluded that, pursuant to 47 U.S.C. § 309(d), Primosphere had not established a prima facie case supporting its challenge. *See In Re Am. Mobile Radio Corp.*, 16 F.C.C.R. at 21,434–37. "The decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and expertise is paramount." *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987) (quotation omitted).

As a threshold issue, intervenor XM Radio's contention that Primosphere lacks standing to pursue this appeal fails. An unsuccessful participant in a Commission auction may challenge alleged procedural irregularities in that auction if it demonstrates that it is "ready, willing, and able to participate in a new auction should it prevail in court." *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (quotations omitted). Primosphere's efforts before the Commission to sustain its own application for a DARS license in order to maintain its ability to participate in any auction that might proceed if XM Radio's license is revoked are sufficient to demonstrate this point.

Turning to the merits, the relevant control issue under long-held Commission precedent is whether "the allegedly

controlling party has the power to dominate the management of corporate affairs." *In re Fox Television Stations, Inc.*, 10 F.C.C.R. 8452, 8514 (1995) (quotation omitted). A mere showing of financing is generally insufficient. *Id.* at 8515. In light of *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir 1998), and *Gencom*, 832 F.2d at 180–81, the Commission has defined the standard under § 309(d) to be whether a party has shown "solid factual assertions which, if proved, would affect the Commission's determination that the grant of this application is in the public interest," and whether, if those facts are assumed to be true, "a reasonable factfinder could conclude that the ultimate fact in dispute had been established." *In re Am. Mobile Radio Corp.*, 16 F.C.C.R. at 21,434–35. Only then, after a prima facie case is established, would the Commission proceed to the second step, to determine whether, considering all the evidence, there is "a substantial and material question of fact as to whether grant of the application would serve the public interest." *Id.* at 21,435.

While the nature of a prima facie case may be variously stated, *see, e.g., Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 397 (D.C. Cir. 1985), a review of the evidence on which Primosphere relies demonstrates that the Commission could reasonably conclude that the evidence offered by Primosphere regarding WorldSpace's alleged control over the corporate management of AMRC at the time of the license grant, combined with the subsequent withdrawal of WorldSpace's application for a transfer of AMRC's license in 1998, did not amount to a prima facie case under 47 U.S.C. § 309(d). As the International Bureau found, and the Commission affirmed, Primosphere's three-page petition to deny was conclusory and unsupported by affidavits or other sworn evidence. *See In re*

*Am. Mobile Radio Corp.,* 13 F.C.C.R. 8829, 8838–39 ¶ 21; *In re Am. Mobile Radio Corp.*, 16 F.C.C.R. at 21,436–37. The "facts" offered by Primosphere, based on publicly available information, did not show that WorldSpace held *de facto* control of AMRC, but rather showed that AMRC's parent company was experiencing financial difficulties at the time of the auction and afterwards and that WorldSpace contributed funding and held 20% of AMRC's equity with options to acquire a majority of equity. *In re Am. Mobile Radio Corp.*, 16 F.C.C.R. at 21,435. The Commission could reasonably conclude that Primosphere showed only that the

> building and launching of [a DARS] system would be a costly undertaking; that AMRC was at one point operating at a loss; that it obtained financing (allegedly supplied by WorldSpace) to continue building its system; and that WorldSpace's interests in AMRC, if WorldSpace's options were exercised, would make it the majority shareholder of AMRC.

*Id*. There is no merit to Primosphere's contention that the Commission failed to consider all of its evidence, including that which was late filed. *See id.* at 21,434 n.24.

Similarly, the Commission could view Primosphere's other "facts" regarding, for example, arrangements for leasing and telephone systems, and representation on the corporate structure of AMRC, as failing to establish that WorldSpace's involvement rose to the level of domination. *Id.* at 21,436. Under Commission rules and precedent, options do not constitute control unless exercised. 47 C.F.R. § 73.3555, n.2(e); *see also Salt City Communications, Inc.*, 8 F.C.C.R. 7584 (1993). Moreover, the Commission noted, while AMRC had applied to transfer control to WorldSpace, it subsequently withdrew the application and WorldSpace no longer held any ownership interest in AMRC. *In re Am. Mobile Radio Corp.*, 16

F.C.C.R. at 21,436. Although Primosphere challenges the Commission's view that the withdrawal was persuasive evidence of lack of control, it was within the realm of the Commission's expertise to conclude that it would be "unlikely in the extreme (if not simply impossible) that WorldSpace had dominated the affairs of [AMRC] for more than a year only to see the entire relationship dissolve just months after seeking formal recognition of control, leaving WorldSpace with no interest in [AMRC] at all." Respondent's Br. at 13.

As in Appeal No. 01-1526, Primosphere's contention that the court should vacate the Commission's order because of delay is unavailing.