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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW, Room TW-A325
Washington, DC 20554

Re: WT Docket No. 02-55 and ET Dockets No. 00-258 & 95-18

Dear Ms. Dortch:

The recent letters filed by TerreStar Networks Inc. (TerreStar) and New ICO Satellite Services G.P. (ICO) in the above-referenced dockets represent the latest efforts by these two Mobile Satellite Service (MSS) licensees to avoid their Broadcast Auxiliary Service (BAS) band clearing and reimbursement obligations.¹ TerreStar and ICO have an independent obligation to clear 2 GHz MSS spectrum and relocate BAS licensees, yet for eight years they have failed to carry out that obligation. Now that Sprint Nextel Corporation (Sprint Nextel) is relocating the BAS licensees, TerreStar and ICO have also refused to reimburse Sprint Nextel for any portion of the relocation costs.

As detailed below, requiring the MSS licensees to fund their fair share of the cost of clearing BAS incumbents is the only rational outcome under the Commission's policies. Under the Commission's bedrock relocation principles, TerreStar and ICO must share the cost of relocating BAS licensees because they benefit directly from Sprint Nextel's band-clearing efforts. Moreover, the Commission's orders in this proceeding require MSS licensees to reimburse Sprint Nextel for their share of BAS relocation costs. This reimbursement obligation did not sunset on June 26, 2008, as TerreStar and ICO claim, but extends at least through the end of the BAS and 800 MHz relocation projects. Attempts by TerreStar and ICO to escape their obligations ignore the Commission's

¹ Letter from Douglas Brandon, TerreStar Networks Inc., to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55 (Sept. 8, 2008) (TerreStar Letter); Letter from Suzanne Hutchings Malloy, New ICO Satellite Services G.P., to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55 (Sept. 9, 2008) (ICO Letter).

orders and would arbitrarily and unfairly saddle Sprint Nextel and the American taxpayer with the entire burden of clearing MSS spectrum.

Sprint Nextel agreed to relinquish spectrum rights and fund the up-front costs of BAS relocation based on the good faith expectation that MSS licensees would comply with their BAS reimbursement obligations.² There is no legal or equitable basis for allowing TerreStar or ICO to escape these obligations. The MSS licensees' refusal to pay their fair share of BAS relocation costs is consistent, however, with their long history of seeking to avoid or minimize their duties both as licensees and under the Commission's orders. TerreStar and ICO each obtained their satellite spectrum for free, and then acquired authority to use their spectrum to provide terrestrial services, again without having to pay for these valuable spectrum rights like other terrestrial commercial mobile service licensees. TerreStar and ICO delayed launching their services for years and have sought numerous waivers of their construction and launch milestones. Moreover, they have taken no constructive steps to clear BAS incumbents from their spectrum during the eight years since the FCC first imposed that independent obligation on MSS licensees. And now, even though Sprint Nextel and BAS incumbents have met the MSS licensees' timetable for clearing their priority markets for initiating service, the MSS licensees are trying to game the regulatory process yet again to avoid paying their fair share of band clearing costs.

The issue before the Commission is simple. Allowing MSS licensees to shift the costs of clearing their spectrum to Sprint Nextel's shareholders and American taxpayers would violate express MSS license obligations, years of Commission precedent, the Commission's fundamental relocation cost-sharing principles, and basic notions of fairness. TerreStar and ICO must pay their band clearing costs like every other Commission licensee that has benefited from a Commission-mandated reallocation of occupied spectrum since the mid-1990s. If TerreStar and ICO choose not to do so, the Commission should revoke their licenses and assign them to entities willing to carry their own weight.

Sprint Nextel notes that TerreStar's predecessor, TMI, recognized that "equity requires" that entities that benefit from the clearing of BAS licensees "should . . . share in the financial burdens of the relocation of [these] licensees."³ ICO has similarly recognized that requiring the first new entrant to pay "full relocation costs without any

² See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶¶ 5, 260, 261, 342 (2004) (*800 MHz R&O*), as amended by Erratum, WT Docket No. 02-55 (rel. Sep. 10, 2004); Second Erratum, 19 FCC Rcd 19651 (2004); Third Erratum, 19 FCC Rcd 21818 (2004); Public Notice, "Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding," 19 FCC Rcd 21492 (2004).

³ Comments of TMI Communications and Company, ET Docket No. 95-18, at 2, 7 (Feb. 3, 1999).

reimbursement from later entering MSS providers” would “unfairly punish” the first new entrant.⁴ Sprint Nextel agrees completely. TerreStar and ICO, *not* Sprint Nextel or the American taxpayer, must pay the MSS share of relocating BAS licensees.

The Commission should therefore issue a declaratory ruling affirming that TerreStar and ICO must reimburse Sprint Nextel for their *pro rata* share of all eligible BAS relocation costs through the completion of the 800 MHz and BAS relocation programs. The declaratory ruling should also direct the parties to negotiate a timetable for the payment of the MSS licensee reimbursement obligations, and to file a report with the Commission regarding the outcome of these negotiations within thirty days of the release of the declaratory ruling. Sprint Nextel requests that the Commission issue the declaratory ruling as expeditiously as possible to provide certainty as both Sprint Nextel and MSS licensees develop future budgets for capital expenditures.

1. *TerreStar and ICO Ignore Their Relocation Obligations and the Commission’s Bedrock Cost-Sharing Principles*

TerreStar and ICO each have had an independent obligation to relocate Broadcast Auxiliary Service (BAS) licensees for years.⁵ This obligation dates back to 2000, when the Commission established rules requiring MSS licensees to relocate BAS operators.⁶ As the Commission and BAS licensees have recognized, TerreStar and ICO have failed to meet this obligation. In 2002, the broadcast industry reported that, well into the MSS – BAS mandatory negotiation period, “there have been no substantive relocation negotiations undertaken by any MSS licensee.”⁷ Rather than negotiating with broadcasters, MSS licensees obtained numerous extensions of their mandatory negotiation deadlines.⁸ More recently, the Commission observed that “there was no record of meaningful negotiations or relocation activities having taken place between MSS and BAS at the time the Sprint Nextel relocation plan was adopted” in 2004.⁹

⁴ Comments of ICO Services Limited, ET Docket No. 95-18, at 14 (Feb. 3, 1999).

⁵ See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, Order, 23 FCC Rcd 575, ¶ 2 (2008). Although the Commission established rules in 2004 for the Sprint Nextel – BAS relocation process, it expressly retained the existing MSS – BAS relocation rules. *800 MHz R&O* ¶¶ 250, 264.

⁶ *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, ¶ 1 (2000) (*2000 MSS Order*).

⁷ Letter from Edward O. Fritts, National Association of Broadcasters, and David L. Donovan, Association for Maximum Service Television, Inc., to FCC Chairman Michael Powell, ET Docket No. 95-18, at 2 (June 6, 2002) (emphasis added).

⁸ *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393, ¶ 11 & n.20 (2008) (FCC 08-73) (*BAS Extension Order*).

⁹ *Id.* ¶ 31.

TerreStar and ICO not only failed to meet their independent and longstanding BAS relocation obligations, but also have ignored or refused all offers from Sprint Nextel to participate in the relocation process. As a result, Sprint Nextel has had no choice but to shoulder the entire up-front burden of relocating BAS licensees. Because MSS licensees did nothing to advance BAS relocation from 2000 to 2005, Sprint Nextel and the broadcast industry were required to start from scratch when the Sprint Nextel-BAS relocation rules went into effect in 2005.¹⁰ Since that time, Sprint Nextel has worked with the broadcast industry to overcome the many complexities and unanticipated problems raised by relocating approximately 1000 unique BAS systems across the country without disrupting critical electronic newsgathering operations. During this time, Sprint Nextel made repeated entreaties to the MSS licensees to participate in the relocation process, all of which were rebuffed.

Despite MSS neglect, Sprint Nextel and BAS licensees have made strong progress towards completing the BAS transition. Sprint Nextel has inventoried 100% of BAS operations, signed frequency relocation agreements with 97% of BAS incumbents, and has worked diligently with the affected BAS licensees to meet the specific market-clearing demands of MSS licensees – all without any help from MSS licensees who benefit significantly from these efforts.¹¹

For example, at the insistence of the MSS licensees, Sprint Nextel and broadcasters accelerated the transition of twenty-five markets that TerreStar and ICO identified as priority markets for their services.¹² Transitioning these twenty-five markets, which cover a combined population of *more than 40 million people*, required substantial effort; it also diverted resources from other scheduled markets and delayed the transition in some of the markets scheduled to be completed this past summer. With the cooperation of the BAS licensee community, however, the BAS transition in the MSS priority markets is now complete¹³ – even though TerreStar recently requested yet another launch and operational extension (through August 2009) that now makes the advanced transition of its priority markets essentially unnecessary.¹⁴

¹⁰ *Id.*

¹¹ Letter from Trey Hanbury, Sprint Nextel, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, at 3 & App. A (Oct. 1, 2008) (Oct. 1 BAS Progress Report).

¹² The Designated Market Areas that were accelerated to meet the MSS licensees' demands are: Las Vegas, NV; Charlotte, NC; Raleigh-Durham, NC; Greensboro-High Point-Winston-Salem, NC; Wilmington, NC; Columbia, SC; Charleston, SC; Greenville-North Bern-Washington, SC; Florence-Myrtle Beach, SC; Salt Lake City, UT; Washington, DC; Baltimore, MD; Norfolk-Portsmouth-Newport News, VA; Richmond-Petersburg, VA; Harrisonburg, VA; Charlottesville, VA; Houston, TX; San Antonio, TX; Austin, TX; Harlingen-Brownsville, TX; Corpus Christi, TX; Beaumont-Port Arthur, TX; Lake Charles, TX; Laredo, TX; and Victoria, TX.

¹³ Oct. 1 BAS Progress Report at 1.

¹⁴ Request for Milestone Extension of TerreStar Networks Inc., File No. SAT-MOD-20080718-00143, Exhibit 1 at 1 (July 18, 2008).

Sprint Nextel's efforts greatly benefit TerreStar and ICO. Sprint Nextel has dedicated dozens of full-time employees and scores of consultants to implementing BAS relocation. Sprint Nextel has also to date funded by itself the up-front costs of BAS relocation. Because of Sprint Nextel's efforts, BAS incumbents will be relocated to the new 2 GHz band plan, clearing 35 MHz for new entrants. TerreStar and ICO occupy 57% of the cleared spectrum to Sprint Nextel's 15%, but – incredibly – TerreStar and ICO want to pay 0% of the cost of clearing the band.

Recognizing that MSS licensees would benefit greatly from Sprint Nextel's efforts, the Commission has stated that its "traditional cost-sharing principles are applicable to the 1990-2025 MHz band."¹⁵ Under these principles, Sprint Nextel, "as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees."¹⁶ Under a strict *pro rata* formula, the MSS licensees that occupy 57% of the cleared spectrum should pay 57% of expenses. Sprint Nextel, however, has sought to recover only expenses for the relocation of mobile and fixed BAS operations in the top thirty designated market areas (DMAs) and fixed BAS operations in the remaining DMAs, an amount estimated to be \$100 million for each MSS licensee.¹⁷ Based on current projected relocation costs, the MSS licensees will have to pay only 27% of the total band-clearing expenses that Sprint Nextel will incur, even though the MSS licensees occupy 57% of the cleared band.

The Commission's cost-sharing requirements serve as bedrock principles underlying Congressional and Commission spectrum reallocation policies for nearly twenty years. The Commission first applied these requirements in the 1990s,¹⁸ and since then has required new entrants to share the cost of relocating incumbents in numerous reallocated spectrum bands. Cost sharing is the only practical mechanism for avoiding the obvious "free rider" problem that would arise if first entrants faced the risk of funding the entire cost of clearing incumbent licensees in a band that has also been licensed to other new entrants. Without a cost-sharing requirement, no new entrant will want to take the lead in clearing a band, thereby delaying and even blocking Congressional and Commission efforts to introduce new wireless services. The Commission's cost-sharing

¹⁵ *BAS Extension Order* ¶ 15.

¹⁶ *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 111 (2005) (*800 MHz MO&O*). On March 7, 2006, Sprint Nextel provided notice of its intent to seek reimbursement from 2 GHz MSS licensees, including TerreStar and ICO. See Letter from Lawrence R. Krevor, Sprint Nextel, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55 (March 7, 2006).

¹⁷ *800 MHz R&O* ¶ 261 (granting Sprint Nextel a right to reimbursement of costs incurred for clearing mobile BAS facilities in the top thirty markets and all fixed BAS facilities, regardless of market size).

¹⁸ See *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8825, ¶¶ 7, 69-77 (1996).

rules have prevented this problem and proven highly successful. The Commission's bedrock cost-sharing policy has been critical in clearing large amounts of spectrum, including the PCS and AWS bands, for innovative new services for the American consumer.

To achieve these same public interest benefits, the Commission has made clear that its cost-sharing principles apply to the 2 GHz band and that TerreStar and ICO are each obligated to reimburse Sprint Nextel for their share of BAS relocation costs. The MSS licensees' obligation to reimburse Sprint Nextel is also an express condition of their licenses.¹⁹ Despite repeated Sprint Nextel requests, however, TerreStar and ICO have so far denied their cost-sharing responsibilities. Their failure to comply with these duties violates Commission rules as well as TerreStar's and ICO's licenses, and imposes an unfair and substantial financial burden on Sprint Nextel and American taxpayers. It would also undermine years of Commission precedent, creating uncertainty for future new entrants about their ability to obtain reimbursement from other new entrants. This uncertainty would in turn discourage operators from raising the capital necessary to relocate incumbents, placing at risk the Commission's efforts to promote new wireless services. Like every other new entrant to reallocated spectrum for nearly twenty years, TerreStar and New ICO should bear their fair share of the burden of relocating incumbent licensees.

2. *TerreStar and ICO Improperly Seek to Shift Liability for Clearing their MSS Spectrum to the American Taxpayer or Sprint Nextel and its Customers*

TerreStar and ICO disingenuously seize on one aspect of the 800 MHz R&O in trying to skirt their reimbursement obligations. In order to implement the unique "windfall payment" contingency concerning 800 MHz reconfiguration, the Commission initially tied MSS reimbursement obligations to the end of the 800 MHz reconfiguration period, which at that time was expected to take 36 months and end on June 26, 2008.²⁰ This was done so that the both BAS and 800 MHz reconfiguration costs could be tallied together and a determination reached as to whether Sprint Nextel would owe a windfall payment to the U.S. Treasury.

As the Commission has repeatedly recognized, however, neither BAS nor 800 MHz reconfiguration is complete at this time and the Commission has granted waivers and extensions of time for all parties to continue their reconfiguration work.²¹ Logically, the Commission will also revise its true-up timing to accord with the additional time

¹⁹ 2000 MSS Order ¶¶ 69, 71 ("Subsequently entering MSS licensees . . . will, as a condition of their licenses, compensate the first entrant on a *pro rata* basis, according to the amount of spectrum the subsequently entering licensees are authorized to use.") (emphasis added).

²⁰ 800 MHz R&O ¶¶ 261.

²¹ BAS Extension Order ¶ 1; Letter from Lawrence Krevor, Sprint Nextel, to Marlene Dortch, FCC Secretary, WT Docket No. 02-55, at 3-4, nn.11-13 (June 25, 2008) (Sprint Nextel June 25 Letter) (citing Commission orders waiving 800 MHz reconfiguration deadlines).

required to substantially complete these activities.²² Given these realities, it makes no sense for TerreStar and ICO to claim that they are not obligated to pay their fair share of BAS relocation costs because they claim they did not “enter the band” until after June 26, 2008 and/or because some BAS relocation costs were not incurred until after that date. The relevance, if any, of the June 26 date to MSS licensee reimbursement obligations has been superseded by the Commission’s decision to extend the deadline for completing BAS retuning at least through March 31, 2009, as well as the Commission’s decision to grant additional time to complete 800 MHz reconfiguration.²³

Moreover, a new entrant’s band clearing reimbursement obligation normally runs until the end of the reimbursement “sunset” period, which is typically ten years from the commencement of the relocation process.²⁴ In the *800 MHz R&O*, the Commission modified this sunset period to coincide with the end of the 800 MHz reconfiguration process solely to achieve “administrative efficiency in the [true-up] accounting process”;²⁵ *i.e.*, the MSS BAS retuning reimbursement payments will be deducted from Sprint Nextel’s reconfiguration cost credits to determine whether Sprint Nextel’s financial and spectral contributions to 800 MHz and BAS reconfiguration exceed the \$4.8 billion ceiling above which no windfall payment is required. But now that the Commission has extended the 800 MHz and BAS retuning periods beyond June 26, 2008, there is no public interest or other rational basis for artificially limiting the spectrum clearing reimbursement obligations of the MSS licensees to that date – particularly where much of the BAS retuning costs since June 26, 2008 were incurred directly to achieve expedited BAS retuning in the MSS priority markets. Under the *800 MHz R&O*, Sprint Nextel is entitled to seek *pro rata* reimbursement of its eligible BAS band-clearing costs incurred prior to the end of the 800 MHz reconfiguration period from MSS licensees that “enter the band” prior to the completion of band reconfiguration.²⁶

Additionally, contrary to the assertions in their letters, both ICO and TerreStar “entered the band” by June 26, 2008, even assuming *arguendo* their reimbursement obligations sunset on that date. For example, by already launching and commencing satellite operations, ICO entered the band well before June 26, 2008.²⁷ These satellite

²² See Sprint Nextel June 25 Letter at 6-8.

²³ See note 21 *supra*.

²⁴ *800 MHz MO&O* ¶ 113 (“[U]nder traditional reimbursement procedures, including those applied among the MSS licensees . . . , reimbursement obligations run . . . until the requirement for relocation sunsets.”). Cost-sharing obligations among MSS licensees have a ten-year sunset period. *2000 MSS Order* ¶ 52.

²⁵ *800 MHz MO&O* ¶ 113.

²⁶ *800 MHz R&O* ¶ 261; *BAS Extension Order* ¶ 16.

²⁷ On May 9, 2008, ICO certified to the Commission that “the entire ICO 2 GHz mobile satellite service system is operational” and that it has conducted two-way voice and data sessions in the 2 GHz band. Letter from Suzanne Hutchings Malloy, New ICO Satellite Services G.P., to Marlene H. Dortch, FCC Secretary, File No. SAT-LOI-19970926-00163, Final Milestone Certification

transmissions, as well as other activities, have triggered ICO's reimbursement obligation.²⁸ TerreStar similarly entered the band by June 26, 2008 through its licensing activities, system build out, testing, satellite construction and ATC operations.²⁹ Each of these activities confirms TerreStar's intent to take advantage of Sprint Nextel's efforts in clearing 2 GHz spectrum, thus triggering TerreStar's reimbursement obligations.

In any event, notwithstanding their pre-June 26, 2008 activities, ICO and TerreStar will certainly "enter the band" prior to the completion of 800 MHz reconfiguration. Significantly, neither TerreStar nor ICO oppose Sprint Nextel's request to adjust the true-up schedule so that it coincides with the actual completion of 800 MHz reconfiguration. Both MSS licensees nonetheless argue that the BAS reimbursement sunset date should remain June 26, 2008. This argument makes no sense. The *only* reason the Commission initially established June 26, 2008 as the sunset date was to promote "administrative efficiency" related to the true-up "accounting process," not to give MSS licensees a windfall.³⁰ Under the *800 MHz R&O*, the sunset date goes hand-in-hand with the completion of the 800 MHz and BAS relocations.³¹ Delays in the relocation are due to reasons beyond the control of Sprint Nextel and provide no basis for relieving the MSS licensees of their BAS clearing reimbursement obligations.³²

and Selected Assignment Notification for Call Sign S2651 (May 9, 2008) (attaching Certification of Dennis Schmitt, ICO Global Communications (Holdings) Limited). It is Sprint Nextel's understanding that ICO has commenced operation in the 2000-2020 MHz band on at least four transmit beacon stations in Nevada, Massachusetts, Georgia, and Washington.

²⁸ See Letter from Suzanne Hutchings Malloy, New ICO Satellite Services G.P., to Marlene H. Dortch, FCC Secretary, File Nos. SAT-LOI-19970926-00163 & SAT-MOD-20070806-00110 (Aug. 24, 2007) (providing notice of ICO ATC operations and indicating intent to move forward with construction and testing on or after August 27, 2007).

²⁹ See Letter from Joseph A. Godles, Counsel for TerreStar Networks Inc., to Marlene H. Dortch, FCC Secretary, File Nos. SAT-LOI-19970926-00161, SAT-ASG-20021211-00238, SAT-AMD-20061127-00143, and SAT-MOD-20070529-00075 (Sep. 7, 2007) (providing notice of TerreStar ATC operations and indicating its intent to move forward with construction and testing on or after September 15, 2007).

³⁰ *800 MHz MO&O* ¶ 113. The Commission has already conferred a significant benefit on MSS licensees by precluding Sprint Nextel from seeking reimbursement for the costs of relocating non-fixed BAS licensees in markets below the top thirty markets. *800 MHz R&O* ¶ 261.

³¹ See, e.g., *800 MHz MO&O* ¶ 112 (describing link between end of band reconfiguration and the reimbursement sunset date and making no reference to "36 months" or June 26, 2008).

³² See *BAS Extension Order* ¶¶ 31, 39; Sprint Nextel June 25 Letter at 2-4. As noted, Sprint Nextel has also requested that the Commission adjust the true-up date so that it is synchronized with the completion of band reconfiguration. Sprint Nextel June 25 Letter at 6-8. The Commission cannot conduct an accurate true-up without knowing Sprint Nextel's actual band reconfiguration costs, and these costs will not be known until 800 MHz and BAS reconfiguration are completed or at least substantially completed. The true-up must also take into account MSS reimbursement, which has not yet taken place.

TerreStar and ICO's real objective is to change the terms of the 800 MHz R&O by de-linking the reimbursement sunset date from the end of band reconfiguration and arbitrarily imposing a June 26, 2008 reimbursement sunset, which they argue has passed without subjecting them to liability. TerreStar and ICO provide no legal basis or public interest rationale for this argument. Stripped of their self-serving rhetoric, TerreStar and ICO are attempting to shift the cost of clearing their spectrum from their shareholders to Sprint Nextel's shareholders and/or American taxpayers.

The cost of clearing MSS spectrum must come from someone, after all, and, under the TerreStar and ICO proposal, either Sprint Nextel or American taxpayers will end up footing the MSS band-clearing bill depending on the outcome of the true-up accounting process. If Sprint Nextel's creditable reconfiguration costs (above its \$2 billion spectrum contribution) exceed \$3.0 billion, Sprint Nextel will be forced to pay an extra \$200 million in BAS relocation costs if TerreStar and ICO renege on their obligations.³³ If Sprint Nextel's creditable costs are \$2.8 billion or less, the American taxpayer will end up picking up TerreStar's and ICO's bill.³⁴ If the creditable costs are between \$2.8 – \$3 billion, both Sprint Nextel and taxpayers pick up the tab.³⁵ Under any of these scenarios, TerreStar and ICO will achieve a large windfall that comes directly out of someone else's pocket.

The Commission tied the BAS reimbursement sunset date to the end of band reconfiguration to protect both American taxpayers and Sprint Nextel. In proposing to disconnect the two dates, TerreStar and ICO ignore these vital protections as well as the traditional sunset period under prior cost-sharing orders. As described above, under the Commission's standard reimbursement approach MSS licensee reimbursement obligations would sunset in 2015.³⁶ A 2015 sunset date complies with Commission's cost-sharing precedent and ensures that all new entrants to the 2 GHz band share equally

³³ As explained in the Sprint Nextel June 25 Letter, Sprint Nextel will owe an anti-windfall payment to the U.S. Treasury if Sprint Nextel's 800 MHz and BAS reconfiguration costs are less than \$2.8 billion. *See* Sprint Nextel June 25 Letter at 6. Sprint Nextel's creditable costs are reduced by any reimbursement it receives from MSS licensees for their share of BAS relocation costs, which Sprint Nextel estimates will be \$200 million. If Sprint Nextel's creditable costs exceed \$3 billion, it will not owe any anti-windfall payment whether or not it is reimbursed by MSS licensees, and will be forced to absorb a \$200 million loss if MSS licensees in fact fail to comply with their reimbursement obligations.

³⁴ If Sprint Nextel's creditable costs are below \$2.8 billion, every dollar that MSS licensees fail to pay under their reimbursement obligation comes out of the U.S. Treasury, since that dollar would otherwise have reduced Sprint Nextel's creditable costs.

³⁵ Sprint Nextel estimates that its total direct costs attributable to completing 800 MHz reconfiguration will range between \$2.7 billion and \$3.4 billion. This estimate does not include Sprint Nextel's internal network costs related to the construction and modification of capacity sites to sustain subscriber capacity during reconfiguration. *See* Sprint Nextel June 25 Letter at 7 n.24.

³⁶ *See* note 24 *supra*.

in the cost of relocating BAS. Thus, if Sprint Nextel does not owe any anti-windfall payment to the U.S. Treasury, the Commission should establish 2015 as the BAS relocation reimbursement sunset date.

Allowing TerreStar and ICO to escape their reimbursement obligations by setting an arbitrarily premature sunset date would not only unfairly penalize Sprint Nextel and American taxpayers, but also reward TerreStar and ICO for their extensive delays in implementing their satellite operations. ICO has received three milestone extensions.³⁷ TerreStar has also received a number of milestone extensions and has a pending request for yet another extension.³⁸ Had ICO and TerreStar complied with their original launch and operational milestones, they would have relocated BAS licensees themselves as required by the Commission, or at least unequivocally triggered their reimbursement obligations to Sprint Nextel well before June 26, 2008. The Commission should not allow ICO and TerreStar to escape both their obligation to relocate BAS licensees *and* their obligation to bear their fair share of BAS relocation costs due to their prolonged delays in initiating full commercial service to American citizens. Doing so would not only reward ICO and TerreStar's behavior, but also establish precedent for licensees in any future relocation efforts to try to similarly game the Commission's cost-sharing principles to their own advantage. It is difficult to imagine that any party would agree to take the lead in future relocation efforts with the knowledge that subsequent entrants will be able to shirk their portion of the incurred relocation expenses.

³⁷ *ICO Satellite Services G.P.*, Memorandum Opinion and Order, 20 FCC Rcd 9797 (Int'l Bur. 2005) (granting one year extension of launch milestone to July 2007); *New ICO Satellite Services G.P. Application to Extend Milestones*, Memorandum Opinion and Order, 22 FCC Rcd 2229 (Int'l Bur. 2007) (further extending ICO launch milestone from July 2007 to November 2007 and extending ICO operational milestone from July 2007 to December 2007); Public Notice, *Policy Branch Information: Actions Taken*, File No. SAT-MOD-20070806-00110, 23 FCC Rcd 6902 (2008) (extending ICO launch milestone to April 15, 2008 and operational milestone to May 15, 2008).

³⁸ The Commission originally required that this system be launched by July 2006 and operational by July 2007, but TMI, TerreStar's predecessor, failed to meet its July 2002 construction contract milestone. *TMI Communications and Company, Limited Partnership*, Order, 16 FCC Rcd 13808, ¶ 24 (Int'l Bur. 2001); *TMI Communications and Company, Limited Partnership*, Memorandum Opinion and Order, 18 FCC Rcd 1725, ¶ 1 (Int'l Bur. 2003). The Commission subsequently waived the 2002 milestone, reinstated TMI's license, and established new launch and operational milestones of November 2007 and November 2008, respectively. *TMI Communications and Company, Limited Partnership*, Memorandum Opinion and Order, 19 FCC Rcd 12603, ¶¶ 34-52, 59 (2004) (*Reinstatement Order*). In October 2007, the Commission granted yet another extension request, providing TerreStar an extra ten months to launch its satellite. *TerreStar Networks, Inc. Request for Milestone Extension*, Memorandum Opinion and Order, 22 FCC Rcd 17698, ¶¶ 1, 11 (Int'l Bur. 2007). TerreStar has recently filed yet another extension request, seeking to extend its launch milestone to June 30, 2009 and its operational milestone to August 30, 2009. *Request for Milestone Extension, TerreStar Networks Inc.*, File No. SAT-MOD-20080718-00143 (July 18, 2008).

3. *TerreStar and ICO Must Pay Their Fair Share of BAS Relocation Costs*

MSS licensees know full well that Sprint Nextel is not to “blame” for delays in 800 MHz or BAS relocation. As Sprint Nextel has explained previously, it has taken all steps within its control to complete 800 MHz reconfiguration on schedule. Public safety licensees, however, need additional time to complete the complex transition, and the Commission has granted more than 600 waivers extending the public safety relocation deadlines well past June 26, 2008.³⁹ As for BAS relocation, the Commission found “many valid reasons” why Sprint Nextel was unable to complete the BAS transition by the previous deadline and has stated that the “record presents a compelling case that the BAS transition is sufficiently complex” to justify an extension.⁴⁰ Indeed, the only parties singled out by the Commission for any sort of blame were *MSS licensees*, who conducted no “meaningful negotiations or relocation activities” before Sprint Nextel commenced its relocation efforts in 2005.⁴¹

As previously noted, TerreStar and ICO have done nothing to move BAS relocation forward, including declining repeated requests to contribute staffing resources to BAS relocation. And even as Sprint Nextel spends hundreds of millions of dollars on implementing the BAS transition, TerreStar and ICO spend their resources on lobbying tactics to evade their obligations to pay their share and shoulder a portion of the burden of relocating these licensees. Bizarrely, TerreStar and ICO claim that requiring them to pay their share of BAS relocation costs will somehow disrupt their “settled expectations” and “unreasonably burden MSS.”⁴² These claims have no credibility and are directly contradicted by the record. Both TerreStar and ICO have been on notice of their respective obligations for years, and cannot have reasonably expected that they would be able to circumvent the Commission’s long-standing cost-sharing principles. The alleged “burden” of which the MSS licensees complain is nothing more than paying Sprint Nextel fairly for the value of the cleared spectrum they occupy and received through Sprint Nextel’s efforts.

For example, in its recent filing, TerreStar feigns surprise about its BAS reimbursement obligations; however, TerreStar just last month told the Securities and Exchange Commission that “[c]osts associated with spectrum clearing could be substantial” and that “2 GHz MSS S-band licensees . . . might be required to reimburse Sprint Nextel for a portion of its band clearing costs.”⁴³ Indeed, on March 7, 2006, as authorized and directed by the Commission, Sprint Nextel notified both TerreStar and

³⁹ See Sprint Nextel June 25 Letter at 3-4 & n.11 (describing Commission decisions granting public safety waiver requests).

⁴⁰ *BAS Extension Order* ¶¶ 31, 33.

⁴¹ *Id.* ¶ 31.

⁴² TerreStar Letter at 4; ICO Letter at 3.

⁴³ TerreStar Corp., Quarterly Report (Form 10-Q) at 55 (Aug. 11, 2008).

ICO of its intent to seek reimbursement for their *pro rata* share of BAS relocation costs.⁴⁴ Still earlier, on May 6, 2005, TerreStar and TMI both acknowledged their responsibility for making a *pro rata* contribution to Sprint Nextel's BAS relocation costs upon entering the market.⁴⁵ The MSS licensees' unwarranted "expectation" of a free lunch cannot trump black-letter FCC cost-sharing rules that have been on the books for years, including Commission orders and license conditions that expressly require TerreStar and ICO to pay their share of BAS relocation costs.⁴⁶ If ICO and TerreStar failed to include legitimate spectrum costs in their business plans they deserve whatever consequences that failure entails, not another bailout.

4. *TerreStar's and ICO's Procedural Objections Have No Merit*

TerreStar and ICO argue that the Commission must comply with notice and comment rulemaking procedures before it can confirm that MSS licensees must reimburse Sprint Nextel for their share of BAS relocation costs through the completion of 800 MHz reconfiguration.⁴⁷ This argument is erroneous. The Commission has ample authority to issue a declaratory ruling resolving the issues concerning MSS reimbursement obligations.⁴⁸ TerreStar itself has recognized this fact, stating that "Sprint has the ability to request a ruling from the FCC declaring that Sprint is entitled to payment from the [MSS licensees] under the FCC Orders at issue in this case."⁴⁹ Just as in numerous other instances in which the Commission has issued a declaratory ruling instead of conducting a rulemaking proceeding, the Commission in this case would be clarifying its existing rules and policies rather than adopting a new rule.⁵⁰ In its June 25

⁴⁴ Letter from Lawrence R. Krevor, Sprint Nextel, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55 (March 7, 2006).

⁴⁵ Comments of TMI and TerreStar on Nextel BAS Relocation and Implementation Plan, WT Docket No. 02-55, at 3 n.6 (May 6, 2005) ("The *R&O* (at ¶ 261) currently requires 2 GHz MSS licenses to make a *pro rata* contribution to Nextel's BAS relocation costs if they enter the market").

⁴⁶ See notes 16, 18-19 *supra*.

⁴⁷ ICO Letter at 2; TerreStar Letter at 4 n.6.

⁴⁸ 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

⁴⁹ Defendant TerreStar Network Inc.'s Memorandum of Law In Support of its Motion to Dismiss, Civil Action No. 1:08cv651, at 8 (E.D. Va. filed Aug. 1, 2008).

⁵⁰ See, e.g., *Qualcomm Inc. Petition for Declaratory Ruling*, Order, 21 FCC Rcd 11683, ¶¶ 37-39 (2006) (clarifying that Qualcomm could use a particular engineering study to demonstrate compliance with technical rules); *Petitions of Sprint PCS and AT&T Corp., For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, ¶¶ 19-20 n. 51 (2002) (clarifying requirements for CMRS access charges under existing rules); *Cox Cable Communications, Inc., Commline, Inc., and COX DTS, Inc. Petition for Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling, and Order, 102 F.C.C. 2d 110, ¶¶ 19-20, 42 (1985) (*Cox Cable Order*) (clarifying that the Commission has preempted state certification requirement for cable system provider of intrastate services including non-video services); *Community*

Letter, Sprint Nextel simply seeks clarification that the sunset of the MSS reimbursement obligation and the commencement of the 800 MHz true-up process will remain synchronized, consistent with the Commission's established policy linking these milestones. As stated above, it is TerreStar and ICO – not Sprint Nextel – that are attempting to modify the Commission's BAS relocation rules and policies by de-linking these dates. Moreover, since TerreStar and ICO were served with Sprint Nextel's request and have had a full opportunity to comment on this filing, the Commission need not seek additional comment on these issues before issuing its declaratory ruling.⁵¹ Finally, to the extent that the Commission concludes that a waiver is necessary to synchronize these dates, the Commission can similarly grant that waiver without initiating a rulemaking proceeding.⁵²

5. Conclusion

The rules and policies governing reimbursement are clear. Sprint Nextel has attempted to recover a portion of the expense associated with the relocation of incumbent BAS licensees from ICO and TerreStar by filing suit against these companies in the United States District Court for the Eastern District of Virginia. The court denied the motions to dismiss that ICO and TerreStar had filed with regard to Sprint's legal and equitable claims, but stayed and referred the case to the Commission for further proceedings under the doctrine of primary jurisdiction.⁵³

Accordingly, Sprint Nextel requests that the Commission expeditiously issue a declaratory ruling affirming that TerreStar and ICO must reimburse Sprint Nextel for their respective *pro rata* shares of all eligible BAS relocation costs incurred by Sprint Nextel through the completion of both 800 MHz reconfiguration and the BAS relocation.⁵⁴ For the same reasons, the Commission should clarify that new entrants to the Advanced Wireless Services spectrum at 1995-2000 MHz and 2020-2025 MHz continue to have an obligation to reimburse Sprint Nextel for their *pro rata* share of BAS

Antenna Television Ass'n Petition for Rulemaking or for Declaratory Ruling to Permit the Authorization of Receive-Only Small Earth Station Antennas, Declaratory Ruling and Order, 62 F.C.C. 2d 901, ¶ 44 (1977) (clarifying the showings necessary to demonstrate compliance with technical rules for domestic satellite communications).

⁵¹ *Cox Cable Order* ¶ 20 (noting that Commission had already received comments on the relevant legal and policy issues and that further proceedings would not contribute to a better decision).

⁵² See 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁵³ *Sprint Nextel Corp. v. New ICO Satellite Services G.P., et al.*, No. 1:08cv651 (E.D. Va. Aug. 29, 2008) (order referring claims to FCC). The pertinent pleadings filed by Sprint Nextel (excluding exhibits) in this litigation, along with the court's order and a transcript of the court hearing, are attached as Appendix A.

⁵⁴ See 47 C.F.R. §§ 1.2, 1.41, 1.925(b)(3).

relocation costs through the end of the adjusted reconfiguration and true-up periods.⁵⁵ The 800 MHz R&O, the Commission's well-established cost-sharing precedent, and equitable principles all require TerreStar and ICO to pay their fair share of band clearing costs.

Respectfully submitted,

/s/ Lawrence R. Krevor
Lawrence R. Krevor
Vice President – Spectrum

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Director, Government Affairs

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⁵⁵ *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services*, Sixth Report and Order, 19 FCC Rcd 20720, ¶ 72 (2004) (requiring AWS new entrants that enter the band prior to the end of 800 MHz reconfiguration to reimburse Sprint Nextel for their *pro rata* share of BAS relocation costs).

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 8th day of October, 2008, I caused true and correct copies of the foregoing letter from Lawrence R. Krevor, Sprint Nextel Corporation, to be served upon the following by first class U.S. mail, postage prepaid, except where otherwise indicated:

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/s/ Ruth E. Holder
Ruth E. Holder

Appendix A

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

2008 JUN 25 P 4:40

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

SPRINT NEXTEL CORPORATION,

Plaintiff,

v.

Civil Action No.:

1:08 cv 651

NEW ICO SATELLITE SERVICES G.P.

LMB/TKJ

and

TERRESTAR NETWORKS, INC.

Defendants.

**COMPLAINT TO ENFORCE ORDERS OF THE FEDERAL COMMUNICATIONS
COMMISSION**

Plaintiff, Sprint Nextel Corporation ("Sprint"), by counsel, brings this Complaint to Enforce Orders of the Federal Communications Commission against the Defendants, New ICO Satellite Services G.P. ("ICO") and TerreStar Networks, Inc. ("TerreStar") (collectively, "Defendants"). Plaintiff states as follows:

INTRODUCTION

1. This Complaint seeks to enforce certain orders of the Federal Communications Commission ("FCC") that require Defendants to reimburse Sprint for its Broadcast Auxiliary Service relocation expenditures, and the Complaint also seeks to recover reimbursement costs that are due and owing to Plaintiff from Defendants.

2. In 2004, the FCC issued an order addressing the increasing amounts of interference experienced by public safety communications systems in the 800 MHz spectrum band. *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800*

and 900 MHz Industrial/Land Transportation and Business Pool Channels, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969 (2004) (“*800 MHz Order*”). Public safety communications are defined under 47 U.S.C. § 337(f) as communications the sole or principal purpose of which is to protect the safety of life, health, or property; and that are provided by State and local government agencies, or authorized nongovernmental organizations. Public safety communications typically involve police officers, ambulances, fire departments, and other first responders.

3. The FCC’s *800 MHz Order* called for the reconfiguration of the 800 MHz band in a manner designed to spectrally segregate public safety systems from other radio and cellular systems. To facilitate the reconfiguration, Sprint agreed to relinquish certain of its own 800 MHz spectrum and to accept certain other reconfiguration responsibilities in return for the FCC granting Sprint new spectrum in the 1.9 GHz band. As part of its 800 MHz reconfiguration responsibilities, the FCC authorized and obligated Sprint to retune Broadcast Auxiliary Service (“BAS”) incumbents in the 1990-2025 MHz band to channels above 2025 MHz, thereby clearing the 1990 – 2025 channel block for new licensees, including Sprint Nextel at 1990 – 1995 MHz, and Mobile-Satellite Service (“MSS”) entrants at 2000 – 2020 MHz. (This process in its totality is referred to as the “BAS relocation”). BAS involves systems of integrated transmitters, receivers, and related equipment that television broadcasters use for electronic newsgathering to provide breaking news, live sports, and real-time weather information to the public, as well as to relay video programming to the public (through translator and booster stations).

4. As part of the BAS relocation, Sprint committed to funding the entire cost of relocating all BAS incumbents nationwide from the 1990-2025 MHz band to the new BAS channel block. Under the relocation plan, Sprint would be considered the first entrant into this

band. Under the FCC's rules and policies for the past 15 years, subsequent licensees must reimburse the first entrant for a *pro rata* portion of the band retuning costs. Consistent with these policies, Sprint requested that the FCC require MSS licensees moving into the vacated 2000 – 2020 MHz channel block to pay their *pro rata* share of Sprint's cost of clearing that spectrum. Otherwise, the MSS entrants to the band would simply be free riders, with Sprint having unfairly borne the entire cost of clearing the band for the MSS entrants, contrary to FCC rules and precedent.

5. The FCC granted Sprint's request, specifically applying its reimbursement policies to the BAS relocation proceeding and ordered that Sprint could require reimbursement from subsequently entering MSS licensees for a share of Sprint's costs in clearing the BAS spectrum, on a *pro rata* basis according to the amount of spectrum each MSS licensee is assigned.

6. Defendants are MSS licensees that have entered the 2000 – 2020 MHz portion of the 1990 – 2025 MHz former BAS band being cleared by Sprint. Under the FCC's orders, Defendants are required to reimburse Sprint on a *pro rata* basis for Sprint's costs in clearing these channels for the MSS entrant's use. Defendants, however, have refused to reimburse Sprint for the amounts that are due and owing, and have further indicated they have no intention of complying with the FCC's orders regarding reimbursements, or otherwise timely and fully compensating Sprint for the costs it has incurred on their behalf.

7. Accordingly, Sprint brings this suit to enforce the FCC orders and to recover the reimbursement costs that are due and owing.

PARTIES

8. Sprint is a corporation organized under the laws of Kansas, with its principal place of business in Overland Park, Kansas. Under pertinent FCC filings and orders, Sprint has the duties and rights under the *800 MHz Order* with regard to the BAS relocation, including the right to a *pro rata* reimbursement by MSS licensees such as Defendants of eligible clearing costs.

9. ICO is a partnership organized under the laws of Delaware, with its principal place of business in Reston, Virginia.

10. TerreStar is a corporation organized under the laws of Delaware, with its principal place of business in Reston, Virginia.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the parties based on 28 U.S.C. § 1331, as Sprint brings this suit to enforce FCC orders pursuant to the Communications Act of 1934, as amended, 47 U.S.C. §§ 401(b) and 407.

12. This Court also has jurisdiction over the parties based on diversity of citizenship under 28 U.S.C. § 1332, in that there is complete diversity among the parties and the amount in controversy exceeds \$75,000.

13. This Court has personal jurisdiction over the Defendants pursuant to Va. Code Ann. § 8.01-328.1.

14. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a).

15. Venue lies under 28 U.S.C. § 1391(b), because both defendants reside in the Eastern District of Virginia.

FACTS

I. Orders

16. In the *800 MHz Order*, the FCC stated in relevant part that “[Sprint] is entitled to seek pro rata reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period.” *800 MHz Order*, ¶ 261. A true and correct copy of the *800 MHz Order* is attached hereto as **Exhibit 1**.

17. The FCC reaffirmed this reimbursement obligation on the part of subsequent MSS licensees such as Defendants in March 2008, when it stated that “consistent with the Commission’s overall band relocation cost-sharing principles, Sprint Nextel is entitled to seek a *pro rata* reimbursement of its eligible BAS band-clearing costs incurred during the 800 MHz 36-month transition period from any MSS entrant that enters the band during the transition period.” *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 08-73, ¶ 15 (March 5, 2008) (“*March 5 Order*”). A true and correct copy of the *March 5 Order* is attached hereto as **Exhibit 2**.

18. The *800 MHz Order* and *March 5 Order* are valid, regularly made orders of the FCC, and were duly served upon and are applicable to and enforceable against Defendants.

19. Pursuant to the terms of *800 MHz Order* and the *March 5 Order*, any MSS licensee that enters the 1990-2025 MHz band is required to pay, and Sprint is authorized to seek, a *pro rata* reimbursement of Sprint’s eligible BAS band-clearing costs incurred during the 800 MHz transition period.

20. In addition to these orders, as a condition of their FCC licenses, MSS licensees who benefit from BAS relocation and subsequently enter the BAS spectrum must compensate

Sprint, as the first entrant, on a *pro rata* basis according to the amount of spectrum the subsequently-entering MSS licensees are authorized to use.

21. Since the *800 MHz Order*, Sprint has worked to clear the BAS band, including but not limited to incurring significant costs, legal obligations, and commitments, and continues to work to clear the BAS band. Included in these costs are monies that have been spent for equipment that has been assigned to licensees; monies that have been committed to obtain new BAS equipment necessary to operate in the new BAS band plan, although the equipment has not yet been assigned to individual licensees; and future costs which – based on Sprint’s experience and expertise in retuning BAS and other communications providers – are certain to be spent in an amount that is reasonably calculable at the present time.

22. To date, Sprint has spent funds, committed to spend funds, and anticipates spending funds in such amounts that the *pro rata* share for each Defendant will be approximately \$100 million. Included in that amount are funds already spent, such that the *pro rata* share of each Defendant for funds already spent is not less than approximately \$40 million.

II. ICO

23. ICO is authorized and licensed by the FCC to provide MSS in a total of 20 MHz of spectrum, consisting of 10 MHz in each of the 2000-2020 MHz and 2180-2200 MHz bands, through the use of a geostationary satellite.

24. ICO holds a letter of intent authorization (*i.e.*, an authorization for a non-U.S. satellite to provide service to the United States).

25. Ten megahertz of ICO’s authorization lies in the 2000 – 2020 MHz portion of the 1990-2025 MHz band that Sprint Nextel is clearing of BAS licensees for MSS use.

26. ICO successfully launched its geostationary satellite, "ICO G1", into space on April 14, 2008.

27. Upon information and belief, following the successful launch of its transmitting satellite, ICO commenced operation of four transmit beacon stations in the 2000-2020 MHz frequencies.

28. Those transmit beacon stations are located in: (1) South Easton, Bristol, MA; (2) Ellenwood, Clayton, GA; (3) North Las Vegas, Clark, NV; and (4) Brewster, Okanogan, WA.

29. Upon information and belief, ICO has conducted testing and transmissions by and between the ICO G1 satellite and its transmit beacon stations and other ICO transmission facilities.

30. Upon information and belief, ICO's transmissions have occurred in the 2000-2020 MHz channel block, including the 1990-2025 MHz band that Sprint Nextel is clearing of BAS licensees.

31. Upon information and belief, ICO has also engaged in the construction and operation of its Ancillary Terrestrial Component ("ATC") operations. ATC operations are terrestrial network components that the FCC permits MSS licensees to incorporate into their satellite systems. The FCC may grant certain authorizations and licenses to MSS licensees to operate ATC mobile wireless operations provided that they relate in an FCC-specified manner to their MSS licensed operations.

32. The FCC routinely imposes milestone deadlines for satellite system implementation in order to ensure that licensees proceed with construction and launch their satellites in a timely manner, and that valuable spectrum will not be held to the exclusion of

others by those who are unwilling or unable to proceed. The FCC also often cancels the licenses of MSS satellite operators for failure to meet milestone obligations.

33. On May 9, 2008, pursuant to its FCC milestone requirements, ICO submitted its “Final Milestone Certification and Selected Assignment Notification” to the FCC. A true and correct copy of that certification is attached hereto as **Exhibit 3**.

34. In that milestone report, ICO certified that its MSS satellite system is now operational, and that ICO has successfully completed two-way voice and data sessions between the ICO G1 satellite and its authorized earth stations in the 2000-2020 and 2180-2200 MHz frequency bands.

35. On May 30, 2008, the FCC issued a Public Notice that the Satellite Division had determined that ICO “has met the launch and operation milestones associated with its reservation of spectrum in the 2 GHz frequency for the ICO-G1 satellite.”

36. Through its spectrum reservation, licensing and FCC authorization, as well as its subsequent system build out, testing, and operation, ICO has entered the 1990-2025 MHz band that Sprint is clearing of BAS licensees.

37. On February 4, 2008, Sprint submitted a letter to ICO seeking reimbursements in the amount of approximately \$100 million, ICO’s estimated *pro rata* share based on Sprint’s total paid, payable, and projected BAS relocation expenses that are eligible for reimbursement by 2 GHz MSS licensees as of that date. A true and correct copy of that letter is attached hereto as **Exhibit 4**.

38. By letter dated February 12, 2008, ICO responded to Sprint’s reimbursement request and asserted that Sprint’s request was “premature” and “likely to be factually incorrect.” A true and correct copy of that letter is attached hereto as **Exhibit 5**.

39. During meetings and discussions between senior executives of ICO and Sprint, ICO acknowledged an obligation to reimburse Sprint under the FCC's orders, but sought to negotiate discounts as to the amount and alternatives as to timing.

40. At various subsequent points, despite requests by Sprint, ICO has continued to refuse to pay reimbursement amounts to Sprint as required by the FCC's orders and ICO's license.

41. To date, although ICO has entered the pertinent portion of the BAS band being cleared by Sprint, ICO has not paid any reimbursement amounts to Sprint, and has provided no assurance that it has any plans to do so in the future.

III. TerreStar

42. TerreStar is authorized and licensed by the FCC to provide MSS in a total of 20 MHz of spectrum, including 10 MHz in the 1990-2025 MHz band that Sprint Nextel is clearing of BAS licensees.

43. TerreStar also holds a letter of intent authorization and spectrum reservation.

44. In 2004, the FCC reinstated the reservation of 2 GHz spectrum originally granted in 2001 to TerreStar's predecessor in interest, TMI Communications and Company.

45. As a condition of that reinstatement, TerreStar was required to comply with a milestone schedule consisting primarily of (1) completion of critical design review in November 2004; (2) start of physical construction of satellite in March 2005; (3) launch of satellite into assigned orbital location by November 2007; and (4) certification that the entire system was operational by November 2008.

46. The FCC subsequently granted TerreStar an extension of its milestone deadline for satellite launch from November 2007 until September 2008, but left unchanged the system operational milestone date of November 2008.

47. Although the deadline for TerreStar's launch milestone has been delayed, TerreStar has made significant and extensive gains in the development of its satellite system.

48. On December 6, 2006, TerreStar certified that it had completed the critical design review phase for the satellite as of November 29, 2004.

49. On April 11, 2005, TerreStar certified that it had commenced physical construction of the satellite. A true and correct copy of that certification is attached as **Exhibit 6**.

50. Indeed, the FCC granted TerreStar an extension of its original November 2007 satellite launch milestone date because "TerreStar has demonstrated a substantial and continuing commitment to satellite construction and system implementation. ... Terrestar's satellite is in the final stages of construction, is almost paid for, and is slated for launch pursuant to a launch services agreement under which substantial payments have also been made." *In Re TerreStar Networks, Inc.*, 22 FCC Rcd 17698, ¶ 7 (October 3, 2007).

51. In the required 2007 Annual Report for 2 GHz Mobile Satellite Service System that TerreStar submitted to the FCC, TerreStar stated that it had "made substantial progress in constructing TerreStar-1," and that construction was "at an advanced stage." TerreStar further stated that "TerreStar's satellite manufacturer, Space Systems/Loral ... had installed 84% of hardware units of the main body of the satellite, had completed payload module level assembly and testing, had integrated the payload modules with the main structure, and was proceeding with main body integration." A true and correct copy of this 2007 Annual Report is attached hereto as **Exhibit 7**.

52. In that same 2007 Annual Report, TerreStar also represented that it has an “ongoing band clearance program” in place and that “it has been necessary for TerreStar to rely on Sprint Nextel’s nationwide band clearance efforts.” *Id.*

53. Upon information and belief, TerreStar has also engaged in the construction and testing of other various components of its system.

54. TerreStar holds an experimental radio station construction permit and license (*i.e.*, an FCC authorization that allows for the operation of an experimental radio station in order to test and refine the company’s techniques and technologies) for operating radio transmitting facilities in the frequencies of 1920-1960 MHz and 2110-2150 MHz. A true and correct copy of TerreStar’s experimental license is attached hereto as **Exhibit 8**.

55. Upon information and belief, pursuant to its experimental license, TerreStar has also constructed and tested ATC operations, and engaged in radio transmissions. The construction and use of ATC operations is a derivative right of an MSS license granted by the FCC.

56. Through its licensing, FCC authorization, and spectrum reservation, as well as its subsequent system build out, testing, satellite construction, and ATC operations, TerreStar has entered the 1990-2025 MHz band that Sprint Nextel is clearing of BAS licensees.

57. On February 4, 2008, Sprint submitted a letter to TerreStar seeking reimbursements in the amount of approximately \$100 million, TerreStar’s *pro rata* share based on Sprint’s total paid, payable, and projected BAS relocation expenses that are eligible for reimbursement by 2 GHz MSS licensees. A true and correct copy of that letter is attached hereto as **Exhibit 9**.

58. By letter dated February 11, 2008, TerreStar responded to Sprint's reimbursement request and asserted that "TerreStar has not entered the 2 GHz MSS band to date and has no plans to enter the band by June 27, 2008. In fact, TerreStar's 2 GHz MSS satellite will not even be launched until after June 27, 2008." A true and correct copy of that letter is attached hereto as **Exhibit 10.**

59. At various subsequent points, despite numerous requests by Sprint, TerreStar has continued to refuse to pay any reimbursement amounts to Sprint for its entry into the 1990-2025 MHz band as required by the FCC's orders and ICO's license.

60. Contrary to the language and intent of the FCC orders, by its February 11, 2008 letter and in subsequent representations TerreStar has stated its duty to reimburse expires on June 27, 2008 with no adverse legal consequences provided that TerreStar has not launched full operations prior to that date. Under TerreStar's invalid theory, it can avoid paying any reimbursements to Sprint by improperly waiting out the 36-month transition period.

61. To date, although TerreStar has entered the pertinent portion of the BAS band being cleared by Sprint, TerreStar has not paid any reimbursement amounts to Sprint, and has indicated that it has no intention to do so in the future.

COUNT I: ENFORCEMENT OF THE FCC ORDERS

62. Sprint incorporates by reference the allegations in paragraphs 1 through 61 as if fully set forth herein.

63. Under Section 416(c) of the Communications Act of 1934, as amended, Defendants, and their agents and employees, are required to observe and comply with FCC orders so long as the orders remain in effect.

64. Under Sections 401(b), and 407, of the Communications Act of 1934, as amended, any party injured by a person who fails or neglects to obey an FCC order, including for the payment of money, may apply to an appropriate district court for enforcement of such order, as well as damages and other remedies.

65. The *800 MHz Order*, as well as the *March 5 Order*, permits and authorizes Sprint to recover from subsequently entering licensees in the 1990-2025 MHz band a share of Sprint's costs in clearing BAS spectrum, on a *pro rata* basis according to the amount of spectrum each licensee is assigned.

66. Defendants are also required as a condition of their FCC licenses to compensate Sprint, as the first entrant, on a *pro rata* basis according to the amount of spectrum the subsequently entering licensees are authorized to use. *See, e.g., Amendment of 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd. 12315, ¶¶ 69, 71 (2000); *ICO Services Limited*, Order, 16 FCC Rcd. 13762, ¶ 8 n.31 (2001).

67. The *800 MHz Order*, as well as the *March 5 Order*, is a valid order in effect and applicable to Defendants, and that requires Defendants to pay money to Sprint.

68. ICO entered the 1990-2025 MHz band by voluntarily seeking and obtaining FCC spectrum reservations, licenses, and authorization to construct satellite systems in that spectrum, the grant of which reserves the spectrum and precludes the operations of third parties.

69. In addition, ICO entered the 1990-2025 MHz band by funding, planning, constructing, testing, and operating new facilities, including ATC operations, and launching satellites related to operations using the band.

70. Furthermore, ICO entered the band by fully completing and activating its satellite system and certifying same to the FCC.

71. TerreStar entered the 1990-2025 MHz band by voluntarily seeking and obtaining FCC spectrum reservations, licenses, and authorization to construct satellite systems in that spectrum, the grant of which reserves the spectrum and precludes the operations of third parties.

72. In addition, TerreStar entered the 1990-2025 MHz band by funding, planning, constructing, testing, and operating new facilities and satellites related to MSS operations, including ATC operations.

73. By entering the 1990-2025 MHz band, Defendants have each obligated themselves to reimburse Sprint on a *pro rata* basis according to the amount of spectrum each licensee is assigned, and have disobeyed the FCC orders by failing to reimburse Sprint.

74. The amounts of that reimbursement are known, due, and owing, and should be enforced against Defendants, and Sprint has been injured by Defendants' disobedience.

75. Therefore, Sprint asks this Court to enforce the pertinent FCC orders, and to order Defendants to pay all sums due and owing under the orders, and to pay any and all *pro rata* amounts of eligible costs Sprint continues to incur throughout the BAS relocation. To date, Sprint has spent funds, committed to spend funds, and anticipates spending funds in such amounts that the *pro rata* share for each Defendant will be approximately \$100 million. Included in that amount are funds already spent, such that the *pro rata* share of each Defendant for funds already spent is not less than approximately \$40 million.

COUNT II: UNJUST ENRICHMENT/QUASI CONTRACT

76. Sprint incorporates by reference the allegations in paragraphs 1 through 75 as if fully set forth herein.

77. In the alternative to Counts I, *supra*, Sprint conferred a benefit upon Defendants by incurring and paying the BAS relocation costs and all related expenses.

78. Defendants knew of the benefits being conferred by Sprint and accepted them under circumstances demonstrating their acquiescence.

79. It would be unfair and inequitable under the circumstances for Defendants to continue to be unjustly enriched by retaining the benefits conferred by Sprint without compensating Sprint for the value of the benefits received by Defendants.

80. To date, Sprint has spent funds, committed to spend funds, and anticipates spending funds in such amounts that the *pro rata* share for each Defendant will be approximately \$100 million. Included in that amount are funds already spent such that the *pro rata* share of each Defendant for funds already spent is not less than approximately \$40 million.

81. Therefore, Sprint asks that the Court order Defendants to pay Sprint an amount necessary to compensate Sprint for the amounts that have unjustly enriched Defendants, but in any event not less than \$100 million per Defendant.

COUNT III: QUANTUM MERUIT

82. Sprint incorporates by reference the allegations in paragraphs 1 through 81 as if fully set forth herein.

83. In the alternative to Counts I and II, *supra*, Sprint rendered valuable services to Defendants by clearing portions of the BAS spectrum on their behalfs, and Defendants have accepted those services.

84. Pursuant to the FCC orders and past practice, Sprint had a reasonable expectation of payment from Defendants and all other subsequent MSS licensees for reimbursements for the eligible costs Sprint incurs in clearing the BAS spectrum.

85. Similarly, Defendants should both reasonably have expected to pay the *pro rata* reimbursements for which they are liable, and have been on notice of the likelihood of same since at least the issuance of the *800 MHz Order* in 2004.

86. Defendants have been unjustly enriched by Sprint's payments and efforts in clearing the band.

87. Therefore, Sprint asks this Court to order Defendants to pay all sums due and owing, and to pay any and all *pro rata* amounts of eligible costs Sprint continues to incur throughout the BAS relocation. To date, Sprint has spent funds, committed to spend funds, and anticipates spending funds in such amounts that the *pro rata* share for each Defendant will be approximately \$100 million. Included in that amount are funds already spent such that the *pro rata* share of each Defendant for funds already spent is not less than approximately \$40 million.

COUNT IV: ESTOPPEL/DETRIMENTAL RELIANCE

88. Sprint incorporates by reference the allegations in paragraphs 1 through 87 as if fully set forth herein.

89. In the alternative to Counts I through III, *supra*, throughout the BAS relocation Defendants each made promises, representations, and guarantees to both the FCC and to Sprint that they would cooperate and assist in the BAS relocation, and would reimburse Sprint for the eligible costs Sprint incurred in shouldering the costs for the BAS relocation that, in part, cleared the spectrum intended for use by each of Defendants' satellite systems.

90. Defendants should reasonably have expected Sprint to rely on their promises, representations, and guarantees, which were made before the FCC and in light of FCC orders requiring same.

91. Sprint directly relied on Defendants' promises, representations, and guarantees to its own detriment, and has and will continue to expend significant time, effort, and expense in the total amount of approximately \$100 million each in relocating BAS incumbents specific to Defendants' spectrum and to Defendants' benefit during the BAS relocation.

92. Defendants' efforts to avoid their obligations should be estopped, and Defendants' promises, representations, and guarantees should be enforced and full reimbursement made to Sprint with regard to the eligible costs of the BAS relocation, which would serve to prevent the damages and injustice Sprint has incurred and will incur in reasonable reliance on Defendants' promises, representations, and guarantees.

93. Therefore, Sprint asks this Court to order that Defendants are estopped from challenging their express obligations under the *800 MHz Order* and its progeny, that Defendants are responsible for and required to pay all sums due and owing to Sprint under the orders and pursuant to Sprint's detrimental reliance, and that Defendants must pay any and all *pro rata* amounts of eligible costs Sprint continues to incur throughout the BAS relocation. To date, Sprint has spent funds, committed to spend funds, and anticipates spending funds in such amounts that the *pro rata* share for each Defendant will be approximately \$100 million. Included in that amount are funds already spent such that the *pro rata* share of each Defendant for funds already spent is not less than approximately \$40 million.

COUNT V: PERMANENT INJUNCTION

94. Sprint incorporates by reference the allegations in paragraphs 1 through 93 as if fully set forth herein.

95. Sprint has a legally recognized right to obtain reimbursements for the eligible costs Sprint incurs in clearing the BAS spectrum.

96. Sprint's legal rights are being infringed and/or will be infringed by Defendants' refusal to pay their *pro rata* reimbursement amounts that are due and owing to Sprint. TerreStar's additional efforts to delay the official operation of its system until after the 36-month reimbursement period, which TerreStar believes will entitle it to avoid any reimbursement payments, further infringe Sprint's rights.

97. There is there is no adequate remedy at law for Defendants' actions in this regard, and the injunction would be an effective and enforceable means of redressing Sprint's injuries and requiring Defendants to comply with the FCC Orders.

98. The balance of hardships clearly favors Sprint, as Sprint has expended hundreds of millions of dollars in clearing spectrum as part of the BAS relocation, while Defendants intend to simply operate in the spectrum without paying Sprint the reimbursement amounts required under the FCC orders and longstanding FCC precedent. Defendants will suffer no cognizable harm through compliance with the FCC orders.

99. Consequently, Sprint requests that this Court enter a permanent injunction enjoining Defendants to (1) comply with all relevant FCC orders related to the BAS relocation; and (2) reimburse Sprint for the eligible costs it has incurred in clearing the spectrum that Defendants currently seek to operate over for free.

WHEREFORE, Sprint, by counsel, respectfully requests that the Court enter an Order:

- (i) affirming the above FCC orders and enforcing same against Defendants;
- (ii) awarding judgment against each Defendant for all eligible costs that have been and will be incurred, in such amounts as to be determined at trial but in any event not less than \$100 million per Defendant;

- (iii) enjoining Defendants to comply with FCC orders and/or their obligations to Sprint under the above orders;
- (iv) awarding Sprint its costs, including attorneys fees', incurred in this action; and
- (v) award such further relief as the Court deems appropriate.

TRIAL BY JURY IS DEMANDED ON ALL ISSUES SO TRIABLE.

Respectfully Submitted,

SPRINT NEXTEL CORPORATION

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Dated: June 25, 2008

**NITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

SPRINT NEXTEL CORPORATION,

Plaintiff,

v.

Civil Action No.: 1:08-cv-651

NEW ICO SATELLITE SERVICES G.P.

LMB/TRJ

and

TERRESTAR NETWORKS INC.,

Defendants.

**SPRINT NEXTEL'S BRIEF IN OPPOSITION TO DEFENDANT NEW ICO SATELLITE
SERVICES G.P.'S AMENDED MOTION TO DISMISS**

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Plaintiff Sprint Nextel Corporation (“Sprint”) respectfully opposes Defendant New ICO Satellite Services G.P.’s (“ICO”) Amended Motion to Dismiss (“Motion”).¹

I. INTRODUCTION

A brief outline of the circumstances that compelled Sprint to bring this matter to the Court will help the Court put Sprint’s claims and rights in context. Defendants ICO and TerreStar Networks, Inc. (“TerreStar”) (collectively “Defendants”) are generally referred to as “MSS licensees,” which means that they each have Federal Communications Commission (“FCC” or “Commission”) licenses and authorization to provide wireless Mobile Satellite Service (“MSS”) via an orbiting satellite system.

Starting in the late 1990s, and well prior to Sprint’s involvement, the Commission began designating certain portions of spectrum (or “band”) for the use of MSS licensees and their anticipated MSS systems. However, that band was already occupied by unrelated Broadcast Auxiliary Service (“BAS”) entities (consequently known as “BAS incumbents”).² Concerned about potential interference, the Commission held that MSS licensees such as Defendants had to bear the costs required to move the BAS incumbents to another part of the band where there would be no interference (generally known as the “BAS relocation”). This would clear the portions of spectrum through which the BAS incumbents had previously broadcast for use by the entering MSS licensees.

¹ ICO’s Motion also purports to adopt and incorporate by reference the Motion to Dismiss filed by TerreStar. *See* Motion, at 1. Sprint hereby adopts and incorporates its Opposition to TerreStar’s Motion.

² BAS involves land-based systems of equipment that television broadcasters use for electronic newsgathering to provide breaking news, live sports, and real-time weather information to the public, as well as to relay video programming to the public through translator and booster stations.

Nevertheless, to prevent free riders, if a later MSS licensee came into the band after it had been cleared of BAS incumbents by the earlier entering MSS licensees, the later MSS licensee had to pay a *pro rata* share of the costs expended to move the BAS incumbents by the earlier MSS licensees. This arrangement was intended to address a concern by the Commission that the costs for moving the BAS incumbents into other portions of the band should be fairly shared by each MSS licensees, rather than borne solely by the first MSS licensee to begin clearing the band.

Sprint is not an MSS licensee, but is a land-based mobile radio provider. In 2004, Sprint was trying to address the potential interference with public safety communications as a result of Sprint's use of the nearby parts of the band. At the same time, the MSS licensees had done nothing to move the BAS incumbents out of the band. Therefore, pursuant to the 2004 FCC order underlying this action, Sprint agreed to relinquish certain of its own spectrum and to accept certain other BAS relocation in return for the Commission granting Sprint new spectrum in the band reserved for the MSS licensees.³ The Commission authorized and obligated Sprint to relocate BAS incumbents in, in relevant part, spectrum now reserved for both Sprint and Defendants, while at the same time making clear that Defendants still retained an independent duty to engage in the BAS relocation despite their failure to undertake any relocation efforts.

In keeping with its long-standing cost-sharing approach, the FCC identified Sprint as the initial entrant to the MSS band, and consistent with prior practice held that "...the first entrant [i.e., Sprint] may seek reimbursement from subsequently entering licensees for a proportional share of the first entrant's costs in clearing BAS spectrum, on a *pro rata* basis according to the

³ Complaint, ¶ 3.

amount of spectrum each licensee is assigned."⁴ Since 2004, Defendants have continued to do nothing to move the BAS incumbents, while Sprint has expended many millions of dollars to relocate the BAS incumbents. Through both their inaction as well as express representations to Sprint, Defendants have indicated they have no intention of reimbursing Sprint.⁵

This case is thus a straightforward effort to collect monies due and owing. Sprint seeks to enforce a series of Commission orders that require Defendants to pay for Sprint's work in clearing broadcast spectrum that Defendants are using for their satellite systems. The BAS relocation is a complex and expensive nationwide effort that involves negotiating and executing frequency relocation agreements with individual BAS incumbents; surveying current equipment; and purchasing, testing, and installing new equipment in the course of relocating each BAS incumbent to new spectrum. To date, Sprint has incurred approximately \$40 million in eligible clearing costs allocable to each Defendant, and Sprint projects with reasonable certainty that its reimbursement costs for clearing each Defendant's spectrum will ultimately reach \$100 million per Defendant.

Defendants have been on notice of their duties and reimbursement obligations to Sprint since 2004. The relevant FCC orders have established and reconfirmed that Defendants have (1) an independent obligation to assist Sprint with its efforts to relocate BAS incumbents, and (2) an obligation to reimburse Sprint for Sprint's eligible costs in clearing the spectrum that Defendants have entered through build-outs, testing, broadcasts, and other operations. Those orders unequivocally provide that subsequent entrants to the cleared spectrum owe reimbursements to the entity that cleared the spectrum to the benefit of the subsequent entrants.

⁴ Complaint, ¶ 65.

⁵ Complaint, ¶¶ 41, 61.

Faced with this circumstance, ICO's Motion to Dismiss does not challenge the validity or applicability of the relevant FCC orders. Nor does ICO challenge Sprint's description of Defendants' activities in the band. Instead, ICO argues that despite the FCC orders and Defendants' activities, Defendants have not triggered, and in ICO's view could not trigger, their reimbursement obligations. ICO is mistaken, and ICO's Motion should be denied.

Defendants have accepted Sprint's efforts related to clearing the band, and Defendants have built out, tested, and operated their respective satellite systems in that band. Yet Defendants seek to avoid their obligations through misinterpretation of Commission precedent, or by asking this Court to return Sprint to the Commission to seek yet another in a long line of precedents reaffirming Defendants' obligations to Sprint.⁶ In the specific context of ICO's Motion, ICO makes two arguments to avoid payment. First, ICO argues that the "Top 30 Market Rule" means that none of Defendants' activities or operations in the spectrum actually constitutes "entering the band" for purposes of triggering their reimbursement obligations to Sprint. Second, ICO asserts that Sprint's alternative equitable claims should be rejected, apparently due to the alleged existence of an express contract that ICO neither identifies nor describes. These arguments must be rejected on several grounds.

As a threshold matter, the issue before the Court is straightforward: under a plain reading of the Commission's orders, Defendants owe money to Sprint and should be compelled to pay. Defendants' ongoing efforts to evade these reimbursement obligations put Defendants in the position of "free riders," as Defendants hope to continue transmitting in the portions of the

⁶ Sprint addresses the Defendants' arguments concerning exhaustion of administrative remedies and primary jurisdiction in Sprint's Brief in Opposition to TerreStar's Motion to Dismiss.

spectrum that Sprint clears for them without providing any reimbursement. Moreover, ICO's specific arguments under the Top 30 Market Rule fail because:

- The Top 30 Market Rule precludes only full commercial operations (i.e., the provision of service to customers) until the top 30 markets are cleared.
- The Rule does not apply to the FCC's substantively distinct, unrelated, and significantly lower standard for "entering the band" through, for example, the planning, testing, constructing, and lesser scope operations that Defendants have undertaken with regard to the spectrum.
- ICO's attempt to interpose the Top 30 Market Rule is a ruse that ICO seeks to employ in an effort to avoid its reimbursement duties by delaying the full and official provision of commercial services to customers, notwithstanding the otherwise numerous material steps ICO has taken to enter and remain in the band.
- The Rule by its very terms applies only to MSS-led relocation attempts, not the relocation efforts undertaken by Sprint, and will likely be waived by the FCC shortly.

ICO's argument with regard to Sprint's other claims also fails, for absent an express contractual agreement, this Court retains full equitable jurisdiction and authority to grant Sprint's request to recover the benefits that Defendants have unequivocally received from Sprint.

In sum, ICO's arguments to dismiss should be rejected and this case should go forward so Sprint can establish the predicates to enforce the FCC Order.

II. FACTUAL BACKGROUND

The Commission has been trying to encourage and accomplish the BAS relocation since 2000. In the years prior to Sprint's involvement in the process, the Commission had required the MSS entrants themselves, including Defendants, to undertake the BAS relocation (the "MSS plan"). Pursuant to long-standing cost-sharing principles, the Commission held in 2000 that under the MSS plan for BAS relocation, the MSS licensees subsequently entering a cleared band would be required to compensate earlier entrants for costs incurred in clearing the spectrum on their behalf. This obligation was imposed both under the FCC's orders and as a condition of

their broadcast licenses.⁷ Moreover, when the Commission eventually authorized Sprint to undertake portions of the BAS relocation, it reaffirmed the independent duties that the MSS entrants had to engage in their own BAS relocation efforts, both under the orders and their licenses.⁸

As part of the MSS plan, MSS entrants were made subject to what has become known as the “Top 30 Market Rule.” In 2000, the FCC ordered that it would “require the first MSS licensee(s) to complete Phase I of our relocation plan *only* in the 30 largest (LA and Metro) television markets before they begin operations.”⁹ In a subsequent 2005 Order, the Commission confirmed that the Top 30 Market Rule serves to require MSS licensees, namely Defendants, to “clear the top thirty BAS markets and all fixed BAS stations, regardless of market size, before beginning operations.”¹⁰ The Commission later clarified that the Top Thirty Market Rule precluded full nationwide commercial operations until all 30 markets were cleared, but did not

⁷ See *In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd. 19403, 2000 WL 870848, ¶¶ 67, 69, 71 (2000) (“...we will require subsequently entering MSS licensees ... to pay the earlier licensees a proportional share of the earlier MSS licensee’s costs in clearing the BAS spectrum, on a *pro rata* basis according to the amount each licensee is assigned. ... All MSS licensees who benefit from relocation of BAS are responsible for contributing, as a condition of their licenses.”) (“*July 3, 2000 Order*”) (emphasis added) (attached hereto as **Exhibit 1**).

⁸ See, e.g., *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969, 2004 WL 1780979, ¶ 250 (2004) (“*800 MHz Order*”) (attached to Sprint’s Complaint as Exhibit 1).

⁹ *July 3, 2000 Order*, ¶ 31 (emphasis added).

¹⁰ *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd. 18970, 2005 WL 2465886, ¶ 112 and n.315 (October 5, 2005) (“*October 5, 2005 Order*”) (emphasis added) (attached hereto as **Exhibit 2**).

preclude operations in the band that accompanied the Defendants' system construction, testing, and milestone certifications to the Commission.¹¹

When the Commission began considering Sprint's alternative plan to accomplish the relocation in 2004, Defendants had accomplished nothing under the MSS plan.¹² As a result, in 2004, the FCC issued an order authorizing and obligating Sprint to relocate the then-present BAS incumbents out of the 1990-2025 MHz band and into channels above 2025 MHz. In effect, the order authorized and obligated Sprint to clear the 1990 – 2025 band for new licensees – namely, Sprint and Defendants.¹³ Under the new Sprint-led relocation plan, Sprint would be considered the first entrant into this band.¹⁴

The FCC, in keeping with its cost-sharing approach, still applicable to the MSS entrants under the MSS plan, held that Sprint could require reimbursement from subsequently entering MSS licensees for a share of Sprint's costs in clearing the BAS spectrum used by those other MSS licensees, on a *pro rata* basis according to the amount of spectrum each MSS licensee is assigned.¹⁵ The Commission explicitly set forth its cost-sharing ruling in the *800 MHz Order*:

We have decided to generally follow the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the

¹¹ See *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 08-73, 2008 WL 612182, ¶¶ 47-48 (March 5, 2008) ("*March 5, 2008 Order*") (attached to Sprint's Complaint as Exhibit 2).

¹² See, e.g., *800 MHz Order*, ¶¶ 261, 353; *March 5, 2008 Order*, ¶ 31 (noting that at the time Sprint's relocation plan was approved in 2004, despite years of authorization there was "no record of meaningful negotiations or relocation activities having taken place between MSS and BAS ...").

¹³ See Complaint, ¶ 4.

¹⁴ *Id.*

¹⁵ See *id.*, ¶ 5.

cost of reimbursing the first entrant for the accrual of that benefit, except as discussed below. Therefore, the first entrant may seek reimbursement from subsequently entering licensees for a proportional share of the first entrant's costs in clearing BAS spectrum, on a pro rata basis according to the amount of spectrum each licensee is assigned. Consequently, [Sprint] is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period.¹⁶

Since the issuance of the *800 MHz Order*, Sprint has incurred over \$40 million in eligible relocation costs attributable to each Defendant's spectrum. Defendants, however, have refused to reimburse Sprint for the costs it incurred, and at present are free riders in the cleared spectrum by acting as subsequent entrants without fairly reimbursing Sprint, the initial entrant.

III. APPLICABLE STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should only be granted in "very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). Upon such a motion, the court must accept the complaint's factual allegations as true, and must construe each allegation in the light most favorable to the plaintiff. *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). As a general principle, a court should not grant a motion to dismiss for failure to state a claim unless it appears to a certainty that the plaintiff cannot prove any set of facts that would support its claim and entitle it to relief. *Rogers*, 883 F.2d at 325.

The court's inquiry is limited to whether the plaintiff's allegations constitute "a short and plain statement of the claim showing that the pleader is entitled to relief" pursuant to Fed. R. Civ. P. 8(a)(2). *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (internal quotations omitted). "The purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the

¹⁶ *800 MHz Order*, ¶ 261 (emphasis added).

applicability of defenses.” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Simply put, the issue on the motion is not whether Sprint will ultimately prevail, or even if Sprint is likely to prevail, but whether Sprint is entitled to the opportunity to offer evidence in support of its claims. *Revene v. Charles County Comm’rs*, 882 F.2d 870, 872 (4th Cir. 1989). Under these standards, ICO’s Motion must be denied.

IV. **ARGUMENT**

A. **Defendants Have a Reimbursement Obligation to Sprint Based on FCC Orders, Precedent, and Their Licenses**

Under the standards of Rule 12(b)(6), Sprint has alleged that Defendants owe Sprint funds pursuant Commission orders and the terms of Defendants’ licenses. This is also confirmed by FCC precedent, and Defendants’ own statements.

1. **The FCC’s Orders Establish That Defendants Have a Reimbursement Obligation to Sprint**

There can be no doubt that the Commission required Defendants to reimburse Sprint for the costs it incurs in clearing Defendants’ portions of the spectrum. In issuing the *800 MHz Order*, the Commission concluded that as a general matter:

it is in the public interest to compensate [Sprint] for the surrendered spectrum rights and costs it incurs as a result of band reconfiguration. By facilitating band reconfiguration, giving up spectrum rights, and bearing the financial burden of the relocation process for all affected incumbents, [Sprint] will play a critical role in solving the 800 MHz band public safety interference problem.¹⁷

The Commission’s chosen mechanism to compensate Sprint for its relocation costs incurred specific to the MSS licensees’ spectrum was the same one that it had repeatedly applied in the past: the cost-sharing principle “that the licensees that ultimately benefit from the spectrum

¹⁷ *800 MHz Order*, ¶ 31 (emphasis added).

cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit ...¹⁸

Neither Sprint nor the Commission intended or expected Sprint to bear the entire cost of clearing the band, since Sprint only occupies a portion of it. Specifically, the Commission ordered that "... the first entrant [i.e., Sprint] may seek reimbursement from subsequently entering licensees [i.e., Defendants] for a proportional share of the first entrant's costs in clearing BAS spectrum, on a *pro rata* basis according to the amount of spectrum each licensee is assigned."¹⁹ Sprint is therefore "entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period."²⁰

2. The FCC's Orders Are Consistent With Precedent Establishing the Reimbursement Duties of Subsequent Entrants

The FCC's cost-sharing requirements in the *800 MHz Order* do not exist in a vacuum, but were first developed in the Commission's *Emerging Technologies* proceeding in the early 1990s, and have been consistently applied over the years to ensure that subsequent entrants provide first entrant *pro rata* reimbursements.²¹ In 2000, cost-sharing principles were applied to the BAS relocation process because the BAS relocation "presents a unique situation where earlier entrants will bear significant costs in clearing BAS spectrum, yet will not ultimately use most of the

¹⁸ *Id.* ¶ 261 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz For Use by the Mobile-Satellite Service*, Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order, 13 FCC Rcd. 23949, 1998 WL 814505, ¶¶ 12-13 (Nov. 19, 1998) (attached hereto as **Exhibit 3**).

spectrum that they clear,” and because otherwise “the first MSS licensee will clear such a large amount of spectrum, [and] several subsequently entering licensees likely will find their spectrum had been cleared.”²² As a consequence, the Commission ordered that:

...we will require subsequently entering MSS licensees ... to pay the earlier licensees a proportional share of the earlier MSS licensee’s costs in clearing the BAS spectrum, on a *pro rata* basis according to the amount of spectrum each licensee is assigned.²³

Thus, the Commission applies *pro rata* cost sharing based on a cogent concern that the first entrant in the BAS relocation would expend significant sums in clearing the entire spectrum, but subsequent entrants would reap a windfall in the form of cleared spectrum for which they had expended no money or effort. In other words, the Commission feared the precise scenario that Defendants seek to create: subsequent entrants attempting to avoid paying their fair share of relocation expenses.

3. **Defendants Are Required to Reimburse as Conditions of Their Licenses**

The Commission did not tie the reimbursement obligations of the MSS entrants solely to the express language of its orders. Rather, the Commission established an independent basis for the reimbursement duty: MSS licensees subsequently entering a band are required to compensate earlier entrants for costs incurred in clearing the spectrum as a condition of the subsequent entrants’ broadcast licenses.²⁴ For example, in granting the broadcast license to ICO’s parent, ICO Services Limited,²⁵ the Commission required that ICO’s system “must be

²² *July 3, 2000 Order*, ¶ 66.

²³ *Id.* ¶ 67.

²⁴ *Id.* ¶¶ 69, 71 (“All MSS licensees who benefit from relocation of BAS are responsible for contributing, as a condition of their licenses.”) (emphasis added).

²⁵ ICO’s corporate structure is available at: http://www.ico.com/_about/corpstruct/.

implemented consistent with the plans for incumbent relocation adopted in the [July 3, 2000 Order], including the phased plan for relocation in the 1990-2025 MHz band.”²⁶ Similarly, the license that TerreStar received from its predecessor in interest was likewise conditioned on adherence to the Commission’s cost-sharing principles for the BAS relocation.²⁷

4. ICO Has Acknowledged the Applicability of the Cost-Sharing Principles

It is telling that, when earlier in the relocation process it was faced with the possibility of being the first entrant, ICO was strongly in favor of ensuring that later entrants bore a portion of the band clearing costs.²⁸ In particular, ICO argued that the Commission should resist adopting a sunset on any cost-sharing plan, because “as a practical matter ICO may be the only authorized MSS provider providing service at 2 GHz for a number of years. If this is indeed the case, then a ten-year sunset on a cost-sharing plan could result in ICO paying full relocation costs without any reimbursement from later entering MSS providers. This possibility would unfairly punish ICO for being the earliest provider of 2 GHz MSS . . .”²⁹

²⁶ See *In the Matter of ICO Services Limited*, 16 FCC Rcd. 12315, 2001 WL 803187, ¶ 8 n.31 (July 17, 2001) (granting ICO its MSS license on condition that ICO’s MSS satellite system be implemented in accordance with the *July 3, 2000 Order*) (attached hereto as **Exhibit 4**).

²⁷ See *In the Matter of TMI Communications and Company*, 16 FCC Rcd. 13808, 2001 WL 803192, ¶ 7 n.23 (July 17, 2001) (granting ICO its MSS license on condition that ICO’s MSS satellite system be implemented in accordance with the *July 3, 2000 Order*) (attached hereto as **Exhibit 5**); *In Re TMI Communications and Company, LP, and TerreStar Networks, Inc.*, 19 FCC Rcd. 12603, 2004 WL 1443008, ¶ 16 (June 29, 2004) (reinstating and assigning TMI spectrum to TerreStar) (attached hereto as **Exhibit 6**).

²⁸ See Comments of ICO Services Limited, ET Docket No. 95-18 (Feb. 3, 1999), at 13 (“...an MSS provider should only pay to relocate incumbents from the spectrum actually used by the MSS provider; an operator should not be responsible for a proportion of the overall costs of relocating the entire 2 GHz spectrum. It simply makes no sense to burden MSS providers with the cost of relocating incumbent operators from spectrum that the MSS provider does not utilize ...”) (attached hereto as **Exhibit 7**).

²⁹ *Id.* at 14 (emphasis added).

In short, over a decade of FCC precedent, as well as ICO's prior stance against the possibility of being left holding the entire bill for the 2 GHz relocation costs, directly contradicts Defendants' current argument that reimbursement obligations could not be triggered as a "matter of law."

B. Defendants Have Entered the Band and Triggered Their Reimbursement Obligations

The Commission expressly ordered that Sprint is "entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period."³⁰ Nowhere in Defendants' filings have Defendants even attempted to refute the allegations in the Complaint as to their activities in entering the band.

For example, the Complaint identifies numerous instances where ICO had entered the band.³¹ In particular, Sprint alleges that ICO entered the band (1) by voluntarily seeking and obtaining FCC spectrum reservations, licenses, and authorization to construct satellite systems in that spectrum, the grant of which reserves the spectrum and precludes the operations of third parties; (2) by funding, planning, constructing, testing, and operating new facilities, including ATC operations, and launching satellites related to operations using the band; and (3) by completing and activating its satellite system and certifying same to the FCC.³² Similarly, TerreStar entered the band (1) by voluntarily seeking and obtaining FCC spectrum reservations, licenses, and authorization to construct satellite systems in that spectrum, the grant of which reserves the spectrum and precludes the operations of third parties, and (2) by funding, planning,

³⁰ 800 MHz Order, ¶ 261 (emphasis added).

³¹ Complaint, ¶¶ 23-36, 68-70.

³² *Id.* ¶¶ 68-70.

constructing, testing, and operating new facilities and satellites related to MSS operations, including ATC operations.³³

C. The Top 30 Market Rule Precludes Only “Full Commercial Operations” by MSS Licensees, and Does Not Bear on Reimbursement Obligations Triggered by Band Entry

Sprint has clearly alleged a sufficient cause of action to enforce the orders under the standards of Rule 12(b)(6). ICO now argues that its conduct in the band could not have triggered a reimbursement obligation because, as a matter of law, it could not have “entered the band” due to the Top 30 Market Rule.³⁴ ICO supports its argument by asserting that the FCC “uses the terms ‘enter the band’ and ‘commence operation’ interchangeably for the purposes of both the reimbursement obligation and the Top 30 Market Rule.”³⁵ This assertion is wrong, because both the history behind the Commission’s adoption of these two standards, and the Commission’s own clarifications on this point, have made clear that the two concepts are substantively distinct, unrelated, and materially different.³⁶

1. The Origin and Purpose of the Top 30 Market Rule

The Commission created the Top 30 Market Rule in 2000, prior to Sprint’s engagement in the BAS relocation, when it began allowing new MSS licensees to clear spectrum for their

³³ *Id.* ¶¶ 42-56, 71-72.

³⁴ ICO’s Memorandum, at 8 (“The testing and other activities alleged in the Complaint do not constitute entering the band as a matter of law.”)

³⁵ *Id.* (emphasis added).

³⁶ ICO incorrectly asserts that an earlier Sprint statement before the Commission concerning TerreStar’s commencement of operations in part through its ATC testing is related to the Top 30 Market Rule’s prohibition on full commercial operations. ICO’s Memorandum, at 8. This is wrong. Sprint’s statement simply asserted that TerreStar had triggered its reimbursement obligations through test transmissions, a point that is literally and conceptually unrelated to the Top 30 Market rule. See Petition to Deny of Sprint Nextel Corporation, File Nos. SES-LIC-20061206-02100 *et al.*, pp. 6-7 (April 25, 2008) (attached to ICO’s Motion as Exhibit 4).

operations. The FCC ordered that it would “require the first MSS licensee(s) to complete Phase I of our relocation plan *only* in the 30 largest (LA and Metro) television markets before they *begin operations*.”³⁷ The Commission’s emphasis on “only” clearing the top 30 markets (rather than all markets) prior to official operations demonstrates that the Rule was a “compromise between a simultaneous national cut-over [to nationwide MSS service] and a multi-phase, licensee-by-licensee transition.”³⁸ The Rule was intended to ensure that the MSS entrants did not create broadcast interference in the most important top 30 markets by clearing those markets first, and in fact was intended to encourage “early entry to the 1990-2025 MHz band for new MSS licensees.”³⁹ Nowhere in the origin of the Top 30 Market Rule does the Commission state, or even imply, that the Rule was intended to allow MSS licensees to avoid the reimbursement obligations by conflating the Rule’s prohibition on full commercial operations with the reimbursement-triggering band entry activities in which Defendants have already engaged.

2. **The Top 30 Market Rule Prohibits Only Full Commercial Operations, Not Band Entry Activity**

As stated by the Commission, the Top 30 Market Rule requires MSS licensees to relocate the BAS incumbents in the top 30 markets in the United States, as well as all fixed BAS links, prior to beginning operations.⁴⁰ As the parties started to experience delays in the BAS relocation process, the MSS entrants became concerned over the interplay between the Top 30 Market Rule with the system milestones they were required to certify to the Commission. To avoid confusion as to when or whether the MSS licensees might violate the Rule, the Commission contrasted

³⁷ *July 3, 2000 Order*, ¶ 31 (emphasis added).

³⁸ *Id.* ¶ 34.

³⁹ *Id.* ¶ 27.

⁴⁰ *March 5, 2008 Order*, ¶ 39.

testing transmissions that could be considered “operations” for certification requirements under Defendants’ licenses with “full commercial operations” that would violate the Top 30 Market Rule.⁴¹

Specifically, the Commission made clear that, because no prior rules or orders addressed whether testing or broadcasts “would constitute ‘operations’ for the purposes of the top 30 market rule,” the Commission would clarify that testing would not constitute “operations” for determining whether an MSS licensee had violated the Rule, but could constitute operations for other requirements such as milestone certifications.⁴² In other words, the Commission explained that, when considering only possible violations of the Top 30 Market Rule, it would distinguish between “operational” for the purposes of transmissions, testing, and system certification (which were still permissible under the Rule), and “full commercial operations” that violated the Rule.⁴³

Consequently, the Commission held that Defendants’ satellite systems could be considered “operational” based on spectrum transmissions for certification purposes, but not violate the Top 30 Market Rule.⁴⁴ Thus, the Commission’s analysis defeats ICO’s own argument, for the Commission considers systems to be operational based on, among other things, transmissions in the band, even if they do not violate the Top 30 Market Rule.⁴⁵ Indeed, ICO’s

⁴¹ *Id.* ¶ 48.

⁴² *Id.* ¶ 47 (emphasis added).

⁴³ *Id.* ¶ 48.

⁴⁴ *Id.*

⁴⁵ Similarly, in filings before the Commission, ICO itself does not view the Top 30 Market Rule as a bright line prohibition. For example, ICO argued that, in adopting the existing Sprint-BAS relocation plan, the Commission had held that “[i]f MSS licensees begin operations before all BAS incumbents are relocated, we expect that MSS and BAS licensees will work together to minimize interference; however, MSS licensees would have to accept interference from the remaining BAS users until they are relocated.” *800 MHz Order*, ¶ 270. ICO then went on to

theory that all types of operations violate the Top 30 Market Rule is explicitly contrary to the Commission's view. In other words, the Commission has stated that the very band entry activities alleged in Sprint's Complaint, and which are uncontested by Defendants, were not violative of the Rule that Defendants argue prevents them from entering the band.

Consistent with the Commission's policy on these issues, the *800 MHz Order* does not require an entrant to engage in full commercial operations in order to trigger the reimbursement obligation. Specifically, the Order states:

We have decided to generally follow the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit, except as discussed below. Therefore, the first entrant may seek reimbursement from subsequently entering licensees for a proportional share of the first entrant's costs in clearing BAS spectrum, on a pro rata basis according to the amount of spectrum each licensee is assigned. Consequently, [Sprint] is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period.⁴⁶

Compared to commencement of full commercial operations, band entry is a significantly reduced hurdle to clear in order to trigger reimbursement expenses. Thus, band entry only requires Defendants to each have engaged in any form of activity, process, operations or transmissions either in or related to the spectrum, and does not require Defendants' conduct to rise to the level of full, ongoing commercial operations and service simultaneously in all the top markets, as contemplated under the Top 30 Market Rule.⁴⁷

claim that "the Commission expressly contemplated that 2 GHz MSS and BAS licensees could co-exist even if all markets have not been cleared." See ICO Notice of Ex Parte, WT Docket No. 02-55, *et al.*, (Feb. 26, 2008), at 2-3 (attached hereto as **Exhibit 8**). ICO has also indicated it can nonetheless operate on a "secondary" basis in markets where the BAS incumbent has not yet been relocated and remains the primary licensee. See *March 5, 2008 Order*, ¶ 40.

⁴⁶ *800 MHz Order*, ¶ 261 (emphasis added).

⁴⁷ For example, with regard to subsequent band or market "entrants," when analyzing

Turning to the Commission statements that ICO contends permit Defendants to avoid their reimbursement obligations, these statements relate solely to the Commission's analysis of which activities might violate the Top 30 Market Rule, not which activities trigger reimbursement obligations. Whether Defendants to date have avoided violating the Top 30 Market Rule is irrelevant to the fact that they have nonetheless triggered their reimbursement obligations by engaging in operations and entering the band through conduct that includes significant planning, testing, construction, build out, and transmission. Defendants should be required to reimburse amounts due and owing, and which they have been on notice of their duty to remit since the issuance of the *800 MHz Order*, and certainly since Sprint filed its Commission-mandated reimbursement notice in March of 2006. ICO's Motion should be denied.

3. **The Commission Has Demonstrated That the Top 30 Market Rule Does Not Preclude Recovery of Reimbursements**

The Commission's orders demonstrate the numerous fallacies underpinning ICO's mistaken reliance on the Top 30 Market Rule. For example, on December 22, 2004, TerreStar filed a self-styled "Joint Request for Clarification" of the *800 MHz Order*.⁴⁸ TerreStar was

competition in the satellite services market, the Commission routinely uses a far lower standard than that contained in the narrow Top 30 Market Rule to determine whether an entity can be considered an entrant. *See In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Domestic and International Satellite Communications Services*, First Report, 22 FCC Rcd. 5954, 2007 WL 1288687, ¶¶ 82-83 (Mar. 26, 2007) ("Entry is the construction of new facilities and/or the offering of service by a participant who was not in the market before. An entrant is a new market participant that can add capacity and competition to the relevant market in which it participates. Generally, entry is considered significant if a participant can enter the market within two years from initial planning to significant market impact. ... Entry relevant to this Report can occur, however, in new satellites that have moved far enough through the entry process that they will begin providing service within two years...") (Emphasis added) (attached hereto as **Exhibit 9**).

⁴⁸ *See Joint Request for Clarification*, WT Docket No. 02-55 *et al.*, (Dec. 22, 2004) (attached hereto as **Exhibit 10**).

concerned that the reimbursement obligations to Sprint contained in the *800 MHz Order* “makes this [BAS reimbursement] obligation open-ended because it is currently unclear when this 36-month period will commence” and claimed that “any delay in the start of the 36-month period will also move back the reimbursement cut-off date for MSS licensees.”⁴⁹ To assuage TerreStar’s concerns about uncertainty as to its reimbursement obligations to Sprint, the Commission stated in a subsequent order that “[t]o address potential MSS licensees’ concerns of uncertainty regarding their reimbursement obligations to [Sprint], the Commission required [Sprint] to inform the Commission and MSS licensees, twelve months after the effective date of the [800 MHz Order], whether or not it will be seeking reimbursement from the MSS licensees.”⁵⁰

As the Commission noted, this 12-month reimbursement notification period coincided with Sprint’s *first* status report as to its BAS relocation efforts – well in advance of any end date for the calculation of reimbursement and well in advance of the anticipated time frame for clearing all top 30 markets.⁵¹ In other words, the Commission authorized Sprint to notify both the Commission and Defendants that it would seek reimbursements from Defendants years before Defendants could ever have been in a position to comply with the Top 30 Market Rule, a fact that gives lie to ICO’s claim that the Commission somehow intended the Rule to be a precondition to triggering reimbursement.⁵² Indeed, it is particularly telling that the Commission

⁴⁹ *Id.* at 6-7.

⁵⁰ *See October 5, 2005 Order*, ¶ 113 (emphasis added).

⁵¹ *Id.*, n.317.

⁵² In compliance with the *800 MHz Order*, on March 7, 2006, Sprint filed and circulated a letter notifying the FCC, ICO, and TerreStar’s predecessor in interest that it would seek reimbursement from Defendants for the clearing costs incurred related to the 1990 – 2020 MHz band. *See* March 7, 2006 Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to

enacted this notice requirement precisely because one of the current Defendants sought clarification as to the extent and relevant time periods for its reimbursement obligations. The Commission's response was straightforward: Sprint will (and subsequently did) notify the Commission and the MSS licensees when it intends to seek reimbursement, well in advance of the operation of any of the rules Defendants now claim preclude reimbursement.⁵³

The Commission has similarly rejected Defendants' various other efforts to evade their reimbursement obligations. For example, in the *October 5, 2005 Order*, the Commission further addressed "[TerreStar]'s argument that an MSS licensee that enters after [Sprint]'s thirty-month BAS relocation deadline should be relieved of its reimbursement obligation to [Sprint]" on the grounds that Sprint might receive a credit for relocation costs.⁵⁴ The Commission held that it saw "no benefit in a proposal that would relieve an MSS licensee from paying its established BAS relocation obligation simply because [Sprint] will be receiving credit for relocation costs" and noted that "[f]urther, ... the Commission has adhered to the cost sharing principle that the

Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, *et al.*, at 1 ("Sprint Nextel Corporation ... hereby informs the Federal Communications Commission ... and Mobile Satellite Service ('MSS') licensees that it will seek reimbursement from MSS licensees for eligible costs Sprint Nextel incurs in clearing the 1990 – 2025 MHz band, as provided in paragraphs 261 and 352 of the [800 MHz Order] Sprint Nextel is providing this notice to the two remaining MSS licensees at 2 GHz, New ICO Satellite Service G.P. and TMI Communications and Company L.P.") (attached hereto as **Exhibit 11**).

⁵³ In addition, the *March 5, 2008 Order* inherently presupposes that the Defendants could broadcast in certain of the top 30 markets despite the rule. See *March 5, 2008 Order*, ¶ 43 (requiring Sprint to transition certain "high priority" markets as identified by the MSS operators, and to do so prior to September 30, 2008 in order to "alleviate the hardship imposed on MSS by the prospect of continued BAS operations in the band after January 1, 2009").

⁵⁴ *Id.* ¶ 110.

licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit.⁵⁵

Nor did the Commission end its inquiry there. In keeping with other decisions, the Commission then actually defined the *pro rata* share it expected Defendants to pay: “the MSS licensees’ *pro rata* share, collectively, represents the cost to relocate BAS incumbents from four-sevenths of the spectrum ...”⁵⁶ More recent orders have reconfirmed the *pro rata* share on which the Commission expects Defendants to pay based on their current systems.⁵⁷

D. The Top 30 Market Rule Is Not Relevant to Defendants’ Reimbursement Obligations to Sprint

Not only is the “commercial operations” standard of the Top 30 Market Rule different from the standard for entering the band, there is strong evidence that the Top 30 Market Rule does not even apply to Sprint-led BAS relocations. The Commission’s historical approach to the BAS relocation provided for two general avenues by which the BAS incumbents were to be relocated. Prior to Sprint’s engagement in the process in 2004, the MSS licensees themselves were supposed to be performing the BAS relocation, an independent and existing duty the Commission has continued to reaffirm.⁵⁸ Thus, with the FCC’s authorization of Sprint in 2004,

⁵⁵ *Id.* ¶¶ 110, 111 (emphasis added).

⁵⁶ *Id.* ¶ 111.

⁵⁷ *See, e.g., March 5, 2008 Order*, ¶ 16 n.36 (“Because there are two authorized MSS systems in the 2000-2020 MHz MSS band, each MSS operator is assigned 10 MHz of spectrum. ... The *pro rata* share of each MSS operator will be 2/7 of the total 35 megahertz of spectrum.”) (emphasis added).

⁵⁸ *See, e.g., March 5, 2008 Order*, ¶ 13 (“We note that when Sprint Nextel undertook its commitment to relocate the BAS licensees, the Commission did not remove the obligation of the MSS entrants to relocate the BAS licensees, nor the procedures that had already been put in place for doing so.”); *Id.*, ¶ 39 (“In 2004 when the Commission established BAS relocation obligations for Sprint Nextel, we did not alter ‘the underlying relocation rules that we established for MSS entrants to undertake the relocation of BAS incumbents[.]’”); *800 MHz Order*, ¶ 250

the MSS entrants were faced with a choice: either (1) relocate BAS incumbents themselves at their own cost (the MSS plan), or (2) let Sprint perform the relocation and then reimburse Sprint for their *pro rata* portion of the relocation costs. Or, as ICO itself described the process, "... the Commission expressly noted that 2 GHz MSS licensees could choose not to relocate BAS licensees and allow Sprint to take the lead, subject to Sprint's right to seek reimbursements from 2 GHz licensees at a later date."⁵⁹ Not surprisingly, Defendants elected the latter approach, permitting Sprint to take the lead on relocation efforts and expenses, but they have not stepped up to their reimbursement obligations, as they attempt to leave Sprint holding the bill for Defendants' own relocation expenses and benefits.⁶⁰

The Commission has never held that the Top 30 Market Rule applies in any way to the reimbursement obligations owed to Sprint under Sprint-led relocations. Indeed, Defendants have challenged the application of the Rule in the context of the Sprint-led BAS relocation, calling it

("As an initial matter, we are not altering the underlying relocation rules that we established for MSS entrants that undertake the relocation of BAS incumbents from the 1990-2025 MHz band and MSS licensees will continue to follow the procedures that the Commission adopted in the MSS Third R&O when relocating BAS incumbents. We are, however, modifying on reconsideration one aspect of the existing MSS plan to relocate BAS incumbents in order to allow Nextel to enter into the band and to address BAS relocation issues raised in the petitions for reconsideration of the MSS Third R&O. By retaining the existing MSS relocation rules but also overlaying procedures by which Nextel may relocate BAS incumbents, we will be able to ensure the continuity of BAS during the transition.") (emphasis added).

⁵⁹ ICO's Comments and Request for Expedited Relief, WT Docket No. 02-55, *et al.*, (Apr. 13, 2007), at 4 (emphasis added) (attached hereto as **Exhibit 12**).

⁶⁰ As recognized by the FCC, Defendants have made no substantive effort to engage in the BAS relocation process, and have been content to allow Sprint to incur all the costs for the relocation apparently in hopes that they will avoid their obligations entirely and enjoy a windfall in the form of cleared spectrum for which they made no effort or direct expenditures. *See, e.g., March 5, 2008 Order*, ¶ 31 (noting that at the time Sprint's relocation plan was approved in 2004, for despite years of authorization there was "no record of meaningful negotiations or relocation activities having taken place between MSS and BAS ...").

“obsolete” in the context of Sprint-led relocation efforts.⁶¹ Indeed, Defendants manipulate the Top 30 Market Rule in an effort to meet the perceived risks of the moment. Before the Commission, Defendants characterized the Rule as irrelevant and overtaken by events, while before the Court, they manipulate the language in an effort to avoid obligations. The Court should reject Defendants’ efforts to “game” the Top 30 Market Rule.

E. Sprint’s Alternative Claims Are Valid and Properly Pled

ICO’s Memorandum in Support (“ICO’s Memorandum”) finally asserts that Counts II – V in Sprint’s Complaint must fail as well, under the apparent theory that an express contractual arrangement exists between the parties and governs their rights and duties.⁶² Moreover, ICO asserts that because the FCC rulings already address Sprint’s claims, Sprint cannot rely on implied contractual rights.⁶³ This argument must be rejected, on several grounds.

As a fundamental matter, Counts II (Unjust Enrichment/Quasi Contract), III (Quantum Meruit), and IV (Estoppel/Detrimental Reliance)⁶⁴ are each pled in the alternative to Count I,

⁶¹ ICO has previously argued that the Top 30 Market Rule is irrelevant to Sprint’s BAS relocation process. In filings before the Commission, ICO argued that the Top 30 Market Rule has become “obsolete,” and that requiring an initial transition of the top 30 markets by MSS entrants is “out of step with the original Sprint-BAS relocation plan as well as the revised Sprint-BAS relocation plan because these plans prioritize clearing by market-based clusters, rather than by the top 30 markets.” *Comments of New ICO Satellite Services G.P., WT Docket 02-55, et al.*, (Apr. 30, 2008), 6 (attached hereto as **Exhibit 13**). The Commission rejected ICO’s argument, but only with regard to ICO’s claims that the Rule did not apply unless the MSS entrants initiated involuntary relocations. *March 5, 2008 Order*, ¶ 39.

⁶² ICO’s Memorandum, at 10.

⁶³ *Id.* at 11.

⁶⁴ Count V, a request for a permanent injunction as to both Defendants, was not pled in the alternative because, as stated in the Complaint, no other adequate remedy exists at law to enjoin Defendants’ ongoing efforts to avoid their reimbursement obligations to Sprint. *See* Complaint, ¶ 97. In addition to the Court’s inherent equitable powers, the Communications Act expressly empowers and directs the Court to issue such an injunction. *See, e.g.*, 47 U.S.C. § 401(b) (“If, after hearing, that court determines that the order was regularly made and duly served, and that

which seeks enforcement of the FCC Orders and recovery of the reimbursements owed to Sprint thereunder.⁶⁵ Under Fed. R. Civ. P. 8, a party may state as many claims as it has regardless of consistency, and alternative claims may be made; a pleading is therefore sufficient “if any one of them is sufficient.”

Moreover, the factual basis for ICO’s “express contract” theory is unknown. ICO cites to various cases advancing the unremarkable proposition that equitable remedies are typically not available when an express contract governs the relationship between the parties, but ICO fails to identify any such contract.⁶⁶ Sprint’s Complaint does not plead breach of contract, and ICO does not identify any purported contract; describe the alleged contract’s consideration; identify the alleged contract’s scope, duration or terms; or describe any related duties or obligations.⁶⁷

Defendants are certainly under an obligation to Sprint based on the Commission’s orders, which Defendants, and their agents and employees, are required to observe and comply with under 47 U.S.C. § 416(c). However, one may scour ICO and TerreStar’s respective memoranda in vain for any argument that the Commission’s orders or the parties’ actions thereon amount to or are based on an express, written contract between Sprint and Defendants that might serve to preclude certain claims based in equity.

the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.”) (emphasis added).

⁶⁵ See Complaint, ¶¶ 77, 83, 89.

⁶⁶ ICO’s Memorandum, at 10.

⁶⁷ Indeed, given Defendants’ apparent view that Sprint should spend hundreds of millions of dollars to clear the band for them with no corresponding duties or obligations flowing from Defendants, any such “contract” would be void for want of consideration.

Notably, ICO does not dispute that Sprint properly pled the various elements of its alternative claims, but merely alleges that such claims are in effect barred due to the alleged existence of an express contract.⁶⁸ However, the cases cited by Defendants involve actual express, written agreements directly between the parties, rather than duties and obligations flowing from express agency orders.⁶⁹

ICO also claims that the same “principles” apply where the “express agreement is a result of a statutory or regulatory scheme” – a strange effort to argue that the FCC orders establish a “regulatory scheme” that exclusively governs the very reimbursements that Defendants assert they do not owe, and can never owe, due to the supposed applicability of the Top 30 Market Rule. In other words, ICO contradicts itself when on one hand ICO argues that an express contract governs the relationship of the parties sufficient to preclude equitable remedies, yet on the other hand argues that Sprint’s activities and claimed reimbursements fall outside the FCC’s orders requiring ICO and TerreStar to provide reimbursements. If for some reason the Court were to be persuaded by ICO’s argument that it cannot have triggered reimbursements to Sprint “as a matter of law,” then the costs Sprint seeks necessarily fall into the realm of equitable remedies outside the purview of the FCC’s orders, for these equitable remedies constitute an entirely sufficient and independent grounds for recovery. Furthermore, the cases ICO cites in alleged support of its claim that a “regulatory scheme” precludes equitable remedies are not relevant to this proceeding.⁷⁰

⁶⁸ ICO’s Memorandum, at 10.

⁶⁹ See, e.g., *W.R.H. Mortgage v. S.A.S. Associates*, 214 F.3d 528 (4th Cir. 2000) (action brought on contractual claim based on “Construction, Loan and Lease Agreement” to build bank branch); *Centex Constr. v. Acstar*, 448 F. Supp. 2d 697 (E.D. Va. 2006) (contract claim based on express written subcontract).

⁷⁰ In *Vollmar v. CSX Transp.*, 898 F.2d 413, 417 (4th Cir. 1989), the court reviewed claims

The Communications Act does not preclude the use or availability of equitable jurisdiction or remedies. Indeed, 47 U.S.C. § 401(b), one of the grounds upon which Sprint brought suit, specifically invokes the equity jurisdiction of the Court.⁷¹ The Supreme Court has

by railroad workers that a Memorandum of Understanding established contractual rights between the workers and their railroad employer which obligated the employer to repay retirement funds the employer had contributed and then received back as refunds. *Id.* at 416. In rejecting a related claim for unjust enrichment, the court disagreed with the workers' claim that the railroad had a mutual understanding as to the benefits conferred, an element of the claim. *Id.* at 417. Instead, the court held that the only understanding between the parties was that expressed in the Memorandum of Understanding, which only justified an expectation in the workers that the railroad would contribute as contemplated under the governing statute. *Id.* Contrary to ICO's claims, the court did not reject the unjust enrichment claim out of hand, but did so based only the theory that an existing statutory mechanism that clearly expressed the will of Congress served to limit the parties' expectations and impacted the necessary elements of the claim.

In *Iowa Network Serv. Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 899, 907-8 (S.D. Iowa 2005), one intermediate mobile call carrier brought a collection action against another interconnecting carrier for the calls the latter routed over the former's network without providing related compensation. *Id.* at 858. Generally, interconnecting carriers can charge one another either "reciprocal compensation" fees, or "access" fees. Reciprocal compensation fees could be set by contract, while access fees are set by the tariffs carriers are required to file with the FCC and Iowa's regulatory agency. *Id.* at 859, 865-66. Because Iowa's state agency determined that the plaintiff carrier should seek its compensation through a negotiated interconnection agreement, "a viable common law unjust enrichment claim sufficient to survive summary judgment may be negated if there exists an express contract." *Id.* at 908. Consequently, the court held that a related unjust enrichment claim depended on resolution of various contractual and tariff issues, and that the regulatory agency's actions in directing negotiation provided a framework under which the plaintiff "will be compensated" for the traffic directed over its network. *Id.* at 909. That scenario is quite different from the one facing the Court here, where no express contract or tariff applies, and Defendants are advocating a scenario under which Sprint would receive nothing, which defeats any claim that despite Defendants' refusal to comply with the *800 MHz Order* some general regulatory scheme or mechanism nonetheless exists to "resolve[]" Sprint's demands for reimbursement and provide Sprint with its fair reimbursements. *Id.* The *Iowa Network* court in fact noted that "[t]he FCC has acknowledged the potential availability under state law of unjust enrichment and quantum meruit in the absence of an applicable tariff." *Id.* at 908.

⁷¹ "If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same." 47 U.S.C. § 401(b) (emphasis added).

stated that, when a statute invokes the equity jurisdiction of a court, “[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.”⁷² Moreover, the “comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”⁷³ In short, the Communications Act itself empowers this Court to grant the equitable remedies Sprint seeks, irrespective of Defendants’ claims of an “express contract” between the parties.

Even if the Court were to stay this action and refer it to the FCC, or otherwise dismiss Count I, it is uncontested that Sprint has expended vast amounts of time, effort, and money in clearing the portions of the 1990-2020 MHz band that Defendants currently occupy, and that Defendants have been on notice of, and have accepted, said efforts and benefits for some time as more fully set forth in Sprint’s Complaint.⁷⁴ Sprint has at all times endeavored in good faith to fulfill its duties under the pertinent FCC orders, and Defendants should be compelled to do the same through immediate enforcement of the orders. Absent that, the Court should permit Sprint

⁷² See *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (district court could enter order compelling restitution of payments once its equitable jurisdiction had been invoked by statute) (emphasis added).

⁷³ *Id.*; see also *United States v. Universal Mgmt. Serv., Inc.*, 191 F.3d 750, 760-62 (6th Cir. 1999) (collecting cases); *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 502-03 & n.7 (S.D.N.Y. 2000) (in context of Communications Act, *Porter* “stands for the proposition that this Court may exercise its inherent equitable powers once its equity jurisdiction is invoked and the scope of such jurisdiction is not limited by a clear statement from Congress.”).

⁷⁴ As previously noted, Sprint incorporates by reference its response to TerreStar’s Motion, and refutes ICO’s related assertions that this suit should be stayed or referred to the FCC. ICO and TerreStar do not claim that the Commission’s governing orders are ambiguous or inapplicable, and recourse to the FCC is not necessary. The Communications Act expressly empowers Sprint to bring suit to enforce those orders, and empowers this Court to render judgment upon them.

to recover its expended costs and reimbursements from Defendants through the prosecution of its alternative claims.

V. **CONCLUSION**

Defendants have failed to establish any of their defenses, and Defendants have plainly failed to do so under the standards for consideration a motion to dismiss under Fed. R. Civ. P. 12(b)(6). For the reasons discussed above, ICO's Motion should be denied.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

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Dated: August 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and pursuant to agreement among counsel, copies will be sent via e-mail to those indicated as non-registered participants on this 15th day of August, 2008.

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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

SPRINT NEXTEL CORPORATION,

Plaintiff,

v.

Civil Action No.: 1:08-cv-651

NEW ICO SATELLITE SERVICES G.P.

LMB/TRJ

and

TERRESTAR NETWORKS INC.,

Defendants.

**SPRINT NEXTEL'S BRIEF IN OPPOSITION TO DEFENDANT
TERRESTAR NETWORKS INC.'S MOTION TO DISMISS**

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Sprint Nextel Corporation (“Sprint”) submits this brief in opposition to Defendant TerreStar Networks Inc.’s (“TerreStar”) motion to dismiss the complaint for failure to state a claim and, in the alternative, to dismiss based on a failure to exhaust administrative remedies or based on the doctrine of primary jurisdiction (“TerreStar’s Motion”).¹ For the reasons set forth below, TerreStar’s Motion should be denied.

I. INTRODUCTION

Sprint commenced this action pursuant to 47 U.S.C. §§ 401(b) and 407 to enforce a final order issued by the Federal Communications Commission (the “FCC” or “Commission”). In particular, Sprint seeks to enforce the FCC order stating:

We have decided to generally follow the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit, except as discussed below. Therefore, the first entrant may seek reimbursement from subsequently entering licensees for a proportional share of the first entrant’s costs in clearing BAS spectrum, on a pro rata basis according to the amount of spectrum each licensee is assigned. Consequently, [Sprint] is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during the 36-month reconfiguration period from MSS licensees that enter the band prior to the end of that period.²

Accordingly, this case involves a conventional judicial analysis concerning the enforcement of a valid order, and the Court will simply be assessing: (1) whether the Defendants have triggered their reimbursement obligations by entering the band; and (2) how the remedy against Defendants should be crafted. This straightforward analysis is properly before this Court

¹ TerreStar’s Motion also purports to adopt and incorporate by reference the motion to dismiss filed by Defendant New ICO Satellite Services G.P. (“ICO”) (collectively, “MSS entrants” or “Defendants”). See Motion, at 1. Sprint is filing a separate Brief in Opposition to ICO’s Motion to Dismiss, and Sprint hereby adopts and incorporates its Opposition to ICO’s Motion, including the standard for review.

² See *Improving Public Safety Communications in the 800 MHz Band: Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd. 14969, 2004 WL 1780979, ¶ 261 (2004) (“800 MHz Order”) (emphasis added).

pursuant to the Communications Act of 1934, and there is no basis for voluntarily relinquishing this Court's jurisdiction to the FCC.

II. FACTS

A brief summary of the pertinent facts establishes that this is an action that should be decided by this Court.³ Sprint, pursuant to the orders issued by the FCC, has retuned Broadcast Auxiliary Service ("BAS") incumbents in the 1990-2025 MHz band (the "Spectrum") to another part of the band.⁴ Sprint is funding the entire cost of relocating all BAS incumbents nationwide to another part of the band, and the *800 MHz Order* is a final order that specifically authorizes Sprint to seek reimbursement from subsequently entering licensees for their *pro rata* share of Sprint's costs.⁵

Defendants TerreStar and ICO are two Mobile Satellite Service ("MSS") licensees that have entered the band cleared by Sprint.⁶ As a result, Sprint formally requested from each of these parties that they reimburse Sprint in accordance with the *800 MHz Order*.⁷ In direct contravention of the *800 MHz Order*, the Defendants have refused to reimburse Sprint for their *pro rata* share of Sprint's costs to clear the BAS spectrum, and Defendants have further indicated they have no intention of reimbursing Sprint.⁸ Accordingly, Sprint commenced this action

³ A more complete discussion of the relevant facts is set forth in Sprint's Brief in Opposition to ICO's Motion to Dismiss.

⁴ Complaint, ¶ 3.

⁵ Complaint, ¶¶ 4, 18-20.

⁶ Complaint, ¶¶ 62-75.

⁷ Complaint, ¶¶ 37, 57.

⁸ Complaint, ¶¶ 38, 58.

pursuant to 47 U.S.C. §§ 401(b) and 407 to enforce the *800 MHz Order* and to recover from the Defendants their *pro rata* share of Sprint's costs.⁹

In sum, this is a straightforward complaint to enforce the FCC's *800 MHz Order* and its progeny. Sprint has expended funds, Sprint is entitled to reimbursement of those funds under the *800 MHz Order*, and Sprint asks this Court to enforce the FCC's orders.

III. STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should only be granted in "very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). Upon such a motion, the court must accept the complaint's factual allegations as true, and must construe each allegation in the light most favorable to the plaintiff. *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). As a general principle, a court should not grant a motion to dismiss for failure to state a claim unless it appears to a certainty that the plaintiff cannot prove any set of facts that would support its claim and entitle it to relief. *Rogers*, 883 F.2d at 325.

The court's inquiry is limited to whether the plaintiff's allegations constitute "a short and plain statement of the claim showing that the pleader is entitled to relief" pursuant to Fed. R. Civ. P. 8(a)(2). *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (internal quotations omitted). "The purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Simply put, the issue on the motion is not whether Sprint will ultimately prevail, or even if Sprint is likely to prevail,

⁹ Complaint, ¶¶ 62-75.

but whether Sprint is entitled to the opportunity to offer evidence in support of its claims.

Revene v. Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989). Under these standards, TerreStar's Motion must be denied.

IV. ARGUMENT

TerreStar has raised two arguments in addition to those of Defendant ICO: (i) that Sprint has failed to exhaust its administrative remedies prior to bringing this action; and (ii) that this Court should voluntarily relinquish its jurisdiction over this action in favor of the FCC under the doctrine of primary jurisdiction. Sprint's claim is properly before this Court pursuant to both statute and case law, and the Court should reject TerreStar's arguments.

A. The Doctrine of Exhaustion of Administrative Remedies Does Not Apply to Sprint's Claims

TerreStar argues that Sprint's only option to compel compliance with the *800 MHz Order* is to seek redress through the FCC.¹⁰ This argument must be rejected, as it ignores both the statutory basis for Sprint's claim and pertinent case law.

As a threshold matter, Defendants fail to identify the supposed "remedies" that Sprint is allegedly required to exhaust. Rather, TerreStar merely speculates as to the various actions Sprint could take before the Commission, if Sprint so elected.¹¹ While Sprint has repeatedly maintained and reasserted its position on the reimbursements it is owed under the FCC's orders in subsequent filings before the Commission, Sprint did so in order to preserve its rights in the face of various FCC filings by Defendants, and Sprint has not challenged the uncontested orders from which the reimbursement rights flow. As a result, this is not a situation where Sprint or

¹⁰ See TerreStar's Memorandum, at 7-9.

¹¹ See TerreStar's Memorandum, at 8 (noting that Sprint has "several administrative remedies available").

Defendants are challenging the FCC's orders. To the contrary, the orders are valid and in effect, and Sprint requests that the Court enforce them.

Simply put, TerreStar is unable to show that Sprint must exhaust any remedies before the agency, because Sprint is statutorily authorized to seek enforcement of a final FCC order in federal district court.¹² In particular, the *800 MHz Order*, as well as its progeny, is a final order in effect and applicable to Sprint and Defendants, and the Communications Act is explicitly identified as the basis for Plaintiff's Complaint. Complaint, ¶¶ 11, 64.

The statutory authority of the Communications Act takes Sprint's claim outside the doctrine of the exhaustion of administrative remedies under any formulation of that doctrine. The first principle of the exhaustion doctrine is that it requires parties to "exhaust prescribed administrative remedies" before seeking relief from the federal courts.¹³ In other words, application of the exhaustion doctrine is required when "Congress imposes an exhaustion requirement by statute."¹⁴

In this case, an express exhaustion requirement does not exist. No applicable statute or regulation requires the exhaustion of administrative remedies that might be available before seeking enforcement of the *800 MHz Order* under 47 U.S.C. § 401(b). In fact, TerreStar tacitly acknowledges this fact by failing to identify any mandatory administrative process that Sprint

¹² See 47 U.S.C. § 401(b) ("If any person fails or neglect to obey any order of the Commission . . . , any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.").

¹³ *AES Sparrow Point LNG, LLC v. Smith*, 527 F.3d 120, 125 n.7 (4th Cir. 2008) (rejecting exhaustion claim where court could identify no mandatory administrative remedy that party failed to exhaust) (emphasis in original).

¹⁴ *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989) (internal citation omitted).

failed to exhaust prior to commencing this action. Accordingly, administrative exhaustion is not required on the grounds that an exhaustion requirement must be explicitly imposed by statute.

The second facet of the exhaustion doctrine is that when Congress does not expressly impose an exhaustion requirement, “courts are guided by congressional intent in determining whether application of the [exhaustion] doctrine would be consistent with the statutory scheme.”¹⁵ Nevertheless, the Supreme Court has been clear that in assessing congressional intent, “a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.”¹⁶ Thus, congressional intent is determinative of whether application of the exhaustion doctrine is warranted in cases where federal administrative remedies are available, but not mandatory.¹⁷

In this case, the intent of Congress could not be plainer. The Communications Act expressly authorizes injured parties to seek judicial enforcement of FCC orders regardless of the availability of administrative remedies:

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order.¹⁸

This straightforward language is mirrored in the case law, which holds that for § 401(b) to apply, Sprint need only show that the order in question is “an FCC order within the meaning of the

¹⁵ *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 502 n.4 (1982).

¹⁶ *Id.*, 457 U.S. at 501-02.

¹⁷ *Id.* at 502 n.4.

¹⁸ 47 U.S.C. § 401(b) (emphasis added).

Act.”¹⁹ Although some disagreement among the Circuits exists, the Fourth Circuit has joined the majority of courts in holding that an order resulting from an FCC rulemaking proceeding, such as the one in question here, is an order within the meaning of § 401(b).²⁰

In sum, Sprint is expressly authorized to prosecute this action in a federal district court regardless of the availability of administrative remedies because the *800 MHz Order* is “an order” for purposes of § 401(b). There is nothing in the Communications Act that requires exhaustion or that identifies an intent to exhaust. As a result, TerreStar’s exhaustion of administrative remedies argument fails, for its application in these circumstances would destroy the statutory grant of enforcement power provided by § 401(b).²¹

Consistent with the statutory basis for Sprint’s claim, TerreStar’s reliance on *Cavalier Telephone, L.L.C. v. Virginia Electric and Power Co.*, 303 F.3d 316 (4th Cir. 2002) to support its argument is misplaced. Indeed, a review of the facts in *Cavalier Telephone* establishes that it is clearly distinguishable from the instant case. In *Cavalier Telephone*, the plaintiff filed a complaint in federal district court to enforce an order entered by the Cable Services Bureau (“CSB”) of the FCC, not an order issued by the FCC. The CSB order was issued in response to a complaint filed by the plaintiff alleging violations of the Pole Attachment Act, 47 U.S.C. § 224.

¹⁹ *AT&T v. MCI*, No. 93-1147, 1993 U.S. Dist. LEXIS 9084, *3-4 (D.D.C. 1993) (citations omitted); *see also S. Cent. Bell Tel. Co. v. La. Pub. Serv. Comm’n*, 744 F.2d 1107, 1114-15 (5th Cir. 1984); *S.W. Bell Tel. Co. v. Ark. Pub. Serv. Comm’n*, 738 F.2d 901 (8th Cir. 1984).

²⁰ *See Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm’n*, 758 F.2d 879, 880-81 (4th Cir. 1984). Similarly, in *Alltel Tenn., Inc. v. Tennessee Pub. Serv. Comm’n*, 913 F.2d 305, 308 (6th Cir. 1990), the court noted that nearly every Circuit that has addressed this issue has either implicitly or expressly found that an order resulting from a rulemaking proceeding “may be an order under § 401(b).” *Id.* (collecting cases).

²¹ As a general matter, courts should also to give weight to the plaintiff’s right to the selection of forum. *See, e.g., Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984) (“...unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed”).

As part of its authority under the Pole Attachment Act, the FCC has promulgated express enforcement procedures, 47 C.F.R. §§ 1.1401-1.1418, to govern the process whereby pole attachment disputes are resolved. But instead of following the Pole Attachment Enforcement Procedures, the plaintiff filed an action in the federal court to enforce the CSB order. Not surprisingly, the Fourth Circuit held that the plaintiff failed to exhaust the administrative remedies because plaintiff did not first avail itself of the Pole Attachment Enforcement Procedures.

Cavalier Telephone is plainly inapposite to this case. Sprint's Complaint does not involve the attachment of wires to poles, a situation contemplated and governed by the Pole Attachment Act. Sprint is seeking to enforce an order issued by the FCC, not the CSB, and Congress has expressly authorized parties to enforce final FCC orders by bringing civil actions in federal district court. Moreover, the FCC has not promulgated specific enforcement procedures in this situation, such as the Pole Attachment Enforcement Procedures at issue in *Cavalier Telephone*.

With no support in the statute, regulations, or case law, TerreStar's Motion should be denied as to exhaustion of remedies.

B. The Doctrine of Primary Jurisdiction Does Not Require Referral of Sprint's Case to the FCC

TerreStar argues in the alternative that this Court should adopt the doctrine of primary jurisdiction to relinquish its lawful jurisdiction over this action and refer the case to the FCC. The Court should decline TerreStar's invitation.

The doctrine of primary jurisdiction does not implicate the subject matter jurisdiction of the federal courts. Instead, it is "a prudential doctrine under which a court may, under appropriate circumstances, determine that the initial decision-making responsibility should be

performed by the relevant agency rather than the courts.”²² The purpose of the primary jurisdiction doctrine is to “coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional expertise of judges or cases which require the exercise of administrative discretion.”²³ In applying this doctrine, the courts must “balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceeding.”²⁴

In analyzing the doctrine of primary jurisdiction, courts have held that “[n]o fixed formula has been established for determining whether an agency has primary jurisdiction.”²⁵ Thus, to determine whether the doctrine should apply in any given case, courts have identified four factors to consider: (1) whether the question at issue is within the conventional experience of judges or within the agency’s particular field of expertise; (2) whether the question at issue is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.²⁶ Applying these four factors to the instant case, this Court should retain jurisdiction over this action.

²² *Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002); see also *Advantel, LLC v. AT&T Corp.*, 105 F.Supp. 2d 507, 511 (E.D. Va. 2000).

²³ *Advantel*, 105 F.Supp.2d at 511 (quoting *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir.1996)).

²⁴ *Id.* (citing *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 321, 93 S.Ct. 573 (1973)).

²⁵ *Nat’l Communications Ass’n, Inc. v. AT&T*, 46 F.3d 220, 223 (2d Cir. 1995); *Global Naps N.C., Inc. v. Bellsouth Telecomm., Inc.*, 455 F.Supp. 2d 447, 448 (E.D.N.C. 2006).

²⁶ See *Nat’l Communications*, 46 F.3d at 222; see also *Global Naps*, 455 F. Supp.2d at 448.

1. This Matter is Within the Experience of the Court

The basis for this action is conventional and straightforward: the Defendants entered the cleared Spectrum and failed to pay their *pro rata* share of the relocation costs to Sprint as required by the *800 MHz Order*. As a result, the Court must decide whether the *800 MHz Order* is binding on the Defendants and whether they are required to reimburse Sprint. The Court's analysis of this issue will parallel the issues in a contract dispute, which is "certainly within the conventional experience of judges."²⁷

Sprint seeks judicial enforcement of the *800 MHz Order*, asking the Court to require Defendants to adhere to the Order's reimbursement requirement. Sprint is not asking the Court to address the reasonableness of the *800 MHz Order*, the wisdom of any policy underlying the Order, or the validity of the Order. Because the Court is not addressing issues of reasonableness, validity, or communications policy, the FCC's expertise and discretionary powers are simply not implicated.

Indeed, the nature of Sprint's Complaint as a collection action directed to Defendants is especially relevant, for courts have recognized that "the doctrine of primary jurisdiction does not apply to an action seeking the enforcement of an established tariff. Because a tariff is essentially an offer to contract, such an action is simply one for the enforcement of a contract."²⁸ Thus, "enforcement of a tariff to collect amounts due under it is well within the ordinary competence of courts."²⁹

²⁷ See *Nat'l Communications*, 46 F.3d at 223; see also *Global Naps*, 455 F.Supp. 2d at 449.

²⁸ See *Advamtel*, 105 F.Supp. 2d at 511 (emphasis added).

²⁹ *Advamtel*, 105 F.Supp. 2d at 511; see also *MCI v. T.A. Communications*, 40 F.Supp. 2d 728 (D. Md. 1999). In *MCI v. T.A. Communications*, the court noted that "[n]ot all cases involving questions under the Communications Act are appropriate for primary jurisdictions." *Id.* at 732 n.5. The court recognized that courts, including the Second Circuit, have drawn "a

Advantel illustrates this point clearly. In *Advantel*, the plaintiff sought to collect fees owed by AT&T under a tariff for AT&T's use of plaintiff's local exchange networks in routing long distance telephone calls. In a tariff setting, parties that use a local exchange network to route long distance calls are required to pay fees to the owner of the local exchange network, and the tariff, as accepted by the FCC, identifies and lists the appropriate fees. Accordingly, parties are on notice as to the costs associated with utilizing a local exchange network. In *Advantel*, AT&T used plaintiff's local exchange network but refused to pay the tariff fees, and the plaintiff then filed an action to collect those fees. AT&T sought referral of the case to the FCC, but the court held that "because a tariff is essentially an offer to contract," plaintiff's action to enforce the tariff did not warrant referral to the FCC.³⁰

The Court's analysis in this case should reflect that in *Advantel*. Sprint is clearing the Spectrum and, as part of the clearing process, is absorbing all of the costs associated with that clearing. The FCC, recognizing the inequities associated with Sprint bearing all of the relocation costs, issued an order that "the first entrant [Sprint] may seek reimbursement from subsequently entering licensees [Defendants] for a proportional share of the first entrant's costs in clearing BAS spectrum."³¹ By issuing the *800 MHz Order*, the FCC put all subsequent licensees on notice that they will be responsible for paying their *pro rata* share of the relocation costs. Like the situation in *Advantel*, the *800 MHz Order* is an offer to contract – if the licensee decides to

distinction between cases 'involving the enforcement of a tariff, as opposed to a challenge to the reasonableness of a tariff.'" *Id.* (internal citations omitted). The court decided that "[t]he first type [enforcement of a tariff] should be decided by the district court, while cases involving the reasonableness of a tariff or 'tariff interpretation' should be referred to the FCC." *Id.* (internal citations omitted) (emphasis added).

³⁰ *Id.* at 511.

³¹ *800 MHz Order*, at ¶ 261.

enter the specific BAS spectrum, then Sprint is entitled to receive a *pro rata* reimbursement share from the licensee. If the licensee fails to pay, then the first entrant [Sprint] is entitled to seek enforcement of the contract [800 MHz Order] from the Court. Like in *Advantel*, enforcement of the 800 MHz Order is “well within the ordinary competence of courts,” *Advantel*, 105 F. Supp.2d at 511, and this Court should not refer this case to the FCC.

2. The Issues in This Case are Not Particularly Within the Discretion of the FCC

In its Motion, TerreStar notes that the regulation of the electromagnetic spectrum has been delegated by Congress to the FCC and argues that, given this delegation, the FCC should determine the criteria for entering a particular band.³² This argument is an exercise in misdirection, as TerreStar misconstrues the nature of the relief sought by Sprint. Sprint is seeking enforcement of an order already issued and decided by the FCC, not a determination as to what criteria are applicable. Those criteria are well established, for the 800 MHz Order, as well as its predecessors and progeny, confirms the principle that subsequent band entrants such as Defendants are required both under the orders and as conditions of their licenses, to reimburse Sprint for the clearing costs incurred to their benefit.³³

Contrary to Defendants’ implications, the Commission has already spoken to these issues repeatedly and definitively. Specifically, the 800 MHz Order provides that Defendants triggered their reimbursement obligations upon engaging in transmissions and other activities in and related to the band, as set forth in Sprint’s Complaint.³⁴ The Commission’s orders and the filings

³² TerreStar’s Memorandum, at 13-14.

³³ The origin and scope of Defendants’ reimbursement obligations are discussed in greater detail in Sprint’s Opposition to ICO’s Motion to Dismiss.

³⁴ See, e.g., Complaint, ¶¶ 16-21.

and submissions of Defendants provide an extensive record upon which the Court may make its findings. All that remains is for the Court to review the facts and apply the FCC's orders, a factual and legal assessment analogous to the commercial disputes or other civil litigation matters before the Court on a routine basis.

Sprint filed its Complaint pursuant in part to § 401(b), which provides in pertinent part that if the Defendants fail or neglect to obey the *800 MHz Order*, "while the same is in effect," Sprint "may apply to the appropriate court of the United States for the enforcement of such order."³⁵ If, as TerreStar argues, district courts should always defer to the jurisdiction of the FCC, the Congress's express statutory grant of enforcement power to this Court under § 401(b) would be eviscerated. In cases such as this, where the issues do not involve policy or complex technical questions that might be appropriate for initial review by the FCC, the Court should exercise the power granted by Congress under the Communications Act and reject TerreStar's efforts to require the FCC to issue yet another order re-affirming the duties Defendants already owe under the FCC's prior, and uncontested, orders. Plaintiff is simply asking the Court to enforce the *800 MHz Order* as written, a matter that is basic to the function of the district court.

3. There is No Substantial Risk of Inconsistent Interpretations

This case does not involve a substantial risk of inconsistent interpretations related to what constitutes entry to the cleared band, as the Court's determination will be focused solely upon the particular situation faced by Sprint in this case. The FCC adopted the *800 MHz Order* that dictated the terms by which Sprint cleared the Spectrum and, as one of those terms, Sprint has the right to seek reimbursement from entrants into that cleared Spectrum. The FCC issued this order specifically to address the particular situation faced by Sprint, and as a result, the Court's

³⁵ 47 U.S.C. § 401(b).

decision to enforce the *800 MHz Order* is limited to Sprint's situation, and there is not a substantial danger of inconsistent interpretations or rulings.

4. Although Sprint has Preserved its Right to Reimbursements Before the FCC, the Administration of Justice Weighs Strongly Against Referral

There is no need to refer these matters back to the FCC, as the Commission has repeatedly issued consistent orders providing for Sprint's reimbursement rights, and there is no active proceeding challenging those rights. It is certainly true that Sprint has consistently requested that the FCC enforce its *800 MHz Order* and require Defendants to reimburse Sprint for their *pro rata* share of the relocation costs. In various filings before the FCC, Sprint has repeatedly preserved its right to reimbursements by re-asserting that right, but Sprint has not challenged the validity of the FCC's orders on reimbursement, or "taken action in the administrative context"³⁶ in such a manner as to implicate referral. Indeed, TerreStar asserted in a recent filing that if Sprint did want the FCC to "reconsider" the 800 MHz reimbursement schedule, it would have to start a separate rulemaking proceeding.³⁷ Referral to the FCC would therefore inject significant delay into these matters, and subject Sprint to significant additional costs and potentially adverse long-term financial ramifications.

Courts are hesitant to apply the doctrine of primary jurisdiction when referral will result in the imposition of additional costs and undue delay.³⁸ Hesitation is warranted because, as courts recognize, "[a]gency decisionmaking often takes a long time' and the delay 'imposes

³⁶ TerreStar's Memorandum, at 8.

³⁷ See Reply Comments of TerreStar Networks Inc., WT Docket No. 02-55, *et al.*, 18 (May 30, 2008) (attached hereto as **Exhibit 1**).

³⁸ See *Nat'l Communications*, 46 F.3d at 225.

enormous costs on individuals, society, and the legal system.”³⁹ This delay is frequently due to: “(1) large workload; (2) difficult issues; (3) inadequate funding and staffing; (4) poor organizational structure and management; (5) time-consuming decisionmaking procedures; (6) judicial review; (7) OMB review [by the President’s Office of Management and Budget]; and (8) intentional delay.”⁴⁰

Sprint invested significant money and resources to clear the Spectrum. Sprint made this investment with the understanding, as confirmed by the *800 MHz Order*, that subsequent entrants into the cleared Spectrum would be required to reimburse Sprint for that entrant’s *pro rata* share of the costs that Sprint incurred to clear the Spectrum. Any delay in receiving reimbursements currently due and owing imposes significant additional costs on Sprint, and given the delays inherent with any agency decision, this Court can decide this matter much more expeditiously than the FCC. The potential delay and the imposition of significant additional costs more than outweigh “any benefit that might be achieved by having the FCC resolve this relatively simple factual dispute.”⁴¹ Indeed, the outcome of any referral would presumably be yet another order from the FCC reconfirming Sprint’s reimbursement rights, which Defendants would subsequently claim still did not apply, therefore compelling Sprint to refile suit in district court to enforce the new order. In other words, referral back to the FCC would significantly delay final resolution of these issues, and the fundamental tenets of efficient administration of justice weigh strongly against referral of this case to the FCC.

³⁹ *Id.* (internal citations omitted).

⁴⁰ *Id.* (internal citations omitted).

⁴¹ *Id.*

V. **CONCLUSION**

For the reasons set forth above, TerreStar's Motion should be denied.

Respectfully submitted,

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Dated: August 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and pursuant to agreement among counsel, copies will be sent via e-mail to those indicated as non-registered participants on this 15th day of August, 2008.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SPRINT NEXTEL CORPORATION,	.	Civil Action No. 1:08cv651
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	August 29, 2008
NEW ICO SATELLITE	.	10:25 a.m.
SERVICES G.P. and	.	
TERRESTAR NETWORKS INC.,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	DAVID T. CASE, ESQ.
	BRENDON P. FOWLER, ESQ.
	MARC S. MARTIN, ESQ.
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	and
	TREY HANBURY, ESQ.
	Sprint Nextel Corporation
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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

(Pages 1 - 19)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 08-651, Sprint Nextel
3 Corporation v. New ICO Satellite Services G.P., et al. Would
4 counsel please note their appearances for the record.

5 MR. CORRADO: Good morning, Your Honor. Jack Corrado
6 for defendant ICO. Your Honor, may I introduce to the Court John
7 Flynn, who is the general counsel of ICO, who is a member in good
8 standing of the Bars of California and the District of Columbia,
9 and with permission of the Court, can he join me at counsel table?

10 THE COURT: I'm sorry, there's so much noise, I couldn't
11 hear the name of the attorney.

12 MR. CORRADO: John Flynn.

13 THE COURT: Mr. Flynn. Yes, that motion is granted.

14 MR. CORRADO: Thank you, Your Honor.

15 THE COURT: All right. And we have a second, TerreStar?
16 Who is representing TerreStar?

17 MR. MILLER: May it please the Court, my name is Ralph
18 Miller, with Weil, Gotshal & Manges, here on behalf of TerreStar,
19 and I would ask, I have with me Douglas Brandon, who is the Vice
20 President for Regulatory Affairs and a lawyer, if he could join
21 us, Your Honor, in front of the bar? My colleague, Jarrad Wright,
22 is with me and Joseph Godles, who is a co-counsel in the matter
23 with us.

24 THE COURT: That request is granted. You know, only
25 patent and FCC cases would have this many attorneys. I hope

1 there's a chair for all of you-all.

2 All right, does that take care of all defense counsel?

3 MR. CORRADO: Yes.

4 MR. MILLER: Yes.

5 THE COURT: All right, you-all may have seats if you can
6 find chairs.

7 All right, now for the plaintiff.

8 MR. RUSNAK: Good morning, Your Honor. Eric Rusnak for
9 plaintiff, Sprint Nextel. With me from K&L Gates I have David
10 Case, Marc Martin, and Brendon Fowler, and from Sprint Nextel is
11 Trey Hanbury.

12 THE COURT: All right. Good morning.

13 MR. CASE: Good morning.

14 THE COURT: Have a seat, please.

15 This case comes before the Court on each defendant's
16 motion to dismiss the complaint. Between the motions, different
17 grounds are offered to support that position, but the bottom line
18 is, speaking quickly, the defendants are jointly moving to have
19 the complaint dismissed, although for different reasons.

20 I guess I want to understand a little bit more about
21 the, the setting of this case. I am going to probably not use all
22 the proper technical terminology, but I want to make sure that I
23 understand exactly what's going on here.

24 As I understand it, the FCC several years ago, because
25 it became concerned about the need to free up various bandwidths

1 for emergency services, decided to do some rearranging of
2 bandwidth, and as I understand it from the agreement or the order
3 that's at issue in this case is that ultimately it awarded Sprint
4 the job of clearing this bandwidth and, under the agreement or the
5 order that's at issue in this case, provided that once certain
6 things were done and the bandwidth was clear, then if new
7 communications entities entered into that bandwidth, they would
8 reimburse Sprint on a pro rata basis for the work that Sprint had
9 done in getting that bandwidth cleared and readied for them.

10 Is that in very simple terms what basically went on?

11 MR. CORRADO: Your Honor, if I might, with one
12 clarification?

13 THE COURT: Yes.

14 MR. CORRADO: The clarification is if they entered the
15 band prior to the end of the reconfiguration period.

16 THE COURT: Well, let me ask you that, because that's --
17 that would be the next thing. It's a 36-month period, as I
18 understand the order of the FCC.

19 MR. CORRADO: That's correct.

20 THE COURT: And I also understand that Sprint has a
21 pending request to the FCC to extend that time period; is that
22 correct?

23 MR. CORRADO: That's my understanding, Your Honor.

24 THE COURT: All right. What is your understanding as to
25 what would happen if -- let us say for the sake of argument that

1 Sprint had been successful in getting the bandwidth ready for
2 operation within that 36-month time period, all right, and various
3 carriers came in, but let's say at the end of the 36-month period,
4 there was still 10 percent of the bandwidth that had not been --
5 was not occupied, so on the 40th month, four months after the
6 termination of the 36-month time period, a new entity came in and
7 wanted to take up that remaining 10 percent.

8 What's the position of the defendants as to what, if
9 any, fees that new entity would be -- would owe to Sprint?

10 MR. CORRADO: Your Honor, I think that it is
11 straightforwardly an application of that rule, which is that the
12 period of time is 36 months, that if an entrant -- if an MSS, for
13 example, an entrant has not entered the band before that 36-month
14 period, has entered the band, let's say, on the 40th-month period,
15 then there is no reimbursement that is due and owing under the
16 strict language of that order.

17 The order says --

18 THE COURT: Well, let's put the strict language aside.
19 Under concepts of quantum meruit or other concepts which the law
20 recognizes, would that party -- would Sprint have in your view a
21 claim that that party should reimburse them 10 percent? Because
22 again, pro rata was the basis upon which the fees were being
23 determined.

24 MR. CORRADO: No, Your Honor, because I think that the
25 ruling is the equivalent of a statute. It's the equivalent of a,

1 of a strict agreement which limits Sprint's entitlement to
2 reimbursement.

3 Under issues of quantum meruit, I think -- and we have
4 briefed this -- that when you have a clear provision that says
5 when somebody is entitled to recover and when they are not, that
6 if you don't meet those conditions, then you're not entitled to
7 recover not only under the regulation itself but also under
8 issues -- under theories of quantum meruit and unjust enrichment.

9 I think the cases we cited are very close on this. The
10 *Qwest* case was a case in which parties were trying to recover
11 under a tariff, and they claimed that if they couldn't recover
12 under the tariff, that then they should be entitled to recover
13 under quantum meruit or unjust enrichment, and the court in *Iowa*,
14 I believe, the federal court was very clear that if you have a
15 regulation, if you have a regulatory scheme -- and it may be
16 helpful simply to read the language of that court:

17 "There is a regulatory scheme in place to resolve the
18 issues presented here. Under that framework, the plaintiff will
19 be compensated for the traffic it transported over its lines and
20 delivered to end user customers. In short, because resort to
21 equity is improper where there is a regulatory scheme, the
22 plaintiff's unjust enrichment claim is not the proper vehicle for
23 resolution of these issues."

24 So our position is that it's the equivalent of a
25 statute. You have a clear provision that expresses when there is

1 entitlement to relief and when there is not, and it says that
2 Sprint is entitled to relief if ICO and TerreStar entered the band
3 before the end of that 36-month period.

4 They have not. There's no real question about that.
5 The FCC has ruled that they have not commenced operations in that
6 36-month period.

7 So because they have not met the conditions under the
8 rule that gives them the relief, they certainly can't have a
9 reasonable expectation of being entitled to be reimbursed under
10 some other theory of quantum meruit.

11 THE COURT: All right. Now, I understand that New ICO
12 Satellite is actually ready and able to start -- and I don't want
13 to prejudge the issue -- but to start using the bandwidth but
14 can't because of the, what is it, the 30 top market --

15 MR. CORRADO: The Top 30 Market.

16 THE COURT: Top 30 Market problem.

17 Is that a fair understanding of the evidence as to ICO?

18 MR. CORRADO: Yes, it is, Your Honor. ICO is prepared
19 to commence operations but is prohibited by the Top 30 Market Rule
20 from doing that because the band hasn't yet been cleared. Sprint
21 took the obligation to clear that band. We've been waiting for
22 that to happen, can't commence operations, can't begin to, to
23 implement the business that we have a billion-dollar investment
24 in, and are waiting on the resolution of that band clearing.

25 THE COURT: And as I understand it, there is, in fact, a

1 rule, a proposed rule change by the FCC that, as I understand it,
2 would change that Top 30 Market Rule effective January 1 of 2009.
3 Is that correct?

4 MR. CORRADO: My understanding, Your Honor, is that
5 yes -- well, there is a, there is a proposal that is pending, and
6 that could happen and may change the date for when that clearance
7 can be completed. That's right.

8 THE COURT: So for the sake of argument, if on
9 January 1, 2009, that rule is no longer in effect, the Top 30
10 Market Rule, that would then enable your company to go live?

11 MR. CORRADO: If the FCC either permits ICO to enter the
12 band or has said that the conditions have been, have been met,
13 yes, and at that point, ICO would be able to enter the band.

14 THE COURT: All right. Then --

15 MR. CORRADO: It wouldn't change -- I would suggest it
16 wouldn't change the reimbursement issue, which is a separate
17 issue.

18 THE COURT: Well, that's where I was going next. And
19 your view would be then at that point, you could go into the band
20 and start operating and you didn't owe Sprint a penny?

21 MR. CORRADO: That's correct, Your Honor, for the plain
22 reason that -- and I should say that this issue was a very
23 complicated -- as you can tell, I think, from the pleadings and
24 the volume of exhibits that have been offered, this has been a
25 painful process that started back in 2000, when the FCC determined

1 that there should be certain spectrum reserved for MSS and other
2 entrants, and then in 2004, when Sprint came forward asking for a
3 huge allocation of spectrum, and the FCC understood that that
4 would be a grand windfall to Sprint to award them that spectrum
5 and then carefully balanced in that order what the obligations of
6 the respective parties were and what obligations Sprint had to
7 reimburse the Treasury, for example, for the \$4.86 billion value
8 of that spectrum, and when there could be offsets to its
9 obligation to reimburse the Treasury for that, measuring whether
10 or not it had gotten reimbursement from the parties.

11 So it was a very sophisticated, very delicate balancing
12 of interests, and the consequence was that they laid a rule that
13 said very plainly, and it's admitted -- I mean, it's paragraph 16
14 in Sprint's complaint -- the rule is that the MCC entrants are --
15 must reimburse Sprint to the extent that they enter that band
16 before the end of the reconfiguration period. There's no question
17 that that is June 26, 2008.

18 It hasn't happened, and therefore, under any sort of
19 statutory construction, statutory application of admitted facts to
20 a statute, regulatory scheme, it hasn't happened. Their
21 entitlement to reimbursement has not ripened, and therefore, the
22 case ought to be dismissed on legal grounds.

23 THE COURT: Now, the reason why the Top 30 Markets were
24 not cleared, is that in your view Sprint's fault, or is that a
25 fault of the way in which the whole industry operates? Was it

1 partly a problem with those markets with the FCC? Why was that
2 not done?

3 MR. CORRADO: Your Honor, in my view and the view of my
4 client, respectfully, that is entirely Sprint's fault. You have a
5 situation in which it's not a simple matter to clear the band.
6 It's a very complicated matter.

7 You have to go to a particular occupant of the band.
8 You have to change the equipment with which that occupant is
9 operating in that band. You've got to change certification,
10 change licensing. You've got to get requisite permissions.

11 They have to essentially move into a completely
12 different spectrum. You have to give them notice that you're
13 going to do it.

14 It's a very, very complicated process, and only one
15 party can really do it. You can't have ICO and TerreStar and
16 Sprint all doing it at the same time, and that's why when Sprint
17 came forward and said, "We'll do this in return for \$4.86 billion
18 worth of spectrum," it made it effectively impossible for ICO and
19 TerreStar to do it.

20 So why it has taken Sprint so long to do this, I can't
21 answer. Perhaps Sprint can. But it has taken much longer than
22 anybody anticipated, and ICO and TerreStar are waiting on the
23 sidelines for this to happen so that they can begin the commercial
24 operations which they have been anticipating for a long time.

25 THE COURT: All right. Does TerreStar want to add

1 anything to this discussion from the defendants' standpoint?

2 MR. MILLER: Yes, Your Honor, very briefly. I just
3 wanted to first of all join in all of the remarks of Mr. Corrado,
4 but with regard to the Court's understanding of the issues, it is
5 important, I think, and this is clearly in the record, that the
6 original problem here is that Sprint had operations that were
7 causing interference in the emergency band, the 800 MHz band, and
8 Sprint designed a solution and brought it to the FCC.

9 They were not -- they were a volunteer. They came
10 forward to the FCC, and they said, "Why don't you give us some
11 free spectrum if we can clear that spectrum in what's called the
12 2 GHz band?" and they proposed the date 36 months later, as we
13 understand it, or at least they agreed to that date and said, "We
14 can get it done by that time."

15 It's important to understand that simultaneously, there
16 was the proposal to put some satellites up and let them
17 communicate directly with cell phones, which is what MSS service
18 is, mobile satellite service. They may also use some ground units
19 to assist in that process, which are called ancillary terrestrial
20 components, or ATCs. The point is that Sprint picked this date.

21 TerreStar, Your Honor, had deadlines by which to put up
22 its satellite. They were always beyond the date when Sprint was
23 supposed to have the band cleared, and there was never any
24 expectation that TerreStar was going to enter the band and do
25 anything about it until after Sprint had it cleared.

1 There's actually been some delay. The record is clear
2 TerreStar doesn't even have a satellite up, so TerreStar is in no
3 position to enter the band or do anything else.

4 Under these circumstances, Your Honor, Sprint is bound
5 with this date that has been set. The facts are clear, we
6 believe, that Sprint is premature. It can't possibly have a claim
7 at this point.

8 If the FCC should extend that date, that's a different
9 situation, and Sprint has asked them to do that, but that's all
10 pending. There's at least four matters pending before the FCC.

11 One of the points, Your Honor, is that the equities are
12 well known to the FCC. They have been living with this for years.
13 They have designed a policy system that has to do with getting
14 these broadcast auxiliary services, which are basically television
15 stations doing live feeds as well as fixed units that go between
16 buildings and the television stations, balancing the public
17 interest of those against the public interest of getting the
18 emergency band completely cleared and getting the mobile satellite
19 services in operation, and those things, we suggest, Your Honor,
20 are not matters that are within the expertise of this Court, and
21 that's why in the alternative, Your Honor, if you're not going to
22 grant the absolute motion to dismiss, which we think is the right
23 outcome, we believe that this is a perfect situation for either
24 requiring exhaustion of remedies, since we put in the record
25 Sprint's requests, they keep saying, "Don't do that until you make

1 them pay \$200 million" -- we can pass those up -- or
2 alternatively, under primary jurisdiction, Your Honor, we believe
3 that this meets all four elements that the Court has outlined for
4 primary jurisdiction.

5 Thank you, Your Honor.

6 THE COURT: All right, I'll let Sprint respond.

7 MR. CASE: Thank you, Your Honor. I would respond to
8 some of the questions, I guess, the flip side of what the Court
9 has asked the defendants in this case if that will the Court.

10 First off, the 2004 order, I think the Court generally
11 set forth correctly how it was supposed to work and the context in
12 which it was done, but there's one component of that context which
13 is important here is that both defendants were under a preexisting
14 obligation in 2000 to clear this band as well, and under that 2000
15 order, the commission adopted principles which it reinforced in
16 paragraph 261 that the second entrant to a band owes a pro rata
17 share to the first party who clears the incumbents, and really the
18 FCC was taking that principle and in paragraph 261 making it part
19 of the structure that they were setting up.

20 The Court has asked whose fault is it that the band has
21 not been cleared by the July deadline, and it's simply a matter of
22 logistics. My understanding is there's over 1,000 television
23 broadcasters that have to be addressed in this process. The BAS
24 process, it's the trucks that are at football games or that the
25 Court sees when the Court has a very prominent trial here outside,

1 and to get that equipment changed out, get new equipment,
2 inventory, what's there, there's a limited supply capability
3 amongst the equipment manufacturers. There's also issues of
4 getting licenses changed. It's a complicated process, and it has
5 taken a long time, much more than anyone had ever anticipated.

6 In terms of the concept of the use of the citing of the
7 Iowa decision, the key thing there was, A, there was a regulatory
8 scheme in place that would provide compensation. There is not a
9 specific regulatory scheme in place here that would provide
10 compensation.

11 What defendants are trying to do is essentially leave
12 Sprint Nextel holding the bag, so to speak colloquially, for all
13 of the monies that are used to retune or move the BAS incumbents.

14 So I would answer any other questions the Court has.
15 The one point I think -- I hope was clear in our briefs but just
16 to emphasize for the Court, this 30 Market Rule is not a rule that
17 applies to the compensation obligation under paragraph 261.

18 THE COURT: Oh, I understand that. I understand that.

19 MR. CASE: Okay.

20 THE COURT: I have looked at this case with some care.
21 I mean, obviously, it's complicated. I'm going to rule, and what
22 I'm going to do is I am finding that this is an absolute paradigm
23 case for applying the doctrine of primary jurisdiction. First of
24 all, this question is clearly within the -- not within the
25 conventional experience of judges.

1 The issue about, you know, interpreting contracts,
2 interpreting agreements certainly is, but there is no question
3 that when you're talking about, you know, telecommunications and
4 satellite communications, etc., just your vocabulary is a unique
5 vocabulary. The concepts, the whole -- you know, there aren't
6 tariffs involved in this case, but the whole concept of how
7 compensation is done in your industry is complex.

8 Much of it is governed by regulation, not specifically
9 in this case perhaps, but also here, at least since 2004 and
10 probably earlier than that, the FCC has been intimately involved
11 in all of the key issues that are involved in this litigation,
12 whereas this Court has not, and while I don't have any doubt that
13 with enough time, we could perhaps become expert, it's clearly not
14 within the normal area of expertise for a generalist federal
15 court.

16 Secondly, the questions at issue are particularly within
17 the FCC's expertise and discretion, and in particular, we all know
18 that Sprint, I think, the same day you filed this lawsuit, there
19 were additional filings with the FCC addressing some of the
20 various issues that are actually floating around in this case.

21 Therefore, there is also, in my view, a true danger of
22 potentially inconsistent rulings, because I, for example, if this
23 case stayed on my docket, might define what "entry" means one way
24 or "entry into the band" one way, and the FCC might ultimately
25 decide it a different way, and then we would have a terrible

1 problem within the industry, and as I said, there have been, I
2 believe, prior applications to the FCC addressing issues that are
3 within the scope of this litigation.

4 So I am going to -- what I am going to do is not dismiss
5 the complaint, but I am going to stay it, take it off the active
6 docket of the Court, and essentially remand this back to the FCC
7 to the extent one could remand it.

8 I don't think given the regulatory scheme that there is
9 an exhaustion requirement here. I just don't think exhaustion is
10 the correct theory. I think it is a correct theory of primary
11 jurisdiction.

12 Now, having also said that, I want to extend to you an
13 invitation if you're interested -- and at least Mr. Corrado has
14 had experience with the Court -- I'm very interested in the
15 mediation process, and I think this is the kind of case that
16 perhaps -- and you could talk among yourselves -- some sitting
17 down and talking about what can be worked out might make some
18 sense. I don't know whether that's been tried.

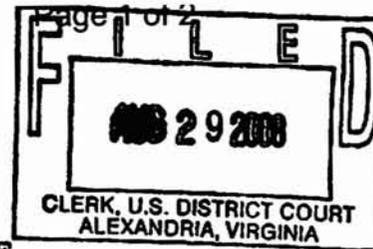
19 Because I will now tell you from a non-legal, just a
20 very simple, old-fashioned approach, putting aside all the
21 requirements and technicalities of the law, if Sprint has paid out
22 hundreds of millions of dollars to clear this bandwidth from which
23 the two defendants will ultimately -- and others perhaps will
24 ultimately benefit and if the basic principle within the FCC is
25 that there is a concept of fair reimbursement when subsequent

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CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

Anneliese J. Thomson



IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SPRINT NEXTEL CORP.,)	
)	
Plaintiff,)	
)	
v.)	1:08cv651 (LMB/TRJ)
)	
NEW ICO SATELLITE)	
SERVICES G.P., <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

For the reasons stated in open court, defendant New ICO Satellite Services's Amended Motion to Dismiss the Complaint for Failure to State a Claim [22] is DENIED and defendant Terrestar Networks's Motion to Dismiss the Complaint for Failure to State a Claim and on the Alternative Grounds of Failure to Exhaust Administrative Remedies and Primary Jurisdiction [16] is GRANTED IN PART and DENIED IN PART; and it is hereby

ORDERED that all claims in this civil action be and are referred to the Federal Communications Commission for resolution; and it is further

ORDERED that all proceedings before this Court be and are stayed pending further decision of the Federal Communication Commission.

The Clerk is directed remove this civil action from the

active docket of the Court and to forward copies of this Order to counsel of record.

Entered this 29th day of August, 2008.

Alexandria, Virginia

lmb

Leonie M. Brinkema
United States District Judge