

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
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, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18

COMMENTS OF SPRINT NEXTEL CORPORATION

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Summary

Sprint Nextel Corporation (Sprint Nextel) strongly supports the Commission's decision to reaffirm that the 2 GHz Mobile Satellite Service (MSS) licensees must pay their fair share of the costs associated with relocating the Broadcast Auxiliary Service (BAS) above 2025 MHz. The 2 GHz MSS operators have long sought to place responsibility for their spectrum-clearing expenses onto Sprint Nextel's customers and shareholders by misinterpreting the Commission's orders and precedent. In its June 12, 2009 *Report and Order and Further Notice of Proposed Rulemaking*, the Commission rejected the 2 GHz MSS operators' arguments as contrary to both law and equity and sought comment on how and when the 2 GHz MSS operators must pay their fair share of BAS relocation expenses.

The Commission's *Report and Order* confirmed that its *Emerging Technologies* policies apply to the 2 GHz BAS relocation. Under those long-standing policies, each new entrant to reallocated spectrum must shoulder its fair share of the cost of relocating incumbent licensees. Consistent with the *Emerging Technologies* line of decisions, the Commission reiterated that it expects 2 GHz MSS operators, as well as future Advanced Wireless Service (AWS) entrants, to reimburse Sprint Nextel for their *pro rata* shares of BAS relocation costs, and that it will enforce these obligations.

The Commission's *Further Notice* seeks comment on the specific procedures to implement the financial obligations of the 2 GHz MSS operators and AWS licensees. Sprint Nextel respectfully submits that clear, transparent, easily administered procedures will provide all parties certainty regarding their established BAS relocation rights and obligations. To that end, Sprint Nextel supports the Commission's tentative conclusion

to explicitly “de-link” the reimbursement period from the thirty-six month 800 MHz reconfiguration period or the 800 MHz true-up date.

Sprint Nextel concurs with the Commission’s tentative conclusion that an MSS operator enters the band, and thus incurs its reimbursement obligation, when it certifies that its satellite is operational. One 2 GHz MSS operator, ICO, has already made its operations milestone certification for the purposes of the tentative conclusion, and the other, TerreStar, is expected to do so next month. Having said that, Sprint Nextel maintains that actions by MSS licensees well prior to formal operational certification can also constitute band entry, and urges the Commission to revisit its tentative position if it receives any request for waivers, postponement of certifications, or any other delays related to milestone certifications by the two, 2 GHz MSS licensees. In addition, Sprint Nextel recommends that the Commission adopt a sunset date of January 21, 2015 rather than December 9, 2013 for clarity and consistency with the ten-year relocation reimbursement period of other bands.

Consistent with the guiding principles of clarity, transparency, and certainty, the Commission should require the 2 GHz MSS operators to make reimbursement payments within thirty days of either (i) the scheduled February 8, 2010 date for completing the BAS transition, or (ii) the date on which third-party audited statements of expenses associated with the BAS relocation are delivered to the 2 GHz MSS operators, whichever is later. This straightforward formulation assures the 2 GHz MSS operators that their payment obligation rests on audited financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP). This approach also permits the 2 GHz MSS operators the flexibility to initiate service to customers without market-by-

market reimbursement preconditions. Establishing a date certain by which the 2 GHz MSS operators' BAS relocation reimbursement obligations must be paid provides certainty to all parties, ensures beneficial use of the band, and allows any issues of non-payment to be put squarely before state or Federal court systems experienced in the adjudication of debt-payment obligations.¹

The Commission should also require 2 GHz MSS operators to pay their full 57 percent *pro rata* share of BAS relocation costs based on the amount of cleared BAS spectrum they occupy. This full *pro rata* share is consistent with the Commission's *Emerging Technologies* precedent and will avoid an unwarranted commercial subsidy to the 2 GHz MSS operators and their commercial affiliates, such as AT&T,² as well as an inequitable burden on Sprint Nextel's customers and shareholders. In addition, each MSS operator should have "joint and several" responsibility for reimbursing Sprint Nextel for the entire MSS share of BAS relocation costs, with those MSS entrants reimbursing Sprint Nextel retaining the right to seek their own subsequent reimbursement from other MSS entrants.

The Commission has reaffirmed the fundamental principle that band-clearing new entrant first movers are entitled to reimbursement from subsequent entrants in the cleared spectrum and concluded that 2 GHz MSS and AWS licensees are not exempt from this principle. The sole remaining task is to establish the specific mechanisms and time periods in which to implement the 2 GHz MSS and AWS licensees' payment obligations.

¹ Such rules should not, however, preclude the parties from entering voluntarily into alternative reimbursement arrangements.

² See, e.g., Stephen Lawson, *Satellite Launch Will Lead to Wider AT&T Coverage*, COMPUTERWORLD (June 23, 2009) (describing AT&T's resale arrangement with TerreStar), available at <http://www.computerworld.com/s/article/9134734/Satellite_launch_will_lead_to_wider_AT_T_coverage>.

With the adoption of clear, easy-to-apply rules, the Commission will solidify a framework for completing BAS relocation in a fair, efficient manner consistent with its well-established *Emerging Technologies* precedent.

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COMMENTS OF SPRINT NEXTEL CORPORATION

I. INTRODUCTION

Sprint Nextel Corporation (Sprint Nextel) supports the Commission's decision to reaffirm its longstanding *Emerging Technologies* relocation policies and to propose clear, transparent procedures for implementing the reimbursement obligations of new entrants to the 2 GHz band, including Mobile Satellite Service (MSS) operators.¹ For years, the 2 GHz MSS operators ICO and TerreStar have sought to escape their cost-sharing responsibilities and make Sprint Nextel's customers and shareholders responsible for

¹ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Report and Order and Order and Further Notice of Proposed Rulemaking, FCC 09-49 (rel. June 12, 2009) (*Report and Order and Further Notice*).

hundreds of millions of dollars worth of the 2 GHz MSS operators' spectrum-clearing obligations.² The Commission's *Report and Order* rejects the 2 GHz MSS operators' arguments as contrary to both law and equity. In the *Further Notice*, the Commission seeks to implement its unambiguous conclusion that 2 GHz MSS operators must pay their fair share of the cost of relocating Broadcast Auxiliary Service (BAS) operations above 2025 MHz. Sprint Nextel welcomes the opportunity to comment on how and when the 2 GHz MSS operators must pay their fair share of BAS relocation costs, and offers comments on how these policies should apply to future Advanced Wireless Service (AWS) licensees in the 1990-2025 MHz band.

II. THE REPORT AND ORDER CORRECTLY REAFFIRMS THAT THE COMMISSION'S EMERGING TECHNOLOGIES POLICIES APPLY TO THE BAS RELOCATION

As the Commission has recognized, “[s]uccessful completion of [BAS relocation] does not rest with any one party but requires the cooperation of the incumbents and all new entrants, acting in good faith, to assume responsibility for the relocation process so that all may benefit.”³ To ensure this good faith cooperation, the Commission based its BAS relocation policies on the relocation and cost-sharing principles established more than fifteen years ago in the *Emerging Technologies* proceeding.⁴ Under these principles, “responsibility for relocation of BAS from the band would be shared between

² One of ICO's affiliated companies has notified the Commission that it has changed its name to New DBSD Satellite Services G.P. See Letter from Suzanne Hutchings Malloy, ICO, to Marlene Dortch, FCC Secretary, IBFS File Nos. SAT-AMD-20071129-00166, *et al.* (May 13, 2009).

³ *Report and Order and Further Notice* ¶ 4.

⁴ *Id.* ¶ 7.

the MSS systems and the other new entrants to the band.”⁵ Moreover, “licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for that benefit.”⁶

Sprint Nextel and BAS licensees have worked diligently and in good faith to meet their relocation obligations and to complete the transition to the new 2 GHz band plan as quickly as possible. The *Report and Order* “observe[s] that Sprint Nextel remains the sole entity actively undertaking [BAS] relocations” with incumbents.⁷ As Sprint Nextel has previously explained, it has spent many hundreds of millions of dollars and dedicated substantial company resources towards completing BAS relocation.⁸ In granting the joint Sprint Nextel/broadcaster request for additional time to complete the process, the Commission stated that “Sprint Nextel has made considerable progress in the BAS relocation process that has proven to be a more complex undertaking than any party may have initially anticipated.”⁹

MSS operators, however, have made virtually no effort to participate in the BAS relocation, notwithstanding their independent obligation to relocate BAS incumbents.¹⁰ Contrary to the Commission’s *Emerging Technologies* policies, moreover, the 2 GHz MSS operators have resisted their obligations to reimburse Sprint Nextel for their *pro*

⁵ *Id.* ¶ 8.

⁶ *Id.* ¶ 79.

⁷ *Id.* ¶ 28.

⁸ See Supplemental Joint Request Concerning the BAS Relocation, WT Docket No. 02-55, at 2-3, 6-7 (Feb. 12, 2009).

⁹ *Report and Order and Further Notice* ¶ 29.

¹⁰ *Id.* ¶ 10 (“When the decision was made to permit Sprint Nextel to use the 1990-1995 MHz band, no BAS licensees had yet been relocated and there was no evidence that any meaningful relocation negotiations had taken place between BAS licensees and MSS entrants.”).

rata shares of BAS relocation costs. For example, the MSS operators argued for an arbitrary cut-off of Sprint Nextel’s reimbursement rights based on the initially projected date for completing 800 MHz reconfiguration, a date that has been superseded by intervening events beyond Sprint Nextel’s control.

The *Report and Order* firmly and correctly rejects various arguments by the MSS operators regarding their reimbursement obligations and reaffirms that MSS operators must reimburse Sprint Nextel under the Commission’s *Emerging Technologies* principles. The Commission held that the MSS operators’ arguments ignore “the stated purposes and structure of the cost-sharing principles set forth in the *800 MHz R&O* and other decisions regarding the shared responsibilities of new entrants for BAS relocation.”¹¹ The Commission found that:

Nothing in the text of the relevant orders suggests that the Commission limited the time in which Sprint Nextel could seek reimbursements from MSS entrants to provide an independent benefit to MSS entrants, *e.g.*, to subsidize them or provide them certainty about their business costs. Thus, we find that the MSS entrants’ cost sharing obligations must be interpreted in light of the unanticipated changed circumstances, and these obligations should not be tied to a deadline that is no longer relevant. In short, MSS entrants should pay a *pro rata* share of the BAS relocation costs unless doing so would allow Sprint Nextel to be reimbursed twice (by both the Treasury and the MSS and AWS-2 licensees).¹²

In the *Further Notice*, the Commission makes a number of tentative conclusions and proposals to delineate the precise mechanisms for implementing MSS and AWS cost-sharing obligations. In the *Report and Order*, however, the Commission leaves no doubt that a “guiding principle for relocation is that those entrants that benefit from cleared spectrum have an obligation to shoulder their portion of the costs to relocate incumbent

¹¹ *Id.* ¶ 77.

¹² *Id.* ¶ 80.

operations,” and that it “fully intend[s] to apply” this principle to the 2 GHz MSS operators and other new entrants.¹³ Requiring the 2 GHz MSS operators to abide by their cost-sharing obligations is fully supported by consistent Commission precedent and is necessary to ensure the continued integrity of the Commission’s relocation policies and its efforts to reallocate spectrum to new wireless technologies.

III. THE COMMISSION SHOULD ESTABLISH CLEAR, TRANSPARENT RULES TO IMPLEMENT MSS AND AWS COST-SHARING OBLIGATIONS

The *Further Notice* seeks comment on specific procedures and requirements for implementing MSS and AWS cost-sharing obligations. The Commission makes clear that a primary objective of these proposals is to provide “simplicity of administration” and to give all parties certainty about their obligations.¹⁴ To avoid any further disputes regarding reimbursement obligations, the Commission’s cost-sharing requirements must be unambiguous, transparent, and consistent with the Commission’s *Emerging Technologies* principles.

A. The Commission Should Require New Entrants that Enter the Band Prior to January 21, 2015 to Reimburse Sprint Nextel for Their *Pro Rata* Share of BAS Relocation Costs

In the *Further Notice*, the Commission tentatively concluded that MSS and AWS “cost-sharing obligation[s] will no longer be linked to the 800 MHz thirty-six month reconfiguration period or the 800 MHz true-up date.”¹⁵ Sprint Nextel fully supports this conclusion. Linking cost-sharing obligations to either of these dates is inconsistent with

¹³ *Id.* ¶ 46.

¹⁴ *Id.* ¶ 91; *see also id.* ¶ 81 (describing need to establish “clearly delineated” cost-sharing obligations).

¹⁵ *Id.* ¶ 84.

the Commission's public interest objectives and its *Emerging Technologies* precedent.

Once the MSS and AWS cost-sharing obligations are de-linked from the 800 MHz benchmarks, the Commission also sought comment on exactly when the reimbursement obligation of the 2 GHz MSS operators and new entrants should end. Under the Commission's *Emerging Technologies* precedent, the relocation sunset period commences at "the beginning of the negotiation period" and generally ends ten years later.¹⁶ In this case, the Commission has twice found that the 2 GHz MSS operators conducted no "meaningful negotiations or relocation activities" before Sprint Nextel commenced its relocation efforts in 2005.¹⁷ Therefore, while the *Further Notice* proposed to establish December 9, 2003 as the commencement date for the ten-year reimbursement obligation because it coincided with the beginning of the modified mandatory negotiation period for MSS and BAS licensees;¹⁸ in point of fact, none of the 2 GHz MSS operators ever commenced negotiations or their BAS relocation responsibilities under the 2003 Order. Under the *Emerging Technologies* precedent, the relevant date for reimbursement purposes should not be the date on which the MSS

¹⁶ *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, ¶ 52 (2000).

¹⁷ *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 4393, ¶ 31 (2008); see also *Report and Order and Further Notice* ¶ 10; 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) ("To our knowledge, 21 months into the two-year mandatory negotiation period, there have been no substantive relocation negotiations undertaken by any MSS licensee.").

¹⁸ *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service*, Third Report and Order and Third Memorandum Opinion and Order, 18 FCC Rcd. 23638, ¶¶ 29-44, 77 (2003) (*MSS Third R&O*); 68 Fed. Reg. 68241 (2003).

operators should have – but did not – commence the BAS relocation, but the date on which Sprint Nextel actually did so. Thus, the normal ten-year sunset period for reimbursement obligations should commence January 21, 2005, when Sprint Nextel commenced its relocation activities,¹⁹ and end January 21, 2015, ten years after the effective date of the rules governing the Sprint Nextel-BAS relocation plan.²⁰

The Commission has previously adjusted the start of sunset periods to better reflect the “on-the-ground” facts affecting relocation negotiations.²¹ The Commission should take the same approach here. The Commission should require that MSS or AWS entrants that enter the 2 GHz band prior to January 21, 2015 reimburse Sprint Nextel for their fair share of BAS relocation costs.

A 2015 sunset date will also help avoid imposing inequitable burdens on Sprint Nextel. As further discussed below, under the Commission’s tentative conclusions that ICO has already entered the band and TerreStar is expected to enter the band next month; however, the Commission has not licensed the 2 GHz AWS spectrum, which makes it unclear when AWS entrants will enter the band. When AWS entrants are licensed, they will have immediate access to incumbent-free spectrum as the result of Sprint Nextel’s

¹⁹ *Report and Order and Further Notice* ¶ 74 n.170 (“In past spectrum relocations, the relocation obligations have sunset either ten or fifteen years after the beginning of the relocation period.”).

²⁰ The Sprint Nextel – BAS relocation rules became effective on January 21, 2005, sixty days after their publication in the Federal Register. *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, ¶ 341 (2004) (*800 MHz R&O*); 69 Fed. Reg. 67823 (2004). Sprint Nextel is not requesting that the Commission change the BAS transition sunset date (*i.e.*, December 9, 2013, the date on which BAS licensees become secondary in the 1990-2025 MHz band, *see* 47 C.F.R. § 74.690(e)(6)).

²¹ *See MSS Third R&O*, 18 FCC Rcd. 23638, ¶¶ 45-47.

band clearing efforts. A premature sunset date would give prospective AWS entrants a windfall of hundreds of millions of dollars. Even ICO has recognized that establishing an inappropriate sunset date “would unfairly punish” the first new entrant by arbitrarily cutting off the reimbursement obligations of later entrants.²² Sprint Nextel should consequently be entitled to reimbursement from all 2 GHz MSS and AWS entities entering the band prior to January 21, 2015, provided Sprint Nextel does not seek credit for the reimbursed costs in the 800 MHz true up.²³

B. An MSS Operator Should Be Deemed to Have “Entered the Band” When Its Satellite Is Found Operational Under Its Authorization Milestone, Provided No Further Delays Occur

Sprint Nextel has long maintained that the current MSS entrants have already entered the band and triggered their reimbursement obligations by engaging in a number of activities in and related to the band, including obtaining their licenses and authorizations to construct satellite systems in the spectrum, launching satellites, and testing and operating various elements of their systems. Sprint Nextel concurs with the Commission’s tentative conclusion “that an MSS entrant will have entered the band and incurred a cost-sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone.”²⁴ Under the facts, this tentative conclusion leads directly to the result that ICO and TerreStar have entered the band.

Specifically, ICO has already certified that it has satisfied its operational milestone.²⁵ Thus under the Commission’s tentative conclusion, ICO, along with its

²² Comments of ICO Services Limited, ET Docket No. 95-18, at 13-14 (Feb. 3, 1999).

²³ *Report and Order and Further Notice* ¶ 84.

²⁴ *Id.* ¶ 91.

²⁵ On May 9, 2008, ICO certified to the Commission that “the entire ICO 2 GHz mobile

affiliated companies, has already “entered the band” and incurred an obligation to reimburse Sprint Nextel for the MSS *pro rata* share of BAS relocation costs. Although TerreStar has not yet certified that its satellite is operational, it must do so by its August 30, 2009 operational milestone deadline.²⁶ After that date, TerreStar would be deemed to have “entered the band” and be subject to its BAS cost-sharing obligations under the Commission’s tentative conclusion. In concurring with the Commission’s tentative conclusion, Sprint Nextel is mindful of the Commission’s position that “[s]implicity of administration is especially important in the case of BAS because there is no clearinghouse to determine when a party has ‘entered the band’ or to parse out the relocation costs on a BAS receiver site-by-site basis.”²⁷

Notwithstanding the above, actions by MSS licensees well prior to formal operational certification can also constitute band entry. If the 2 GHz MSS operators receive additional waivers or extensions of their operational requirements, the Commission’s affirmative and imminent determination that the MSS operators’ actions trigger reimbursement obligations could be thwarted. In that event, the Commission should revisit its definition of “operational.”

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 and Selected Assignment Notification for Call Sign S2651, and attached Certification of Dennis Schmitt, ICO Global Communications (Holdings) Limited (May 9, 2008); *see also Report and Order and Further Notice* ¶ 91 n.201.

²⁶ *See Report and Order and Further Notice* ¶ 22 n.53. Although TerreStar has requested extensions of its milestones in the past, it has recently stated to the Commission that it “will not require an extension” of its current August 30, 2009 operational milestone. Request for Milestone Extension of TerreStar Networks Inc., IBFS File No. SAT-MOD-20090617-00070, Exhibit 1 at 1 (filed June 17, 2009).

²⁷ *Report and Order and Further Notice* ¶ 91.

Similarly, if the Commission were to establish some triggering mechanism for payment that is based on subjective interpretations by MSS entrants, or vulnerable to efforts at delay or avoidance, it could also have the unintended consequence of enabling the 2 GHz MSS operators to “manage” their business activities to avoid a financial obligation to Sprint Nextel, its shareholders and customers. ICO, for example, has already admitted in federal court filings that, although it has an operational satellite, it will have no revenue through December 2013.²⁸

ICO’s particular business plans and financial projections are – and must remain – irrelevant to its BAS reimbursement obligation. The same must be true of any other 2 GHz MSS entrants, including TerreStar. Any other approach for defining when an MSS operator “enters the band” will only invite undesirable uncertainty and possible game-playing in contravention of the Commission’s public interest objectives.

C. The FCC Should Require MSS Operators to Make Their Reimbursement Payments by Either the February 8, 2010 Scheduled Date for the Completion of the BAS Transition, or the Delivery of an Audited Financial Statement, Whichever Occurs Later

The *Emerging Technologies* precedent requires new entrants to reimburse the party that has cleared the band prior to or shortly after commencing operations.²⁹ The

²⁸ On May 15, 2009, DBSD North America, Inc. (formerly ICO North America, Inc.), a 99.84% owned subsidiary of ICO Global Communications (Holdings) Limited, along with its subsidiaries, filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”). On June 26, 2009, ICO filed its Plan and Disclosure Statement which detail its plan for emerging from the protection of the Bankruptcy Court and project its financial results through December 31, 2013. *See* Disclosure Statement for the Debtors’ First Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (unapproved), dated June 26, 2009, at 1-2, 66-67, and Exhibit D, filed in the ICO bankruptcy proceeding. *In re DBSD North America, Inc.*, Case No 09-13061 (S.D.N.Y.).

²⁹ *Report and Order and Further Notice* ¶ 45 (“Usually, reimbursement is required

Commission's longstanding policy of affixing a new entrant's obligation to reimburse the clearing party upon certification of operations makes an immense amount of sense.

First, the policy permits the Commission to move spectrum to its highest and best use by providing some modicum of certainty to the band-clearing party that it will actually receive payment for the work it has performed for the benefit of other operators' spectrum. Unless the band-clearing party receives assurance that it will receive payment for work it performs that benefits another operator in a timely manner, no one will conduct band-clearing operations for fear of non-payment. Moreover, comparatively inefficient technologies could continue to encumber valuable spectrum indefinitely.

Second, the policy is fair to the new entrant. The most realistic hope for a band-clearing party to recover the cost of clearing a subsequent entrant's spectrum is if the new entrant quickly commences and sustains revenue-generating operations. The band-clearing party has a strong commercial incentive to see the later entrants initiate revenue-generating activities; accordingly, the band clearing party has a financial incentive to adopt terms, conditions, and payment schedules that allow the later entrants to continue to pursue their business goals as profitably and as quickly as possible so that the band-clearing party can receive full payment.

Third, the policy does not drag the Commission into disputes created by vague payment deadlines or complicated questions of gauging whether any given new entrant has the debt-service capability and overall debt capacity to satisfy the obligations that they have incurred. Nor does the *Emerging Technologies* policy require the Commission

before or shortly after the later new entrant will begin use of the cleared spectrum.”); *id.* ¶ 95 (“Generally, in other band clearings the later new entrant has to pay its reimbursement costs when beginning operations or shortly thereafter.”).

to weigh these concerns against the need of the band-clearing party to meet its continuing capital requirements and operating expenses. All parties have a simple and objective means for ascertaining when reimbursement obligations have been triggered, and when they must be paid.

Consistent with the *Emerging Technologies* proceeding, the Commission should adopt a clear, definitive, and unambiguous payment deadline in this case. Under the Commission's *Emerging Technologies* precedent, a new entrant's reimbursement obligation is a condition of its license and does not depend on whether it is collecting subscriber revenues at any given time. Here, Sprint Nextel has funded the BAS relocation project entirely from its own revenue stream for more than four years without one penny of reimbursement from the two 2 GHz MSS licensees, which are, in terms of megahertz occupied, by far the largest beneficiaries of the multi-billion dollar band-clearing activities that Sprint Nextel has funded. Establishing a date certain for reimbursement *payment*, as proposed here, is simple, fair, and transparent. Doing so also promotes the Commission's spectrum-relocation goals.³⁰

The scheduled completion date of the BAS transition is February 8, 2010.

³⁰ The 2 GHz MSS operators have already had the benefit of four years in which Sprint Nextel has borne the entire burden of clearing the BAS spectrum for their benefit. Although the 2 GHz MSS operators do not yet "have an established revenue stream" because they "have not yet begun to provide commercial services," the same can be said about most other new entrants and does not make 2 GHz MSS operators unique. *See id.* ¶ 98. Adopting some alternative payment mechanism that would force Sprint Nextel into continuing to serve as an indefinite creditor to the MSS licensees until the MSS licensees achieve some as-yet unknown level of commercial success would not only upend the Commission's longstanding practice under the *Emerging Technologies* proceedings, but also create uncertainty throughout the band over whether and when a band-clearing party might ever hope to receive payment. Like any other new entrant, the 2 GHz MSS operators must take steps to ensure that they obtain sufficient capital to satisfy this condition of their authorization and make their reimbursement payments in a timely fashion.

Consistent with the Commission's *Emerging Technologies* precedent, which requires payment prior to or shortly after the new entrant enters the band, the Commission should require the 2 GHz MSS operators to make reimbursement payments within thirty days of either (i) the scheduled February 8, 2010 date for completing the BAS transition, or (ii) the date on which third-party audited statements of expenses associated with the BAS relocation are delivered to the 2 GHz MSS operators, whichever is later. This straightforward formulation assures the 2 GHz MSS operators that their payment obligation rests on final, audited financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP). This approach also ensures the 2 GHz MSS operators can initiate service without having to make reimbursement payments on a market-by-market basis. As in past relocation processes, moreover, this payment deadline falls on or shortly after the February 8, 2010 date on which *all* BAS market areas are expected to be cleared of incumbent operations, which will simplify the calculation of MSS reimbursement payments.³¹ Like any other band-clearing party, of course, Sprint Nextel and the 2 GHz MSS operators should be free to voluntarily agree to another arrangement, provided they do so prior to February 8, 2010 or when third-party audited financial statements are delivered. But, as a matter of affixing the debt

³¹ Sprint Nextel expects the BAS transition to be completed in all markets by February 8, 2010, but notes that it does not control the relocation process once a Frequency Relocation Agreement (FRA) is signed. In the event special or unique circumstances prevent an individual market from completing the transition by February 8, 2010, requiring Sprint Nextel to provide the MSS licensees with third-party audited financial statement will ensure that the MSS licensees do not have to reimburse Sprint Nextel for the costs of clearing markets until the transition is completed in those markets. Determining the relocation costs for any particular market is a straightforward matter given that each FRA specifies the funding commitments made to each BAS licensee. Once the third-party audited financial statements are delivered to the MSS operators, therefore, the 2 GHz MSS operators would be required to reimburse Sprint Nextel for their *pro rata* share within thirty days.

obligation, MSS operators should be required to make their reimbursement payments to Sprint Nextel within thirty days of February 8, 2010 or within thirty days of the delivery of the third-party audited financial statement, whichever is later.

Sprint Nextel's proposed approach provides certainty and an easy-to-administer mechanism for calculating the reimbursement payments due from MSS operators. Tying the reimbursement payment deadline to the later of the February 8, 2010 date for completing the BAS transition or the date on which third-party audited statements of expenses associated with the BAS relocation are delivered to the 2 GHz MSS operators will avoid the complexities of establishing and administering a deadline for each individual market based on when a market completes the transition. Sprint Nextel's approach also gives the 2 GHz MSS operators additional time to satisfy their cost-sharing obligations, providing them the flexibility to begin operations eight months before their reimbursement payments become due.³²

In the meantime, Sprint Nextel is willing and able to share detailed information on its relocation costs with other new entrants as proposed in the *Further Notice*.³³ Indeed, Sprint Nextel has already provided the 2 GHz MSS operators with estimates of their share of eligible BAS relocation costs in February 2008 and has offered to meet with both ICO and TerreStar to review its accounting ledgers and discuss the nature of the expenses

³² The Commission's elimination of the top 30 market rule, which becomes effective on July 23, 2009, allows the 2 GHz MSS operators to commence commercial service even though all top 30 markets have not all been cleared. *Report and Order and Further Notice* ¶ 45; 74 Fed. Reg. 29607 (2009).

³³ *Report and Order and Further Notice* ¶ 99 (“[W]e tentatively conclude that, for cost-sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administration, as required by the *800 MHz R&O*.”).

and invoicing procedures.

The Commission's *Report and Order* makes clear that it expects the 2 GHz MSS operators to comply with its reimbursement rules and states that "we intend to enforce those rules."³⁴ The Commission also seeks comment "on what actions we should take if MSS entrants fail to pay."³⁵ Failure to reimburse Sprint Nextel on a timely basis would violate express conditions of the MSS operator's authorization and should automatically result in the suspension of the MSS entity's right to operate until it satisfies its payment obligations with interest. If the failure to pay continues, the Commission should, at a minimum, revoke the operator's authorization. Consistent with Commission precedent and applicable law, Sprint Nextel also reserves the right to seek enforcement of its reimbursement rights in court separate and apart from any Commission proceedings to enforce the 2 GHz MSS operators' financial obligations.

D. The Commission Should Require MSS Operators to Pay Their Full 57 Percent *Pro Rata* Share of all BAS Relocation Costs

Under the Commission's *Emerging Technologies* precedent, a "later entrant's cost-sharing obligation to the earlier entrant who cleared the spectrum shall be in proportion to the spectrum assigned to the later entrant."³⁶ According to this principle, MSS operators should reimburse Sprint Nextel for 57 percent of total BAS relocation costs, since "57 percent of the cleared BAS spectrum [has been] assigned to the two MSS entrants."³⁷ The *800 MHz R&O*, however, departed from *Emerging Technologies* precedent and limited the MSS operators' cost-sharing obligation to a *pro rata* share of

³⁴ *Id.* ¶ 46.

³⁵ *Id.* ¶ 98.

³⁶ *Id.* ¶ 84.

³⁷ *Id.* ¶ 86.

the cost of clearing the thirty largest markets and all fixed BAS links.³⁸ The Commission adopted this limitation, which reduces the MSS reimbursement obligation to 27 percent of total BAS relocation costs, “because the MSS entrants were required to clear the thirty largest markets and all fixed BAS links before they could begin operations, but were not required to relocate BAS in the other markets until later.”³⁹

The Commission should require MSS operators to pay their full, 57 percent *pro rata* share. While the *Further Notice* tentatively concludes that the MSS licensees should only reimburse Sprint Nextel for the cost of clearing the thirty largest markets and all fixed BAS links, it seeks comment on whether to “require MSS entrants to pay a *pro rata share* of all BAS relocation costs, regardless of market size.”⁴⁰ Given that circumstances have changed since the Commission adopted the limitation on MSS reimbursement obligations in 2004, the public interest supports requiring MSS operators to pay their full, 57 percent share of expenses. The Commission based the limitation on the relocation obligations and operational flexibility that applied to MSS in 2004. Those rules required MSS operators to relocate the top 30 markets and all fixed BAS links before commencing service, but allowed MSS operators to commence service in smaller markets (markets 31-210) before those markets were transitioned. Because of this flexibility to operate in unrelocated smaller markets, MSS operators presumably would benefit less from Sprint

³⁸ 800 MHz R&O, 19 FCC Rcd. 14969 ¶ 261.

³⁹ *Report and Order and Further Notice* ¶ 85.

⁴⁰ *Id.* ¶ 86. Although the *Further Notice* tentatively concludes that the Commission should retain the limitation, this tentative conclusion appears to conflict with the Commission’s tentative conclusion that MSS cost-sharing obligations “should follow the traditional *Emerging Technologies* policies in obligating new entrants to share the costs of relocating the BAS incumbents,” with this obligation based on the proportion of the cleared spectrum that is assigned to the later entrant. *Id.* ¶ 84.

Nextel's clearing of these markets, and therefore were not obligated to reimburse Sprint Nextel for clearing non-fixed BAS operations in markets 31-210.

The Commission, however, altered MSS relocation obligations in the *Report and Order and Further Notice* and, in doing so, undermined the premise for the limitation on MSS reimbursement. Under the *Report and Order*, MSS operators are no longer required to clear the top 30 markets and all fixed BAS links prior to commencing operations in relocated markets, although they still benefit from Sprint Nextel's relocation efforts because they may not commence service on a primary basis in a market until it is cleared. In addition, MSS operators are now prohibited from commencing commercial operations in *any* market, including markets 31-210, without prior coordination and without complying with conditions that greatly limit their operations.⁴¹ MSS operators consequently benefit greatly when Sprint Nextel relocates any market, including markets 31-210, thereby allowing MSS operators to provide service without restrictions. In return for this benefit, MSS operators should pay their full *pro rata* share of clearing *all* BAS markets. Furthermore, the Commission has also proposed that MSS operators may commence providing service prior to making their reimbursement payments, a significant benefit that new entrants in other relocations have not enjoyed. Therefore, the Commission's reasons for adopting the limitation on MSS reimbursement obligations – the top 30 market rule and the expectation that MSS could operate in markets 31-210

⁴¹ The *Report and Order* concludes “that the record is insufficient to support the MSS operators’ claim that they will be able to routinely operate in nonrelocated BAS markets without causing interference.” *Report and Order and Further Notice* ¶ 50. MSS operators may seek to operate in nonrelocated markets on a secondary basis only if they can successfully coordinate with BAS incumbents, and even if the coordination is successful they are prohibited from marketing their services and may not launch Ancillary Terrestrial Component (ATC) operations until the market is transitioned. *Id.* ¶ 53.

without specific conditions prior to the completion of the BAS transition – no longer apply.

No public interest basis exists for retaining the limitation on MSS reimbursement obligations. Capping the MSS operators' reimbursement obligation based on a relocation scenario that the MSS licensees never implemented runs contrary to the Commission's *Emerging Technologies* policies and the Commission's tentative conclusion in this proceeding that these policies should apply to MSS cost-sharing obligations. The limitation is also inequitable, giving MSS operators a spectrum-clearing cost benefit at the expense of Sprint Nextel, its customers, and shareholders. The Commission's cost-sharing obligations are not designed "to provide an independent benefit to MSS entrants" or "to subsidize" their businesses.⁴² The effective 27 percent expense limitation would also reward MSS operators for doing virtually nothing to relocate BAS licensees. Despite having an independent obligation to relocate BAS incumbents dating back to 2000, MSS operators have not relocated a single BAS licensee, negotiated a single FRA, or ordered a single piece of BAS equipment. MSS operators also refused Sprint Nextel's entreaties to work with Sprint Nextel and BAS licensees in moving the BAS transition forward.⁴³ The Commission should not allow MSS operators to free ride on Sprint Nextel's relocation efforts by limiting their reimbursement obligations.

Thus, like any other new entrant, MSS operators should pay their full *pro rata* share of incumbent relocation costs. MSS operators have been assigned valuable spectrum rights that give them an opportunity to generate substantial revenues in

⁴² *Id.* ¶ 80.

⁴³ See Letter from Lawrence Krevor, Sprint Nextel, to Marlene Dortch, FCC Secretary, WT Docket No. 02-55, at 3-4 (Oct. 8, 2008).

providing satellite and terrestrial wireless services.⁴⁴ Their spectrum rights amount to 57 percent of the 2 GHz spectrum that has or is being cleared by Sprint Nextel, and their reimbursement obligations should be *pro rated* on the basis of their proportional share of the cleared spectrum.

E. Each 2 GHz MSS Operator Should Be Responsible for Reimbursing Sprint Nextel for the Entire MSS Share of BAS Relocation

The *Further Notice* notes that “if Sprint Nextel was reimbursed by only one MSS entrant, that entrant could in turn seek reimbursement of what it owed Sprint Nextel from another MSS entrant.”⁴⁵ The *Further Notice* thus seeks “comment on whether Sprint Nextel should be allowed to request relocation costs for BAS operations in all of the 20 megahertz of spectrum allocated for MSS from a single MSS entrant that may, in turn, seek reimbursement from another MSS entrant.”⁴⁶ Sprint Nextel supports this proposal. Sprint Nextel has fronted the entire cost of funding the BAS relocation for the past four years, and there is no reason why the 2 GHz MSS operators should not have responsibility for funding the entire MSS share of these costs and seeking reimbursement from other entering MSS operators.

As the *Further Notice* states, the Commission has already established an MSS “true-up” mechanism to facilitate reimbursement payments between MSS operators at the

⁴⁴ See, e.g., Mike Musgrove, *Va. Firm to Offer Pocket-Size Satellite Phone*, THE WASHINGTON POST, at A17 (July 1, 2009) (describing TerreStar’s plan to launch a smartphone service this year that will combine its satellite service with a terrestrial service under an agreement with AT&T, with the service providing ubiquitous coverage for government users and ultimately mainstream consumers).

⁴⁵ *Report and Order and Further Notice* ¶ 87.

⁴⁶ *Id.*

end of the BAS transition.⁴⁷ Consistent with this mechanism, the two MSS operators should assume joint and several responsibility for reimbursing Sprint Nextel the entire MSS share of BAS relocation costs and seek reimbursement from each other through the MSS true up.

The Commission's cost-sharing obligations in effect mandate that Sprint Nextel be made whole for the costs it incurs in clearing spectrum occupied by subsequent entrants. Applying a joint and several reimbursement responsibility to MSS entrants properly keeps the focus of their obligation on the full and complete reimbursement of Sprint Nextel's band clearance costs, by ensuring that Sprint Nextel will be able to obtain full reimbursement from the collective group of MSS operators, regardless of their individual business situations.

F. The Commission Should Adopt Clear Cost-Sharing Obligations for AWS Licensees

Sprint Nextel fully supports the Commission's tentative conclusion that "AWS-2 licensees will be responsible for reimbursing earlier entrants for relocating BAS operations in their assigned geographic areas."⁴⁸ AWS licensees will be operating in the 1995-2000 MHz and 2020-2025 MHz bands and will benefit greatly from Sprint Nextel's efforts in clearing incumbents from these bands. These licensees should consequently reimburse Sprint Nextel for their *pro rata* share of BAS relocation costs, provided that Sprint Nextel does not seek credit for these reimbursed costs in the 800 MHz true up.

AWS entrants should be subject to cost-sharing obligations if they enter the band

⁴⁷ *Id.*

⁴⁸ *Id.* ¶ 88.

prior to January 21, 2015, as discussed in section II.A.⁴⁹ An AWS entrant should be deemed to have “entered the band” upon grant of its long-form application, as proposed in the *Further Notice*.⁵⁰ This approach will “provide a clear and easy-to-administer standard and provide certainty for all parties involved.”⁵¹ This approach also eliminates any incentive for AWS entrants to delay the initiation of service to avoid cost-sharing obligations.⁵² Consistent with the Commission’s *Emerging Technologies* policies, an AWS entrant’s reimbursement obligation should become due and payable prior to beginning operations or shortly thereafter.⁵³

III. CONCLUSION

By reaffirming its *Emerging Technologies* policies in this proceeding, the Commission has confirmed the reimbursement obligations and rights for Sprint Nextel, MSS operators, and AWS new entrants in the 2 GHz band. The Commission’s decision will promote a more effective and equitable BAS relocation process, and also preserves the integrity of its relocation policies. The Commission should adopt clear, transparent procedures to implement these policies and ensure *all* new entrants to the 2 GHz band, including MSS operators, pay their fair share of relocating BAS incumbents from the band.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

⁴⁹ *Supra* section II.A.

⁵⁰ *Report and Order and Further Notice* ¶ 93.

⁵¹ *Id.*

⁵² *Id.* ¶ 94.

⁵³ *Id.* ¶ 95. AWS entrants will most likely receive their licenses and commence operations after February 8, 2010, the scheduled date for completing the BAS transition.

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