

**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

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

Lawrence R. Krevor
Vice President, Government Affairs – Spectrum
Trey Hanbury
Director, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-8124

Regina M. Keeney
Charles W. Logan
Lawler, Metzger, Keeney & Logan, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
Counsel for Sprint Nextel Corporation

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Summary

The *Report and Order and Further Notice* represents a vital step in helping all stakeholders in this proceeding bring the transition of the Broadcast Auxiliary Service (BAS) to the new 2 GHz band plan to a successful conclusion. The *Report and Order* recognizes the substantial, good faith efforts Sprint Nextel Corporation (Sprint Nextel) and the broadcast industry have made in completing the transition as soon as possible, and grants the parties additional time to tackle the many complexities the transition has presented. In a thorough, well-reasoned analysis, the *Report and Order* also confirms that the Commission's longstanding cost-sharing principles apply to BAS relocation, and that under these principles 2 GHz Mobile Satellite Service (MSS) operators must reimburse Sprint Nextel for their fair share of BAS relocation costs. The companion *Further Notice* seeks comment on procedures to implement these cost-sharing obligations in a manner that promotes certainty and ease of administration.

Sprint Nextel's comments strongly supported the Commission's efforts to affirm and clarify its BAS spectrum relocation reimbursement requirements, but the MSS operators unfortunately continue their stubborn refusal to accept their cost-sharing responsibilities. The MSS parties recycle the same arguments and distortions of the record from their prior filings. In the *Report and Order and Further Notice*, the Commission rejected the MSS argument that the *800 MHz R&O* established an arbitrary cut-off of Sprint Nextel's reimbursement rights and confirmed that its relocation framework was never designed to give a windfall to MSS operators at Sprint Nextel's expense. The MSS comments offer nothing to rebut these Commission conclusions and findings and the Commission should reject these recycled claims yet again.

The Commission should move forward on proposals to establish clear, transparent rules to implement the cost-sharing obligations of MSS operators as well as Advanced Wireless Service (AWS) new entrants in the 1990-2025 MHz band. Contrary to the assertions of one MSS operator, none of these proposals constitutes impermissible retroactive rulemaking. Adopting clear, effective cost-sharing procedures will further the Commission's original objective in the *800 MHz R&O* to ensure a fair and efficient BAS relocation process and help bring it to a successful conclusion.

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REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

I. INTRODUCTION

In their comments to the *Report and Order and Further Notice*,¹ New DBSD Satellite Services G.P. and TerreStar Networks Inc. once again seek to circumvent and arbitrarily limit their cost-sharing obligations for clearing the 2 GHz spectrum used by incumbents in the Broadcast Auxiliary Service (BAS).² The Commission should

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*).

² Comments of TerreStar Networks Inc. (July 14, 2009) (TerreStar Comments); Comments of New DBSD Satellite Services G.P. (July 14, 2009) (ICO Comments). Sprint Nextel uses the shorthand reference to ICO to refer to New DBSD Satellite Services G.P. and all of its parent and affiliated companies. All pleadings referenced in

continue to reject these efforts. Under the Commission's longstanding *Emerging Technologies* principles, Mobile Satellite Service (MSS) operators must pay their fair share of relocating BAS operators to the new 2 GHz band plan.

As a threshold matter, ICO argues that this proceeding should be stayed under the Bankruptcy Code because subsidiary New DBSD Satellite Services G.P has filed for Chapter 11 protection.³ However, the bankruptcy filing of a particular subsidiary will not obviate ICO's overarching reimbursement obligations. The Commission has long treated parent company ICO Global Communications (Holdings) Limited and its subsidiaries as a single entity with regard to its operations and authorization, regardless of its various corporate restructurings and bankruptcies.⁴ The *Report and Order and Further Notice* further considered ICO as a single entity with regard to MSS operations when calculating its business status, similar to standards the FCC has adopted for competitive bidding in other contexts.⁵ ICO has never challenged this before the Commission, and collectively describes itself the same way in regulatory filings.⁶ Moreover, the Commission has held

these reply comments are filed in WT Docket No. 02-55 unless otherwise noted.

³ ICO raises this argument in both its Petition for Stay and in its Comments. Sprint Nextel responds more extensively to these arguments in its Opposition to ICO's Petition for Stay.

⁴ *See, e.g., Applications of Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited for Transfer of Control*, Memorandum Opinion and Order, 18 FCC Rcd 1094, ¶ 3 (2003) (“*Through subsidiaries, ICO obtained authority from the United Kingdom to construct, launch, and operate a 12-satellite, NGSO MSS system and subsequently obtained a Letter of Intent authorization from the Commission for provision of MSS in the United States, using specific segments in the 1990-2025 MHz . . . band[]*”) (emphasis added).

⁵ *See Report and Order and Further Notice*, Appendix B, ¶ 17 & n.43 (stating that there are “two MSS operators in the 1990-2110 MHz band” and reviewing ICO Global Communications (Holdings) Limited's SEC filings to determine that ICO is not a “small business” for the purposes of the *Report and Order and Further Notice*).

⁶ *See, e.g.,* ICO Global Communications (Holdings) Limited, Annual Report (Form

that “[w]here absolute control over a subsidiary licensee corporation resides in a parent, the parent must be prepared to assume full responsibility for the operation of the station in accordance with the Communications Act. Power and responsibility cannot be separated for our purposes, whatever the particular rule may be in different fields of law.”⁷ Consequently, there is no basis for staying this proceeding or for otherwise altering ICO’s reimbursement obligations based on the bankruptcy filing of its majority-owned subsidiary entity.⁸ To hold otherwise would be to upend years of Commission precedent with regard to the treatment of the two MSS operators, and potentially allow entities to justify the grant of their licenses and authorizations based on their full corporate structure and affiliations, obtain the benefits of their licenses and operations, and then avoid related costs and obligations through exploitation of a subsidiary.

10-K), at 1, 28 (March 31, 2009) (*ICO 2009 10-K Filing*) (stating that “ICO Global Communications (Holdings) Limited is a next-generation mobile satellite service (“MSS”) operator . . . [w]e are authorized by the [FCC] to offer MSS throughout the United States,” and noting that “Sprint is seeking reimbursement of clearing costs from 2 GHz MSS licensees, including us, through litigation and regulatory action.”).

⁷ *Liability of Federated Publications, Inc., Former Owner of WMRI, Inc., Licensee of WMRI (AM and FM) for Forfeiture*, Memorandum Opinion and Order, 7 F.C.C.2d 522, ¶ 4 (1967); see also *Liability of Federated Publications, Inc., Former Owner of WMRI, Inc., Licensee of WMRI (AM and FM) for Forfeiture*, Memorandum Opinion and Order, 6 F.C.C.2d 279, ¶ 5 (1967) (“The Communications Act defines ‘licensee’ as ‘the holder of a Radio Station license granted or continued in force under authority of this Act.’ While Federated was not the licensee, it was the sole stockholder of the licensee, and gained from the operation and sale of the station, as such sole stockholder. Thus, in fact, Federated was the ‘holder of a Radio Station license . . .’ *In a situation as we have before us, we will look behind the licensee corporation to determine its true identity, and in this case we conclude that Federated Publications, Inc., is responsible to the Commission for violations of the act and the rules that occurred while it owned WMRI, Inc., i.e., within the period of the forfeiture provisions.*”) (emphasis added).

⁸ *ICO 2009 10-K Filing* at 14 (stating that New ICO Satellite Services G.P. (now known as New DBSD Satellite Services G.P.) is more than 99 percent owned by ICO Global Communications (Holdings) Limited).

II. THE COMMISSION HAS ALREADY REJECTED MSS EFFORTS TO EVADE THEIR COST-SHARING OBLIGATIONS BY REAFFIRMING THAT *EMERGING TECHNOLOGIES* POLICIES APPLY TO THE BAS RELOCATION

In the *Report and Order and Further Notice*, the Commission reaffirmed that MSS operators are subject to the bedrock relocation principle, established fifteen years ago in the *Emerging Technologies* proceeding, that all new entrants must share the cost of relocating incumbents from reallocated spectrum. MSS operators had previously tried to escape this obligation, arguing for an arbitrary cut-off of Sprint Nextel's reimbursement rights based on the initial, June 2008 projected date for completing 800 MHz reconfiguration, a date that has been superseded by intervening events beyond Sprint Nextel's control. The Commission rejected these arguments in the *Report and Order and Further Notice*, making clear 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 operations," and that it "fully intend[s] to apply" this principle to the 2 GHz MSS operators and other new entrants.⁹

In their July 14 comments, the MSS operators rehash many of the same arguments the Commission already rejected in reaffirming its cost-sharing principles in the *Report and Order and Further Notice*. The MSS operators continue to argue for an arbitrary cut off of reimbursement obligations on June 26, 2008 or earlier based on the same distortions of the record and Commission precedent they advanced in their prior filings. Sprint Nextel has previously responded to these arguments in detail, showing that the MSS arguments are contradicted by the record, long-standing Commission policy, and

⁹ *Report and Order and Further Notice* ¶ 46.

common sense.¹⁰ More importantly, *the Commission* has adopted findings and conclusions that repudiate the MSS arguments.¹¹ *The Report and Order and Further Notice* found that unanticipated circumstances beyond Sprint Nextel's control warranted an extension of the relocation deadlines, and that these circumstances render the references to June 26, 2008 in the *800 MHz R&O* irrelevant for purposes of MSS reimbursement obligations:

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

¹⁰ See Reply Comments of Sprint Nextel, the Association for Maximum Service Television, the National Association of Broadcasters, and the Society of Broadcast Engineers, at 13-23 (March 19, 2009) (*Sprint Nextel – Broadcaster March 19 Comments*); Letter from Lawrence Krevor, Sprint Nextel, to Marlene Dortch, FCC Secretary (October 8, 2008) (*Sprint Nextel October 2008 Letter*).

¹¹ TerreStar, for instance, raises a number of purported "equitable" factors that, it claims, should reduce or eliminate its obligation to pay its fair share of BAS relocation expenses. See TerreStar Comments at 9-17; see also, e.g., ICO Comments at 21 (seeking to reduce or eliminate its reimbursement requirement to Sprint Nextel based on alleged depreciation of its satellite asset due to delays that ICO could presumably have avoided had ICO fulfilled its independent obligation to relocate BAS). None of these claims withstand scrutiny. The Commission's prior findings completely undermine the MSS claims. See, e.g., *Report and Order and Further Notice* ¶¶ 28-29, 46 (reaffirming cost-sharing principles apply to MSS and finding that Sprint Nextel, the "sole entity" working to relocate BAS, and BAS licensees have acted in good faith and made "considerable progress" to overcome transition delays and complexities beyond their control); *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393, ¶¶ 31, 33 (2008) (*BAS Extension Order and Further Notice*) (finding that the "record presents a compelling case that the BAS transition is sufficiently complex" to justify an extension). Sprint Nextel has exhaustively addressed most of the MSS allegations in prior submissions. See *Sprint Nextel – Broadcaster March 19 Comments* at 13-23 & n.46 (rebutting MSS claims and noting that, pursuant to Commission direction, Sprint Nextel declared its intent to seek reimbursement from both ICO and TerreStar in 2006); *Sprint Nextel October 2008 Letter*. The handful of new MSS charges – such as the claim that Sprint Nextel somehow "lacked [a] sense of urgency" for the BAS transition (TerreStar Comments at 14) – are even more far-fetched than the old ones. One has only to look at the record – and the human and financial resources Sprint Nextel has employed to advance the relocation process – to disprove the claims.

doing so would allow Sprint Nextel to be reimbursed twice (by both the Treasury and the MSS and AWS-2 licensees).¹²

These Commission findings refute any further argument by MSS parties that they should be relieved of their cost-sharing obligations due to the references to June 26, 2008 in the *800 MHz R&O* or the unanticipated delays in completing the BAS transition.¹³

The *Report and Order and Further Notice* rejects another central premise behind the MSS arguments. The MSS operators claim – once again – that the Commission imposed limitations on Sprint Nextel’s reimbursement rights as a means to give MSS operators cost-free access to their 2 GHz spectrum or to otherwise cap their

¹² *Report and Order and Further Notice* ¶ 80.

¹³ The MSS operators have never explained why relocation delays should have any relevance to their cost-sharing obligations. The delays do not change the fact that MSS operators benefit significantly from Sprint Nextel’s clearing efforts or the fact that MSS operators have a separate, independent obligation to relocate BAS licensees. Although the MSS parties claim that they have been burdened by delays in completing the BAS transition, the record proves otherwise. Extending the deadline for completing the BAS transition has not harmed and will not harm TerreStar or ICO given TerreStar’s many delays in launching its MSS operations and ICO’s apparent plans to postpone full commercial operations due to alleged liquidity problems. Similarly, ICO’s submissions to federal bankruptcy court show no revenue through 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.). Indeed, neither MSS party seriously disputed the need for an extension of the BAS transition deadline. *Sprint Nextel – Broadcaster March 19 Comments* at 6, 8-11. The MSS claims of harm are also contradicted by the fact that, as the broadcast parties have pointed out, “TerreStar and ICO chose to sit out the BAS relocation notwithstanding the Commission’s decision five years ago that ‘MSS licensees will retain the option of accelerating the clearing of . . . markets so that they could begin operations before Nextel has completed nationwide clearing’ and its ‘encourage[ment] of MSS licensees to work cooperatively with Nextel in [BAS] negotiations because all parties will collectively benefit from the expeditious relocation of BAS incumbents to the new band plan.’” Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters at 3-4 (July 14, 2009) (*Broadcaster July 14 Comments*). Finally, Sprint Nextel and the broadcasters timely cleared all BAS incumbents in each of the more than two dozen MSS priority markets that ICO and TerreStar identified for MSS testing and service initiation. *Report and Order and Further Notice* ¶ 28.

reimbursement obligations. The Commission dismissed this notion in the *Report and Order and Further Notice*, stating that “[n]othing 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.”¹⁴ The MSS operators’ arguments regarding supposed “equities” and their “expectations” about their reimbursement obligations 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.”¹⁵

In addition to ignoring the Commission’s findings and precedent, the MSS arguments conveniently ignore their abject failure to comply with their own relocation obligations. As the Commission stated in the *Report and Order and Further Notice*, “[w]hen Sprint Nextel undertook its commitment to relocate the BAS licensees, the

¹⁴ *Report and Order and Further Notice* ¶ 80.

¹⁵ *Id.* ¶ 77. In addition, in compliance with the *800 MHz R&O*, more than *three years ago* on March 7, 2006 Sprint Nextel filed and circulated a letter specifically notifying the Commission, ICO, and TerreStar’s predecessor-in-interest that it would seek reimbursement from the MSS operators for the clearing costs incurred related to the 1990-2020 MHz band. See Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to Marlene H. Dortch, FCC Secretary, WT Docket No. 02-55, at 1 (March 7, 2006) (“Sprint Nextel Corporation . . . hereby informs the [FCC] . . . 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 R&O* 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.”) With *more than three years* having passed since Sprint Nextel provided public and direct notice to the MSS operators of its intent to seek, pursuant to the express terms of the Commission’s *800 MHz R&O*, reimbursement from the MSS operators for the cost of clearing the spectrum that the MSS operators occupy, any claims by the MSS operators that upholding their reimbursement obligations would somehow disrupt their “expectations” are simply untrue and contradicted by the facts and record evidence.

Commission did not remove either the obligation previously placed on the MSS entrants to relocate the BAS licensees, or the procedures that had already been put in place for doing so.”¹⁶ The MSS relocation obligations predated the adoption of the Sprint Nextel – BAS relocation plan by several years, yet the Commission found that the 2 GHz MSS operators conducted no “meaningful negotiations or relocation activities” before Sprint Nextel commenced its relocation efforts in 2005.¹⁷ Since then, the MSS operators have made no constructive effort to help in the BAS relocation despite Sprint Nextel’s invitations to participate.¹⁸ In their comments in this proceeding, the broadcast industry emphasized the uncooperative role MSS operators have played:

All of [the] progress [broadcasters and Sprint Nextel have made] has occurred in the face of the ongoing refusal of the two MSS entrants, TerreStar and ICO, to make *any* contribution – whether in the form of labor, planning, technical expertise, or financial reimbursement – to the BAS relocation. As far as the BAS relocation is concerned, TerreStar’s and ICO’s sole involvement has been to file comments and make *ex parte* presentations . . . in which they have lobbied the Commission repeatedly for rule changes that would excuse them from paying their fair share of BAS relocation costs prior to commencing operations.¹⁹

The MSS operators’ latest effort to avoid their cost-sharing obligations offers nothing new. The Commission has already rejected the MSS operators’ demands by

¹⁶ *Report and Order and Further Notice* ¶ 11.

¹⁷ *BAS Extension Order and Further Notice*, 23 FCC Rcd 4393, ¶ 31; *see also Report and Order and Further Notice* ¶ 10. The MSS operators’ failure to conduct any relocation activities forced Sprint Nextel and broadcasters to start from scratch in 2005. MSS operators’ were consequently responsible for the slow start for BAS relocation, not Sprint Nextel or BAS licensees.

¹⁸ TerreStar is simply wrong in arguing in its comments that Sprint Nextel discouraged TerreStar from contributing to the BAS relocation process. As Sprint Nextel has previously explained in detail, it met repeatedly with TerreStar to encourage its participation in the process and made a specific proposal to TerreStar to provide a team of employees to help with the relocation, only to be rebuffed. *Sprint Nextel – Broadcaster March 19 Comments* at 10-11.

¹⁹ *Broadcaster July 14 Comments* at 3.

reaffirming that MSS operators are subject to the *Emerging Technologies*' cost-sharing principles. Under both of these principles and the tentative conclusion in the *Further Notice*, both MSS operators have unquestionably incurred a reimbursement obligation.²⁰

III. THE MSS OPERATORS' PROPOSALS WOULD UNDERMINE THE COMMISSION'S GOAL FOR ESTABLISHING CLEAR, TRANSPARENT COST-SHARING PROCEDURES

The *Further Notice* seeks comment on specific procedures and requirements for implementing MSS and AWS cost-sharing obligations. The Commission's proposals are based on its *Emerging Technologies* principles and seek to promote certainty and "[s]implicity of administration."²¹ The MSS operators' proposed reimbursement procedures would undermine the Commission's objectives and are designed to give MSS entrants an arbitrary windfall.

A. The Commission Should Reject MSS Proposals to Delay and Limit Their Reimbursement Payments

TerreStar proposes that MSS reimbursement payments should not be due until the end of the true-up period.²² ICO proposes that its reimbursement payments be due "after the true-up process and under an installment payment plan,"²³ and also claims, with no

²⁰ As more fully discussed in its Comments, Sprint Nextel accepts the Commission's tentative conclusion regarding band entry based on operational milestones. Comments of Sprint Nextel Corporation at 8-10 (July 14, 2009) (*Sprint Nextel July 14 Comments*). TerreStar certified compliance with its operational milestone on July 20, 2009. See Letter from Joseph Godles, Attorney for TerreStar, to Marlene Dortch, FCC Secretary, Call Sign S2633 (July 20, 2009). ICO certified compliance with its operational milestone on May 9, 2008. See *Sprint Nextel July 14 Comments* at 8-9 & n.25.

²¹ *Report and Order and Further Notice* ¶ 91; see also *id.* ¶ 81 (describing need to establish "clearly delineated" cost-sharing obligations).

²² TerreStar Comments at 21-23.

²³ ICO Comments at 20.

justification, that its reimbursement obligations should be capped or subject to an undefined offset or depreciation.²⁴

The Commission should reject these proposals. Like their arguments for an arbitrary cut-off of their reimbursement obligations, the proposals are based on the erroneous presumption that the Commission's relocation rules are intended to confer an independent benefit on MSS operators and subsidize their operations at Sprint Nextel's expense.²⁵ The Commission flatly rejected this notion in the *Report and Order and*

²⁴ *Id.* at 21-23.

²⁵ ICO, for example, goes so far as to argue that the Commission's decision to eliminate the top 30 market rule and allow MSS operators to commence service in relocated markets, but to require prior coordination before allowing MSS operations in unrellocated markets, represents a "burden" that should exempt the MSS operator from having to pay its fair share of BAS relocation expenses. *See* ICO Comments at 16-17. As a threshold matter, ICO, which has done nothing to relocate BAS over the course of eight years, has only itself to blame for any perceived "burden" that it must face to coordinate the spectrum that it has failed to clear. More to the point, the *Report and Order*, in eliminating the top 30 market rule, provides a boon to MSS operators by giving them immediate access to any relocated market, hardly the burden that ICO claims it to be. ICO also conveniently ignores the reality that fully *sixty percent* of all BAS stations have cleared the band today and that the remaining forty percent are scheduled to exit the band in little more than six months. Moreover, ICO has already told a federal bankruptcy court that it expects to earn no revenues from customer offerings or any other means through at least 2013. If ICO has no intention to earn any revenue through a service offering until at least the end of 2013, why would ICO ever need to coordinate operations in any unrellocated markets under an interim requirement that expires a full three years before ICO's revenues and, presumably, services will commence? Stated differently, how can ICO possibly incur additional costs under an interim coordination requirement that is already irrelevant for sixty percent of the country today and will become entirely or almost entirely irrelevant in six months? The reality, of course, is that just as ICO sat on the sidelines while Sprint Nextel and the broadcasters performed the hard work of relocation, ICO is not likely to engage in any sort of coordination during the interim period until the remaining markets are transitioned. In short, the notion that the *Report and Order* or any coordination requirement imposes an unfair "burden" on ICO that should offset or eliminate its responsibility for the BAS relocation is yet another red herring in ICO's ongoing attempt to evade its independent obligation to relocate BAS licensees above 2025 MHz.

*Further Notice.*²⁶ The MSS operators, having failed to make any effort to relocate BAS licensees notwithstanding their independent obligation to do so, must now reimburse Sprint Nextel their full *pro rata* share of BAS relocation costs. There is no public interest basis for depreciating or otherwise limiting their cost-sharing obligation.²⁷ Indeed, ICO is on record in this proceeding as “oppos[ing] application of any formula that reduces the amount of the obligation of later-entering licensees.”²⁸ Furthermore, the MSS proposals are contrary to *Emerging Technologies* precedent, which requires new entrants to make their reimbursement payments prior to or shortly after entering the band.²⁹ The proposals

²⁶ *Report and Order and Further Notice* ¶ 80.

²⁷ ICO argues that its reimbursement payments should be depreciated because Sprint Nextel had “immediate access” to its 1.9 GHz spectrum. *See* ICO Comments at 21. Notwithstanding the lack of any logical nexus between Sprint Nextel’s ability to access the spectrum and ICO’s payment obligation, ICO’s statement is incorrect because the 1990-1995 megahertz spectrum has and continues to be encumbered by BAS incumbents in some markets and, thus, unavailable for use by a nationwide terrestrial carrier such as Sprint Nextel. ICO’s proposal also has no support in Commission precedent. Although depreciation can be appropriate in limited circumstances involving the relocation of fixed-link microwave incumbents, the Commission has made clear that, even in those circumstances, first relocators are “entitled to full reimbursement, not subject to depreciation, for relocating non-interfering links that are either fully outside their markets area . . . or their licensed frequency band.” *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 13999, ¶ 19 (2000) (emphasis added). Here, Sprint Nextel is clearing BAS incumbents from the MSS spectrum at 2000-2020 MHz, which is well outside Sprint Nextel’s assigned spectrum in the 1990-1995 MHz band, and is also clearing BAS incumbents in areas where it may not immediately deploy its facilities. The Commission has never proposed applying a depreciation factor in such circumstances, particularly where the relocation does not involve clearing incumbents on a link-by-link basis and does not involve a clearinghouse. *See, e.g., Amendment of Part 2 of the Commission’s Rules*, Eighth Report and Order, Fifth Notice of Proposed Rulemaking and Order, 20 FCC Rcd 15866, ¶ 50 (2005) (*AWS Report & Order*). Under the *Emerging Technologies* policies, Sprint Nextel is entitled to full reimbursement, without depreciation, from MSS operators.

²⁸ *Amendment of Section 2.106 of the Commission’s Rules*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, ¶ 65 (2000).

²⁹ *Report and Order and Further Notice* ¶ 95.

also conflict with the Commission's objective of establishing "clearly delineated cost sharing requirements," including a "date certain" for MSS reimbursement payments.³⁰ As the Commission found, "there is no future date certain for completing either the 800 MHz rebanding or the true up."³¹

By contrast, Sprint Nextel's proposed payment deadline promotes certainty and remains consistent with the Commission's *Emerging Technologies* principles. Under Sprint Nextel's proposal, the MSS operators would be required 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 MSS operators, whichever is later. Sprint Nextel's proposal will establish a definite, easy-to-administer payment deadline, avoid the uncertainties that would be created by market-by-market deadlines, and ensure that MSS payment obligations rest on final, audited financial statements concerning BAS relocation costs.³² There is no justification for the Commission to adopt any sort of installment payment plan, which would force Sprint Nextel to continue the burden of serving as a creditor for the 2 GHz MSS industry into the indefinite future, and also require the Commission to oversee this creditor-debtor relationship for years to come.³³ The Commission should instead establish a clear,

³⁰ *Id.* ¶¶ 80-81.

³¹ *Id.* ¶ 80.

³² There is no need to link the payment deadline to the 800 MHz true up as the MSS operators propose. Sprint Nextel will not seek credit in the true up for any costs reimbursed by MSS or other new entrants.

³³ The Commission should also reject ICO's attempt to postpone its reimbursement deadline until after it is earning revenues from its services. As Sprint Nextel explained in its comments, Sprint Nextel should not be forced into serving as an indefinite creditor to

transparent deadline, and allow the parties to negotiate any alternative payment arrangements that meet their mutual interests.³⁴

B. TerreStar and ICO Should Not Be Allowed to Avoid Their Payment Obligation to Sprint Nextel Indirectly by Capping or Second-Guessing BAS Relocation Expenses that Sprint Nextel Had Every Incentive to Minimize.

Sprint Nextel has spent four years and hundreds of millions of dollars relocating BAS licensees; it has no incentive to make the BAS relocation process any more costly, burdensome or time-consuming than absolutely necessary.³⁵ And yet the MSS operators' latest gambit to avoid paying their fair share of BAS relocation costs appears to be to try to arbitrarily "cap" relocation expenses or, alternatively, to allow the MSS operators to second-guess the expenses necessary to complete the BAS relocation process now that the relocation is nearly complete.³⁶ The Commission should reject any attempt by TerreStar and ICO to arbitrarily circumvent, delay, or limit their cost-sharing obligations by challenging documented and audited BAS relocation expenses after the fact.

During the course of the BAS relocation process, Sprint Nextel and the BAS licensees have made hundreds of thousands of discrete spending decisions about BAS systems, vendors, integrators, installers, consultants, engineers, technicians,

MSS operators until they achieve some unknown level of revenue or capital appreciation. This result would directly contradict Commission precedent and impose unfair burdens on Sprint Nextel. ICO's argument is yet another attempt to distort the Commission's cost-sharing policies by forcing Sprint Nextel to subsidize ICO's business.

³⁴ See *AWS Report & Order*, 20 FCC Rcd 15866, ¶ 46 ("All of these payment obligations are imposed as a default, and new licensees are permitted to enter into private cost sharing arrangements with each other that supersede the cost sharing plan as it applies to reimbursement between those licensees.").

³⁵ Similarly, no rational actor would "artificially inflate" expenses that it has to pay out of pocket today in the hope that, years later, it might prove able to recoup just 27-57% of those expenses from third parties.

³⁶ See, e.g., TerreStar Comments at 22-23; ICO Comments at 22-23.

manufacturers, and more. Allowing ICO and TerreStar to second-guess the propriety and wisdom of each of those myriad decisions – as both MSS operators demand – would delay reimbursement indefinitely. Unlike the relocation of microwave links, which typically involve the same type of standard equipment and costs in each relocation, each BAS system presents its own unique relocation challenges and complexities given the great variety in BAS equipment, system designs, and station deployments implemented over the last three decades. No two BAS relocations are alike. Each depends on the precise facts at that particular facility in that particular market.

To relocate each unique BAS system, Sprint Nextel entered into good-faith negotiations with BAS operators and signed arms-length, good-faith contracts governing the terms and conditions of relocation, as required by the Commission’s “comparable facilities” policies.³⁷ Sprint Nextel’s internal costs are also managed in accordance with its internal policies and control systems that are part of Sprint Nextel’s annual third-party BAS auditing process. Sprint Nextel carefully documents all of its reconfiguration expenditures to comply with its obligations under the Commission’s anti-windfall payment process and the federal False Claims Act.³⁸ Sprint Nextel consequently has every incentive to minimize BAS relocation costs. The MSS operators should not now be allowed to second guess expenses entered into as a result of good-faith negotiations

³⁷ If the MSS licensees truly doubted Sprint Nextel’s incentive or ability to minimize staffing, equipment, and installation expenses, then the MSS operators could have relocated the BAS licensees themselves before Sprint Nextel entered the scene in 2005 or supported Sprint Nextel relocation program after 2005 by offering their own staff or resources to supplement the Sprint Nextel effort. The MSS operators chose a different course.

³⁸ 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, ¶¶ 329-330 (2004) (*800 MHz R&O*); 31 U.S.C. § 3729.

and then verified by an independent third-party audit performed by a national public accounting firm, particularly when the MSS operators have sat on the sidelines of the relocation process for eight years,.

Indeed, with so many safeguards and incentives to protect against abusive claims already in place, TerreStar's and ICO's real concern appears to be not so much that they will have to pay fraudulent BAS relocation claims, but rather that they will have to pay *any* BAS relocation claims at all. Requiring a third-party audit of eligible expenses that Sprint Nextel incurred in good faith during the course of the BAS relocation – combined with Sprint Nextel's strong incentive to reduce costs and the Commission's ample enforcement powers to punish fraudulent claims – provides significant and redundant checks on the propriety of the hundreds of thousands of complicated, fact-specific judgments by both Sprint Nextel and BAS licensees that are inherent to the BAS relocation process.

C. The Commission Should Require MSS Operators to Pay the Full MSS Share of BAS Relocation Costs

In the *Further Notice*, the Commission sought comment on whether it should require MSS operators to pay their full *pro rata* share of the cost of relocating all BAS incumbents in all markets, or whether it should continue to limit MSS reimbursement obligations to the cost of relocating the top 30 markets and all fixed BAS links.³⁹ The MSS operators support limiting their obligations.⁴⁰ As Sprint Nextel explained its comments, however, the Commission's reasons for the limitation are no longer valid. With the elimination of the top 30 market rule and the conditions it has imposed on MSS

³⁹ *Report and Order and Further Notice* ¶¶ 85-86.

⁴⁰ TerreStar Comments at 18; ICO Comments at 24.

operations in unrellocated markets, the Commission has eliminated any distinction between the top 30 markets and smaller markets for purposes of reimbursement.⁴¹ Under the new rules and conditions, MSS operators may not operate free of restrictions in *any* market until the market is relocated. The MSS operators consequently benefit from Sprint Nextel's relocation efforts in *all* markets, not just the top 30 markets. Consistent with the Commission's *Emerging Technologies* precedent, MSS operators should accordingly pay their full, 57 percent share of BAS relocation costs in all markets.

Sprint Nextel also demonstrated in its comments the public interest basis for requiring each MSS operator to be responsible for reimbursing Sprint Nextel for the entire MSS share of BAS relocation costs.⁴² The MSS operators point to no precedent or equitable reason why Sprint Nextel should continue to bear the burden of fronting the costs of clearing the MSS spectrum. Sprint Nextel should have the right to seek reimbursement for the full MSS share of BAS relocation costs from a single MSS operator, with that operator entitled to seek reimbursement from the other MSS operator as provided in the MSS true-up mechanism. This process ensures that Sprint Nextel will be fully reimbursed for its efforts, rather than continuing to carry the burden for MSS operators that attempt to avoid their reimbursement obligations. Each MSS operator receives the full benefit of Sprint Nextel's band clearance efforts on its behalf, and Sprint Nextel should be afforded the right to obtain full and fair reimbursement for those efforts as necessary from the MSS entrants.

⁴¹ *Sprint Nextel July 14 Comments* at 15-19.

⁴² *Id.* at 19-20.

IV. THE COMMISSION'S PROPOSALS IN THE *FURTHER NOTICE* DO NOT CONSTITUTE IMPERMISSIBLE RETROACTIVE RULEMAKING

The Commission should reject ICO's argument that the proposals in the *Further Notice* are impermissibly retroactive.⁴³ "[A] retroactive rule forbidden by the [Administrative Procedure Act] is one which 'alters the *past* legal consequences of past actions.'"⁴⁴ The *Further Notice* proposes no rules that would have this impermissible effect.

ICO's retroactivity argument fails because, contrary to its assertions, the *Further Notice* does not propose to alter the MSS operators' fundamental cost-sharing obligations. The *800 MHz R&O* imposed cost-sharing obligations on MSS operators that entered the band prior to the completion of 800 MHz reconfiguration.⁴⁵ Both MSS operators have now entered the band well before the completion of 800 MHz rebanding, thus incurring their cost-sharing responsibilities under the framework adopted by the

⁴³ ICO Comments at 9-13.

⁴⁴ *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002) (emphasis in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)).

⁴⁵ As the Commission states in the *Further Notice*, "the most logical and appropriate interpretation of the language in the 800 MHz orders is that the MSS entrants must pay their *pro rata* share of BAS relocation costs to the extent that they enter the band before the 800 MHz rebanding or true up is complete." *Report and Order and Further Notice* ¶ 80. The Commission has thus rejected ICO's argument that the *800 MHz R&O* established June 26, 2008 as the sunset date for MSS reimbursement obligations. The Commission correctly found that the references to this date in the *800 MHz R&O* are not relevant or supported by the context of the *800 MHz R&O*. In addition, the Commission found that changes in circumstances beyond the individual or collective control of the parties have undermined the Commission's original assumptions regarding the projected date for completing 800 MHz reconfiguration. These Commission findings hardly constitute retroactive rulemaking, as they merely clarify the Commission's original intent and eliminate ambiguities in the original order.

Commission five years ago.⁴⁶ Although the *Further Notice* proposes to establish a “date certain” for the reimbursement sunset date because the precise timing of the completion of 800 MHz reconfiguration and the true up is unclear, this proposal and other proposals in the *Further Notice* will only provide greater certainty and simplify the administration of cost-sharing obligations. Nothing in the *Report and Order and Further Notice* alters the fundamental obligations for MSS operators. Far from retroactively changing MSS rights and responsibilities, the *Further Notice* simply confirms that, under the “stated purposes and structure of the cost sharing principles set forth in the *800 MHz R&O* and other decisions,” MSS operators must pay their fair share of BAS relocation costs.⁴⁷

ICO’s retroactivity arguments would fail even assuming for the sake of argument that the *Further Notice* actually proposed new cost-sharing rules. A rule change “does not have an impermissible retroactive effect” if “it does not make past behavior unlawful or otherwise impose a penalty for past actions.”⁴⁸ Neither of these circumstances applies to the Commission’s proposals in the *Further Notice*. ICO can point to no past action or conduct on the part of MSS operators that will be penalized or rendered illegal under any of the proposals in the *Further Notice*. The MSS operators, in fact, have taken *no* action in response to the Commission’s current relocation and reimbursement rules and

⁴⁶ See *Report and Order and Further Notice* ¶¶ 46, 80. The *Further Notice* tentatively concludes that an MSS operator will be deemed to have entered the band, and incurred its cost-sharing obligation, when it certifies that its satellite is operational. *Id.* ¶ 91. ICO cannot claim that this proposal constitutes retroactive rulemaking because it seeks to clarify a previously undefined term rather than to modify an existing definition. *Id.* ¶ 78 (“the Commission has never defined what ‘entered the band’ means”).

⁴⁷ *Id.* ¶ 77; see also *id.* ¶ 79.

⁴⁸ *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825 (D.C. Cir. 1997); see also *id.*, 110 F.3d at 825-26 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

therefore cannot claim that they took any action in detrimental reliance on the Commission's current rules.

ICO claims it has "vested rights" in avoiding its reimbursement obligation,⁴⁹ but, like another party in a prior case that raised a meritless retroactivity claim, it "never explains where this vested right came from."⁵⁰ The *800 MHz R&O* certainly gave MSS operators no such right.⁵¹ MSS operators may have hoped or expected that they could escape their reimbursement obligations based on their strained interpretation of the *800 MHz R&O*.⁵² But "a new rule or law is not retroactive 'merely because it . . . upsets expectations based on prior law.'"⁵³ The D.C. Circuit has explained that "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been

⁴⁹ ICO Comments at 11 & n.34.

⁵⁰ *Celtronix Telemetry, Inc.*, 272 F.3d at 589.

⁵¹ *See, e.g., Report and Order and Further Notice* ¶ 79 (noting that the "Commission clearly allowed for the possibility that the MSS entrants would incur a cost-sharing obligation, and Sprint Nextel was explicitly allowed to pursue cost sharing from the MSS entrants by giving them notice within one year of adoption of the *800 MHz R&O*.").

⁵² As explained previously, there is no basis in the Commission's prior decisions or policies for any such expectation by MSS operators.

⁵³ *DIRECTV, Inc.*, 110 F.3d at 826 (quoting *Landgraf*, 511 U.S. at 269); *see also Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712, ¶ 137 (1995) (Retroactivity argument was "based on the misconception that the Commission cannot or should not change settled rules or policies if doing so would have a detrimental impact on those it regulates. On the contrary, the Commission enjoys wide latitude when using rulemaking to change its own policies and the manner by which those policies are implemented. If the Commission is to function effectively, it must have the flexibility to amend its rules and regulations in light of its experience.").

thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.”⁵⁴

In light of these considerations, the courts have repeatedly rejected retroactivity challenges to agency rulemaking.⁵⁵ The Commission should similarly reject ICO’s retroactivity argument.

⁵⁴ *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

⁵⁵ *See, e.g., Am. Mining Congress v. EPA*, 965 F.2d 759, 769-70 (9th Cir. 1992) (holding that a regulation requiring storm water discharge permits for inactive mines was not retroactive when applied to parties who had purchased the inactive mines before the regulation was adopted, even when the contamination was a result of mining activities only conducted in the past); *DIRECTV, Inc.*, 110 F.3d at 825-26 (holding that FCC rules deciding that reclaimed channels would be auctioned rather than distributed on a *pro rata* basis among existing permittees were not retroactive); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 241 (D.C. Cir. 1997) (holding that it was not retroactive for the FCC to change regulations governing construction of communications systems for which applications had been filed before the new regulations were adopted); *Bergerco Can. v. U.S. Treasury Dep’t*, 129 F.3d 189, 194 (D.C. Cir. 1997) (holding that it was not retroactive to apply new rules to applications that had been filed before the new rules were adopted, and finding that “if [an] expectation . . . qualified as a ‘right’ for purposes of determining impermissible retroactivity, then virtually every licensing applicant would acquire protection from any rule-made variation in licensing standards, even where the original set of rules was vague or obviously provisional”); *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233, 236 (D.C. Cir. 2000) (holding that the FCC’s changes to its financial rules were not impermissibly retroactive even as applied to bidders in a previously held auction); *Celtronix Telemetry, Inc.*, 272 F.3d at 588-90 (holding that changes to grace periods and late fees for future payments on licenses acquired at a past auction were not impermissibly retroactive); *Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 327 F.3d 1339, 1344-45 (Fed. Cir. 2003) (holding that the Department of Veterans Affairs was not acting retroactively in applying new evidentiary regulations to pending cases); *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 10-11 (D.C. Cir. 2006) (holding that the FCC’s modification of 800 MHz licenses was not retroactive); *Combs v. Comm’r of Soc. Sec.*, 459 F.3d 640, 648-49 (6th Cir. 2006) (en banc) (holding that the Social Security Administration could change a list of presumptive disabilities and apply that change when adjudicating an application for benefits that had been filed three years prior).

V. CONCLUSION

The Commission should dismiss the MSS operators' continued efforts to avoid and limit their reimbursement obligations. Like any other new entrant, MSS operators should pay their fair share of relocating incumbent licensees based on clear, transparent cost-sharing rules and procedures.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Lawrence R. Krevor

Lawrence R. Krevor
Vice President, Government Affairs – Spectrum
Trey Hanbury
Director, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-8124

Regina M. Keeney
Charles W. Logan
Lawler, Metzger, Keeney & Logan, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
Counsel for Sprint Nextel Corporation

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