

**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

**OPPOSITION OF SPRINT NEXTEL CORPORATION TO THE PETITION FOR  
STAY FILED BY NEW DBSD SATELLITE SERVICES G.P.**

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

July 24, 2009

## Introduction

Pursuant to 47 C.F.R. § 1.45(b), Sprint Nextel Corporation (“Sprint Nextel”) hereby opposes the Petition for Stay (the “Petition”) filed by New DBSD Satellite Services G.P. (f/k/a New ICO Satellite Services G.P.) (“DBSD”)<sup>1</sup> with regard to the Further Notice of Proposed Rulemaking (“*Further NPRM*”) in the above-captioned proceeding. ICO contends that this *Further NPRM* proceeding is subject to the automatic stay imposed by section 362(a) of the Bankruptcy Code because ICO’s subsidiary has commenced a bankruptcy case under Chapter 11 of the Bankruptcy Code.<sup>2</sup> ICO’s argument fails for several independent reasons.

First, ICO fails to acknowledge the fundamental distinction between an adjudicative proceeding to *enforce* established rules and regulations against a specific party, and a rulemaking proceeding to *establish* rules of general applicability. Although a regulatory enforcement action might be subject to the automatic stay in certain circumstances not at issue here, the automatic stay is simply not applicable to a rulemaking proceeding such as this one.

Second, even if this rulemaking proceeding could somehow be construed as an enforcement action, which it cannot, the Bankruptcy Code provides a specific exception to the automatic stay for any proceeding by a governmental unit to enforce its regulatory power.

---

<sup>1</sup> Sprint Nextel uses the shorthand reference to ICO to refer to DBSD and all of its parent and affiliated companies.

<sup>2</sup> ICO also raised arguments regarding the automatic stay provision of 11 U.S.C. § 362 in its July 14, 2009 Comments. *See* Comments of New DBSD Satellite Services G.P. (July 14, 2009), at 3-9. Those similar arguments likewise fail for the reasons set forth herein and in Sprint Nextel’s concurrently filed Reply Comments.

Third, the automatic stay applies only to debtors in bankruptcy and does not extend to co-defendants or other parties to an action that have not filed for bankruptcy. Thus, even if the automatic stay were somehow applicable to this proceeding, it would only apply to ICO's subsidiary New DBSD Satellite Services G.P., and the proceeding should continue with respect to all other parties in interest.<sup>3</sup> For each of these reasons, the Petition should be denied.

**I. The Automatic Stay Does Not Apply To This Rulemaking Proceeding.**

The *Further NPRM*, which the Commission captioned, styled, and is conducting as a rulemaking proceeding, is, in fact, a rulemaking, not an adjudication specific to ICO. The Commission established its June 12, 2009 *Further NPRM* as a rulemaking of general applicability and is explicitly conducting it pursuant to the Commission's power to establish rules and regulations.<sup>4</sup> ICO ultimately concedes this is the case.<sup>5</sup>

Contrary to ICO's assertions regarding the alleged applicability of the automatic stay provision, the law has long recognized a critical difference between a rulemaking and an adjudication for the purposes of the applicability of the automatic stay. Simply put, an adjudication decides a discrete dispute between specific entities, while a rulemaking involves the promulgation of rules or standards broadly applicable to any number of unspecified entities.<sup>6</sup> This distinction between a rulemaking proceeding and

---

<sup>3</sup> As more fully discussed in Sprint Nextel's Reply Comments, the bankruptcy filing of ICO's subsidiary does not alter ICO's overarching reimbursement obligations or provide any basis for the stay. The Commission has consistently treated ICO as a single entity with regard to its authorizations and obligations, regardless of its corporate restructurings and bankruptcies. *See* Sprint Nextel Reply Comments, at 2-3.

<sup>4</sup> *See Further NPRM*, ¶¶ 59, 85 (citing, *inter alia*, 47 U.S.C. §§ 154(i), 155(c), & 303(f)).

<sup>5</sup> *See, e.g.*, Petition, at 2 ("The Commission's *rulemaking proceeding here* is controlled by the mandatory and automatic statutory stay that Congress established in Section 362(a)") (emphasis added).

<sup>6</sup> *See Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 448 (9<sup>th</sup> Cir. 1994) ("[A]djudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects

an adjudication is directly relevant to the issue of whether the automatic stay applies to this proceeding because the statutory provisions that create the automatic stay only prohibit *actions taken against a particular debtor or its property*. For instance, the specific subdivisions of the Bankruptcy Code relied upon by ICO state as follows:

Except as provided in subsection (b) of this section, a petition filed [to commence a Chapter 11 bankruptcy proceeding] operates as a stay applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim *against the debtor* that arose before the commencement of the case under this title;

\* \* \*

(3) any action to obtain possession of property *of the estate* or of property *from the estate* or to exercise control over property *of the estate*;

\* \* \*

(6) any act to collect, assess, or recover a claim *against the debtor* that arose before the commencement of the case under this title . . . .<sup>7</sup>

Because the automatic stay provisions refer to actions “against” a particular debtor or “against” the debtor’s property, the automatic stay simply does not apply to rulemaking proceedings that are not brought “against” any particular entity but, instead, generally apply to everyone. That is the precise situation here, where the *Further NPRM* itself is not a proceeding specifically against ICO or its property.

---

the rights of broad classes of unspecified individuals.”); *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978) (“While the line dividing them may not always be a bright one, [there is] a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”)

<sup>7</sup> 11 U.S.C. § 362(a) (emphasis added).

For example, as stated by one court in the context of zoning regulations:

I do not consider the enactment of a municipal ordinance amending that town's zoning ordinance to be a "proceeding against the debtor." I consider that act to be an exercise of the municipal legislative power rather than a "judicial, administrative, or other proceeding against the debtor."<sup>8</sup>

In other words, while the establishment of a rule may as a consequence negatively impact a debtor, that does not mean that the establishment of a rule of general application violates the automatic stay.<sup>9</sup>

After apparently recognizing the *Further NPRM* is a rulemaking proceeding and that the automatic stay does not apply, ICO attempts to re-characterize this rulemaking as a disguised adjudication. For instance, it refers to this proceeding as a "nominal 'rulemaking'"<sup>10</sup> and states that it would "functionally adjudicate" Sprint Nextel's claim against ICO.<sup>11</sup> ICO also cites two cases to argue that the Commission should not be allowed to use a rulemaking proceeding to avoid the limitations placed upon its adjudication abilities by the automatic stay.<sup>12</sup> As further discussed below, ICO's cited cases are inapposite.

In *Transcon*, the court issued an injunction preventing the enforcement of regulations by the Interstate Commerce Commission (the "ICC") on the theory that enforcement of the regulations would result in the ICC exercising control over claims

---

<sup>8</sup> *In re Lacoquille Investment Co.*, 44 B.R. 731, 732-33 (Bankr. S.D. Fla. 1984).

<sup>9</sup> *In re Albion Disposal, Inc.*, 217 B.R. 394, 406 (W.D.N.Y. 1997) ("The plaintiffs also argue that the Local Laws were an act to exercise control over the Premises because the Laws prohibited them from using that property in the manner in which they had intended. Once again, that position does not find support in the Bankruptcy Code, inasmuch as section 362(a)(3) does not stay acts simply because they may have an indirect effect of limiting the manner in which the debtor had intended to use his property.").

<sup>10</sup> See Petition at p. 1

<sup>11</sup> *Id.* at p. 6.

<sup>12</sup> *Id.* at pp. 5-6 (citing *In re Transcon Lines*, 147 B.R. 770, 774-77 (Bankr. C.D. Cal. 1992) and *White v. United States*, 989 F.2d 643 (3d Cir. 1993)).

belonging to the bankruptcy estate.<sup>13</sup> Thus, the issue in *Transcon* was whether *enforcement* of the regulation at issue would violate the automatic stay and not whether a rulemaking proceeding would violate the automatic stay.

In addition, the regulation at issue in *Transcon* was completely different than the rules proposed in this proceeding. Under the regulations at issue in *Transcon* any carrier that ceased operations was required to submit rate-undercharge claims for review by the ICC before they could pursue such claims.<sup>14</sup> The regulations allowed the ICC to prevent a carrier from pursuing the claims if the ICC determined that the claims were facially invalid.<sup>15</sup> As a result, a trustee in bankruptcy was prohibited from pursuing claims belonging to the bankruptcy estate without first obtaining permission from the ICC.<sup>16</sup>

This proceeding is completely different from the situation in *Transcon*, and *Transcon* has no application to it. The Commission is not seeking to divest the Bankruptcy Court of jurisdiction over any claims belonging to the bankruptcy estate, and the outcome of this proceeding will not limit in any way the actions that ICO may take in its bankruptcy case. Thus, *Transcon* has no application to this proceeding.

Furthermore, *White*, the only other case cited by ICO for the proposition that the Commission should not be allowed to use a rulemaking proceeding to avoid the automatic stay, actually does not discuss the automatic stay at all. The court in *White* addressed the same regulations at issue in *Transcon*. However, the impact of the automatic stay upon those regulations was not at issue in *White*. Instead, the court struck

---

<sup>13</sup> *In re Transcon Lines*, 147 B.R. at 775-76 (“Because the *application or enforcement* of the Bankruptcy Regulations to or against this estate, its property or the Trustee would violate the automatic stay, the Trustee may disregard such Regulations. . . .”)

<sup>14</sup> *Id.* at 773, ¶ 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 773, ¶ 13.

down the regulations as exceeding the statutory authority of the ICC. Thus, *White* is inapposite to this proceeding. Therefore, both of the cases cited by ICO on this point are inapplicable.

Notably, ICO does not cite a single case in which a court holds that a rulemaking proceeding in and of itself constitutes a violation of the automatic stay. ICO has demonstrably failed to carry its burden as the petitioner by failing to provide any support for that proposition. In addition, despite ICO's suggestion to the contrary, this rulemaking is not a disguised adjudication. This proceeding will not result in the immediate entry of an order or monetary judgment against ICO by the Commission. Instead, the proceeding will result only in the promulgation or clarification of rules and procedures applicable not only to ICO but also other providers of Mobile Satellite Services ("MSS") and future licensees of Advanced Wireless Services ("AWS") in the 1990-2025 spectrum band. Because this proceeding does not constitute an action "against" ICO individually but, instead, will result in the promulgation of rules applicable to all new entrants in the 1990-2025 MHz band, the automatic stay is inapplicable to this rulemaking proceeding.

## **II. The Bankruptcy Code Contains An Exception To The Automatic Stay For The Enforcement of Police and Regulatory Powers.**

Even if this rulemaking proceeding could somehow be construed as an enforcement action, the automatic stay would still not apply because the Bankruptcy Code provides a specific exception to the automatic stay for any proceeding by a governmental unit to enforce its regulatory or police power.<sup>17</sup> Courts apply two tests to determine whether the exception applies: the pecuniary purpose test, and the public

---

<sup>17</sup> See 11 U.S.C. §362(b)(4).

policy test. Under the pecuniary purpose test, courts focus on whether the governmental proceeding relates primarily to the protection of the government’s pecuniary interest in the debtor’s property and not to matters of public policy.<sup>18</sup> Under the public policy test, courts must distinguish between proceedings that adjudicate private rights and those that effectuate public policy.<sup>19</sup> In this case, both tests are satisfied.

As stated in the *Further NPRM*, the Commission’s plans for the transition of BAS licensees began in 1997.<sup>20</sup> The purpose of the relocation was to promote more efficient use of the spectrum and to permit the entry of new services.<sup>21</sup> Absent a workable BAS relocation process, comparatively inefficient technologies would continue to encumber valuable spectrum indefinitely and would preclude the introduction of valuable new wireless services. Moreover, BAS is a crucial component of broadcasting operations, and the proposed rules set forth in the *Further NPRM* are intended to bring the long and complex BAS relocation process to completion.<sup>22</sup> The rules will also further the public interest by providing clarity with respect to the obligations of all parties in interest, including future AWS licensees.

Despite these public policy justifications for the proposed rules, ICO contends that the pecuniary interest test is not satisfied because Sprint Nextel’s pecuniary interests are “plainly impacted” and a “monetary judgment as between Sprint Nextel and ICO is

---

<sup>18</sup> *Eddleman v. U.S. Dep’t of Labor*, 923 F.2d 782, 791 (10<sup>th</sup> Cir. 1992); overruled in part on other grounds by *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10<sup>th</sup> Cir. 1992).

<sup>19</sup> *Id.*

<sup>20</sup> *See Further NPRM*, ¶ 7.

<sup>21</sup> *Id.* at ¶ 6.

<sup>22</sup> *Id.* at ¶ 4.

clearly involved.”<sup>23</sup> These statements demonstrate that ICO misunderstands the focus of the pecuniary interest test. The test is not whether pecuniary interests are “implicated” or “involved.” Indeed, practically all regulatory action will have some pecuniary impact on some party. Instead, the test is whether or not the proceeding relates primarily to a public policy purpose notwithstanding the potential implication upon pecuniary interests.<sup>24</sup>

There are numerous cases in which courts have found that the underlying public policies justified the application of the policy power exception to the automatic stay even though the enforcement actions clearly impacted pecuniary interests.<sup>25</sup> In this case, any pecuniary implications are merely an ancillary side-effect of rules that have the primary purpose of furthering the public policies described above. Thus, under the pecuniary interest test, the automatic stay does not apply to this proceeding.

For the same reasons, the automatic stay is inapplicable under the public policy test. Under the public policy test, the issue is whether the private interests “significantly outweigh” the public benefit from enforcement.<sup>26</sup> In this proceeding, private interests do not significantly outweigh the public benefit. As noted above, the proposed rules further the important policy of implementing procedures for the completion of the BAS relocation. In contrast, promulgation of the rules themselves will not constitute a monetary judgment in favor of Sprint Nextel or any other person. Thus, any private interests do not significantly outweigh the public policy objectives of the proceeding.

---

<sup>23</sup> Petition, at pp. 7-8.

<sup>24</sup> *Eddleman*, 923 F.2d at 791 (holding that a suit by the Department of Labor to enforce the Service Contract Act, in which the government sought liquidation of certain workers’ back-pay claims, was within the police power exception).

<sup>25</sup> *See, e.g., NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6<sup>th</sup> Cir. 1986) (unfair labor practice proceeding not subject to automatic stay); *SEC v. Towers Financial Corp.*, 205 B.R. 27 (S.D.N.Y. 1992) (SEC action seeking disgorgement of illicit profits not subject to automatic stay).

<sup>26</sup> *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 390 (6<sup>th</sup> Cir. 2001).

Finally, courts have recognized that under both tests, one of the primary factors is whether the governmental agency is using its enforcement powers to obtain a better distribution than it would otherwise receive pursuant to the priority of distribution established by the Bankruptcy Code.<sup>27</sup> This rulemaking proceeding will have no impact on the treatment that any claim will receive in ICO's bankruptcy case. Any claim of Sprint Nextel may be determined in accordance with any rules promulgated by the Commission, and that claim will be treated in a manner that will be determined in the Bankruptcy Court.<sup>28</sup> This further demonstrates that the primary purpose of this rulemaking proceeding is to advance public policy goals and not to enhance any party's position in ICO's bankruptcy case.

For each of these reasons, the police power exception to the automatic stay applies to this proceeding.

### **III. The Automatic Stay Does Not Protect Parties Who Have Not Filed For Bankruptcy**

Even if the automatic stay somehow applied to ICO's subsidiary DBSD in this proceeding, that would not mean that the proceeding should be stayed in its entirety. One

---

<sup>27</sup> *Id.* at 389 n. 9 ("We join the Eighth Circuit in refining the 'pecuniary interest' test to focus our inquiry on whether the enforcement action would result in a pecuniary *advantage* to the government vis-à-vis other creditors of the bankruptcy estate. . . . We must apply the test uniformly to prevent a class of government-favored creditors from obtaining a pecuniary advantage over other creditors who must stand in the places assigned by the Bankruptcy Code's carefully drawn priority scheme.") (emphasis in original); *Eddleman v. United States Dep't of Labor*, 923 F.2d 782, 784 (10<sup>th</sup> Cir. 1991), overruled in part on other grounds by *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003 (10<sup>th</sup> Cir. 1992) (holding that a suit to enforce back-pay claims was within the police power exception because "back-pay claimants would not receive any extra priority by virtue of the" lawsuit but instead would have to collect their claims in bankruptcy.).

<sup>28</sup> While not at issue at this time, Sprint Nextel does not concede that the Bankruptcy Court should finally determine the treatment of its claim against ICO. Rather, as asserted by ICO in the federal court enforcement action brought by Sprint Nextel, the application of the doctrine of primary jurisdiction may result in the issue being referred to the FCC. *See also* 28 U.S.C. § 157(d) (mandatory withdrawal of referral to bankruptcy court if issues concern both the bankruptcy laws "and other laws of the United States regulating organization or activities affecting interstate commerce").

of the basic rules of bankruptcy is that the automatic stay applies only to the debtor in bankruptcy and does not apply to non-debtors, including any non-debtor co-defendants.<sup>29</sup> Thus, this proceeding should continue with respect to TerreStar and other parties in interest that have not filed for bankruptcy.

The fact that ICO's subsidiary may subsequently be bound by any ruling issued against non-debtor parties does not change this result. If ICO is concerned that the continuation of this proceeding as against non-debtor entities will collaterally estop ICO from challenging the outcome of this proceeding in the future, then it could petition the Bankruptcy Court to stay this proceeding in its entirety. However, such a stay is not automatic, and is granted only in "unusual circumstances."<sup>30</sup> In any event, ICO has not yet petitioned the Bankruptcy Court to extend the automatic stay to any non-debtor entities. Accordingly, the automatic stay that came into effect upon the filing of DBSD's bankruptcy case does not apply to any non-debtor entity, and this rulemaking may proceed with respect to all other parties in interest.

## **CONCLUSION**

For the foregoing reasons, the automatic stay provided for in 11 U.S.C. § 362 does not apply to this rulemaking proceeding, and the Petition for Stay must be denied.

---

<sup>29</sup> *Teacher's Insurance and Annuity Association of America v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) ("It is well-established that stays pursuant to § 362(a) are limited to debtors and do not encompass non-bankrupt co-defendants."); *American Prairie Construction Company v. Hoich*, 560 F.3d 780, 789 (8<sup>th</sup> Cir. 2009) (bankruptcy stay does not extend to co-defendants "even if they are in a similar legal or factual nexus with the debtor").

<sup>30</sup> *In re Uni-Marts, LLC*, 404 B.R. 767, 782 (Bankr. D. Del. 2009) (noting that some courts have stayed proceedings against non-debtor defendants based upon collateral estoppel concerns but finding that unusual circumstances did not exist to extend the stay).

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

John H. Culver

Felton E. Parrish

K&L Gates LLP

Hearst Tower, 214 North Tryon Street, 47th Floor

Charlotte, North Carolina 28202

(704) 331-7400

Bankruptcy Counsel to Sprint Nextel Corporation

**July 24, 2009**