

**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 NEW DBSD SATELLITE SERVICES G.P.

New DBSD Satellite Services G.P.
Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs
Peter Corea
Senior Regulatory Counsel
815 Connecticut Ave., NW, Suite 610
Washington, D.C. 20006

July 24, 2009

TABLE OF CONTENTS

	Page
I. THE PROCEEDING SHOULD BE STAYED UNDER THE BANKRUPTCY CODE.....	2
II. THE BAN ON RETROACTIVITY PRECLUDES CHANGING THE COST-SHARING REQUIREMENTS	3
III. NO REASONED BASIS EXISTS FOR CHANGING COST-SHARING REQUIREMENTS	5
A. The Proposed Modifications Would Burden MSS with the Consequences of Sprint's Assumption of Control over BAS Relocation	6
B. Preserving Existing BAS Cost-Sharing Requirements Will Not Undermine Application of Cost-Sharing Principles in Other Contexts	8
IV ANY REGULATORY MODIFICATION MUST ACCOUNT FOR THE SIGNIFICANT IMPACT OF THE DELAYED CLEARING ON MSS.....	9
A. Any Reimbursement Payments Should Be Delayed Until the Close of True-up, Subject to Further Documentation, and Made Under an Extended Payment Plan.....	9
B. Any Reimbursement Should Be Limited to Costs for Relocation of the Top 30 and Fixed BAS Markets.....	12
C. The Commission Should Retain the Sunset Date of December 9, 2013	12
V. THE COMMISSION SHOULD ENSURE GOOD FAITH COORDINATION BY BAS, AND BAS SHOULD BECOME SECONDARY UPON THE RELCOATION DEADLING	13
VI. CONCLUSION.....	14

**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 NEW DBSD SATELLITE SERVICES G.P.

New DBSD Satellite Services G.P. (“DBSD”)¹ submits these reply comments regarding the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceedings.² Nothing in the submissions received on this matter alters the following main points DBSD made in it comments: (1) this proceeding should be stayed under the automatic stay of the Bankruptcy Code; (2) the Commission’s proposed modification of the BAS cost-sharing requirements would

¹ In its comments, Sprint refers inexplicably to the obligations of DBSD and its “affiliated companies.” Whatever DBSD’s obligations may be, it is clear that no other entity has any obligation to Sprint. Sprint cites no basis or precedent for any liability for “affiliated companies,” because there is none. All comments filed in this proceeding and cited herein were submitted on July 14, 2009, and will be short cited.

² See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order and Order and Further Notice of Proposed Rulemaking, FCC 09-49 (June 12, 2009) (“*Order and FNPRM*” or “*FNPRM*”).

be impermissibly retroactive; (3) no reasoned basis supports the Commission’s proposed modification; (4) if the Commission nonetheless proceeds with changes to its regulations despite these issues, it at a minimum should do so in a way that mitigates the harms to MSS entrants; and (5) BAS licensees must coordinate with MSS operators in good faith and become secondary by the BAS relocation deadline of February 9, 2010.

I. THE PROCEEDING SHOULD BE STAYED UNDER THE BANKRUPTCY CODE

As DBSD stated in its comments, this rulemaking should be stayed under the Bankruptcy Code, pursuant to DBSD’s filing for Chapter 11 protection.³ Only three parties—DBSD, TerreStar Networks Inc. (“TerreStar”), and Sprint Nextel Corporation (“Sprint”)—filed comments addressing Sprint-MSS reimbursement issues. These comments confirm that those issues affect only the commenting parties and that this proceeding, though styled as a rulemaking, will have the same effect as if it were an adjudication of Sprint’s reimbursement claims against DBSD and TerreStar. To the extent the proposed regulations would alter the status of reimbursement obligations as they existed at the time of DBSD’s bankruptcy petition filing, Commission action on the proposed regulations should be stayed until the close of bankruptcy proceedings.⁴

Moreover, the Commission’s proposed modification of the reimbursement obligation would advance Sprint Nextel’s pecuniary interests and thus this proceeding is not exempt

³ See DBSD Comments at 3-9.

⁴ The automatic stay is not indefinite and lifts upon the occurrence of the carefully specified conditions set by Congress in the Bankruptcy Code. See 11 U.S.C. § 362(c). Given that the BAS relocation sunset date and true-up are in the future as well, obedience by the Commission to the automatic stay would not unduly disrupt these proceedings, even if the Commission possessed the discretion to ignore the automatic statutory injunction that the Bankruptcy Code imposes, which it does not.

pursuant to the police power exception to the automatic stay established by the Bankruptcy Code.⁵ Sprint's comments confirm that the proposed reimbursement requirements are intended to ensure that Sprint is "made whole" for the BAS relocation costs incurred.⁶ Thus, the proposed reimbursement requirements undisputedly are designed to advance only Sprint's pecuniary interests by effectively adjudicating Sprint's financial claims against DBSD and TerreStar.

II. THE BAN ON RETROACTIVITY PRECLUDES CHANGING THE COST-SHARING REQUIREMENTS

As DBSD stated in its Comments, the Commission's proposed modification of the BAS cost-sharing requirements would violate basic administrative law restrictions by retroactively eliminating MSS rights and imposing new duties with respect to events already completed.⁷ The proposal to eliminate MSS rights by extending the June 26, 2008 reimbursement termination date long after that date has passed is impermissibly retroactive. Sprint itself describes the proposed modification as explicitly "de-linking" the cost-sharing obligation from the 36-month reconfiguration period.⁸

Sprint argues, several years after the fact, that linking the cost-sharing with the 36-month reconfiguration period, as the Commission did in adopting the existing requirements in 2004, is now inconsistent with the Commission's public interest objectives and contrary to *Emerging*

⁵ DBSD Comments at 8-9.

⁶ Sprint urges just such an outcome. "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." Sprint Nextel Comments at 20.

⁷ DBSD Comments at 9-13.

⁸ Sprint's indication that "[o]nce the MSS and AWS cost-sharing obligations are de-linked from the 800 MHz benchmarks," certain benefits for Sprint will accrue is a clear concession that: (1) existing MSS cost-sharing obligations *are linked* to the 800 MHz benchmarks, and (2) "de-linking" MSS cost-sharing obligations from the 800 MHz benchmarks would represent a change in law. Sprint Nextel Comments at i-ii, 6.

Technologies precedent.⁹ This is incorrect. Sprint’s argument conveniently ignores the balancing of interests reflected in the existing rules, and specifically the inclusion of MSS interests as part of that balance. The Commission properly concluded in 2004 that setting a reimbursement deadline would hold Sprint to its commitment to conduct band-clearing activities in an expeditious fashion, to the benefit of MSS entrants and the public interest.¹⁰

Sprint’s contention is also irrelevant. The apparent rationale offered by Sprint (and the Commission) for modifying the reimbursement obligation—*i.e.*, “changed circumstances”—cannot save the proposed modification from invalidation as a retroactive regulation.¹¹ The test for retroactivity asks “whether the new provision attaches new legal consequences to events completed before its enactment.”¹² The Commission’s proposal would allow an agency to circumvent the retroactivity analysis at will, since an agency can always say that circumstances have changed.¹³ Indeed, changing reimbursement rules mid-stream has been deemed by the Supreme Court to be a prime example of retroactive regulation.¹⁴

⁹ *Id.* at 5-6.

¹⁰ DBSD is of course not arguing that it was being or should now be “subsidized,” as the *FNPRM* suggests. *FNPRM* ¶ 80. Nothing in the Court’s analysis in *Bowen*, which itself involved a retroactive cost-reimbursement rulemaking turned on whether the change the agency sought to impose retroactively was altering a rule thought to benefit or disadvantage a particular class of regulated party. The key issue here is rather that *FNPRM* seeks to retroactively change a cost-reimbursement rule.

¹¹ See *FNPRM* ¶¶ 75-76, 80.

¹² *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994).

¹³ See also *id.* at 270 (“retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact”).

¹⁴ “The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance. . . . [Proceeding to collect cases spanning more than a century.] *Bowen* . . . was in step with this long line of cases. *Bowen* itself

The June 26, 2008, reimbursement deadline has long passed, thus terminating any reimbursement obligation of MSS operators under the Commission's existing cost-sharing requirements as of that date.¹⁵ The Commission's proposal to modify the cost-sharing obligation of MSS operators more than a year after the obligation terminated is impermissibly retroactive and cannot be adopted.

III. NO REASONED BASIS EXISTS FOR CHANGING COST-SHARING REQUIREMENTS

The proposed regulations would upset the careful balancing of interests the Commission calibrated in 2004 by unlawfully and unfairly shifting to MSS operators burdens of delay explicitly assumed by Sprint Nextel. That balancing appropriately placed upon Sprint Nextel the risks of delay and higher-than-expected costs of BAS relocation, which Sprint Nextel willingly assumed in exchange for billions of dollars worth of spectrum. At that time, Sprint Nextel actively pursued relocation commitments, including relocation of both primary and secondary licensees in of the 1990-2025 MHz BAS reallocated spectrum, so that the credits received could offset any potential windfall payment to the U.S. Treasury.¹⁶ Having mitigated its risks through taking credits at the outset of the proceeding, however, Sprint Nextel now seeks to eliminate its

was a paradigmatic case of retroactivity [in the cost-reimbursement context]" *Id.* at 271-72 (citation omitted).

¹⁵ See DBSD Comments at 13.

¹⁶ The Commission in the *FNPRM* tentatively concludes that, "[a]s is the case under current requirements," Sprint Nextel "may not both receive reimbursement from another new entrant and take credit for the same BAS relocation cost at the 800 MHz true-up." *FNPRM* ¶ 84. DBSD agrees that, at a minimum, this rule should be applied so that MSS entrants are no worse off than under the current requirement and consistent with the Commission's finding in the 800 MHz Order that "there is no risk in our decision of double recovery by Nextel because it cannot claim credit for any BAS relocation expenses for which it seeks or obtains reimbursement from MSS licensees." *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, 19 FCC Rcd 14969, ¶ 304 (2004) ("800 MHz Order").

risks by expanding the scope of reimbursement obligations of later entrants to the band. Several of the proposed modifications would reward Sprint Nextel for BAS relocation delays and inefficiencies by shifting these burdens to MSS operators and other later entrants. Fidelity to the balancing of interests in this proceeding demands that the Commission leave the burdens of BAS relocation delays where the Commission originally assigned them – on those proposing the BAS relocation plan and its timeline, namely Sprint Nextel and the BAS licensees themselves.

A. The Proposed Modifications Would Burden MSS with the Consequences of Sprint’s Assumption of Control over BAS Relocation

Sprint Nextel’s efforts to extend the reimbursement termination date and otherwise to direct the Commission to modify the cost-sharing rules are entirely focused on what it characterizes as being “made whole.”¹⁷ But in fact Sprint Nextel supports rule changes that would allow it to benefit from the so-called changed circumstances – circumstances over which Sprint Nextel has had most of the responsibility and control during the last five years.¹⁸

As TerreStar noted in its comments, Sprint from the outset has insisted on maintaining control over BAS relocation, but now seeks to shift the financial risks that it accepted in assuming control to MSS operators. In fact, in proposing its BAS relocation plan to the

¹⁷ Sprint Nextel Comments at 20.

¹⁸ Sprint’s unfairness is not limited to MSS entrants. For example, Sprint seeks to amass credits toward the anticipated anti-windfall payment by expanding the scope of reimbursement obligations of later entrants to the band, including AWS. Sprint Nextel now represents that it would be “inequitable” that AWS entrants will get a “windfall” by not participating in reimbursement for BAS clearing. Sprint Nextel Comments at 7-8. In other words, having successfully extended all of its clearing obligations by twice the amount of time, or more, Sprint Nextel seeks to renegotiate its 2004 commitments including costs it sought to take credit for as part of its spectrum deal. The Commission should reject this and other proposals that absolve Sprint Nextel of risks and obligations it voluntarily assumed in 2004 as part of a multi-billion dollar spectrum deal.

Commission, Sprint argued that it should remain solely responsible for BAS relocation.¹⁹

Although the Commission rejected this argument and in theory allowed MSS operators the option of accelerating the BAS relocation process,²⁰ that has not been possible as a practical matter. Sprint gave MSS entrants virtually no visibility into the clearing process, and made it impossible for MSS entrants to participate meaningfully. As DBSD has noted previously, once Sprint had engaged BAS licensees substantively in the clearing process, those licenses would not and could not engage in a parallel process with another entity.²¹ The Commission acknowledged as much when it noted that “Sprint, despite its delays, has now substantially engaged most BAS incumbents in the relocation process, and duplicating those efforts would be enormously inefficient – not to mention counterproductive and frustrating to the BAS incumbents that have already invested substantial time and effort with Sprint.”²²

Sprint has been effective in excluding MSS operators from meaningful participation in the process in other ways as well. For example, in sharp contrast to Sprint’s disingenuous claims regarding its efforts to cooperate with MSS operators in the BAS clearing process, the written “cooperation agreement” that Sprint presented to DBSD was an agreement no entity would enter into. The agreement would have supplanted Commission’s rules applicable to the parties and forced DBSD to surrender valuable rights “in consideration for” Sprint Nextel’s willingness to allow DBSD’s participation in the process. On a practical level, the terms offered no means to

¹⁹ See *800 MHz Order* ¶ 257.

²⁰ *Id.*

²¹ DBSD Comments and Request for Expedited Relief at 5 (April 13, 2007).

²² *Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 4393, ¶ 30 (2008) (quoting DBSD’s June 14, 2007 *ex parte* letter).

accelerate BAS relocation or otherwise advance the goal of timely introduction of MSS.

Apparently, Sprint Nextel presented TerreStar with an agreement that was similarly one-sided.²³

Sprint's characterization of DBSD as the recalcitrant party in negotiations is equally false. After an initial meeting to discuss its demand for reimbursement, Sprint Nextel refused multiple subsequent requests to discuss the topic. In October 2008, Sprint Nextel refused to renew a longstanding non-disclosure agreement that would have allowed any further discussions of commercially sensitive topics such as its reimbursement demands.

Thus, in exchange for an extremely valuable spectrum deal, Sprint proposed a clearing process and a timeline it insisted it could meet. It elected to clear all markets and to seek reimbursement for all clearing costs eligible under the rules. It then implemented the clearing process in a way that ensured that it got what it ultimately had requested from the Commission: total control over the process without the ability of MSS entrants to meaningfully participate. MSS entrants necessarily relied on Sprint to follow through on its promises, and have suffered the consequences of that failure. Sprint should not be rewarded for its failure.

B. Preserving Existing BAS Cost-Sharing Requirements Will Not Undermine Application of Cost-Sharing Principles in Other Contexts

Sprint's claim that maintaining the current long-standing rules would undermine future spectrum clearing is equally meritless. According to Sprint, no future licensee will conduct band-clearing operations, for fear of non-payment, unless Sprint Nextel receives assurance that it will receive payment for work it performs in BAS clearing consistent with its characterization of *Emerging Technologies* precedent.²⁴ Yet the Commission throughout this proceeding has acknowledged the myriad ways that its BAS cost-sharing requirements are expressly designed to vary from the cost-

²³ TerreStar Comments at 11-12 n.23.

²⁴ Sprint Nextel Comments at 11.

sharing principles established in the *Emerging Technologies* proceeding. For example, the *800 MHz Order* the Commission specifically flagged as distinctive the need for market-by-market clearing, rather than link-by-link, clearing of BAS facilities, and the need to accommodate nationwide entry for MSS systems that of necessity cover a large geographic area.²⁵ In particular, the Commission established BAS cost-sharing requirements to accommodate the unique circumstances surrounding Sprint Nextel’s acquisition of 1.9 GHz spectrum, 800 MHz realignment, and BAS clearing commitments. Preserving these requirements will not undermine the Commission’s policies underlying the *Emerging Technologies* proceeding because, as with Sprint Nextel’s spectrum acquisition, accommodations must be made in unique cases to achieve a reasonable result. Preserving the existing cost-sharing requirements is eminently reasonable and equitable here, given that the Commission adopted those requirements with the express warning that Sprint was “taking the very substantial risk that it could end up incurring costs that are greater than the value of the spectrum rights it receives.”²⁶

IV. ANY REGULATORY MODIFICATION MUST ACCOUNT FOR THE SIGNIFICANT IMPACT OF THE DELAYED CLEARING ON MSS

A. Any Reimbursement Payments Should Be Delayed Until the Close of True-up, Subject to Further Documentation, and Made Under an Extended Payment Plan

If the Commission nonetheless proceeds to promulgate new regulations, despite the barriers represented by the automatic stay, the ban on retroactive rulemaking, and the absence of a reasoned basis for changing the present scheme of regulation, it must nevertheless account at the very least for the impact of the delayed clearing on MSS entrants. Sprint Nextel concedes that it

²⁵ See *800 MHz Order* ¶ 256.

²⁶ *Id.* ¶ 214 (noting that “we have... imposed significant obligations beyond what the parties proposed to ensure that the public receives full benefit in exchange for making other spectrum available to [Sprint].”).

will be difficult to account for its BAS costs before the transition is complete.²⁷ DBSD agrees with TerreStar that payment should not be due until Sprint Nextel can properly account for its costs. As DBSD requested in its comments, the first payment should not be due until the costs that Sprint Nextel submits are scrutinized, capped, and otherwise justified consistent with Commission policies designed to protect subsequent entrants from facing extravagant or otherwise unwise premiums incurred by first entrants. The true-up process itself will be the best and most likely opportunity to treat Sprint Nextel's submissions properly, so, consistent with logic, payment should not be due until the true-up process is sufficiently complete.

Although the Commission proposes that Sprint Nextel be required to share relocation cost information as documented in an annual internal audit, DBSD agrees with TerreStar that MSS operators should be afforded much greater opportunities to examine and challenge documentation of BAS relocation costs.²⁸ Sprint Nextel's audited financial statements to date contain merely a brief, opaque description of the relocation expenses, followed by a few figures totaling over \$100 million; the Transition Administrator's reports contain even less information.²⁹ These documents can hardly be deemed adequate disclosures. They also do not permit a determination of whether the costs cited are reasonable expenses, or whether the figures include internal or other expenses not permitted to be reimbursed under the Commission's rules.

²⁷ Sprint Nextel Comments at 13 n.31 (“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.”)

²⁸ See TerreStar Comments at 20-21.

²⁹ See Sprint Nextel SEC Form 10-Q at 12 (May 8, 2009); see also 800 MHz Transition Administrator, LLC, Quarterly Progress Report for the Quarter Ended March 31, 2009, at 29 (June 19, 2009), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520222629.

DBSD therefore opposes Sprint Nextel's proposal to require that any reimbursement payments be made on February 10, 2010 or upon delivery of third party audited financial statements,³⁰ given that statements produced to date can in no way support an adequate examination of relocation expenses. Significantly greater scrutiny of the process is warranted. DBSD has requested that certain protections designed to protect subsequent entrants be applied to Sprint Nextel's costs, given the significant cost and time overruns and Sprint Nextel's substantial responsibility for and control over the process.³¹ These protections would most reasonably apply as part of the true-up process, and only after the Commission has determined how these protections should apply.

DBSD also has requested that a payment plan is appropriate – given the untenable position that MSS has been put in after Sprint Nextel's failure to meet its commitments. Sprint Nextel's opposition to a payment plan as contrary to *Emerging Technologies* precedent misses the point.³² Both the 800 MHz proceeding and the MSS relocation procedures specifically note and adopt departures from *Emerging Technologies* precedent to account for the unique circumstances of BAS relocation and MSS requirements. Basic administrative law precedent surely requires agencies to treat like circumstances alike, but the concomitant principle that sufficiently different circumstances must be treated differently is also true, since important differences in factual settings and circumstances cannot be ignored by agencies.³³ A payment

³⁰ Sprint Nextel Comments at 10-14.

³¹ DBSD Comments at 22-23.

³² *Id.* at 6 n.20.

³³ See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agencies may not “entirely fail[] to consider an important aspect of the problem”).

plan that commences at true-up, after BAS clearing is completed, enables MSS operators to finally begin nationwide operations on a primary basis.

B. Any Reimbursement Should Be Limited to Costs for Relocation of the Top 30 and Fixed BAS Markets

The existing limitation on MSS reimbursement properly reflects current limits on MSS ability to operate in 2 GHz spectrum, and acknowledges the impact of the top 30 markets rule on MSS operators' ability to access the spectrum to date. DBSD agrees with TerreStar that the reasons for the Commission's adoption of this limitation remains valid, and that Sprint Nextel has no basis for objecting to a limitation for which it expressed no concern when it was adopted in 2004.³⁴ Expanding any reimbursement obligation under circumstances that have damaged MSS entrants would be particularly unfair, arbitrary and capricious.

C. The Commission Should Retain the Sunset Date of December 9, 2013

The existing sunset date serves as perhaps the only remaining significant incentive to ensure BAS licensees completion of relocation and must be retained. Sprint Nextel notes that “[t]he Commission has previously adjusted the start of sunset periods to better reflect the ‘on-the-ground’ facts affecting relocation negotiations.”³⁵ In this case, the “on the ground” facts are that 99% of BAS licensees have signed Frequency Relocation Agreements (“FRAs”), making them fully capable of completing relocation well prior to the existing December 9, 2013 sunset

³⁴ See TerreStar Comments at 19.

³⁵ Sprint Nextel Comments at 7. Sprint Nextel's claim that MSS operators could “manage” their business activities to avoid a reimbursement obligation is ridiculous and ironic. *Id.* at 10. None of the Commission's proposed triggers would allow MSS operators to avoid a reimbursement obligation. Sprint Nextel, however, would benefit from an extended sunset period under the Commission's proposals because many more AWS entrants could become subject to reimbursement obligations to Sprint Nextel, thereby “managing” to make itself what it deems to be “whole.”

date. The Commission should maintain the current sunset date and should not require MSS operators to relocate BAS incumbents in any market beyond the sunset date, regardless of when the obligation was triggered.

V. THE COMMISSION SHOULD ENSURE GOOD FAITH COORDINATION BY BAS, AND BAS SHOULD BECOME SECONDARY UPON THE RELOCATION DEADLINE

DBSD supports TerreStar's proposal for ensuring good faith coordination by BAS licensees.³⁶ Given the Commission's concern that BAS licensees may not all be making a good faith effort to complete relocation in a timely manner, the measures proposed by TerreStar are a reasonable and minimally disruptive means of ensuring efficient and effective coordination with MSS through the end of the transition period.

DBSD further supports the Commission's proposal to make BAS secondary as of February 9, 2010. DBSD agrees with TerreStar that this option would serve a dual purpose of incentivizing BAS relocation and of acknowledging the needs of MSS operators to provide service in the 2 GHz band.³⁷ The Commission has acknowledged that 99% of the BAS licensees have signed FRAs, so that adoption of this requirement would strike an appropriate balance between avoiding disruption to BAS operations and incentivizing timely BAS relocation. At a minimum, MSS operators should become co-primary as of February 9, 2010, and BAS operations in the 1990-2025 MHz frequency band ideally should cease as of that date to avoid interference to MSS operations.

³⁶ TerreStar Comments at 24-25.

³⁷ *See id.* at 25.

VI. CONCLUSION

DBSD again strongly urges the Commission to stay these proceedings in light of DBSD's Chapter 11 filing. The proposed regulations are unlawfully retroactive and lack a reasoned basis, and should not be adopted. Should the Commission nonetheless issue new regulations, the regulations should mitigate the unfair, additional burdens being placed upon MSS entrants. Finally, the Commission should allow MSS entrants, which have invested hundreds of millions of dollars to successfully launch their satellites, the ability to operate in uncleared markets on a secondary basis.

Respectfully submitted,

New DBSD Satellite Services G.P.

By: /s/ Suzanne Hutchings Malloy
Suzanne Hutchings Malloy
Senior Vice President, Regulatory Affairs
Peter Corea
Senior Regulatory Counsel
815 Connecticut Avenue, NW, Suite 610
Washington, D.C. 20006

July 24, 2009