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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication

WT Docket No. 02-55
ET Docket Nos. 00-258 and 95-18

New DBSD Satellite Services G.P., Applications for Transfer of Control
File Nos. SAT-T/C-20091211-00144, et al.

Dear Ms. Dortch:

ICO Global Communications (Holdings) Limited ("ICO Global"), by its counsel, submits this letter in opposition to the request by Sprint Nextel Corporation ("Sprint")[1/] that the FCC revise its rules to make ICO Global liable for the BAS band clearing reimbursement liability of New DBSD Satellite Services G.P. ("DBSD") or its predecessor New ICO Satellite Services G.P. Contrary to Sprint's assertions, there is no precedent or authority for the Commission to impose a licensee's band clearing reimbursement liability on a corporate shareholder of the licensee.[2/] Two federal courts have found that this responsibility is the licensee's alone, and that

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1/ *See, e.g.*, Reply Comments of Sprint Nextel Corporation, WT Docket No. 02-55, ET Docket Nos. 95-18, 00-258, at 2-3 (filed July 24, 2009) ("*Sprint Nextel Reply Comments*") (arguing that ICO Global and its subsidiaries should be treated as a single entity); Ex Parte Presentation of Sprint Nextel Corp., WT Docket No. 02-55; ET Docket Nos. 00-258, 95-18; *New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144*, at 3-4 (filed July 27, 2010) ("*Sprint July 27 Ex Parte*").

2/ *See, e.g.*, Reply Comments of New DBSD Satellite Services G.P., WT Docket No. 02-55, ET Docket Nos. 95-18, 00-258, at 1, n.1 (filed July 24, 2009) ("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."); *Applications for Transfer of Control of Earth Station Licenses and Authorizations*, File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-01576 & SAT-T/C-0091211-00144, New DBSD Satellite Services G.P. Opposition to Petition to Deny, at 18, n.46, & 20, nn.53-56 (filed Jan. 25, 2010) ("[A]ny attempt by the Commission to declare, in a licensing

the FCC's rules do not impose joint and several responsibility for relocation reimbursement. Imposing this liability on ICO Global now would constitute unauthorized retroactive rulemaking under the Administrative Procedure Act ("APA"); represent an impermissible piercing of the corporate veil, in a manner flatly inconsistent with the United States Supreme Court's bedrock decision in *United States v. Bestfoods*; and would inequitably burden ICO Global and reward Sprint.

I. Background

Sprint went into the 800 MHz proceeding with its eyes wide open, fully aware of the risks and rewards associated with the Commission's extraordinary decision to grant it a license for spectrum in the 2 GHz band without an auction. Now Sprint seeks to undo the carefully balanced terms of the deal that it failed to live up to, and to lay the cost for its failure on others. The *800 MHz Order* made clear that Sprint might not receive reimbursement of its band-clearing costs from Mobile-Satellite Services ("MSS") licensees, but Sprint nonetheless agreed to undertake the task of clearing the 1.9 MHz band of BAS licensees – "[not] out of pure altruism,"[3/] but because it was a great deal for Sprint. Not only is Sprint at fault for missing virtually every band-clearing deadline established under the terms of the original FCC orders, it compounded this failure by effectively preventing the MSS entrants from hastening or otherwise affecting the BAS band clearing process even when it was clear that Sprint was unable or unwilling to meet the original deadlines. Sprint must not be allowed to avoid the foreseeable consequences of its own conduct.

A. Sprint Voluntarily Undertook the Risk and Rewards of Clearing the 2 GHz Band

In 2003-2004, as part of the larger 800 MHz rebanding proceeding, Nextel (prior to merging with Sprint) introduced its controversial plan to gain access to 10 MHz of nationwide 1.9 GHz PCS spectrum ("2 GHz") – outside of the FCC auction process – in return for its commitment to return certain much less valuable spectrum to the FCC,[4/] reconfigure 800 MHz

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proceeding like this one, that any DBSD affiliate (including ICO Global) is jointly and severally liable for band clearing reimbursement would squarely run afoul of applicable law." *Id.* at 20); *Applications for Transfer of Control of Earth Station Licenses and Authorizations*, File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-01576 & SAT-T/C-0091211-00144, Ex Parte of DBSD Satellite Services G.P., at 2-3 (filed July 13, 2010) (citing to holdings of the Bankruptcy Court and the District Court).

3/ *See DBSB N. Am., Inc. v. Sprint Nextel Corp.*, No. 09-9144 (VM), at 4 (S.D.N.Y. Mar. 30, 2010) (decision and order affirming bankruptcy order) ("*2010 S.D.N.Y. Decision and Order*").

4/ The FCC valued the 2 GHz spectrum at $4.86 billion. *See Improving Public Safety Communications in the 800 MHz Band, et al.*, WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904, ¶ 67 (2009) ("*June 12 Order and FNPRM*").

for public safety, and relocate BAS licensees.[5/] The Nextel plan sought to get credit for the costs of relocating the BAS licensees as an offset to the "true-up" or "anti-windfall" payment the FCC established that Sprint would pay to avoid violating certain statutory prohibitions on awarding Nextel 2 GHz spectrum.[6/] The Nextel proposal also sought to control the band-clearing by excluding MSS entrants from participating in the band-clearing but proposed nonetheless to require new MSS entrants to pay a *pro rata* share of BAS relocation costs.[7/]

B. Sprint's Responsibilities and Benefits Were Carefully Balanced and Willingly Undertaken

On July 8, 2004, the Commission adopted the Nextel/BAS plan, but with some important revisions. First, Nextel was required to relocate the BAS in two stages.[8/] The *Order* set a Stage 1 band-clearing deadline of September 7, 2006, and a Stage 2 deadline of September 7, 2007. The Commission also explicitly prohibited MSS licensees from entering the band until the top 30 markets were cleared. Second, the FCC explicitly retained an independent obligation for other MSS entrants to clear the band, and rejected any obligation of MSS operators to make payment to the U.S. Treasury, contrary to Nextel's original proposal.[9/] Third, once the band-clearing was complete, Nextel was required to make a $2.8 billion "true-up" or "anti-windfall" payment to the

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5/ *See Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, et al.*, WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶¶ 251-52 (2004) ("*800 MHz Order*"), *as amended by Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, et al.*, WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18, Second Erratum, 19 FCC Rcd 19651 (2004). Under the terms of the *800 MHz Order*, the FCC granted Nextel access to 10 MHz of nationwide spectrum (1910-1915 MHz and 1990-1995 MHz) in return for Nextel's commitment to relocate all BAS licensees from the entire 1990-2025 MHz band. *See 800 MHz Order* at ¶¶ 251-52.

6/ *Id.* at ¶ 261.

7/ *See 800 MHz Order* at ¶¶ 250-260.

8/ *See 800 MHz Order* at ¶¶ 251-53. During Stage 1, Nextel was required to relocate all BAS incumbents in markets where it elects to deploy service immediately, as well as any adjacent markets that raise inter-market coordination or interference problems. During Stage 2, Nextel was required to relocate BAS incumbents in all remaining markets. Nextel generally was allowed to relocate BAS licensees in any order, but was barred from using 1990-1995 MHz band in a BAS market until all BAS licensees in that market have been relocated.

9/ Under the terms of the *800 MHz Order*, MSS operators were given the option to accelerate certain markets as needed to allow MSS entry under existing clearing regulations, but were also permitted to allow Nextel to clear the band, pursuant to its plan. *See 800 MHz Order* at ¶ 258, n.626 ("Because BAS incumbents would already be in relocation negotiations with Nextel, allowing MSS licensees to accelerate the mandatory negotiation period under the MSS plan for markets 31 and above may satisfy the intent of the mandatory negotiation requirement.").

U.S. Treasury, representing the difference in value the FCC found between the 800 MHz and 2 GHz bands.[10/] Nextel was permitted to deduct from this $2.8 billion true-up obligation any cost Sprint bears in band-clearing.

Alternatively, Nextel was permitted, under certain conditions, to seek reimbursement from other MSS entrants for their *pro rata* share of eligible band-clearing costs, in lieu of receiving a credit against the $2.8 billion true-up. Because the true-up payment needed to be determined as the process proceeded, the FCC set the true-up event at 36-months after the effective date of the *800 MHz Order* and provided that Nextel could seek reimbursement from any MSS operator that entered the band prior to the end of the relocation period. The Commission found that requiring Nextel to pay all upfront costs and then receive credit for BAS relocation in the 800 MHz true-up process (less any MSS-reimbursed expenses) but cutting off Nextel's right to seek reimbursement for eligible costs at the end of the 36-month reconfiguration period "strikes an appropriate balance that is not unreasonably burdensome on Nextel or MSS licensees."[11/]

Nextel understood this balance that the Commission had established and willingly undertook the risk of non-reimbursement if it failed to fulfill its obligations. The Commission specifically warned at the time that Nextel 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."[12/] Moreover, Nextel was aware that if it failed to complete BAS relocation in the time provided, it would forfeit its right to seek reimbursement from MSS operators.

C. Sprint's Failure To Meet Its Obligations

Sprint has failed to meet its obligations associated with the band-clearing process in two ways.

First, Sprint dragged its feet in clearing the band and could not meet the deadlines established by the Commission. In its 2006 clearing report filed with the FCC, Sprint indicated that it was facing potential, significant band-clearing delays due to (1) broadcasters' unsupported dispute over tax issues, and (2) broadcaster disagreement over FRA negotiations, but offered optimism that the band-clearing deadline, then about 30 ½ months away, could be met with diligent efforts and support from the Commission. At the time of the report, *less than 4% of all markets were relocated.*

10/ *See June 12 Order and FNPRM* at ¶ 67.

11/ *800 MHz Order* at ¶ 261.

12/ *See 800 MHz Order* at ¶ 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].").

In early 2007, Sprint filed its second clearing report, indicating that it would require an additional 12 to 24 months to complete the band-clearing process, arguing that the process was complex and that it was making good progress with the broadcasters. Despite these claims, however, it was clear from the report that less than 5% of all markets were relocated at this time. In late 2007, just days before the Stage 1 deadline, Sprint sought from the FCC a 30-month extension to complete the band-clearing process. DBSD and TerreStar both opposed the extension request, noting that pursuant to the Order, they were not permitted to enter the band until the top 30 markets were cleared, and emphasizing their need to begin offering service and generating revenues, but the FCC granted the extension request nonetheless. Over the next few years Sprint continued to stall its band-clearing obligations, and numerous additional extensions were subsequently granted by the FCC. Sprint's failure to clear the top 30 markets in a timely fashion prevented DBSD from commencing service in a timely manner after launching its satellite, thereby directly and adversely affecting DBSD. The current deadline is December 31, 2010, and will likely be extended again. At no time, however, has the 36-month limit on Sprint's ability to collect reimbursement been extended.[13/]

Second, Sprint acted to preclude MSS licensees from a meaningful opportunity to participate in the band-clearing process. Sprint entered into frequency relocation contracts with broadcasters nationwide, effectively foreclosing MSS licensees' opportunity to approach broadcasters directly,[14/] and concentrated on stockpiling equipment rather than expending efforts on clearing the priority markets identified for Stage 1 relocation or almost any other market.[15/] Further, Sprint refused to provide the MSS licensees information critical for making the determination necessary to assume responsibility, despite repeated requests. The Commission was well aware of this issue; as early as 2005, TerreStar complained to the Commission that the

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[13/] Sprint argues that the Commission has already decided that the true-up deadline will be extended to match the delayed relocation milestones, *see Sprint July 27 Ex Parte* at 4-5, but that is plainly wrong. In fact, contrary to Sprint's assertion, the *June 12 Order and FNPRM* specifically includes a request for comment on whether the true-up deadline should be extended among a list of "issues that are ambiguous or not specifically addressed by the current requirements." *See June 12 Order and FNPRM* ¶ 82.

[14/] Indeed, the Commission acknowledged that due to Sprint "substantially engag[ing] most BAS incumbents in the relocation process," the BAS incumbents would find it "enormously inefficient . . . counterproductive and frustrating" to have to engage in negotiations with the MSS licensees. *Improving Public Safety Communications in the 800 MHz Band*, 23 FCC Rcd 4393, ¶ 30 (2008).

[15/] Sprint's 2005 report, for example, shows that of $69.9 million in expenses, $61 million related to equipment costs. The auditor's report notes that "Equipment and prepayments on equipment represent amounts paid to vendors for equipment related to the clearing of the 1.9 GHz band. As of December 31, 2005, in a significant amount of cases, this equipment had not yet been installed and accepted by the third party currently licensed to use the 1.9 GHz band." Sprint Nextel, Submission of 1.9 GHz Audit Report, *Improving Public Safety Communications in the 800 MHz Band,* WT Docket 02-55, ET Docket 00-258, ET Docket 95-18, at 2-3 (filed Jan. 11, 2007). Sprint's 2006 report is similar, showing equipment expenditures accounting for $120.6 million of the $142.5 million in reported expenses. Sprint Nextel, Submission of 1.9 GHz Audit Report, *Improving Public Safety Communications in the 800 MHz Band,* WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, at 2 (filed Dec. 28 2007).

BAS plan was not transparent, and that Sprint was not being cooperative in the process,[16/] yet the FCC dismissed this complaint as speculative.

In November 2007, following DBSD's opposition of its extension request and offer to assume responsibility for band sharing so that it could hasten the date on which it could begin offering service, Sprint sent DBSD a draft agreement purporting to allow DBSD to enter into the BAS relocation process. But this agreement contained a number of facially unreasonable requirements designed to ensure that DBSD would not sign, including a requirement that DBSD surrender its valuable FCC rights in consideration for Sprint allowing DBSD into the process.[17/] Sprint refused to remove or otherwise modify these requirements,[18/] in effect depriving the MSS licensees of any real chance to be part of the relocation process. While DBSD and TerreStar have clearly explained the empty nature of this offer,[19/] Sprint continues to refer to in its filings in this docket as somehow indicative of its willingness to involve the licensees in the process. In fact, Sprint's failure to meet its band clearing commitment on time was a significant contributing factor in DBSD's bankruptcy, since the inability to begin offering service following the launch of its satellite compounded DBSD's difficulties in efforts to refinance its debt.

D. Sprint's Attempt to Obtain Reimbursement After the Deadline's Expiration

Despite the fact that the deadline had long since passed for an MSS operator to enter the band and trigger cost-sharing obligations – and despite the fact that DBSD had not yet entered the band – in February 2008, Sprint sent DBSD and TerreStar an estimate of MSS cost sharing at approximately $100 million each. Since that time, Sprint has sued in federal district court and intervened in the DBSD bankruptcy arguing that reimbursement relocation obligations extend beyond MSS licensees to affiliates of these licensees. Sprint's arguments have been soundly rejected as unwarranted under the FCC's orders in effect at the time and as a matter of corporate law.[20/] No different conclusion is warranted here.

16/ *See* Comments of TMI and TerreStar on Nextel BAS Relocation and Implementation Plan, WT Docket No. 02-55, ET Docket Nos. 00-258 & 95-18, at 9 (filed May 6, 2005) ("A detailed knowledge and understanding of Nextel's BAS relocation plan is therefore essential to 2 GHz MSS licensees so that they can closely coordinate and harmonize their own BAS relocation plans with those of Nextel. As filed, however, the information contained in Nextel's relocation plan falls well short of what is required to develop a cooperative Nextel-MSS relocation effort for the BAS.").

17/ *See, e.g.*, Reply Comments of New DBSD Satellite Services G.P., WT Docket No. 02-55, ET Docket Nos. 95-18, 00-258, at 7-8 (filed July 24, 2009).

18/ *See id.*

19/ *See id.*

20/ *In re DBSD N. Am., Inc.*, No. 09-13061 (REG), at 18 (Bankr. S.D.N.Y. Sept. 30, 2009) (finding that "primary jurisdiction referral of the issue of [DBSD's] joint and several liability to the FCC is inappropriate, and that no basis exists under the facts…to impose joint and several liability on [DBSD]. Sprint's claims against any Debtor entities other than New Satellite Services are disallowed.") ("*2009 Bench Decision*"); *2010 S.D.N.Y. Decision and Order* at 21 ("[T]he Court concludes that the Bankruptcy

II. Imposing BAS Band-Clearing Reimbursement Liability on ICO Global Would Constitute Impermissible Retroactive Rulemaking

The Supreme Court has clearly established that agencies may not issue rules having retroactive effect unless Congress has explicitly granted them that authority.[21/] Congress has not delegated such a power to the Commission in this instance.[22/] In the absence of such express statutory authorization, agency rules adopted under rulemaking procedures pursuant to section 553 of the APA can only be given "future effect."[23/]

A. Regulations that Attach New Legal Consequences to Completed Events Are Retroactive

A regulation has retroactive effect if it "attaches new legal consequences to events completed before its enactment,"[24/] such as by "impair[ing] rights a party possessed when he acted, increas[ing] the party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed."[25/] As the Supreme Court has explained, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal

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Court did not err in its statutory construction of the FCC Orders when ruling that those orders did not impose joint and several liability on the Debtors.").

21/ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 204 (1988) ("An administrative agency's power to promulgate regulations is limited to the authority delegated by Congress. As a general matter, statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms.").

22/ *See Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807, 810 (7th Cir. 2002) ("No statute authorizes the FCC to adopt regulations with retroactive effect….").

23/ 5 U.S.C. § 551(4); *see also Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987) ("the APA requires that legislative rules be given future effect only. Because of this clear statutory command, equitable considerations are irrelevant to the determination of whether the Secretary's rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA."). The Commission enjoys no exception from this general rule. *Bowen*, 488 U.S. at 208; *Motion Picture Ass'n of Am. v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("The holding of *Bowen* is that agencies do not have the authority to promulgate retroactive rules unless Congress has expressly said they do."); *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 425 (D.C. Cir. 1994); *In re Applications of McElroy Electronics Corp., et al.*, File No. 01758-CL-MP-88, Memorandum Opinion and Order, 10 FCC Rcd 6762, ¶ 16 (1995) (the FCC recognizing that "'retroactive rulemaking is unlawful unless permitted by statute,'" that the Commission may not alter "'the past legal consequences of past actions'" or "'chang[e] what the law was in the past,'" and that "'[a] statute does not operate 'retrospectively' merely because it ... upsets expectations based in prior law.'") (internal citations omitted).

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

25/ *Id.* at 280; *see also Bellsouth Telecommc'ns., Inc. v. Southeast Tel., Inc.*, 462 F.3d 650, 658 (6th Cir. 2006).

doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[26/]

B. Defining ICO Global Now as an "Entrant" or a "Licensee" Would Impermissibly Impose Retroactive Liability

Defining ICO Global now as an "entrant" or a "licensee" would constitute retroactive rulemaking by impermissibly imposing new liability on ICO Global for a "transaction already completed" and for disrupting ICO Global's well-founded expectations that a corporate shareholder is not liable for the obligations of a separate corporate entity in which it holds an interest. Applicable Commission rules and orders have never provided that a corporate affiliate is liable for the band clearing reimbursement liability of an affiliate, and so ICO Global had no reason to believe that it would be charged with any band-clearing liabilities of DBSD.[27/] There is no prior instance of the Commission imposing band clearing reimbursement liability on the corporate parent of a licensee. Indeed, in its numerous briefs and filings in connection with the band clearing, Sprint failed to cite a *single* Commission decision in which band clearing reimbursement obligations were imposed on an affiliate of a licensee.

Indeed, prior to its recent efforts to extend reimbursement liability to ICO Global, Sprint itself recognized that reimbursement is an obligation of the entity holding the MSS license. When Sprint brought a federal lawsuit to "enforce" the Commission's reimbursement rules, which it described as imposing liability on "MSS licensees," it sued New ICO Satellite Services G.P. and not ICO Global.[28/] Likewise, Sprint conceded in proceedings before the Bankruptcy Court that "there is nothing in the [FCC] orders that say that there is joint and several liability."[29/] Particularly in the face of these prior statements, Sprint's argument that the

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[26/] *Landgraf*, 511 U.S. at 265. *See also Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005) (consideration must also be given to whether there was fair notice, reasonable reliance, and settled expectations).

[27/] *See 2009 Bench Decision* at 4 ("no current FCC rule or regulation imposes joint and several liability on corporate affiliates of a licensee for reimbursement costs for band-clearing, and no facts have been presented to warrant disregarding the common law rule that parents are not liable for the obligations of their subsidiaries…."), 6 ("the relevant FCC orders did not mention 'joint and several liability' or a synonym for ['entering the band'], and the FCC did not expressly define what 'entrants' means"), & 16 ("While 'entrants' is not defined in the June 12 Order, its natural meaning is that it refers to the three licensees who will be given the rights to operate in the 2 GHz band—Sprint, New Satellite Services and Terrestar—not any of their corporate affiliates who might be assisting those licensees in conducting their operations."); *affirmed*, *2010 S.D.N.Y. Decision and Order* at 21.

[28/] *Complaint to Enforce Orders of the Federal Communications Commission*, Sprint Nextel v. New ICO Satellite Services, Civil Action No. 1:08cv651 (filed June 25, 2008); *see id.* ¶ 20.

[29/] *See 2009 Bench Decision* at 7.

"beneficiaries of a relocation" liable for reimbursement include non-licensee "beneficiaries" such as ICO Global[30/] is unavailing.

Sprint puts forward no support – because there is none – that the Commission's reference to "beneficiaries" in its *June 12 Order and FNPRM* was intended to subject entities other than licensees to relocation reimbursement. In fact, the Commission's longstanding policy is that only entrants and licensees that benefit from a relocation are liable for reimbursement, and its prior statements make clear that it equates "beneficiaries" (and "entrants") with "licensees."[31/] The *June 12 Order and FNPRM* makes clear that Sprint must seek reimbursement from "*entrants* when *those licensees* 'enter the band.'"[32/] Contrary to Sprint's arguments, the Commission rules have never defined a corporate parent or affiliate of a licensee as an "entrant."

For the Commission now to hold that ICO Global is a "beneficiary" or an "entrant" liable for band clearing reimbursement would clearly be "impair[ing] rights a party possessed when he acted, increas[ing the] party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed." Indeed, changing reimbursement rules mid-stream has been deemed by the Supreme Court to be a prime example of retroactive regulation.[33/] To impose band clearing reimbursement liability on ICO Global now would constitute just such a mid-

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30/ *See* Letter from Trey Hanbury, Director, Sprint Nextel Corp., to Marlene Dortch, Secretary, FCC, Ex Parte Presentation in WT Docket No. 02-55, ET Docket Nos. 00-258 & 95-18, at 2 (filed July 8, 2010) ("*Sprint July 8 Ex Parte Letter*").

31/ *See Improving Public Safety Communications in the 800 MHz Band, Memorandum Opinion and Order, et al.*, WT Docket No. 02-55, ET Docket Nos. 00-258 & 95.18, Memorandum Opinion and Order, 20 FCC Rcd 16015, ¶ 111 (2005) ("[Sprint] Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from *subsequent entrants, including MSS licensees*.") (emphasis added) ("*800 MHz MO&O*"). *See also 800 MHz Order* at ¶ 261 (stating that the Commission "decided to generally follow the cost-sharing principle that the *licensees that ultimately benefit* from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant.") (emphasis added). *See also June 12 Order and FNPRM* at ¶ 83 (noting "the traditional relocation principle that the *licensees that ultimately benefit* from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit.") (citing *800 MHz Order* at ¶ 261) (emphasis added). The Commission has not defined "licensee" to include shareholders of a corporate licensee such as ICO Global.

32/ *See June 12 Order and FNPRM* at ¶ 82 ("Sprint Nextel may either obtain cost sharing for an eligible expense from MSS or AWS-2 entrants when those licensees 'enter the band' *or* take credit for that expense against the anti-windfall payment to the Treasury (true-up) for the 5 megahertz of BAS spectrum (1990-1995 MHz) it obtained as part of the 800 MHz band realignment."). The Commission has never defined what "entering the band" means, and has recognized the ambiguity associated with the term. *See June 12 Order and FNPRM* at ¶ 78 ("[B]ecause the Commission has never defined what 'entered the band' means, applying this interpretation is problematic.").

33/ *See Landgraf*, 511 U.S. at 271-72 (an agency's seeking cost reimbursement in the absence of an administrative rule or a Congressional enactment constitutes impermissible retroactive rulemaking) (citing *Bowen*, 488 U.S. at 207).

stream, retroactive rule change,[34/] because such an imposition does not merely "call[] for application of the cost reimbursement principles in effect at the time the costs were incurred."[35/] Because imposing liability on ICO Global would be the retroactive application of new reimbursement principles, it is prohibited.[36/]

Given the determination by the Bankruptcy Court and the District Court that there is no joint and several liability for relocation reimbursement, moreover, the FCC is legally precluded from imposing such liability. When a federal agency proceeding comes after a federal court's final determination on a legal question at issue, the doctrine of preclusion bars the agency from permitting a direct attack on the judgment because Article III bars federal agencies from reconsidering federal judicial decisions, lest the decisions become mere advisory opinions.[37/] Indeed, the Second Circuit has squarely rejected the FCC's prior attempts to issue an order contravening a judicial determination on the same issue.[38/] And in its own orders, the FCC has acknowledged that it is "[c]onsistent with our general policy" to take "cognizance of the [federal] court's final adjudication of this matter."[39/] While Sprint attempts to avoid this conclusion by

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34/ *See Jahn*, 284 F.3d at 811 ("[c]hanging today's financial consequences of an earlier transaction is the paradigm of retroactivity …. [A] wealth transfer that depends on events preceding the rule's adoption has a retroactive effect.").

35/ *See Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (holding that the Secretary's reaudit regulation was not impermissibly retroactive because it called for application of cost reimbursement principles in effect at the time the costs were incurred.).

36/ *See Bowen*, 488 U.S. at 207 (finding that the reinstated cost-limit regulation at issue impermissibly invoked a new substantive standard as a basis for recouping sums previously paid to hospitals).

37/ *See Town of Deerfield, New York v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993) ("Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power."). *See also Marlene Indus. Corp. v. NLRB*, 712 F.2d 1011, 1015-17 (6th Cir. 1983) (noting that a court's ruling that there had been no unfair labor practice was held binding on the NLRB in the agency's own administrative proceedings.); 18B Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. JURIS. § 4475 (2d ed.) (citing same).

38/ *See Deerfield*, 992 F.2d at 428 (after the New York state and federal courts determined that an FCC regulation preempted a local zoning ordinance, the FCC ruled that the ordinance was not preempted and argued that the federal court judgment did not estop the FCC from interpreting its own regulation, but the Second Circuit held that issue preclusion barred reconsideration of the matter by the FCC, as prohibited by Article III) (citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp*., 333 U.S. 103, 113 (1948).

39/ *See In the Matter of Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.: Joint Petition for Expedited Ruling Preempting South Dakota Law*, 17 FCC Rcd 16916, ¶ 19, n.54 (2002) (citing to *Deerfield* and stating that the "doctrine of preclusion applies in circumstances in which a court has previously addressed the legal questions at issue.") & Statement of Commissioner Kathleen Q. Abernathy at n. 91 ("Whether or not we agree with that holding . . . we are

citing the Supreme Court's determination in *Brand X* that an agency is not bound by a court's interpretation of an ambiguous statute,[40/] that decision is irrelevant here. Far from finding the FCC's orders ambiguous, the Bankruptcy Court declared that the language of the FCC orders "*compels* the conclusion" that "entrants" referred only to licensees, not the licensees' affiliates.[41/]

III. Imposing Liability on ICO Global Would Constitute Impermissible Piercing of the Corporate Veil

In *United States v. Bestfoods*, the Supreme Court established the general rule that a parent corporation may not be held liable for the acts of its subsidiaries.[42/] Unless facts exist that warrant "piercing the corporate veil," a parent corporation is not subject to liability for its subsidiary's actions. Courts commonly look to several factors in determining whether to pierce the corporate veil.[43/] These include (1) whether there is such a unity of interest and ownership

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legally barred from relitigating it here."); *see also In re Application of The Curators of the University of Missouri; For Renewal of License for Station KWMU-FM, St. Louis, Missouri*, File No. BRED-960930WI, Memorandum Opinion and Order and Notice of Apparent Liability, 16 FCC Rcd 1174, ¶ 17 (2001) (quoting *Deerfield*'s holding that "[s]ince neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power.").

40/ *Sprint July 27 Ex Parte* at 3.

41/ *2009 Bench Decision* at 16 (emphasis added).

42/ *See United States v. Bestfoods*, 524 U.S. 51, 61, 63 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." "[T]he failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'") (citations omitted). *See also Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 979 (6th Cir. 1999) (finding that the agency lacked the power to decide that a parent company was the "real party in interest" and impose attorney fee liability on that party without running afoul of *Bestfoods*); *In re Dissolution of Seagroatt Floral Co.*, 583 N.E.2d 287, 293 (N.Y. 1991) ("Allowing a court — through joint and several liability — to in effect pierce the corporate veils, without the proper inquiry and proof according to established guidelines, undermines bedrock principles of corporate law."); *see also Jahn*, 284 F.3d at 810 (holding that federal regulations cannot apply retroactively without Congressional authorization, and that "[n]o statute authorizes the FCC to adopt regulations with retroactive effect . . . .") (citing *Bowen*, 488 U.S. at 207).

43/ *See, e.g., Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 322-23 (Bankr. S.D.N.Y. 1999) (identifying the following veil piercing factors: (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the

that the separate personalities of the corporation and the individual no longer exist; and (2) whether, if the acts are treated as those of the corporation alone, an inequitable result will follow.[44/]

Under this standard, the Commission may not impose joint and several liability on ICO Global for BAS relocation. To do so here is not only contrary to law, but it would discourage would-be investors from risking capital in expensive and often uncertain communications ventures. Those investors will look elsewhere if they believe that the Commission, many years after the fact, could assign to them the obligations of the separate corporate licensees in which they invested. Nor is there any logical stopping point to this exercise, once begun. If ICO Global can be held liable for DBSD's obligations, there would seem to be little principled basis for preventing the Commission from imposing those obligations not just on separate corporate entities but on the individuals who hold ownership interests in those entities. Indeed, using Sprint's logic, Sprint should be liable for all of Clearwire's liabilities – and Clearwire could arguably be liable for Sprint's failure to meet its BAS clearing obligations. But Sprint does not even include Clearwire on its consolidated financial statements, despite Sprint's majority ownership of Clearwire.[45/]

A. No Unity Of Interest Between DBSD And ICO Global Exists To Warrant Piercing The Veil

It is well-established that the corporate veil may be pierced only where the parent so dominates the subsidiary corporation as to negate its separate personality.[46/] "The control necessary to pierce the corporate veil is such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal."[47/] It is hornbook law that sole ownership of a subsidiary

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corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own). *See also United States v. Jon-T Chemicals, Inc*., 768 F.2d 686, 691-92 (5th Cir. 1985) (identifying a similar set of factors); *Birbara v. Locke,* 99 F.3d 1233, 1240-41 (1st Cir. 1996) (identifying non-exclusive factors).

44/ *Id*.

45/ *See* Sprint Nextel 2009 Annual Report on Form 10-K (filed Feb. 26, 2010), at F-9, *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzY1NzB8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1.

46/ *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F.Supp.2d 25, 60 (D.D.C. 2007) (citing *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975); *AGS Int'l Servs. S.A. v. Newmont USA Ltd*., 346 F.Supp.2d 64, 89-92 (D.D.C. 2004) (collecting cases); *Material Supply Int'l Inc. v. Sunmatch Indus. Co.*, 62 F.Supp.2d 13, 19-20 (D.D.C. 1999)).

47/ 1 FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 43 (discussing parent, subsidiary, and affiliated corporations and citing cases) (2010).

is *not* a sufficient basis for piercing the veil.[48/] And courts have routinely held that even when there is one-hundred percent ownership of a subsidiary by the parent, and the two companies have identical directors and officers, these factors alone are insufficient to establish the level of dominance and control needed to pierce the corporate veil.[49/]

To assess the unity of interest prong, the courts look to several factors, which include (1) the nature of the corporate ownership and control; (2) whether the corporation has maintained minutes or adequate corporate records; (3) whether the corporation has maintained corporate formalities necessary for issuance or subscription to stock, such as an independent board of directors' formal approval of the stock issue; (4) whether there is a commingling of funds and other assets of the corporation; (5) whether there is a diversion of the corporation's funds or assets to non-corporate uses such as the personal uses of the corporation's shareholders; and (6) whether the corporation and its individual shareholders use the same office or business location.[50/]

Application of these factors in this instance weighs sharply in favor of not piercing the corporate veil to reach ICO Global, because the requisite dominance and control necessary to justify piercing the veil simply did not exist and certainly does not exist now.

- **Nature and Ownership of Control.** ICO Global's ownership and control of DBSD is not pervasive. ICO Global is one of DBSD's smallest shareholders; its ownership interest in DBSD is less than 5% and is likely to be diluted further by DBSD's future capital requirements. Indeed, DBSD's investors insisted on corporate separation between

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48/ *See Bestfoods*, 524 U.S. at 61-62 (noting "A corporation and its stockholders are generally to be treated as separate entities. Thus it is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws ... and the doing of all other acts incident to the legal status of stockholders.'") (citation omitted).

49/ *See id.* at 68-69 (affirming that ownership of a subsidiary's stock does not justify piercing the corporate veil, and that "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts."); *id*. at 62 ("Nor will a duplication of some or all of the directors or executive officers be fatal.") (citation omitted). *See also* Edward Brodsky & M. Patricia Adamski, LAW OF CORP. OFFS. & DIRS.: RTS., DUTIES & LIABS. § 20:14, *Piercing the Corporate Veil - Parent-Subsidiary Cases* (2009) (citing *Jon-T Chemicals*, 768 F.2d at 691). *See also* 1 TOXIC TORTS LITIGATION GUIDE § 3:15, *Developing Law of Liability - The Relative Tort Liability of Related Parties Further Explained* (2009 update) ("just because the directors of both entities are mostly or entirely the same, or the officers of both entities are the same, or the two entities file a consolidated tax return, or they have common accountants and lawyers, it is not automatic that a court will agree to pierce the corporate veil.") (citing Charles R.T. O'Kelley & Robert B. Thompson, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS, 616 (3d ed., 1999)).

50/ *Flynn v. Thibodeaux Masonry, Inc*., 311 F.Supp.2d 30, 41 (D.D.C. 2004) (citing *Labadie Coal Co. v. Black*, 672 F.2d, 92, 97-99 (D.C. Cir. 1982)).

DBSD and ICO Global as a condition of investing in DBSD, because they did not want any liability for ICO Global's operations outside the U.S. ICO Global does not and has never paid the salaries and expenses of DBSD. While the two corporations share a limited number of common directors and officers, with some overlapping responsibilities due to DBSD's small size, the daily operations of the two companies are kept entirely separate.

- **Separate Corporate Records.** ICO Global and DBSD each maintains separate corporate records, including minutes of board meetings, board votes, bylaws, articles of incorporation, and lists of directors. Both companies have separate boards and committees that hold meetings independent of the other entity and record separate minutes of the respective meetings. The companies have separate stockholders and issue separate stock certificates. Trading is in ICO Global equity and DBSD debt. Both companies have separate tax identification numbers and submit separate tax filings. Both companies submit separate regulatory filings. ICO Global is a publicly traded company, submits its own SEC and NASDAQ filings and is governed by a different set of rules than a privately held company like DBSD. DBSD is a privately held company and submits its own FCC filings. DBSD maintains its own financial records which are filed monthly.

- **Maintenance of Corporate Formalities.** Both companies maintain the appropriate corporate formalities when dealing with each other. Both companies are separately incorporated in Delaware. Both companies are separately incorporated in Delaware.[51/] Both companies are separately qualified to transact business in other jurisdictions.[52/] Each entity has its own subsidiaries, and the subsidiaries have their own subsidiaries. Moreover, the companies enter into business contracts and sign documents separately, although personnel may overlap in some cases.[53/]

- **No Commingling of Funds and Assets.** There is no commingling of funds and other assets of the respective corporations. The companies maintain separate bank accounts and separate investments.

[51/] ICO Global was incorporated on March 17, 2000. DBSD was incorporated on December 20, 2004.

[52/] ICO Global transacts business in Virginia, Washington, and California. DBSD transacts business in Virginia and California.

[53/] With regard to DBSD's certification that its MSS system was operational, for example, the certification was made by Dennis Schmitt. Mr. Schmitt was Senior Vice President of ICO Global, but signed in his capacity as Controller for ICO Satellite Services (now DBSD). The certification was filed under cover letter by Suzanne Hutchins Malloy, who while she was ICO Global's Senior Vice President of Regulatory Affairs, was also ICO Satellite Services' Senior Regulatory Counsel.

- **No Diversion of Subsidiary Funds to Personal Use of Shareholders.** DBSD funds are not used for the non-corporate uses of ICO Global, or for any other non-DBSD use.

B. It Would Be Inequitable to Pierce the Corporate Veil

Even if equitable considerations were the only basis on which to impose reimbursement liability on ICO Global, to do so would unjustly burden ICO Global and unfairly reward Sprint. It would amount to scapegoating ICO Global for the foreseeable risks explicitly identified by the Commission and accepted by Sprint in the 800 MHz proceeding, and for the foreseeable consequences of Sprint's own failure to satisfy its band-clearing obligations for which it was well compensated under the balanced terms of the *800 MHz Order*.

First, it would be grossly unfair to impose liability on ICO Global, which (even as the parent company of DBSD) never utilized the BAS spectrum or received any benefit from Sprint's band clearing activities – and never will, now that it has lost all but a minimal interest in DBSD.

Second, far from enjoying a "windfall," ICO Global would be unjustly burdened if made to assume any liability that DBSD is found to owe. The bankruptcy of DBSD has cost ICO Global more than a billion dollars in the lost investment in and value of DBSD. It would be wholly inequitable to add to this loss the $100 million in relocation costs that Sprint now seeks to impose on ICO Global, particularly given Sprint's failure to clear the 2 GHz band in a timely fashion as required by the *800 MHz Order* significantly contributed to DBSD's bankruptcy and ICO Global's associated losses. That failure – particularly the failure to clear the top 30 markets – precluded DBSD from commencing commercial service upon launch of its satellite. Just as ICO Global has absorbed the risk it took in investing in DBSD, Sprint should be held to its responsibility to absorb the costs of relocation in light of its failure to compete this task in the time it proposed the clearing would be done to entice the Commission into its unprecedented spectrum deal.

Two federal courts have already expressly rejected Sprint's "windfall" argument, holding that the equity in the reorganized DBSD that ICO Global will receive pursuant to DBSD's chapter 11 plan is not coming at the expense of DBSD's unsecured creditors such as Sprint, but rather at the expense of DBSD's existing note holders, who have voluntarily agreed to share with ICO Global a portion of the equity that they—and not Sprint—would have otherwise been entitled to receive.[54/]

[54/] *See In re DBSD N. Am., Inc.*, 419 B.R. 179, 212 (Bankr. S.D.N.Y. Oct. 26, 2009) ("[H]ere, the gift comes from secured creditors, there is no doubt as to their secured creditor status, . . . and [Sprint] would get no more if the gift had not been made."); *see also Sprint Nextel Corp. v. DBSD N. Am., Inc.*, No. 09-civ-10156 (LAK), at 5 (S.D.N.Y. Mar. 24, 2010) ("[T]he distribution Sprint contests is a transfer of assets by the senior note holders of property to which they are legally entitled.").

Finally, not only would ICO Global be unfairly burdened by Sprint's proposal, but Sprint would be unfairly *rewarded* if ICO Global were made to reimburse Sprint. To impose reimbursement liability on ICO Global would disregard the burden of risks explicitly identified by the Commission and accepted by Sprint in the *800 MHz Order*,[55/] and represent a windfall for Sprint. The Commission specifically warned at the time 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."[56/] Sprint willingly and knowingly assumed the risks of unanticipated costs or delay under the Commission-imposed BAS relocation framework. DBSD's bankruptcy was a foreseeable consequence of Sprint's foot-dragging, and Sprint bears substantial responsibility.

Retroactive imposition of reimbursement liability on ICO Global would absolve Sprint of these risks, and would inequitably shift the burden for all risk to ICO Global. Any suggestion that a failure to hold ICO Global joint and severally liable will encourage other licensees to file strategic or targeted bankruptcies for the purpose of discharging their relocation obligations is without any grounding in reality. There is no basis to believe that investors would routinely submit to the destruction or dilution of the value of their investments – in the case of ICO Global, over a billion dollars – so that a licensee could avoid legitimate relocation costs. Sprint has offered no proof to support this fanciful claim.

IV. Conclusion

For the foregoing reasons, the Commission may not and should not extend MSS reimbursement liability to ICO Global or any other shareholder of an MSS licensee.

Respectfully submitted,

Howard J. Symons

cc: Rick Kaplan
Jennifer Flynn
Austin Schlick
Julie Veach
David Horowitz
Andrea Kearney
Sarah Stone
Nick Oros

55/ *See 800 MHz Order* at ¶ 304.

56/ *See id.* at ¶ 214.

Jamison Prime
Geraldine Matise
Gardner Foster
Robert Nelson