

August 6, 2010

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**Via Electronic Submission**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**Re: Written Ex Parte Presentation**

**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-20091211-1576, SAT-T/C-  
0091211-00144.**

Dear Ms. Dortch:

Sprint Nextel Corporation (“Sprint Nextel”) briefly responds to the August 2, 2010 and August 4, 2010 *Ex Parte* Communications<sup>1</sup> submitted by ICO Global Communications (Holdings) Limited (“ICO Global”) with respect to the above-captioned proceedings.

Much of ICO Global’s *Ex Parte* Communications consist of allegations that seek to re-write the history of the BAS relocation. For example, ICO Global resorts to pure fantasy in alleging – without any support whatsoever – that Sprint Nextel somehow conspired with

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<sup>1</sup> See ICO Global, *Ex Parte* Communication, 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. SAT-T/C-0091211-00144, *et al* (filed Aug. 2, 2010) (“*ICO Global August 2 Ex Parte Communication*”); ICO Global, Notice of *Ex Parte* Communication, 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. SAT-T/C-0091211-00144, *et al* (filed Aug. 4, 2010) (“*ICO Global August 4 Notice of Ex Parte Communication*”); ICO Global, *Ex Parte* Communication, 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. SAT-T/C-0091211-00144, *et al* (filed Aug. 4, 2010) (“*ICO Global August 4 Correction*”).

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the broadcast manufacturing, installation, and integration industry to prevent the MSS operators from fulfilling their independent regulatory obligation to clear the BAS incumbents from the 1990-2025 MHz band for nearly a decade from 2001 until 2010.<sup>2</sup> Nor did Sprint Nextel spend \$750 million and tens of thousands of work hours on the BAS relocation in order to prevent the MSS operators from hastening the BAS relocation process.<sup>3</sup> ICO Global's farfetched claims are contradicted by the following facts: (1) numerous Commission decisions that affirmed Sprint Nextel's good faith and exhaustive efforts to relocate BAS incumbents; (2) the Commission's repeated findings of a total absence of *any* meaningful MSS activity on the BAS relocation efforts from 2001 until 2010, which includes the four-year period before Sprint Nextel even became involved in the transition; and (3) the numerous opportunities and mechanisms by which the MSS operators could have met their independent relocation obligations and facilitated the relocation themselves had they ever bothered to do so.<sup>4</sup>

The Commission has repeatedly, and properly, rejected ICO Global's baseless claims.<sup>5</sup> ICO Global even ultimately concedes that the Commission has rejected such charges in the past.<sup>6</sup> And it bears repeating that Sprint Nextel was willing to undertake BAS relocation efforts on behalf of the MSS entrants, *provided the MSS entrants paid their fair*

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<sup>2</sup> ICO Global August 2 *Ex Parte* Communication, at 5.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> See Sprint Nextel Written *Ex Parte* Presentation, 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 (July 28, 2010), at 1-3 (“*Sprint Nextel July 28 Written Ex Parte Presentation*”).

<sup>5</sup> See, e.g., *Improving Public Safety Communications in the 800 MHz Band, et al.*, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904, 7910 ¶¶ 11-12 (2009) (“*BAS Relocation Report & Order and Further Notice*”) (noting that no MSS entrant opted to invoke its right to relocate BAS licensees in any of the top 30 markets in order to commence operations more quickly, and that the Commission already found that “Sprint Nextel would likely relocate most BAS licensees before MSS systems begin operations” but “if MSS systems did begin operation before all BAS were relocated... the MSS entrants and remaining BAS licensees could work together to minimize interference”); Reply Comments of Sprint Nextel Corporation, *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55 *et al.*, at 5 n.11 (July 24, 2009) (noting numerous instances where the Commission rejected so-called “equitable” arguments advanced by ICO and TerreStar based on BAS relocation delays) (“*Sprint Nextel July 24, 2009 Reply Comments*”).

<sup>6</sup> See ICO Global August 2 *Ex Parte* Communication, at 6.

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*share of relocation expenses.*<sup>7</sup> ICO Global, however, made the calculated, strategic decision to sit on its hands and ignore both its own independent duty to relocate BAS incumbents and numerous overtures to engage in the process by Sprint Nextel and the Commission itself. ICO Global now seeks to avoid the necessary cost of its purposeful inaction: paying Sprint Nextel for clearing the band that ICO Global's system occupies.<sup>8</sup> That effort must fail.

I. Confirming the MSS Operators' Responsibilities Is Not Retroactive Rulemaking

ICO Global argues that requiring it to comply with its joint and several reimbursement obligations would run afoul of the doctrine that a regulation has an impermissibly retroactive effect if it attaches *new* legal consequences to events completed before its enactment.<sup>9</sup> Yet as Sprint Nextel has explained, the *BAS Relocation Report & Order and Further Notice* and its tentative conclusions regarding band entry do not alter the MSS operators' fundamental cost-sharing obligations.<sup>10</sup> Indeed, agencies routinely issue

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<sup>7</sup> See, e.g., Sprint Nextel July 28 Written *Ex Parte* Presentation, at 6 n.22.

<sup>8</sup> ICO Global also claims that the true-up deadline is August 2010, but what it terms the "36-month limit" on reimbursements has not been extended. ICO Global August 4 Correction, at 1. That is simply not correct. See, e.g., *Bas Relocation Report and Order and Further Notice*, 24 FCC Rcd at 7935-36, ¶¶ 77, 80 ("we find that the MSS entrants' cost sharing obligations must be interpreted in light of the unanticipated changed circumstances, and these obligations should not be tied to a deadline that is no longer relevant.") In fact, even the portion of the Commission's order that ICO Global cites actually contradicts ICO Global's argument regarding reimbursements. *Id.*, 24 FCC Rcd at 7936, ¶ 82 (holding that the Commission "reach[es]" certain tentative conclusions, including that "[t]he attachment of the cost sharing obligation between Sprint Nextel and MSS and AWS-2 would follow traditional *Emerging Technologies* policies, i.e., the obligation to share costs among new entrants would *continue to the BAS sunset date (December 9, 2013)*; any entity that "enters the band" *prior to that date* would be obligated to reimburse the earlier entrant that incurred the relocation expense a proportional share of cost based on the amount of spectrum assigned to it.") (emphasis added).

<sup>9</sup> ICO Global August 2 *Ex Parte* Communication, at 7 (emphasis added).

<sup>10</sup> Sprint Nextel July 24, 2009 Reply Comments, at 17; see also *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (the Commission's exclusivity ban purports to alter only the present situation, not the *past* legal consequences of *past* actions; the Commission has impaired the future value of past bargains but has not rendered past actions "illegal or otherwise sanctionable") (emphasis added). ICO Global also misstates Sprint Nextel's statements when it claims Sprint Nextel conceded that there is "nothing in the [FCC] orders that say that there is joint and several liability?" ICO Global August 2 *Ex Parte* Communication, at 8. In actuality, Sprint Nextel acknowledged that there

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clarifications of ambiguities in existing rules that do not have impermissibly retroactive effect, including where a party was subject to the prior rule as well.<sup>11</sup>

ICO Global's additional assertions that its "expectations" are being impermissibly disrupted are also baseless.<sup>12</sup> ICO Global's "expectations" apparently were that it and its subsidiaries could manipulate the Commission's orders to avoid engaging in the BAS relocation process *and* also avoid reimbursing Sprint Nextel for doing so for them as the de facto "first mover." ICO Global never explains – and cannot explain – how its subjective and bad faith "expectations" amount to a right that is being impermissibly infringed.<sup>13</sup>

## II. The Commission Is Not Precluded From Affirming Joint and Several Liability

Sprint Nextel also previously explained that the Commission is not precluded from interpreting the Communications Act or from employing its rulemaking powers to adopt or clarify rules potentially at variance with earlier decisions rendered by federal courts.<sup>14</sup> ICO

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was "nothing *explicit*" in the Commission's proceeding specifically referencing joint and several liability, but that guidance and clarification had already been requested of the Commission in this proceeding and was currently pending. *See* Transcript of August 20, 2009 Hearing, *In re DBSD North America, Inc., et al.*, Case No. 09-13061 (Aug. 25, 2009), at 49 (emphasis added). In any event, the absence of an explicit discussion earlier in the proceeding does not support ICO Global's implication that such liability could not exist, particularly given the Commission's rulemaking authority to clarify prior orders, and its broad interpretation and treatment of MSS entrants as the entire MSS operator or system. *Id.* at 49-50.

<sup>11</sup> *See, e.g., Handley v. Chapman*, 587 F.3d 273, 283 (9th Cir. 2009) (regulation that clarified the agency's position as to why certain inmates are ineligible for early release did not deprive inmate of any rights previously possessed and did not create an impermissible retroactive effect).

<sup>12</sup> ICO Global August 2 *Ex Parte* Communication, at 8.

<sup>13</sup> Sprint Nextel July 24, 2009 Reply Comments, at 19. Ironically, the actions by the MSS operators, including ICO Global and its subsidiaries, to avoid their reimbursement obligations necessitated the rulemaking clarifications of which ICO Global now complains.

<sup>14</sup> *See, e.g.,* Sprint Nextel Notice of *Ex Parte* Presentation, 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 (July 27, 2010) ("*Sprint Nextel July 27 Notice of Ex Parte Presentation*").

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Global attempts to avoid controlling Supreme Court precedent on this issue<sup>15</sup> by citing to a wholly distinguishable case involving an adjudication specific to an individual party, rather than a rulemaking.<sup>16</sup> The *Town of Deerfield* case relied on by ICO Global did not involve the interpretation of an ambiguous regulation. ICO Global does not dispute that under the binding Supreme Court precedent set forth in *Brand X*, the Commission has the inherent authority to interpret ambiguous regulations even if that interpretation is contrary to a court's prior interpretation. Instead, ICO Global asserts that this binding precedent is inapplicable because the Bankruptcy Court supposedly found the Commission's orders to be unambiguous.<sup>17</sup> Contrary to ICO Global's claims, however, the Bankruptcy Court acknowledged ambiguities in the Commission's past orders and it was precisely because of those ambiguities that the Bankruptcy Court believed it was required make its own interpretation of the orders.<sup>18</sup>

Nor was the Bankruptcy Court the first court to grapple with the ambiguities that the Commission's rulemaking will address. Although ICO Global repeatedly asserts that "[t]wo

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<sup>15</sup> *Id.* (citing *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005)). *See also Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 508-09 (3d Cir. 2008) (SEC's interpretation of a rule that had already been applied by the same court in the same case was nonetheless entitled to deference); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec. of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001) (Department of Veterans Affairs was free to revise its rules to clarify that court's interpretation of its rules was incorrect).

<sup>16</sup> ICO Global August 2 *Ex Parte* Communication, at 10 (citing *Town of Deerfield, N.Y. v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993)). In *Town of Deerfield*, the court addressed an FCC adjudication that "did not promulgate any new regulation or purport to engage in any formal rulemaking." *Id.* at 427. As a consequence, the court found that the Commission improperly ignored prior court decisions involving the exact same parties "in order to grant Carino's petition for a declaratory judgment with respect to his dispute with Deerfield?" *Id.* That case is clearly distinguishable on a number of grounds. Here, the Commission is acting through its formal rulemaking authority. *See, e.g., Sprint Nextel July 27 Notice of Ex Parte Presentation*, at 3 n.6. Moreover, neither ICO Global or the Commission (or TerreStar) were parties to the federal proceedings that ICO Global now claims have preclusive effect on the Commission, and clarification and reaffirmation of the MSS operators' reimbursement obligations would apply to all MSS operators, rather than constitute an adjudication specific to one party.

<sup>17</sup> ICO Global August 2 *Ex Parte* Communication, at 11.

<sup>18</sup> *See, e.g., Sprint Nextel July 27 Notice of Ex Parte Presentation*, at 3; *In re DBSD North America, Inc., et al.*, Case No. 09-13061, at 6-7 (Sept. 30, 2009) ("... the FCC did not expressly define what 'entrants' means. That left open the possibility for the dispute we have here ....").

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federal courts” have reviewed these issues,<sup>19</sup> the U.S. District Court for the Eastern District of Virginia was actually the first Article III court to do so.<sup>20</sup> In that proceeding, the MSS operators each requested that the court refer the suit back to the Commission due to the Commission’s expertise in determining matters such as band entry.<sup>21</sup> In granting that request, Judge Brinkema stated that the issues raised in the suit were “clearly not within the normal area of expertise for a generalist federal court” and instead were “particularly within the FCC’s expertise and discretion.”<sup>22</sup> Judge Brinkema also expressed concern that were she to “define what ‘entry’ means one way or ‘entry into the band’ one way, and the FCC ... ultimately decide[s] it another way” confusion would result.<sup>23</sup> The court’s 2008 decision indicated that the FCC’s prior orders were ambiguous, and Judge Brinkema consequently stayed the case and referred it back to the Commission *at the MSS operators’ request* to resolve those ambiguities, *which will be addressed in the forthcoming rulemaking.*<sup>24</sup> As explained in *Brand X*, clarification of ambiguities in its earlier orders is entirely within the Commission’s rulemaking authority, and ICO Global cites no case to the contrary. Although two other lower courts subsequently decided that they somehow did have sufficient expertise to provide their own interpretations of those ambiguities, that does nothing to prevent the

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<sup>19</sup> See, e.g., ICO Global August 2 *Ex Parte* Communication, at 1.

<sup>20</sup> *Sprint Nextel Corporation v. New ICO Satellite Services, G.P., et al.*, Case No. 1:08-cv-651 (E.D. Va.).

<sup>21</sup> See, e.g., TerreStar Network Inc.’s Memorandum of Law in Support of its Motion to Dismiss, Case No. 1:08-cv-651 (filed August 1, 2008), at 13-15 (asserting that the “Commission’s ability to determine the conditions of band entry to the spectrum is part and parcel of its ‘exclusive authority’ over licensing,” by referring the matter back to the Commission the court would “prevent confusion generated by conflicting interpretations of the FCC’s prior statements”, and that Sprint Nextel has “put this issue before the Commission many times”); Memorandum of New ICO Satellite Services G.P. In Support of Motion to Dismiss, Case No. 1:08-cv-651 (filed August 1, 2008), at 11 (should the Court determine that FCC rulings or terms require interpretation by the FCC, ICO “respectfully joins and adopts TerreStar’s Motion to Dismiss on the Alternative Grounds of Failure to Exhaust Administrative Remedies and Primary Jurisdiction.”).

<sup>22</sup> See Transcript of August 29, 2008 Hearing, *Sprint Nextel Corporation v. New ICO Satellite Services, G.P., et al.*, Case No. 1:08-cv-651 (E.D. Va.), at 16.

<sup>23</sup> *Id.* at 16-17.

<sup>24</sup> ICO Global’s current retroactivity argument is also contradicted by of its prior request to refer the Eastern District of Virginia case back to the Commission for further clarifications. Those clarifications would necessarily issue after the old June 26, 2008 date the MSS operators claimed ended their reimbursement obligations, but would have clarified and affirmed their reimbursement obligations nonetheless. Under ICO Global’s current argument, its own requested clarifications would have been impermissibly retroactive.

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Commission from issuing its own authoritative clarification. Doing so is not only within the Commission's authority, but also will fulfill the referral mandate from the first Article III court to hear these matters.

III. ICO Global's Veil Piercing Argument Is Wrong And Ultimately Irrelevant

The Commission has properly and concisely stated that the central issue is “whether the affiliated entities [of a licensee] are directly liable according to the meaning of the FCC’s rules and orders, not whether the corporate veil may be pierced.”<sup>25</sup> ICO Global’s lengthy protestations that it lacks a unity of interest with DBSD for veil piercing purposes are, thus, entirely irrelevant and misconstrue the central thrust of the Commission’s rules and policies: ICO Global is jointly and severally liable for reimbursement obligations under the FCC’s orders because ICO Global – along with all the several entities in its corporate structure – comprises the entrant to the spectrum Sprint Nextel cleared for ICO Global’s satellite system.<sup>26</sup> While the Commission has long had the power to ignore corporate separations when it deems it appropriate to do so, including when a statutory scheme or regulation may be frustrated,<sup>27</sup> the principal issue for both Sprint Nextel and the Commission is not vicarious liability for a subsidiary, but rather ICO Global’s direct liability as an entrant.

That ICO Global has been and will remain completely integral and necessary for the planning, development, construction, testing, operation, and maintenance of its MSS system is well established: (1) the majority, if not the totality, of ICO Global’s officers and workforce are “dual employees” with its subsidiaries at both the corporate and operational level; (2) ICO Global will continue to provide a comprehensive range of critical technical, regulatory, and operational services to its subsidiaries with respect to the system even after their bankruptcy; and (3) ICO Global’s Senior Vice President provided the necessary milestone certifications for the MSS system.<sup>28</sup> In fact, not only did ICO Global’s Senior Vice President provide the very operational milestone certification that the Commission has tentatively concluded constitutes band entry for reimbursement purposes, but that milestone certification was submitted under a May 9, 2008 transmittal letter by Suzanne Hutchins Malloy explicitly in her capacity as *ICO Global’s* Senior Vice President of Regulatory

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 5-7.

<sup>27</sup> *See, e.g.,* Sprint Nextel July 28 Written *Ex Parte* Presentation, at 4.

<sup>28</sup> *Id.* at 4-8. In response to this evidence, ICO Global describes itself as only “shar[ing] a limited number of common directors and officers, with some overlapping responsibilities due to DBSD’s small size,” and chalks up the fact that its Senior Vice President provided the necessary milestone certifications for the MSS system to a “personnel ... overlap.” ICO Global August 2 *Ex Parte* Communication, at 14 & n.53.

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Affairs.<sup>29</sup> Moreover, contrary to ICO Global's claims,<sup>30</sup> none of the milestone certifications state or even imply that ICO Global's Senior Vice President signed those certifications as an employee for ICO (now DBSD) Satellite Services. Rather, each milestone certification represents that Dennis Schmitt certified, *under penalty of perjury*, that he is "a Senior Vice President of ICO Global Communications (Holdings) Limited, the ultimate parent company" of New ICO Satellite Services G.P.<sup>31</sup> ICO Global's effort to blur the roles of its own "dual" employees and corporate officers simply reinforces Sprint Nextel's point: ICO Global is entirely intertwined with and integral to the entire MSS operator and MSS system that comprises the entrant for reimbursement purposes.

In short, ICO Global and its subsidiaries are inextricably intertwined at the operational, administrative, and corporate levels, and collectively comprise the MSS operator subject to the Commission's jurisdiction and reimbursement requirements. Holding ICO Global jointly and severally liable for the reimbursement obligations related to its MSS system that it triggered through its milestone certification is entirely in keeping with both the spirit and the letter of the Commission's orders and the Commission's tentative conclusions regarding band entry.<sup>32</sup>

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<sup>29</sup> See Sprint Nextel July 28 Written *Ex Parte* Presentation, **Attachment F** (May 9, 2008 letter from Suzanne Hutchings Malloy, "Senior Vice President of Regulatory Affairs," enclosing ICO Global operational milestone certification); ICO Global August 2 *Ex Parte* Communication, at 14 & n.53 (acknowledging ICO Global's milestone certifications were filed "under cover letter" by Suzanne Hutchings Malloy, who serves as *ICO Global's* "Senior Vice President of Regulatory Affairs"). In any event, while on other occasions Ms. Malloy may have transmitted other ICO Global milestone certifications while claiming to be wearing her "ICO Satellite Services Regulatory Counsel" hat instead of her "ICO Global Senior Vice President of Regulatory Affairs" hat, that does not change the fundamental fact that parent ICO Global provided all of the actual MSS system milestone certifications.

<sup>30</sup> ICO Global August 2 *Ex Parte* Communication, at 14 n.53 ("Mr. Schmitt was Senior Vice President of ICO Global, but signed in his capacity as Controller for ICO Satellite Services (now DBSD)").

<sup>31</sup> See Sprint Nextel July 28 Written *Ex Parte* Presentation, **Attachments A-F**.

<sup>32</sup> ICO Global also again argues that it would be "grossly unfair" to require it to reimburse Sprint Nextel for the costs incurred clearing the band occupied by ICO Global's MSS system, because "ICO Global ... never utilized the BAS spectrum or received any benefit from Sprint's band clearing activities, and it never will now that it has lost all but a minimal interest in DBSD." *ICO Global August 4 Notice of Ex Parte Communication*, at 1. *These claims are demonstrably false. As already discussed, ICO Global is an integral and central entity in the overall MSS operator, and has already entered the band under the*

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Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets and electronic copies are being submitted to Commission staff listed below. If you have any questions, please feel free to contact me at (202) 778-9859.

Sincerely,

/s/ Marc S. Martin

Marc S. Martin

Counsel for Sprint Nextel Corporation

cc: Austin Schlick  
Stewart Block  
David Horowitz  
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Karl Kensinger  
Geraldine Matise  
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Nick Oros  
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*Commission's tentative conclusion regarding band entry.* ICO Global does not deny that it will continue to "share" its employees with its subsidiaries, and provide a wide range of corporate, regulatory, and operational services with respect to the MSS system. ICO Global also retains a significant ownership interest in DBSD which may be worth up to \$270 million. *See, e.g.,* Sprint Nextel July 28 Written *Ex Parte* Presentation, at 8; Petition to Deny of Sprint Nextel Corporation, New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al* (filed January 14, 2010) ("According to DBSD's projections ...the value of the interest retained by ICO Global will range from \$28.5 million to as much as \$270 million.") The value of ICO Global's ownership stake is directly tied to the cleared spectrum. *Id.* There is simply no truth to ICO Global's claims.

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