MINTZ LEVIN

Tara M. Corvo | (202) 434-7395 | tmcorvo@mintz.com

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-434-7300
202-434-7400 fax
www.mintz.com

August 27, 2010

FILED ELECTRONICALLY

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

Re: Notice of Ex Parte Presentation

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:

On August 25, 2010, R. Gerard Salemme of ICO Global Communications (Holdings) Limited ("ICO Global") and the undersigned met with Louis Peraertz, Legal Advisor to Commissioner Clyburn, regarding the above-captioned proceedings.

During the meeting, we explained that DBSD (fka ICO North America) and ICO Global are different entities engaged in different businesses. DBSD – not ICO Global – is and has always been the MSS licensee. DBSD has exclusive rights to operate satellite systems in North America and ICO Global was prohibited from operating satellites in North America. ICO Global business plans are focused entirely on the international market using a different satellite system. Indeed, DBSD's investors insisted on corporate separation between 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. Following the formation of DBSD in 2004, ICO Global provided no financial support to DBSD whatsoever. Corporate governance was also separate. The ICO Global board has no ability to make decisions on behalf of DBSD, and the DBSD board has no ability to make decisions on behalf of ICO Global.

We explained that extending an MSS licensee's liability for relocation reimbursement costs to a shareholder of or investor in the licensee would effectively broaden the reimbursement rules to require joint and several liability for those costs. We noted that two federal courts have held that the current BAS reimbursement rules "compel" the conclusion that only licensees are liable for reimbursement costs (at Mr. Peraertz's request, those decisions are attached hereto). Sprint itself acknowledged as much when it brought an action in Federal District Court to "enforce" the Commission's reimbursement rules, telling the court that those rules imposed liability on "MSS licensees" and suing DBSD and not ICO Global. Because it had no liability for relocation costs, ICO Global was not a party to the pending DBSD bankruptcy proceeding – there was no reason for it to seek party status.

We also explained that imposing liability on shareholders or investors would also impermissibly pierce the corporate veil by making a parent corporation liable for its subsidiary's obligations. As explained above, ICO Global and DBSD have always functioned as separate entities in separate businesses.

Finally, we noted that not only would it be legally impermissible to impose liability for relocation costs on ICO Global, it would be grossly unfair. ICO Global (even as the parent company of DBSD) 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.

Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meetings.

Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

Tara M. Corvo

cc: Louis Peraertz

ATTACHMENT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
DBSD NORTH AMERICA, INC., *et al.*,	)	Case No. 09-13061 (REG)
Debtors.	)	Jointly Administered

BENCH DECISION[1] ON DEBTORS' OBJECTION
TO PROOFS OF CLAIM FILED BY SPRINT
NEXTEL CORPORATION

APPEARANCES:

K&L GATES LLP
Counsel to Sprint Nextel Corporation
Hearst Tower, 47th Floor
214 North Tryon Street
Charlotte, North Carolina 28202
By: John H. Culver III, Esq.
Felton E. Parrish, Esq.
Eric Moser, Esq.

KIRKLAND & ELLIS LLP
Attorneys for the Debtors and Debtors in Possession
Citigroup Center
153 East 53rd Street
New York, New York 10022-4611
By: James H.M. Sprayregen, P.C., Esq.
Christopher J. Marcus, Esq.

-and-

[1] I use bench decisions to lay out in writing decisions that are too long, or too important, to dictate in open court, but where the circumstances do not permit more leisurely drafting or more extensive or polished discussion. Because they often start as scripts for decisions to be dictated in open court, they typically have less in the way of citations and footnotes, and have a more conversational tone.

KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
By: Marc J. Carmel, Esq.
Sienna R. Singer, Esq.

-and-

KIRKLAND & ELLIS LLP
655 Fifteenth Street N.W.
Washington, D.C. 20005
By: Jeffrey Bossert Clark, Esq.

NEIGER LLP
Proposed Conflicts Counsel to the Official Committee of Unsecured Creditors
111 John Street, Suite 800
New York, New York 10038
By: Edward E. Neiger, Esq.
Karl Schaffer, Esq.
Mark Taub, Esq.

PREET BHARARA
United States Attorney for the Southern District of New York
Counsel to the Federal Communications Commission
86 Chambers Street
New York, New York 10007
By: Benjamin H. Torrance, Esq.

BEFORE: ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

In this contested matter under the umbrella of the jointly administered chapter 11 cases of DBSD North America, Inc. (**"DBSD"**) and its affiliates, Sprint Nextel Corporation (**"Sprint"**) asserts claims (the **"Sprint Claims"**) against each of the separate Debtors in this case, based on contentions of joint and several liability. The Debtors object to those claims, insofar as they are asserted against Debtor entities other than New DBSD Satellite Services G.P. (**"New Satellite Services"**).

In response, Sprint invokes the doctrine of primary jurisdiction and asks me to abstain from determining the matter of claims allowance, in favor of referring the joint and several liability issue to the Federal Communications Commission (the **"FCC"**).

Sprint filed a motion to withdraw the reference under 28 U.S.C. § 157(d), seeking to have the District Court determine whether a primary jurisdiction referral of the joint and several liability issue to the FCC was warranted. However, consistent with Fed.R.Bankr.P. 5011(c),[2] I declined to stay the claims allowance proceedings in this Court pending the District Court's determination of the withdrawal of the reference motion, and in any event, shortly before this decision was finalized, the District Court determined that the reference would not be withdrawn.

On the threshold issue of whether the FCC has primary jurisdiction and is therefore the proper authority to determine the allowance of claim issue, I rule that the FCC does not have primary jurisdiction. On the merits, I find that the Debtors other than New Satellite Services are not jointly and severally liable for any reimbursement obligations to Sprint. As described more fully below:

> (1) Determining the right of a party to assert a claim against a debtor is a classic function of the Bankruptcy Court, and the non-governmental nature of the creditor and the private nature of the liability to be determined presents issues different from the government's concerns vis-à-vis spectrum allocation in this

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[2] Fed.R.Bankr.P. 5011(c) provides, in relevant part:

> The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion.

case. Therefore, I do not defer to the FCC to determine the joint and several liability issue;

(2) In the absence of any current FCC order or regulation providing for joint and several liability for reimbursement obligations for band-clearing, any future determination on the issue by the FCC would be done through rulemaking (which could only have a prospective effect) and not adjudication—having no legally cognizable bearing on the presently existing rights of Sprint to assert claims against any of the Debtors under the theory of joint and several liability; and

(3) As 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, there is no basis on which to impose liability on any of the Debtors in this case other than New Satellite Services.

My Findings of Fact and Conclusions of Law in connection with these determinations follow.

Findings of Fact[3]

In or around 2004, Sprint entered into an arrangement with the FCC in which Sprint obtained the right to use the spectrum in the 2 GHz band. Around the same time, the FCC issued the order *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business*

[3] Pursuant to the parties' agreement and the provisions of Case Management Order #1, all of the facts (but not necessarily arguments and conclusions) in the declarations submitted to me have been taken as true.

Pool Channels[4] (the **"800 MHz Order"**). Pursuant to the 800 MHz Order, Sprint is authorized and obligated to relocate Broadcast Auxiliary Service (**"BAS"**) licensees from the 1990-2025 MHz spectrum band, in order to promote more efficient use of the spectrum and to permit the entry of new services, including Mobile-Satellite Service (**"MSS"**). Also pursuant to the 800 MHz Order, MSS operators that subsequently enter the spectrum band being cleared by Sprint are obligated to reimburse Sprint for their pro rata share of Sprint's cost of clearing the spectrum band. At this point, three operators share or will share the 2 GHz band: Sprint, New Satellite Services, and Terrestar Networks, Inc. (**"Terrestar"**).

The right to use that 2 GHz band will be very valuable. The FCC valued Sprint's interest in the spectrum it would receive at $4.86 billion.[5] Once the band-clearing is complete, Sprint is required to make a "true-up" or "anti-windfall" payment to the United States Treasury of roughly $2.8 billion (the **"$2.8 Billion True-Up"**), representing the difference in value between the 800 MHz and the 2 GHz bands. Under this arrangement, Sprint is permitted to deduct from the $2.8 Billion True-Up that Sprint must pay the Government any costs that Sprint bears in clearing the 800 MHz band. Alternatively, Sprint is permitted, under certain circumstances, to seek reimbursement from other MSS entrants for their pro rata share of eligible band-clearing costs, in lieu of receiving a credit

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4 Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004).

5 *See Improving Public Safety Communications in the 800 MHz Band, Report and Order and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18, FCC 09-49 (2009) (the **"June 12th Order"**) at ¶ 67.

against the $2.8 Billion True-Up.[6] In the June 12 Order, the FCC elaborates that Sprint may obtain cost sharing from "entrants when those licensees 'enter the band.'"[7]

New Satellite Services is one such MSS entrant, and one of the two licensees other than Sprint. Prior to the filing of this case, Sprint commenced an action against New Satellite Services in the Eastern District of Virginia for reimbursement of such band-clearing expenses described above (the **"Reimbursement Litigation"**). But Sprint did not assert claims in the Reimbursement Litigation against any of New Satellite Services' corporate affiliates under the theory of joint and several liability. Upon motion in that litigation, the District Court referred certain issues to the FCC on the ground that the FCC would have primary jurisdiction. Sprint's subsequent request that the FCC issue a declaratory order finding New Satellite Services liable for the amounts claimed in the lawsuit also did not include claims based on joint and several liability.

The Reimbursement Litigation has been stayed in the Virginia District Court pending the FCC's decision on those issues. In the June 12 Order, the FCC declined to resolve Sprint's request for a declaratory order (an adjudicative function) and proposed a new additional *rule* related to the reimbursement obligation. The FCC has tentatively, but only tentatively, concluded, among other things, that MSS entrants must reimburse Sprint when they "enter the band"[8]—a different question. But the relevant FCC orders did not mention "joint and several liability" or a synonym for that expression, and the FCC did not expressly define what "entrants" means. That left open the possibility for

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6 *See* 800 MHz Order at ¶ 261 ("[T]he first entrant may seek reimbursement from subsequently entering licensees for a proportional share of the first entrant's costs in clearing BAS spectrum, on a *pro rata* basis according to the amount of spectrum each licensee is assigned.").

7 *See* June 12 Order at ¶ 82.

8 June 12 Order at ¶ 82.

the dispute we have here: between Sprint and the Debtors as to whether "entrants" simply means the licensees who would now have the rights to use the 2 GHz band—i.e. Sprint, New Satellite Services, and Terrestar—or means each of the individual companies in those three corporations' corporate families with any role in satellite operations.

In its most recent comments in response to the June 12 Order,[9] Sprint asserted that the reimbursement obligation of Terrestar and New Satellite Services to Sprint should be shared by the affiliates and parents of those entities. Sprint has conceded in proceedings before me that "there is nothing in the [FCC] orders that say that there is joint and several liability."[10] But on the theory that "entrants" is subject to a broad definition including corporate affiliates, Sprint argues here that all of the Debtors are jointly and severally liable for any reimbursement obligation that is owed to Sprint (the **"Reimbursement Claim"**). Sprint argues that the terms "entrants" and "operators" in the June 12 Order must mean more than New Satellite Services itself, because New Satellite Services cannot operate an entire system of ancillary terrestrial component devices without support from other Debtor affiliates.

Accordingly, on June 25, 2009, Sprint filed nine identical proofs of claim against each of the Debtors in the amount of approximately $211 million each. Though these claims would be asserted separately against each of the estates, the claims together would amount to approximately $1.9 billion. That is so even though the aggregate amount expended to date by Sprint in clearing the band appears to have been between $550 and $600 million; only 57% of that would have to be shared by the other MSS entrants New Satellite Services and Terrestar, and the New Satellite Services share of that would be no

9 Taking comments is an element of rulemaking under applicable administrative law.

10 *See* 8/30/09 Hr'g Tr., at 49:12-13.

more than $300 million. It appears that Sprint is including in its claim asserted reimbursement entitlements for sums it has not yet spent, it if ever will. It also appears that Sprint has not taken into account its ability to offset sums spent clearing the 2GHz band against the $2.8 billion it owes the Government pursuant to the $2.8 Billion True-Up or Payment.

Sprint asks me to defer further consideration of the Debtors' objection its claims pending the FCC's determination of Sprint's contentions. At the August 20 hearing on a variety of issues in these chapter 11 cases (Sprint's motions for temporary allowance of claims for voting purposes and for a stay pending the withdrawal of the reference motion, and the Debtors' objection to Sprint's claims,) the FCC (represented by the local U.S. Attorney's Office) attended. Near the conclusion of argument, the FCC entered the dispute on the claims allowance matter before me (having failed to file a brief or any other papers before the hearing), siding with Sprint on the primary jurisdiction issue.

I permitted the FCC to submit a late brief on its primary jurisdiction contentions, and it did so. In that brief, filed after the August 20 hearing, the FCC contended that it should have primary jurisdiction over the issue of joint and several liability, and stated that it intended to decide the issues now before me as part of a rulemaking proceeding.[11] It is significant, in my view, that in addressing the issue of joint and several liability, the FCC would proceed by *rulemaking*, rather than through an adjudicative process.

[11] *See* FCC Br. at 15 ("the Commission currently intends to handle it as part of the ongoing rulemaking proceeding"); *id.* at 15-16 (deciding the matter could be "accomplished either as part of the final rule or as a separate order within the *rulemaking proceeding* clarifying the existing rules and orders") (emphasis added in each case).

Discussion

I.

Claims Allowance Function

As a preliminary matter, we start with the recognition that determination of the Debtors' liability to Sprint involves a classic function of the Bankruptcy Court—the determination of the allowance of a creditor's claims against a debtor. Because the determination requires so basic a Bankruptcy Court function, and indeed is a core matter, in order for me to abstain from making that determination, there must be some reason that a Bankruptcy Court cannot decide this particular issue of claims allowance, as Bankruptcy Courts routinely do.

II.

Primary Jurisdiction

"No fixed formula exists for applying the doctrine of primary jurisdiction."[12] While analysis is on a case-by-case basis, the Second Circuit's inquiry generally has focused on four factors:

> (1) whether the question at issue is within the conventional experience of judges or whether the question involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;
>
> (3) whether there is a substantial danger of inconsistent rulings; and

[12] *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) ("***Western Pacific***"); *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2006) ("***Ellis***") (quoting *Western Pacific).*

(4) whether a prior application to the agency has been made.[13]

"The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings."[14] Here the four factors articulated by the Circuit in *Ellis* and *National Communications Association*, and the advantages-costs balancing also required under those cases, require *this Court* to determine the joint and several liability issue, making primary jurisdiction referral inappropriate here.

1. Within Conventional Experience of Judges

The first factor is whether the question at issue is within the conventional experience of judges, or rather involves technical or policy considerations within the agency's particular field of expertise. Here the "question at issue" is, of course, whether claims should be allowed in a bankruptcy case against various of the debtors, based on contentions that they are liable under contentions of joint and several liability, including Sprint arguments that the word "entrants" as used in the FCC's earlier orders means all of the entrants' corporate affiliates.

The issue of joint and several liability doesn't go to spectrum allocation, the extent to which existing spectrum occupants can be pushed out, or the amount entrants must pay for the right to utilize the spectrum. Assuming, as I do, that issues of this character would be beyond most judges' conventional experience or expertise, issues of that character are not what I'd be required to decide.

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13 *See Ellis*, 443 F.3d at 82-83 (2d Cir. 2006); *Nat'l Communic'ns Ass'n v. AT&T Co*., 46 F.3d 220, 222 (2d Cir. 1995) ("***National Communications Association***").

14 *National Communications Association*, 46 F.3d at 223; *Ellis*, 443 F.3d at 83 (in each case citing *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 321 (1973) (Justices Marshall, Douglas, Stewart and Powell, dissenting).

Matters of construction of the language appearing in statutes, regulations and orders are well within the conventional experience of judges. And indeed, construing such language is a routine and commonplace aspect of the jobs we judges do. Deciding questions as to what the FCC previously said; whether that gave rise to claims against various debtors in these chapter 11 cases; and whether other bases in law exist for imposing joint and several liability falls well within the traditional functions of a Bankruptcy Judge.

2. Particularly Within Agency's Discretion

The second factor asks the court to consider whether the question at issue is particularly within the agency's discretion. Here it is not. Significantly, the FCC doesn't suggest that it would be engaging in an *adjudication* as to the meaning of one or more of its earlier orders. Rather, it would be engaging in *rulemaking*—a fundamentally different undertaking—which could add to the universe of entities that might have liability to Sprint. Presumably, deciding whether to enact new rules is indeed an appropriate matter for agency discretion, and I wouldn't be so presumptuous as to tell the FCC what it should do with respect to any new rules it might wish to enact for the future. But the question at issue here isn't with respect to what the FCC might enact for the future, but what it *already had provided*, and how I should decide a claims allowance matter now before me.

The FCC couldn't retroactively add or change the rules to impose joint and several liability on parties if they did not have such liability as of the time that matters.

The “time that matters” is the Filing Date.[15] To retroactively change any of the Debtors’ liability would violate the Debtors’ administrative law right to adequate notice,[16] and, more fundamentally here, would run contrary to fundamental principles under the Bankruptcy Code.[17] The positions of Sprint and the FCC are particularly problematic, as matters of both bankruptcy and administrative law, when they propose that the FCC, by its rulemaking in the future, could and should interject itself into the claims allowance process, where claims are determined as of the Filing Date.[18]

Sprint maintains that it only seeks the FCC’s interpretation of existing FCC rules and orders, and that it is not asking the FCC to change the rules under the FCC’s rulemaking authority. However, the FCC has unambiguously stated that it will proceed under its rulemaking authority,[19] and as Sprint has acknowledged, the FCC’s existing orders do not address joint and several liability. What Sprint and the FCC are actually proposing, then, is that by rulemaking, one or more *new* rules addressing joint and several liability might be put into effect—whether under the rubric of “clarifying” a rule that said nothing of the kind, or (perhaps less disingenuously) by creating new rights and liabilities. As previously noted, any new rulemaking could not affect Sprint’s claims

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15 *See* Bankruptcy Code section 502(b) (with exceptions not relevant here, if objection to a claim is made, “the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States *as of the date of the filing of the petition*”) (emphasis added).

16 *See, e.g., Satellite Broad Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”). To make the Debtors retroactively liable for claims totaling over $1 billion based on after the fact rulemaking would suffer from that same infirmity.

17 *See* n.15 *supra*.

18 *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 . . . .”), *cert. denied*, 537 U.S. 882 (2002).

19 *See* n.11 *supra*.

against the Debtors, as those claims must be determined "as of the date of the filing of the petition."[20]

3. Substantial Danger of Inconsistent Rulings

The third factor is whether there exists a substantial danger of inconsistent rulings. Here there is no such danger. The Creditors' Committee correctly observes that there is no danger of inconsistent rulings on the issue of joint and several liability, as the FCC has not spoken on that matter, and any future rulemaking on the topic could have no bearing on the case before the Court. The possibility of a future rulemaking is an insufficient ground to prevent a Bankruptcy Court from doing what it is statutorily charged to do—which includes, among other things, determining creditors' entitlements to the allowance of claims, and taking other steps to conduct a chapter 11 case in a timely and efficient manner.

4. Prior Application to Agency

The fourth factor is whether a prior application to the agency has been made. But Sprint first raised the issue of joint and several liability with the FCC in its comments to the FCC's proposed rulemaking at a time when the issue was already before this Court. If there were an adjudicative proceeding already before the FCC when the Debtors' chapter 11 cases were filed, I might well give serious consideration to deferring to the FCC. But here we have no more than a rulemaking, which as relevant here cannot be retroactive, requested after the time by which the Debtors' liability to Sprint was fixed.

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20 Bankruptcy Code section 502(b).

In addition, as the Creditors' Committee points out, although Sprint was engaged in prepetition litigation in the Eastern District of Virginia, it waited until a very late stage of the Debtors' bankruptcy cases to raise the issue joint and several liability.

This factor likewise does not support primary jurisdiction.

5. Balancing Advantages Against Potential Costs of Complications and Delay

Finally, the unnumbered factor articulated by the Circuit—"balanc[ing] the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings"—compels rejecting assertions of primary jurisdiction here.

Even if the FCC could somehow change the rights and responsibilities of Debtors back on the Filing Date with respect to Sprint's Reimbursement Claim, referring the issue to the FCC for rulemaking would grossly interfere with the bankruptcy process. Rulemaking proceedings in the FCC are a notoriously slow process. The FCC's own brief describes rulemaking proceedings relevant to these issues that started in 1992 (17 years ago),[21] and I find it surprising, at the least, when the FCC says that concerns in this regard are "speculative."[22] Given that history, and the nature of the rulemaking process, it is at least foreseeable, if not also certain, that if I were to await the conclusion of rulemaking in the FCC, determination of the issues now before me would take months or years.

I also find it more than a little offensive for the FCC to suggest that the time its rulemaking would take is "irrelevant to the primary jurisdiction question."[23] As

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[21] *See* FCC Br. at 2 nn. 2, 3, 5, 6, 8.

[22] FCC Br. at 14.

[23] *Id.*

previously noted, the Second Circuit has at least twice held that "[t]he court must also balance the advantages of applying the [primary jurisdiction] doctrine against the potential costs resulting from complications and delay in the administrative proceedings."[24] Referring the issue to the FCC for future rulemaking would have a significant adverse impact on the administration of these chapter 11 cases, and have a dramatic adverse impact on the other unsecured creditors in this case. I find compelling the Committee's argument that a referral to the FCC would upset the reasonable expectations of unsecured creditors as to the receipt of their distributions under the Debtors' plan of reorganization. Since the amount of the Sprint Claims is so substantial, if the issue of joint and several liability were referred to the FCC, awaiting the conclusion of the FCC's rulemaking would require the creation of distribution reserves so huge as they would effectively preclude any distributions to unsecured creditors. The Debtors would almost certainly need to wait for a decision on that issue before making any distribution.

And here there would be little or no harm to any of the parties from this Court deciding the issue. This Court routinely determines whether debtors are liable to parties-in-interest, and the nature and amount of any such liability. Assessment of the liability of debtors to their creditors is a traditional function of the Bankruptcy Court, and the facts here don't present the kind of exceptional circumstance in which it might be appropriate to refer a matter of claims allowance to a federal administrative agency.

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[24] *See* n.14 *supra*.

III.

Joint and Several Liability on the Merits

Upon considering the merits, Sprint's claims against Debtors in this case other than the licensee, New Satellite Services, must be disallowed. Under the current FCC regulations and orders, other "entrants" are potentially liable to Sprint for reimbursement for the cost of clearing the band. 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.

Review of the context in which "entrants" was used in the June 12 Order with respect to the 2 GHz band compels the conclusion that "entrants" was intended to refer to Sprint (which might well have its own corporate affiliates with whose assistance Sprint does business) and other *licensees*, like New Satellite Services and Terrestar—without intending the term "entrants" to refer to company-by-company affiliates of the licensees. For example, Paragraph 70 of the June 12 Order shows how "entrants" is synonymous with licensees, as both words were used without distinctions in a single sentence: "As with the MSS *entrants*, Sprint Nextel 'is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during its 36-month 800 MHz reconfiguration period from AWS *licensees* that enter the band prior to the end of that period.'"[25] The two words'

[25] *See* June 12 Order, ¶ 70 (emphasis added). The inference is compelling that "entrants" was used in other orders in the same way. See, for example, the June 12 Order, paragraph 67: "Responsibility for BAS relocation would be shared between the MSS entrants and the other new entrants to the band."; paragraph 68: "[T]he Commission provided that the earlier *entrant* to the band who relocated BAS, *whether Sprint Nextel or MSS*, could receive reimbursement from a later *entrant* for the band clearing costs . . . ." (emphasis added); and "We note that when Sprint Nextel undertook its commitment to relocate the BAS *licensees*, the Commission did not, as discussed

synonymous nature is apparent once more in Paragraph 82 of the June 12 Order, when it says that Sprint may obtain cost sharing from "*entrants* when *those licensees* 'enter the band.'"[26] And the June 12 Order provides that "an MSS entrant will have entered the band and incurred a cost sharing obligation when it certifies that *its satellite* is operational for purposes of meeting its operational milestone."[27] Drafting this paragraph in this fashion is inconsistent with the notion that "entrants" was intended to cover separate corporate affiliates providing services with respect to a single satellite.

Piercing the corporate veil is the exception and not the rule. As a matter of common law, unless changed by statute, corporate parents, subsidiaries or sister corporations are not liable for the other separate entities' liabilities.[28] When joint and several liability is imposed—as it is, for example, under ERISA—statutes so provide and do so unequivocally. As the Supreme Court noted in *United States v. Bestfoods*, the failure of the statute to speak to a matter as fundamental as the liability implications of a corporate ownership demands application of the rule that "to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law."[29] The FCC orders do not "speak directly" to imposing such a fundamental change—even if, arguendo, they do so at all. Imposing joint and several liability on corporate affiliates is such a major change from the normal rule that it cannot lightly be

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above, remove the obligation of the MSS *entrants* to relocate the licensees . . . ." (emphasis added).

[26] Emphasis added.

[27] *Id.* at ¶ 91 (emphasis added).

[28] *See United States v. Bestfoods*, 524 U.S. 51, 61 (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.") (internal citations omitted).

[29] *Id.* at 52.

presumed. In the absence of language in the FCC's rules and regulations imposing joint and several liability, there is no reason to impose such liability on the Debtors.

Conclusion

For the foregoing reasons, I rule that primary jurisdiction referral of the issue of the Debtors' joint and several liability to the FCC is inappropriate, and that no basis exists under the facts as they have been presented to impose joint and several liability on the Debtors. Sprint's claims against any Debtor entities other than New Satellite Services are disallowed.

SO ORDERED.

Dated: New York, New York
September ***30***, 2009

s/Robert E. Gerber
United States Bankruptcy Judge

ATTACHMENT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re DBSD NORTH AMERICA, INC., ET AL., Debtors,	Chapter 11 09-13061(REG)
SPRINT NEXTEL CORP., Appellant, - against - DBSD NORTH AMERICA, INC., ET AL. Appellees.	09 Civ. 9144 (VM) **DECISION AND ORDER**

VICTOR MARRERO, United States District Judge.

Appellant Sprint Nextel Corporation ("Sprint") appealed, pursuant to 28 U.S.C. § 158(a) and Rules 8001(a) and 8002(a) of the Federal Rules of Bankruptcy Procedure, from an order dated September 30, 2009 (the "Bankruptcy Order") of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") which denied Sprint's claims for amounts it asserts it was owed by the appellee debtors (the "Debtors").[1] For the reasons set forth below, the Bankruptcy Order is AFFIRMED.

[1] The Debtors are the following nine affiliated companies currently in bankruptcy in the jointly-administered Chapter 11 Case No. 09-13061 in the Bankruptcy Court: DBSD North America, Inc. ("DBSD, N.A."); 3421554 Canada Inc.; DBSD Satellite Management, LLC; DBSD Satellite North America Limited; DBSD Satellite Services G.P.; DBSD Satellite Services Limited; DBSD Services Limited; New DBSD Satellite Services G.P. ("New Satellite Services"); and SSG UK Limited. The Official Committee of Unsecured Creditors of DBSD, N.A. is also an appellee.

I. BACKGROUND[2]

The Debtors comprise a developmental-stage business formed for the purpose of providing mobile satellite services ("MSS"). In very general terms, MSS provide information from satellites to mobile and portable devices (such as cell phones). The lead Debtor is DBSD, N.A., a holding company and the direct or indirect corporate parent of each of the other Debtors, including New Satellite Services. New Satellite Services is the entity among the Debtors that holds a license from the Federal Communications Commission (the "FCC") authorizing the use of some of the 2-gigahertz radio frequency spectrum band (the "2 GHz Band"). The other Debtors own assets or provide ancillary services involved with the delivery of the MSS provided by the Debtors.

In 1997, part of the 2 GHz Band was first designated for MSS use. At the time, however, the band was already occupied by unrelated Broadcast Auxiliary Service entities (consequently known as "BAS Incumbents"). Concerned about

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[2] The factual summary herein derives primarily from the following documents: Initial Brief of Appellant Sprint Nextel Corp., dated November 18, 2009 ("Sprint Br."); Opposition Brief of Appellees Debtors to Sprint Nextel's Appeal, dated December 11, 2009 ("Debtors' Opp. Br."); Joinder of Appellee the Official Committee of Unsecured Creditors of DBSD North America, Inc.; Opposition Brief of Appellee Debtors to Sprint Nextel's Appeal, dated December 11, 2009; and Reply Brief of Appellant Sprint Nextel Corporation, dated December 21, 2009. Except where specifically referenced, no further citation to these sources will be made.

potential interference between BAS Incumbents and MSS operators on the same spectrum, the FCC required BAS Incumbents to relocate to another spectrum (the "BAS Relocation"). Recognizing the significant costs involved in the BAS Relocation, the FCC also directed that any new 2 GHz Band occupant, such as New Satellite Services, bear the costs required to relocate the BAS Incumbents.

Sprint, unlike New Satellite Services, is not an MSS operator, but a land-based commercial mobile radio service provider. In 2004, Sprint's radio service at least potentially interfered with the radio communications of public safety services (e.g., police, fire, and other first responders) and other private services. At that same time, MSS operators had still not consummated the BAS Relocation. To resolve the potential Sprint-interference issue and the still-outstanding BAS Relocation issue, Sprint proposed (1) relinquishing its right to use the potentially-interfering spectrum in exchange for new spectrum in the band previously reserved for MSS operators (the same 2 GHz Band from which the BAS Incumbents were to be relocated), and (2) to undertake certain responsibilities relating to the inchoate BAS

Relocation. By order in 2004, the FCC authorized the implementation of this plan.

Sprint did not volunteer to incur the substantial costs of BAS Relocation out of pure altruism. The 2 GHz Band was significantly more valuable than Sprint's former band. The FCC valued the difference between Sprint's interest in the 2 GHz Band and its former band at $2.8 billion. Thus, Sprint had received a $2.8 billion windfall for moving spectrum bands.

To account for this windfall, the FCC required Sprint to make a true-up payment of roughly $2.8 billion to United States Treasury (the "$2.8 Billion True-Up"). However, the FCC allowed Sprint a credit against the $2.8 Billion True-Up for its band-clearing costs in both its former band and the 2 GHz Band. The FCC issued orders[3] (the "FCC Orders") delineating the scope of both Sprint's band-clearing obligations and its right to seek reimbursement from other MSS entrants to the 2 GHz Band for their pro rata share of certain

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[3] These orders include Improving Public Safety Communications in the 800 MHz Band; Consolidating 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004); and Improving Public Safety Communications in the 800 MHz Band, Report and Order and Order and Further Notice of Proposed Rulemaking, WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18, FCC 09-49 (2009)

band-clearing costs (the "Reimbursement Obligation"). Pursuant to the FCC Orders, to the extent that Sprint collects money from an MSS entrant under the Reimbursement Obligation, Sprint is not entitled also to take a band-clearing credit for that amount against its $2.8 Billion True-Up.

In Sprint Nextel Corporation v. New ICO Satellite Services G.P. and Terrestar Networks, Inc., 08 CV 651 (E.D. Va.), Sprint and New Satellite Services are engaged in litigation relating to the Reimbursement Obligation (the "Reimbursement Litigation"). In its complaint in that action, Sprint asserted the right to payment from New Satellite Services for its share of the Reimbursement Obligation.[4] Notably, Sprint did not name the other Debtors as defendants in the Reimbursement Litigation, and did not seek joint and several liability against the Debtors for the Reimbursement Obligation. Sprint claimed that the Debtors were jointly and severally liable under the FCC Orders after New Satellite Services and the Debtors filed for bankruptcy protection on May 15, 2009.

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[4] Under the FCC Orders, the Reimbursement Obligation only applies if the entity from which Sprint seeks reimbursement entered the 2 GHz Band on or before June 26, 2008. The factual issue of whether New Satellite Services did so is at the heart of the Reimbursement Litigation.

On June 25, 2009, Sprint filed a proof of claim against each of the Debtors in the amount of $211,429,000 (collectively, the "Sprint Claims"), asserting that the Debtors were each jointly and severally liable to Sprint for their alleged $1.9-billion-plus share of the Reimbursement Obligation. The $1.9 billion represented a nineteen-fold increase over the $100 million Sprint sought in its complaint from New Satellite Services in the Reimbursement Litigation.

On July 22, 2009, the Debtors filed an objection to the Sprint Claims to the extent that Sprint asserted them against any Debtor other than New Satellite Services. The Debtors' position was that no joint and several liability existed and that only the actual FCC-license-holding entity (here, New Satellite Services) was potentially[5] liable for the Reimbursement Obligation. The Bankruptcy Court disallowed the Sprint Claims against the Debtors other than New Satellite Services, holding that the referral to the FCC under the doctrine of primary jurisdiction was not required,[6] and that,

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[5] The extent to which New Satellite Services is actually liable for its share of the Reimbursement Obligation depends on the outcome of the Reimbursement Litigation.

[6] Before the Bankruptcy Court issued the Bankruptcy Order, Sprint filed a motion to withdraw the reference under 28 U.S.C. § 157(d), seeking to have the District Court determine whether a primary jurisdiction referral of the joint and several liability issue to the FCC was warranted. The Bankruptcy Court declined, pursuant to Fed. R. Bankr. P. 5011(c), to stay

on the merits of the joint-and-several-liability claim, "no basis exists under the facts as they have been presented to impose joint and several liability on the Debtors." (Bankruptcy Order at 18.)

Sprint now presents two main arguments on appeal. First, it asserts that the Bankruptcy Court erred by failing to refer the issue of the Debtors' joint and several liability for the Reimbursement Obligation to the FCC under the doctrine of primary jurisdiction. Second, Sprint argues that even if the Bankruptcy Court was not required to refer the issue to the FCC, it made two errors in its analysis on the merits in finding that no joint and several liability existed. After reviewing the relevant record and the parties' submissions, the Court affirms the Bankruptcy Order for the reasons set forth below.

II. DISCUSSION

A. PRIMARY JURISDICTION REFERRAL

In a District Court's review of a Bankruptcy Court order denying a motion for a primary jurisdiction referral and

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the claims allowance proceedings pending the District Court's determination of the withdrawal of the reference motion. The District Court, before the Bankruptcy Court issued the Bankruptcy Order, determined that the reference would not be withdrawn. See Sprint Nextel Corp. v. DBSD North America, Inc., 09 Civ. 7109 (Docket No. 3).

disallowing the underlying claims, the Bankruptcy Court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. See In re Yohannes, No. 06 Civ. 461, 2007 WL 2034301, at *2 (S.D.N.Y. July 17, 2007). Further, the Second Circuit has stated that a court's decision to not apply the doctrine of primary jurisdiction is subject to de novo review. See Ellis v. Tribune Television Co., 443 F.3d 71, 83 n.14 (2d Cir. 2006); see also National Commc'ns Ass'n, Inc. v. American Tel. & Tel. Co., 46 F. 3d 220, 222 (2d Cir. 1995) (stating that the decision is subject to a "standard of review [that] is essentially de novo."). The parties do not dispute that the reviewing court must independently examine the four considerations described below to determine whether referral is appropriate. Accordingly, the Court will examine the primary jurisdiction issue anew.

"No fixed formula exists for applying the doctrine of primary jurisdiction." Ellis, 443 F.3d at 82 (quoting United States v. West Pac. R.R. Co., 352 U.S. 59, 64 (1956)). Instead, the Second Circuit generally focuses on four grounds in determining whether to apply primary jurisdiction, specifically whether the question at issue: (1) falls within the conventional experience of judges or involves technical or policy considerations within the agency's particular field of expertise; (2) is particularly within the agency's discretion; (3) raises a substantial risk of inconsistent rulings; and (4) has been the subject of a prior application to the agency. See id. at 82-83; National Commc'ns Ass'n, 46 F.3d at 220-23. In addition to reviewing these four considerations, "[t]he court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." National Commc'ns Ass'n, 46 F.3d at 223; Ellis, 443 F.3d at 83 (quotation marks omitted).

In reviewing the four grounds and related balancing consideration, the Court is mindful that the Second Circuit applies a "narrow" approach to application of the primary jurisdiction doctrine. Goya Foods, Inc. v. Tropicana Prod., Inc., 846 F.2d 848, 851 (2d Cir. 1988); see also Ellis, 443 F.3d at 91. "[T]he case law establishes that it should not be lightly invoked or applied, and that cases in which its application is warranted tend to be the exception, not the norm." Global Crossing Bandwith, Inc. v. OLS, Inc., No. 05-CV-6423, 2009 WL 763483, at *2 (W.D.N.Y. Mar. 19, 2009).

1. Whether the Question at Issue Falls Within the Conventional Experience of Judges or Involves

Technical or Policy Considerations Within the Agency's Particular Field of Expertise

With regard to the first prong, primary jurisdiction referral is appropriate "when the issue involves technical questions of fact uniquely within the expertise and experience of an agency," Goya Foods, 846 F.2d at 851 (quotation marks omitted), and does not extend to legal questions that are "within the conventional competence of the courts." National Commc'ns Ass'n, 46 F.3d at 223. For substantially the reasons provided by the Bankruptcy Court, the Court finds that the issue of the Debtors' joint and several liability is a legal question squarely within the purview of the judiciary, and not a "technical question[] of fact uniquely within the expertise and experience of [the FCC]." Goya Foods, 846 F.2d at 851. As the Bankruptcy Court stated, "[t]he issue of joint and several liability does not go to spectrum allocation, the extent to which existing spectrum occupants can be pushed out, or the amount entrants must pay for the right to utilize the [2 GHz Band]." (Bankruptcy Order at 10.)

Instead, the issue is whether existing law (specifically, the FCC Orders) imposed joint and several liability for the Reimbursement Obligation on all of the Debtors, as opposed to merely on New Satellite Services. The Court agrees with the

Bankruptcy Court's summary of how this issue falls "within the conventional competence of the courts," National Commc'ns Ass'n, 46 F.3d at 223:

> Matters of construction of the language appearing in statutes, regulations and orders are well within the conventional experience of judges. And indeed, construing such language is a routine and commonplace aspect of the jobs we judges do. Deciding questions as to what the FCC previously said; whether that gave rise to claims against various debtors in these chapter 11 cases; and whether other bases in law exist for imposing joint and several liability falls well within the traditional functions of a Bankruptcy Judge.

(Bankruptcy Order at 11.)

Sprint shifts the scope of the issue before this Court when it argues:

> The issues raised by the claims objections filed by the Debtors involve technical and policy issues the analysis of which has been delegated to the FCC. The underlying policy issue implicated by this case is how to pay for the [BAS Relocation] to make way for advanced technologies. ... The FCC is entitled to the greatest deference on issues related to its spectrum reallocation policies and the payment of costs associated with the relocation of [BAS Incumbents].

(Sprint Br. at 11 (quotation marks omitted).) The issue decided by the Bankruptcy Court, and now before this Court on de novo review, is not how to pay for BAS Relocation, how to best allocate band spectrum for new technologies, or related communications policy issues. Rather the issue is simply whether the FCC Orders in effect at the time of the Debtors' bankruptcy filings imposed joint and several liability on the Debtors for a portion of the Reimbursement Obligation. Accordingly, the Court concludes that what is presented here is a legal issue within the conventional experience of judges that does not involve technical or policy considerations within the FCC's particular field of expertise. The Court therefore finds that the first factor cuts against referral.

2. Whether the Question at Issue Is Particularly Within the Agency's Discretion

With regard to the second prong, Sprint argues that holding "MSS systems" or "MSS operators" to be jointly and severally liable for the Reimbursement Obligation is an issue that is within the discretion of the FCC. To support this argument, Sprint asserts that the FCC Orders are at least ambiguous as to whether they provide for liability for the Reimbursement Obligation on MSS systems and operators, as opposed to merely on "MSS licensees" or "MSS entrants." According to Sprint, "the interpretation of the FCC's prior orders to determine what the FCC meant by interchangeably referring to 'MSS licensees,' 'MSS systems,' 'MSS operators,' and 'MSS entrants' is within the FCC's discretion, and the FCC's determination of that issue is entitled to substantial deference." (Id. at 14.)

Sprint again conflates the pertinent issue. That the FCC has discretion to assign liability to the Debtors does not mean that the issue of whether the existing FCC Orders have in fact subjected the Debtors to joint and several liability is an issue that is particularly within the FCC's discretion. The relevant issue for the purposes of the second prong here is not whether the FCC has the ability or discretion to enact rules requiring joint and several liability of all entities that constitute MSS systems or operators. Rather, the pertinent question is whether analyzing the scope of existing FCC Orders on the Debtors' liability is particularly within the FCC's discretion. The Court finds that judging whether an agency has enacted such a rule goes to the heart of the role of a court -- to interpret and apply what the law provides -- and that function is in no way particularly within the FCC's discretion. As such, the Court concludes that the second consideration militates against referral.

3. Whether the Question Raises a Substantial Risk of Inconsistent Rulings

The third prong of the Second Circuit's primary jurisdiction test "ensure[s] that courts and agencies with concurrent jurisdiction over a matter do not work at cross-purposes." Fulton Cogen. Assocs. v. Niagra Mohawk Power

Corp., 84 F.3d 91, 97 (2d Cir. 1996). Sprint argues that "[o]nce it is recognized that the FCC ... intend[s] to interpret its prior orders, the potential for inconsistent rulings immediately becomes apparent." (Sprint Br. at 14.) Sprint thus asserts that "[i]f the FCC ... reaches a different conclusion and finds that all entities comprising a single 'MSS system' are jointly and severally liable for the [R]eimbursement [O]bligation [under the FCC Orders], subsequent courts will have to reconcile that FCC determination with the Bankruptcy Court's contradictory decision." (Id. at 14.)

Sprint did not raise this argument to the Bankruptcy Court. Appellate courts will not consider arguments raised for the first time on appeal. See In re Fayolle, 159 F. App'x 221, 222 (2d Cir. 2005) ("[W]e hold that plaintiff waived all arguments not presented in the proceeding before the Bankruptcy Court ...."); Medorms, Inc. v. Healthcare Mgmt. Solutions, Inc., 290 F.3d 98, 109 (2d Cir. 2002).

Even if it considered Sprint's argument here, the Court does not foresee a substantial danger of an inconsistent interpretive ruling from the FCC on the scope of the Reimbursement Obligation under the FCC Orders. If the FCC were to address the scope of the liability for affiliated entities, the record suggests that the FCC would do so in the form of rulemaking, which would be presumptively prospective in its application. Based on existing FCC Orders, the Court views it unlikely that such a prospective ruling would be inconsistent for the purposes of primary jurisdiction analysis with the Court's ruling at this time. Accordingly, Sprint has also failed to persuade the Court that the third primary jurisdiction consideration weighs in favor of referral.

4. Whether the Question Has Been the Subject of a Prior Application to the Agency

A party's late request for referral after substantial judicial proceedings have transpired cuts against referral. See Global Crossing Bandwidth, 2009 WL 763483, at *4. The Bankruptcy Court found that Sprint "waited until a very late stage of the Debtors' bankruptcy cases to raise the issue [of] joint and several liability ...." (Bankruptcy Order at 14.) The Bankruptcy Court noted that Sprint raised the issue of referral on the joint and several liability issue less than two months before the scheduled confirmation hearing, and that Sprint did so even though it and New Satellite Services were involved in litigation over the Reimbursement Obligation before the Debtors filed for bankruptcy. (See id. at 14.)

Thus, the Court is persuaded that the fourth consideration additionally weighs against agency referral.

5. Balancing Consideration

The Court must also balance the advantages of referral against any concomitant potential costs of complication and delay. See Ellis, 443 F.3d at 83; National Commc'ns Ass'n, 46 F.3d at 223. The Bankruptcy Court found that "the unnumbered factor articulated by the Circuit -- balancing the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings -- compels rejecting assertions of primary jurisdiction here." (Bankruptcy Order at 14 (quotation marks and alteration omitted).) Sprint asserts, however, that "the possibility of delay is not a legitimate reason to deny a referral request" and that "the Bankruptcy Court's decision was [improperly] driven by its concern that referral would negatively effect [sic] the ongoing administration of the bankruptcy case." (Sprint Br. at 16-17.)

In essence, Sprint contends that the potential economic costs of complication and delay in the Debtors' bankruptcy cases are not relevant grounds in determining whether to refer an issue to an administrative agency. The Court disagrees, especially so in the context, such as presented here, of a complicated bankruptcy proceeding involving many stakeholders relying on an efficient proceeding. For example, both Supreme Court and Second Circuit precedent permit a court to consider delay as a consideration in the equitable analysis connected to a decision on primary jurisdiction referral. See Reiter v. Cooper, 507 U.S. 258, 270 (1993) (rejecting referral to an agency where the "referral ... could produce substantial delay ...."); National Commc'ns Ass'n, 46 F.3d at 225 ("Since the district court can conclude this matter far more expeditiously, a potential delay of even two years more than outweighs any benefit that might be achieved by having the FCC resolve this relatively simple factual dispute.") rev'g No. 93 Civ. 3707, 1994 WL 116083, at *1 (S.D.N.Y. Mar. 25, 1994) (referring issue to the FCC).

The Bankruptcy Court made several salient findings of fact, subject to the clearly erroneous standard on appeal, see In re Yohannes, 2007 WL 2034301, at *2, balancing the advantages and potential costs of complications and delay. The Bankruptcy Court found that "referring the issue to the FCC for rulemaking would grossly interfere with the bankruptcy process," (Bankruptcy Order at 15), stating:

> [A] referral to the FCC would upset the reasonable expectations of unsecured creditors as to the receipt of their distributions under the Debtors' plan of reorganization. Since the amount of the Sprint Claims is so substantial, if the issue of joint and several liability were referred to the FCC, awaiting the conclusion of the FCC's rulemaking would require the creation of distribution reserves so huge as they would effectively preclude any distribution to unsecured creditors. The Debtors would almost certainly need to wait for a decision on that issue before making any distribution.

(Id.) The Bankruptcy Court further found that "it is at least foreseeable, if not also certain, that if I were to await the conclusion of rulemaking in the FCC, determination of the issues now before me would take months or years." (Id. at 14.)

The Court does not take lightly the Bankruptcy Court's findings regarding the potential harm of complication and delay here, and Sprint has not shown that the Bankruptcy Court clearly erred in making these findings.[7] Accordingly, the Court finds that equitable grounds such as delay are

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[7] The Court further considers the representations of the Debtors that

> [t]he timing of the Debtors' confirmation process is of critical importance to the Debtors. The unavoidable delay that could result from an FCC referral could seriously jeopardize the Debtors' current financing and quickly force the Debtors to sell at significant loss the securities that have financed the Debtors' ongoing restructuring. Further given the sheer magnitude of Sprint's claims ($200 million against each of nine debtors), any FCC referral would severely delay distributions to all other unsecured creditors.

(Debtors' Opp. Br. at 20.)

appropriate considerations in the primary jurisdiction analysis and that the Bankruptcy Court's factual findings regarding the significant potential costs of complications and delay are not clearly erroneous.

B. JOINT AND SEVERAL LIABILITY

Sprint contends that the Bankruptcy Court erred in two ways in its analysis on the merits of the joint and several liability issue. First, Sprint contends that the Bankruptcy Court's interpretation of the FCC Orders ignored basic principles of statutory construction. Second, it asserts error because "[i]t is well within the FCC's authority to hold multiple entities comprising a single MSS system directly liable for the reimbursement obligation." (Sprint Br. at 22.)

In asserting these two errors, Sprint is challenging the Bankruptcy Court's interpretation of FCC regulations. A court's interpretation of an administrative regulation is subject to the rules of statutory construction. See APWU, AFL-CIO v. Potter, 343 F.3d 619, 626 (2d Cir. 2003). Matters of statutory interpretation are questions of law subject to de novo review. See United States v. Santos, 541 F.3d 63, 67 (2d Cir. 2008).

1. Statutory Construction

Sprint argues that the Bankruptcy Court erred in its interpretation of the FCC Orders because its interpretation renders them "nonsensical." (Sprint Br. at 20) The Bankruptcy Court's interpretation, Sprint asserts, leads to a result in which New Satellite Services could not be held liable for the Reimbursement Obligation. Sprint's reasoning is based on the FCC's statement that the Reimbursement Obligation is triggered only when the MSS operator's satellite becomes operational. Because New Satellite Services does not itself own a satellite, Sprint argues, the entire group of affiliated entities involved in providing MSS, the "MSS system," must be held liable for the Reimbursement Obligation. Any other result, Sprint contends, would lead to the "nonsensical" (id. at 20) situation in which the Court would have to interpret the FCC Orders to not impose the Reimbursement Obligation on any of the Debtors, including New Satellite Services -- a result Sprint argues the FCC Order could not possibly have intended because it would render the Reimbursement Obligation unenforceable for all practical purposes.

Sprint's argument on this point of statutory construction constitutes a new argument on appeal. Sprint did not present this argument to the Bankruptcy Court. Thus, Sprint has waived this argument. See In re Fayolle, 159 F. App'x at 222; Medorms, 290 F.3d at 109.

Even if Sprint had presented this argument to the Bankruptcy Court, the Court does not find it persuasive. Sprint has still failed to point to language in the FCC Orders that would subject the Debtors to joint and several liability for the Reimbursement Obligation. Also, the Court could very well read the FCC Orders -- without finding them to be "nonsensical" -- to contemplate the liability of New Satellite Services, the FCC licensee, once a satellite owned by one of its affiliates becomes operational. Further, even if the Court credited Sprint's logic, Sprint has failed to explain why such an interpretation of the FCC Orders would lead to the entire MSS system being liable, as opposed to merely the FCC licensee and the one related entity which directly owns the satellite that becomes operational.

Accordingly, the Court concludes that the Bankruptcy 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.

2. The FCC's Ability to Impose Liability on Each of the Debtors

Sprint next appears to argue that the Bankruptcy Court erred by not properly weighing the FCC's ability to impose liability on each of the Debtors. First, Sprint failed to present this argument to the Bankruptcy Court, and therefore cannot present it on appeal. See In re Fayolle, 159 F. App'x at 222; Medorms, 290 F.3d at 109. Second, even if Sprint had preserved this argument, whether the FCC is authorized to impose such liability is a distinct issue from the pertinent issue of whether the current FCC regulations have in fact imposed such liability. The relevant issue is whether the FCC Orders imposed joint and several liability on the Debtors -- not whether the FCC had the authority to impose such liability or whether future FCC orders could do so. In fact, the Debtors explicitly acknowledge that the FCC has the power to promulgate regulations subjecting the Debtors to joint and several liability for costs relating to the BAS Relocation. Thus, the Court concludes that Sprint's argument that the FCC could adopt joint and several liability is of no import here, and assigns no error to the Bankruptcy Court for purportedly failing to provide this fact its due.

III. ORDER

For the reasons stated above, it is hereby

ORDERED that the Order of the United States Bankruptcy Court for the Southern District of New York dated September 30, 2009, is AFFIRMED and the appeal of Appellant Sprint Nextel Corporation in this action (Docket No. 1) is DENIED.

The Clerk of Court is directed to withdraw any pending motions and to close this case.

SO ORDERED.

Dated: New York, New York
30 March 2010

VICTOR MARRERO
U.S.D.J.