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August 30, 2010

Via Electronic Submission

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

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Re: 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. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-0091211-00144.**

Dear Ms. Dortch:

On Friday, August 27, 2010, Lawrence R. Krevor and Trey Hanbury of Sprint Nextel Corporation (Sprint Nextel) and Marc S. Martin of K&L Gates had a teleconference with Louis Peraertz, legal advisor to Commissioner Mignon Clyburn of the Federal Communications Commission (the Commission) regarding the above-captioned proceedings. Relying on documents in the record, the parties discussed the liability of ICO Global Communications (Holdings) Limited (ICO Global) to reimburse Sprint Nextel for its *pro rata* share of Sprint Nextel s costs of clearing the Mobile Satellite Service (MSS) 2 GHz spectrum of the incumbent Broadcast Auxiliary Service licensees.

During that conversation, Mr. Peraertz asked Sprint Nextel to identify the corporate entity with respect to ICO Global/DBSD to which Sprint Nextel sent its 2006 notice of its intent to seek reimbursement from the MSS entrants (the Notice Letter). As indicated in the attached copy of that Notice Letter, Sprint Nextel served its notice of intent to obtain reimbursements on Suzanne Hutchings Malloy, ICO Global Communications (the parent company of the subsidiary now in bankruptcy and known as DBSD). Sprint Nextel also informed Mr. Peraertz that ICO Global officers, in their capacity as ICO Global officers, repeatedly executed the milestone certifications relating to the MSS licenses of the ICO MSS system. Sprint Nextel further noted that the 2004 Report and Order in WT Docket No. 02-55 did not specifically indicate whether DBSD or ICO Global were to reimburse Sprint Nextel because, as a rulemaking decision of general application, the Commission s Order

established and reaffirmed the longstanding *Emerging Technologies* principle that the MSS operators will be obligated to reimburse Sprint Nextel if Sprint Nextel clears the MSS 2 GHz spectrum and seeks reimbursement for such costs.

With respect to ICO Global s continuing attempts to misdirect the Commission with its irrelevant arguments about veil piercing, Sprint Nextel explained that even the Commission itself has stated in a federal court brief that the central issue regarding ICO Global s reimbursement obligations 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.[1] A copy of the Commission Brief is attached.

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

[1] *Response of the FCC to Debtors Omnibus Objection to Proofs of Claim Filed by Sprint Nextel Corporation Regarding Debtors Joint and Several Liability, In re DBSD North America, Inc., et al.*, Case No. 09-13061, at 13 n.26 (Bankr. S.D.N.Y. Aug. 31, 2009) (emphasis added) (Commission Brief).

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Sprint
Together with NEXTEL

Sprint Nextel
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March 7, 2006

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12 Street, SW
Washington, D.C. 20554

RE: Reimbursement for Band-Clearing Costs in the 1990-2025 MHz Band
WT Docket No. 02-55

Dear Ms. Dortch:

Sprint Nextel Corporation ("Sprint Nextel") hereby informs the Federal Communications Commission ("Commission") and Mobile Satellite Service ("MSS") licensees that it will seek reimbursement from MSS licensees for eligible costs Sprint Nextel incurs in clearing the 1990-2025 MHz band, as provided in paragraphs 261 and 352 of the *800 MHz R&O* in the above-captioned proceeding. *See Improving Public Safety Communications in the 800 MHz Band*; *Consolidating the 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, ¶¶ 261, 352 ("*800 MHz R&O*") (as amended by subsequent errata). Sprint Nextel is providing this notice to the two remaining MSS licensees at 2 GHz, New ICO Satellite Service G.P. and TMI Communications and Company L.P., by transmitting this letter to their representatives both electronically and via U.S. mail.

Pursuant to section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Sincerely,

/s/ Lawrence R. Krevor
Lawrence R. Krevor
Vice President, Government Affairs – Spectrum

cc: Suzanne Hutchings Malloy
Gregory C. Staple

Certificate of Service

I, Claudia Del Casino, hereby certify that on this 7th day of March, 2006, I caused true and correct copies of the foregoing notice to be mailed electronically and by U.S. mail to:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
DBSD NORTH AMERICA, INC., et al.,	:	09-13061 (REG)
Debtors.	:	Jointly Administered

Response of the Federal Communications Commission to Debtors' Omnibus Objection to Proofs of Claim Filed by Sprint Nextel Corporation Regarding Debtors' Joint and Several Liability

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Preliminary Statement

The Federal Communications Commission ("FCC" or the "Commission") respectfully submits this memorandum regarding whether the debtors[1] are jointly and severally liable under applicable FCC rules and orders for claims asserted by Sprint Nextel Corporation ("Sprint"). That issue directly implicates the FCC's interpretation of its own rules and orders, as well as the underlying policies adopted by the Commission in its licensing, regulation, and oversight of the radio spectrum. For that reason, the question of joint and several liability under applicable FCC rules and orders falls within the FCC's primary jurisdiction and should be referred to the Commission for determination.

Background

A. Regulatory Framework

1. Title III of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, confers broad authority and responsibility on the FCC to regulate the use of the radio spectrum for the benefit of the public. 47 U.S.C. § 301 *et seq*. Rapidly developing telecommunication technology in recent years has required the FCC to create spectrum management policies that foster innovation while also protecting valuable existing services. To meet this challenge, in 1992 the FCC convened a series of rulemaking proceedings, now commonly known as the "Emerging Technologies proceeding," which set

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[1] The debtors in these jointly administered chapter 11 cases, together with the last four digits of each debtor's federal tax identification number, are DBSD North America, Inc. (6404); 3421554 Canada Inc. (4288); DBSD Satellite Management, LLC (3242); DBSD Satellite North America Limited (6400); DBSD Satellite Services G.P. (0437); DBSD Satellite Services Limited (8189); DBSD Services Limited (0168); New DBSD Satellite Services G.P. (4044); and SSG UK Limited (6399).

forth the regulatory framework for spectrum redevelopment to accommodate new technologies.[2]

2. In 1997, as part of its spectrum management function, the Commission reallocated the 1990–2025 MHz and 2165–2200 MHz bands (both part of the "2 GHz band") of the radio spectrum to mobile satellite service ("MSS").[3] Clearing the 1990–2025 MHz band of incumbent broadcast auxiliary service ("BAS") users to permit entry by new MSS licensees involves costs to the BAS incumbents, principally engineering costs and the cost of new digital broadcasting equipment tuned to the new spectrum. To fairly apportion those expenses, the Commission stated that each new MSS licensee in the band is required to bear the costs of relocating the incumbent licensees,[4] in accordance with the policies established in the Emerging Technologies proceeding.[5] In a further decision in 2000, the Commission established the rules for the relocation of incumbent licensees from the 2 GHz

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[2] *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd. 6886 (1992); *Second Report and Order*, 8 FCC Rcd. 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd. 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd. 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd. 7797 (1994), *aff'd*, *Association of Public Safety Communications Officials International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996). *See also Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8825 (1996); *Second Report and Order*, 12 FCC Rcd. 2705 (1997).

[3] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, *First Report and Order/Further Notice*, 12 FCC Rcd. 7388 ¶ 14 (1997) ("MSS First R&O").

[4] *Id.* ¶ 33.

[5] *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 7 FCC Rcd. 6886 (1992) ¶ 24 (1992) ("the emerging technology service provider must guarantee payment of all relocation expenses").

band of spectrum.[6] The Commission reiterated that each MSS licensee must bear the cost of clearing the spectrum, and that later entrants must reimburse earlier entrants so that the costs of clearing the spectrum are shared in proportion to the amount of spectrum each licensee receives.[7]

3. Subsequently, the Commission reallocated 10 MHz of the 1990–2025 MHz band identified for MSS to Advanced Wireless Services ("AWS") licensees, and 5 MHz to Sprint.[8] Sprint was allocated the 5 MHz of spectrum in the 2004 "800 MHz Order," which also required the realignment of public safety and commercial licensees in the 800 MHz band to resolve ongoing interference to public safety users.[9] The 800 MHz Order required that Sprint both realign the 800 MHz band and relocate the 1990–2025 MHz BAS incumbents by particular dates as a condition for receiving the 2 GHz spectrum.[10] At that time, no MSS entrant had relocated any BAS incumbent. Nonetheless, the Commission reiterated in the

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[6] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd. 12315 (2000) ("MSS Second R&O").

[7] *Id.* ¶¶ 67–69.

[8] *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum below 3 GHz for Mobile and Fixes Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, *Third Report and Order, Third Notice of Proposed Rulemaking, and Second Memorandum Opinion and Order*, 18 FCC Rcd. 2223 ¶¶ 28, 35 (2003); *Improving Public Safety Communications in the 800 MHz Band*, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969 ¶¶ 217, 236–238 (2004) ("800 MHz Order"); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Sixth Report and Order, Third Memorandum Opinion and Order, and Fifth Memorandum Opinion and Order*, 19 FCC Rcd. 20720 ¶¶ 41, 46 (2004) ("AWS Sixth R&O").

[9] "800 MHz band" is shorthand for the bands at 806–824 MHz and 851–869 MHz. Sprint also received paired spectrum in the 1910–1915 MHz band. 800 MHz Order ¶ 217.

[10] *Id.* ¶ 12.

800 MHz Order that the obligation of the MSS entrants to relocate the incumbents continues independent of Sprint's obligation.[11] Moreover, the Commission specified that because Sprint was undertaking band clearing, it could seek reimbursement for a pro rata share of its band clearing costs from the MSS licensees and future AWS licensees that entered the band prior to the end of the 800 MHz reconfiguration period (i.e., by June 26, 2008).[12]

4. To address concerns that the spectrum Sprint was receiving might constitute a windfall, the Commission required Sprint to make a payment to the United States Treasury equal to $2.801 billion less the costs incurred by Sprint in the 800 MHz realignment and in the 2 GHz BAS relocation.[13] Originally, Sprint was to complete the 800 MHz realignment and the 2 GHz BAS relocation before the anti-windfall payment was due on December 26, 2008. However, the 800 MHz realignment and BAS relocation have not yet been completed, and the anti-windfall payment date has been postponed to December 31, 2009.[14]

5. On June 25, 2008, Sprint filed suit against debtor New DBSD Satellite Services G.P. (then known as New ICO Satellite Services) and TerreStar Networks in federal district court in the Eastern District of Virginia, seeking reimbursement of a share of the

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[11] *Id.* ¶¶ 250, 257, 264.

[12] *Id.* ¶ 261; AWS Sixth R&O ¶ 72.

[13] This is the value of the spectrum Sprint is receiving minus the value of spectrum it is giving up the 800 MHz band. 800 MHz Order ¶¶ 249, 297, 329–330, 357; *Improving Public Safety Communications in the 800 MHz Band*, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd. 25120 ¶ 36 (2004).

[14] *Improving Public Safety Communications in the 800 MHz Band*, 24 FCC Rcd. 8410 (2009); *Improving Public Safety Communications in the 800 MHz Band*, 24 FCC Rcd. 7904 ¶¶ 21, 71 (2009) ("June 12 Order").

cost of the band clearing.[15] In August 2008, the court referred the case to the Commission and stayed all proceedings pending further decision by the Commission.[16] On the same day that Sprint filed the suit, Sprint also asked the Commission to make a number of adjustments in the deadlines and procedures regarding reimbursement of relocation costs by the MSS entrants to reflect the delays that had occurred in the relocation.[17] In October 2008, Sprint filed a letter with the FCC asking for a declaratory ruling affirming that TerreStar and New DBSD Satellite Services must reimburse Sprint for a pro rata share of eligible relocation costs.[18] On February 12, 2009, Sprint requested that the FCC extend the BAS relocation deadline until February 2010.

6. On June 12, 2009, the Commission issued a Report and Order and Order and Further Notice of Proposed Rulemaking (the "June 12 Order"), in which the Commission extended the BAS relocation deadline to February 8, 2010, and made a number of tentative conclusions and proposals regarding the cost sharing obligations of the MSS and AWS entrants.[19] With regard to the cost sharing issues, the Commission:

- tentatively conclude[d] that MSS operators and future AWS licensees will have an obligation to share, on a *pro rata* basis, in the costs associated with the relocation of BAS incumbents if they "enter the band" prior to the BAS sunset date of December 9, 2013;

- tentatively conclude[d] that an MSS operator "enters the band" and thus incurs an obligation to share in the costs associated with relocation of BAS incumbents when its satellite is found operational under its authorization milestone; and

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[15] Complaint dated June 25, 2008, *Sprint Nextel Corp. v. New ICO Satellite Services*, No. 08cv651 (E.D.Va.).

[16] Order dated August 29, 2008, *Sprint Nextel Corp. v. New ICO Satellite Services*.

[17] Letter from Sprint, WT Docket 02-55, filed June 25, 2008.

[18] Letter from Sprint, WT Docket No. 02-55, filed October 8, 2008, at 13.

[19] June 12 Order ¶ 82 (2009).

- [sought] comment on various approaches for when MSS operators should be required to reimburse Sprint Nextel for their *pro rata* shares of the relocation costs.[20]

7. TerreStar and the debtors here (collectively, "DBSD") are the only two remaining MSS entrants occupying spectrum in the band. DBSD launched its satellite in April 2008 and satisfied its operational milestone in May 2008[21] while TerreStar launched its satellite and satisfied its operational milestone in July 2009.[22] Until the June 12 Order, the MSS entrants were prevented from beginning operations under the Commission's rules because incumbents in the 30 largest television markets had not been relocated. The June 12 Order eliminated that rule to allow DBSD and TerreStar to operate on a primary basis in markets where incumbents have been relocated and on a secondary basis in unrelocated markets with successful coordination with the incumbent licensees.[23]

8. Both Sprint and DBSD have filed comments with the FCC in response to the tentative findings in the June 12 Order. In its most recent comments, Sprint has raised the issue of whether the reimbursement obligation of TerreStar and DBSD to Sprint is shared by the affiliates and parents of those entities.[24]

B. The Sprint Claims

9. On June 25, 2009, Sprint filed proofs of claim (Nos. 32 through 40) against each of the debtors seeking payment of the reimbursement obligations mandated by the FCC's

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[20] June 12 Order ¶ 2.

[21] Final Milestone Certification and Selected Assignment Notification, New ICO Satellite Services G.P., filed May 9, 2008.

[22] Final Milestone Certification and Selected Assignment Notification, TerreStar Networks Inc., filed July 20, 2009.

[23] June 12 Order ¶¶ 39, 53.

[24] Reply Comments of Sprint, WT Docket 02-55, filed July 24, 2009, at 2–3.

band clearance orders. Sprint filed its claims against both debtor New DBSD Satellite Services G.P., the MSS licensee, as well as the other debtors, contending inter alia that they are all jointly and severally liable for the reimbursement obligation because they are, for this purpose, a single enterprise. By omnibus objection filed July 22, 2009, debtors objected to Sprint's claims and, as relevant here, sought to disallow claims 33 through 40 on the ground that only the actual licensee, not the other debtors, could be liable for Sprint's reimbursement claim.

Argument

A. Law of Preliminary Resort to an Agency

10. The doctrine of primary jurisdiction (also known as preliminary resort) exists to "promote th[e] proper working relationship between court and agency," and to ensure "uniformity and consistency in the regulation of business entrusted to a particular agency, and the limited functions of review by the judiciary." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2007) (quoting *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring), and *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952)). The doctrine "seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within the regulatory regime." *Id.* (internal quotation marks omitted). In short, "[t]he doctrine's central aim is to allocate initial decisionmaking responsibility between courts and agencies and to ensure that they 'do not work at cross-purposes.'" *Id.* at 81 (quoting *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996)). Thus, "where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

administrative body . . . the judicial process is suspended pending referral of such issues to the administrative body for its views." *Tassy v. Brunswick Hospital Center*, 296 F.3d 65, 73 (2d Cir. 2002).

11. "'Whether there should be judicial forbearance hinges therefore on the authority Congress delegated to the agency in the legislative scheme.' . . . [T]he doctrine applies 'when Congress has entrusted the regulation of certain subject matter under a statute to an administrative agency.'" *Id.* (quoting *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994), and *Gen. Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1026 (2d Cir. 1987)). Although there is "[n]o fixed formula for applying the doctrine" and the analysis "is on a case-by-case basis," the Second Circuit has "generally focused on four factors:"

> (1) whether the question at issue is within the conventional experience of judges or whether it 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 exists a substantial danger of inconsistent rulings; and
>
> (4) whether a prior application to the agency has been made.

Id. at 82–83 (internal quotation marks and citations omitted); *accord National Communications Ass'n v. AT&T Co.*, 46 F.3d 220, 222–23 (2d Cir. 1995).

B. This Court Should Refer the Question of Joint and Several Liability to the FCC

12. Under the test for preliminary resort to an agency, the issue of joint and several liability in this case should be referred to the FCC, as all four factors favor judicial forbearance.

1. The Issue Involves Policy and Technical Considerations Committed to the FCC's Discretion

13. A central issue in the FCC's ongoing efforts to relocate certain wireless services to a different part of the radio spectrum is who pays for clearing the band of incumbents. In numerous orders and rulemaking proceedings, as detailed above, the Commission has exercised its authority to regulate the spectrum by reallocating bands of the spectrum for different purposes. Those rules and orders have repeatedly dealt with the integral issue of who will bear the cost of relocating service providers from one part of the spectrum to another.

14. That cost allocation "involves technical or policy considerations within the [FCC's] particular field of expertise" and falls within the agency's discretion, *Ellis*, 443 F.3d at 82–83, and it therefore meets the first and second prongs of the test for preliminary resort to the Commission. As the D.C. Circuit has noted, "the FCC is charged with regulating and overseeing radio spectrum," including making "efforts to reallocate one portion of the spectrum to accommodate an ascendant and promising technology." *Teledesic LLC v. FCC*, 275 F.3d 75, 79 (D.C. Cir. 2001). Such reallocation falls squarely within the FCC's expertise and discretion:

> The problem presented [by spectrum reallocation] is not merely one of economics. The Commission correctly conceives of its role in prophetic and managerial terms: it must predict the effect and growth rate of technological newcomers on the spectrum, while striking a balance between protecting valuable existing uses and making room for these sweeping new technologies. In striking this balance, the Commission has relied on its judgments about the importance of old . . . services, as well as the potential value to society of new, emerging . . . systems. Its decisions about how best to strike this balance thus involve both technology and economics. The Commission is therefore entitled to the deference traditionally accorded decisions regarding spectrum management.

Id. at 84.

15. More broadly, the goal of the FCC's regulatory action is the exercise of its licensing authority,

> a task that Congress has delegated to the Commission in the first instance with deferential judicial review reserved to the courts of appeals. The FCC is expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. Indeed, in the Communications Act of 1934, Congress assigned to the Commission exclusive authority to grant licenses, based on public convenience, interest, or necessity, to persons wishing to construct and operate radio and television broadcast stations in the United States.

Id. at 86 (internal quotation marks, citations, and alterations omitted). As the Second Circuit has recognized, the FCC therefore has broad discretion—and, concomitantly, the courts have a sharply limited role—in licensing matters:

> [w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity. . . . In order for Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions must not be interfered with by other instrumentalities of the federal government acting beyond their statutory authority.

In re NextWave Personal Communications, Inc., 200 F.3d 43, 54, 55–56 (2d Cir. 1999). Thus, in licensing matters—such as the FCC's decision to reallocate bands of the radio spectrum—the FCC has broad discretion. *Ellis*, 443 F.3d at 86–87.

16. Dividing the cost of band clearance is a major issue underlying the FCC's choices regarding how to achieve spectrum reallocation—an issue governed by policy and technical questions of how to achieve the FCC's regulatory goals in the most effective and efficient manner. The Commission has consistently held to a "policy of placing the cost of involuntary [spectrum] relocation to comparable facilities on new entrants" in order to fairly protect incumbent licensees but also encourage development of new technologies. *Teledesic*, 275 F.3d at 85. Those policy goals have been held to be "reasonable," *id.*, and their implementation is within the FCC's discretion.

17. Indeed, in the proceeding at issue in this case, the FCC has expressly noted that questions of band clearance cost-sharing "relate to [the Commission's] fundamental goals of completing the relocation of [incumbent] operations from the 1990–2025 MHz band and providing for the operation of new services on those frequencies." June 12 Order ¶ 2. The cost-sharing measures serve to "balance the responsibilities for and benefits of relocating incumbent . . . operations among all new entrants in the band based on the Commission's relocation policies," and further the "cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for that benefit." *Improving Public Safety Commc'ns in the 800 MHz Band*, Proposed Rule, 74 Fed. Reg. 29636, 29637, 29640 (June 23, 2009). Those policies and principles are well within the FCC's purview: "'The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches.'" *Ellis*, 443 F.3d at 84 (quoting *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 866 (1984) (internal quotation marks omitted).[25]

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[25] At several junctures, the *Ellis* court refers to application of the primary jurisdiction doctrine when the agency is called upon to decide "issues of fact" or "factual inquiry." 443 F.3d at 82, 83. As is clear from the context, however, those phrases should not be read to limit preliminary resort to questions of simple factual adjudication. For instance, *Ellis* describes the types of "factual issues better addressed by the particular expertise of the agency" to include "questions including whether an extension of the waiver is in the public interest and whether divestiture would be an appropriate remedy for continuing non-compliance," *id.* at 85 n.16—in short, issues of how best to implement the agency's policies and how to balance the various factors in determining the public interest. Consistent with that, *Ellis* refers to the types of questions covered by the primary jurisdiction doctrine as "factual *and policy* disputes." *Id.* at 90 (emphasis added); *accord id.* at 85 ("issues of fact and policy that were inextricably intertwined with the public interest"); *Telstar Resource Group, Inc. v. MCI, Inc.*, 476 F. Supp. 2d 261, 271 (S.D.N.Y. 2007) ("Courts apply the doctrine to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency"; noting that "[c]ourts have commonly found that claims alleging 'unreasonable' practices . . . are within the primary

(continued...)

18. Resolution of the particular cost-sharing issue presented here—whether the various debtors should be jointly and severally liable for Sprint's claims—not only requires consideration of policy questions, the technical matter of how best to achieve the FCC's goals, and the exercise of the FCC's discretion, but also will involve interpretation of the FCC's many prior orders and notices. Such interpretation is a matter committed to the agency: an agency's interpretation of its own regulations and orders, "regardless of the formality of the procedures used to formulate it, is 'controlling unless plainly erroneous or inconsistent with the regulations.'" *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (alteration omitted)); *accord Simsbury-Avon Preservation Society v. Metacon Gun Club, Inc.*, __ F.3d __, No. 07-0795-cv, 2009 WL 2341924, at *6 (2d Cir. July 31, 2009). The vesting of such authority in the agency underlies both the administrative-law doctrine of deference to agency interpretation of statutes and regulations, as well as the primary jurisdiction rule of referring matters to the agency in the first instance. *Telstar Resource Group, Inc. v. MCI, Inc.*, 476 F. Supp. 2d 261, 272 (S.D.N.Y. 2007) (when "theory depends so heavily on the proper interpretation of an FCC regulation, the FCC's discretion is very much implicated"); *see Ellis*, 443 F.3d at 84 (citing *Chevron*, 467 U.S. at 866). Thus, the fact that the question of joint and several liability will turn to a significant degree on the FCC's interpretation of its own orders further supports the Commission's primary jurisdiction over that matter.[26]

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[25] (...continued)
jurisdiction of the FCC").

[26] In a brief filed in the district court regarding Sprint's motion to withdraw the reference to this Court, debtors argue that the FCC is in essence bound by the common-law rule that a parent corporation is not liable for the actions of its subsidiary and that the
(continued...)

2. A Judicial Decision Will Present a Substantial Danger of Inconsistent Rulings

19. The risk of inconsistent rulings on the question of joint and several liability is self-evident. The matter has been raised before the Commission in Sprint's comments on the rulemaking, which "raise[s] the possibility that the FCC might take further administrative action" on that matter—action that could easily contradict any ruling this Court might make. *Ellis*, 443 F.3d at 87. The doctrine of primary jurisdiction exists in part to protect against such risk of inconsistent pronouncements: "Courts should be especially solicitous in deferring to agencies that are simultaneously contemplating the same issues[, as] 'to permit the court below initially to determine the issue would invite the very disruption that the doctrine is meant to discourage.'" *Id.* at 87–88 (quoting *Danna v. Air France*, 463 F.2d 407, 412 (2d Cir. 1972) (alterations omitted)). In *Ellis*, "[i]nconsistent rulings did occur . . . in part because the district court failed to defer to the FCC's exclusive authority to address this matter in the first instance," *id.* at 87; the same risk is present here if this Court does not refer the matter to the FCC as a preliminary resort. Moreover,

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[26] (...continued)
corporate veil may be pierced only in extraordinary circumstances. DBSD's Opp. to Mot., *Sprint Nextel Corp. v. DBSD North America, Inc.*, No. 09 Civ. 7109 (PKC), Docket No. 2, at 15–18. Debtors misunderstand the FCC's inquiry: the primary question is whether the affiliated entities are directly liable according to the meaning of the FCC's rules and orders, not whether the corporate veil may be pierced. The scope of the cost-sharing obligation turns on those orders, and is thus a matter committed to the FCC's discretion as an issue both of interpretation of its own rules and of implementing the underlying policies and decisions regarding spectrum allocation and the means of achieving it. Moreover, even if corporate veil-piercing is implicated, the matter is still for the FCC to decide. The Commission has broad authority to act "as public convenience, interest, or necessity requires" when regulating radio communications, 47 U.S.C. § 303, and the Commission's regulations may preempt common-law requirements, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). It is thus for the Commission to determine the scope of its authority and the extent to which veil-piercing or, more generally, cost sharing is necessary to accomplish the goals of the spectrum allocation rules and orders in an efficient and equitable way.

again as in *Ellis*, there is the risk of conflicting results in the same case, making the same parties subject to the conflict, an "especially problematic" situation. *Id.* at 88.

3. The Issue Has Previously Been Presented to the Commission

20. As noted above, Sprint in its comments to the FCC's proposed rulemaking has requested the Commission to consider the joint and several liability issue. "If prior application to the agency is present, this factor provides support for the conclusion that the doctrine of primary jurisdiction is appropriate." *Id.* at 89. Sprint's recent presentation of the joint and several liability issue to the FCC thus further weighs in favor of a referral to the agency.

21. In any event, "[w]here, as here, only the fourth factor weighs against applying the doctrine, courts have in the past stayed or dismissed actions pending FCC review," as the "significant advantages of achieving a uniform understanding" of applicable rules outweighs any possibility of delay. *Telstar*, 476 F. Supp. 2d at 273.

4. The Timing of the FCC's Decisionmaking Is Irrelevant to the Primary Jurisdiction Question

22. Debtors have objected to a referral to the FCC on the ground that the Commission's proceedings are time-consuming. That argument, first, is speculative; debtors have no basis for arguing that the FCC will take an undue amount of time to determine the joint and several liability question if it is referred by the Court. Second, the time the FCC requires is irrelevant to the primary jurisdiction question:

> [T]he Supreme Court has consistently held that there are only two purposes to consider in determining whether to apply the primary jurisdiction doctrine—uniformity and expertise. *See* [*United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956)]. Despite ample opportunity during the ninety-five years since it created the doctrine, *see supra* at 66–68, the Supreme Court has never identified judicial economy as a relevant factor.

Tassy, 296 F.3d at 68 n.2. Thus, "such considerations of judicial economy"—including a claim that "agency referral would result in undue delay"—"should not be considered." *Ellis*, 443 F.3d at 90.[27] That rule holds especially true when the case "involves highly complicated factual and policy disputes that the FCC is uniquely well-situated to address," *id.*, as it does here.

C. On Referral to the FCC, the Joint and Several Liability Question Will Be Part of the Commission's Rulemaking Procedure, in Which the Commission Would Clarify the Meaning of the Cost-Sharing Obligation

23. If the Court were to refer the joint and several liability issue to the FCC, the Commission currently intends to handle it as part of the ongoing rulemaking proceeding, which is largely focused on issues of sharing the costs of band clearance. As noted above, the issue has already been raised by Sprint in its comments regarding that rulemaking, and the Commission could continue to deal with joint and several liability as part of that proceeding, whether it considers the question in response to Sprint's comments or following a referral from this Court.

24. Consideration of the joint and several liability issue would be undertaken as a clarification of the cost-sharing requirements in the Commission's prior orders. As detailed above, the FCC has issued numerous orders and rules relating to sharing the costs of band clearance. Resolution of the cost-sharing obligations of affected affiliated entities could be

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[27] The court in *Ellis* noted the dissenting opinion in *Tassy*, arguing that judicial economy should be a factor and citing *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992). However, neither the *Tassy* dissent nor *Johnson* stated that the possibility of delay should counsel against an agency referral. To the contrary, they both stated that "judicial economy" would be furthered by allowing prior resort to the agency, because the agency's expertise could assist with resolving the disputes at issue. *Tassy*, 296 F.3d at 75 (Walker, J., dissenting); *Johnson*, 964 F.2d at 123. That rationale does not apply to the contention that possible delay should lead a court to decline to refer a matter to an agency.

accomplished either as part of the final rule or as a separate order within the rulemaking proceeding clarifying the existing rules and orders.

25. In either event, the FCC would not need to commence a new, separate proceeding. The FCC is mindful of the time constraints imposed by this litigation and will endeavor to act as quickly as possible once it has given all interested persons a fair opportunity to be heard.

Conclusion

For the foregoing reasons, the Court should refer the matter to the FCC under the doctrine of preliminary resort.

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Respectfully submitted,

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