

September 3, 2010

Via Electronic Submission

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

Marc S. Martin
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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:

Submitted for the record in the above-referenced proceedings, please find attached hereto as Exhibit A a letter dated as of September 3, 2010 from John Culver of K&L Gates LLP, counsel to Sprint Nextel Corporation, to Yosef J. Riemer of Kirkland & Ellis LLP, counsel to New DBSD Satellite Services G.P., Debtor-in-Possession, and attached hereto as Exhibit B a letter dated as of September 1, 2010 from Mr. Riemer to Mr. Culver.

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

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cc: Austin Schlick
Stewart Block
Sally Stone
Geraldine Matise
Jamison Prime
Nick Oros

EXHIBIT A

September 3, 2010

John H. Culver III
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Via E-Mail yosef.riemer@kirkland.com

Yosef J. Riemer
Kirkland & Ellis, LLP
601 Lexington Avenue
New York, New York 10022

Re: In re DBSD North America, Inc.

Dear Yosef:

I write in response to your letter of September 1, 2010.

Your letter repeatedly misrepresents the positions of Sprint Nextel Corporation (“Sprint Nextel”) in the various matters that are pending before the Federal Communications Commission (“FCC”).¹ Although I can only speculate as to your motivation for misrepresenting Sprint Nextel’s positions, the misrepresentations appear designed to create the appearance of violations of the Bankruptcy Code where none exist.

This is not the first time that your client has attempted to misrepresent Sprint Nextel’s position. In a filing shortly after the July 1, 2010 meeting with the FCC, your client submitted a letter to Mindel De La Torre, Chief, International Bureau of the FCC, in which it made similar false statements and argued that Sprint Nextel’s conduct somehow violated section 362 of the Bankruptcy Code.² To clarify the record, Sprint Nextel immediately responded to those false statements as follows:

First and foremost, at no point has Sprint Nextel ever contended that the Applications should be denied because DBSD has filed for bankruptcy or is attempting to discharge its obligations as part of its bankruptcy case. . . . Instead Sprint Nextel contends that the Applications should not be granted unless ICO Global Communications (Holdings)

¹ There are three DBSD transfer of control proceedings before the FCC: *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-20091211-01576; SAT-T/C-20091211-00144 (together the “Transfer Proceedings”). There is also an additional, related pending rulemaking proceeding before the FCC: *Improving Public Safety Communications in the 800 MHz Band, et al*, WT Docket No. 02-55, ET Dockets No. 00-258, 95-18 (the “Rulemaking”).

² Letter from Peter A. Corea, DBSD Satellite Services, G.P. dated July 13, 2010, at 1-2.

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Limited (“ICO Global”) affirms its own obligation to reimburse Sprint Nextel for its pro rata share of the BAS relocation costs.³

A similar statement was made by Sprint Nextel in the initial Petition to Deny that Sprint Nextel filed in the Transfer Proceedings. Sprint Nextel explicitly stated at the outset of that filing that Sprint Nextel does not contend that the transfer applications should be denied because DBSD filed for bankruptcy and is attempting to discharge debts owed to Sprint Nextel as part of the bankruptcy process. Furthermore, I made the exact same statement to the FCC during the meeting on July 1, 2010, which was convened at your client’s request.

To ensure that there is no further confusion on this point, please let me reiterate: **Sprint Nextel is not asking, nor has it ever asked, the FCC to require that DBSD pay anything to Sprint Nextel as a condition to the FCC’s approval of the pending applications, nor has Sprint Nextel requested that the FCC deny the applications because DBSD filed for bankruptcy and is attempting to discharge debts owed to Sprint Nextel.**

It is true, of course, that Sprint Nextel has requested that the FCC make a determination that ICO Global Communications (Holdings) Limited (“ICO Global”) is directly liable to Sprint Nextel for its *pro rata* share of the band-clearing costs incurred by Sprint Nextel. However, as your bankruptcy colleagues can confirm, the automatic stay provided by section 362 of the Bankruptcy Code applies only to debtors that have filed for bankruptcy. ICO Global has not filed for bankruptcy, and therefore, the automatic stay has no application to Sprint Nextel’s attempt to collect from ICO Global.

Your argument that Sprint Nextel has somehow violated section 525 of the Bankruptcy Code is similarly misguided. For instance, on page 2 of your letter, you state that section 525 has been violated because the discharge of Sprint Nextel’s claims against the Debtors is not a permissible basis for the transfer applications to be denied. As discussed above, however, **Sprint Nextel has never argued that the transfer applications should be denied because its claims may ultimately be discharged in DBSD’s bankruptcy case.** Thus, your stated reason for a section 525 violation simply does not exist.

Your argument that Sprint Nextel is asking the FCC to “invade the Bankruptcy Court’s jurisdiction” is similarly flawed. Your client has known (and in fact acknowledged) from the outset that it would need FCC approval to consummate its plan of reorganization, and the plan contains an express condition that it cannot become effective until that approval

³ Letter from Lawrence R. Krevor, Sprint Nextel, dated July 14, 2010, at 1-2.

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is obtained. It seems obvious that the only body with jurisdiction to determine whether that approval should be granted is the FCC, and the FCC's consideration of that issue in no way "invades" the jurisdiction of the Bankruptcy Court. To the extent that there was ever any question regarding this obvious proposition, it was put to rest as a result of the negotiations that partially resolved Sprint Nextel's objection to the plan. As you may recall, one of Sprint Nextel's objections to the plan was that the retention of jurisdiction provisions contained in the plan were overly broad and had the potential to divest the FCC of matters within its primary jurisdiction. To resolve that objection, the retention of jurisdiction provisions in the plan were revised to confirm that the plan did not expand the jurisdiction of the Bankruptcy Court beyond the scope allowed by applicable law. To further address this point, the order confirming the plan was revised at Sprint Nextel's request to include paragraph 98 which states as follows:

Notwithstanding any other provision in the Plan or this Confirmation Order, no transfer of control and/or assignment of any rights and interests of the Debtors in any federal license issued by the FCC shall take place prior to the issuance of FCC regulatory approval for such transfer of control and/or assignment pursuant to the Communications Act of 1934, and the rules and regulations promulgated thereunder.

Accordingly, there is no "invasion" of the Bankruptcy Court's jurisdiction. The Confirmation Order expressly recognizes that the issue of whether the proposed transfers are appropriate pursuant to applicable communications law is an issue that is exclusively within the FCC's jurisdiction.

When exercising its jurisdiction to determine whether any transfer of control application should be approved, the Commission is required to "weigh the potential public interest harms against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessities."⁴ This public interest inquiry is completely separate from any determination made by the Bankruptcy Court, and the fact that the Bankruptcy Court concluded that DBSD satisfied the bankruptcy requirements for confirmation of a plan does not mean that DBSD has satisfied the public interest standard required under applicable communications law. If that were the standard, then there would have been no need for DBSD to file transfer applications with the FCC because the Confirmation Order would have been dispositive of the issue. As noted above, however, the Confirmation Order correctly left it to the FCC to decide whether

⁴ *In Re Application of Orbital Communications Corporation and ORBCOMM Global, L.P.*, Order and Authorization, ¶ 11, 17 FCC Rcd. 4496, 4502, 2002 WL372495, *4 (Mar. 11, 2002).

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approval of the transfers is appropriate under applicable communications law. Thus, any finding by the Bankruptcy Court regarding feasibility or good faith for bankruptcy purposes has no bearing on the public interest inquiry currently being conducted by the FCC.

In accordance with the applicable standard, the basis of Sprint Nextel's objection to the transfer applications is that the public interest is not satisfied. DBSD does not currently have the ability, resources, or intention of building out its ATC network or providing any commercial services. Instead, it is DBSD's hope that it will be able to enter into some kind of strategic transaction that will enable it to accomplish those goals. Given these circumstances, Sprint Nextel believes that it is consistent with the public interest to deny, or at least defer consideration of, the applications until such time as DBSD is able to locate a strategic partner that will enable it to provide service. That will motivate DBSD to find a strategic partner sooner rather than later whereas, under the plan as proposed, DBSD is apparently content to let the spectrum lie unused until 2014 at the earliest. Thus, Sprint Nextel's position completely undercuts your unfounded assertion that Sprint Nextel's goal in this case is to eliminate the Debtors as business competitors. The Debtors are currently providing no competition to any of Sprint Nextel's services and have no intention to do so. If Sprint Nextel's goal was to prevent competition, then it would not be opposing the applications so that DBSD could continue to let the spectrum lie fallow.

You are also incorrect when you state that the Rulemaking, which addresses a number of issues including the direct liability of ICO Global, bears no relationship to the transfer of control applications. The FCC's *Emerging Technologies* doctrine establishes that it is in the public interest for subsequent users of spectrum to reimburse those parties that are responsible for clearing the spectrum being used. Sprint Nextel opposition to the transfer application is based (among other things) on a straightforward application of this doctrine to ICO Global. Sprint Nextel recognizes of course that DBSD has discharged its reimbursement obligation through the bankruptcy case, and Sprint Nextel is not requesting that the FCC impose that reimbursement obligation upon DBSD. ICO Global has not sought bankruptcy relief, and is not protected by the stay. It will continue to retain an interest in the spectrum. **It is inconsistent with FCC policy, and contrary to the public interest, to allow ICO Global to retain an interest in the spectrum cleared by Sprint Nextel unless it is willing to satisfy that reimbursement obligation. Thus, the pending rulemaking regarding ICO Global's liability is directly related to the pending transfer applications.**

The final argument set forth in your letter is that Sprint Nextel's request that the FCC delay its consideration of the transfer application until the United States Court of Appeals for the Second Circuit has rendered a decision in the pending appeal somehow violates Rule 8005 of the Federal Rules of Bankruptcy Procedure. Federal Rules of Bankruptcy Procedure are inapplicable to proceedings before the FCC and cannot prohibit the FCC from exercising

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its authority.⁵ By suggesting otherwise, you are again attempting to impose upon the FCC rulings made by the Bankruptcy Court in a different context. The public interest inquiry being conducted by the FCC is governed by a separate standard from the inquiry conducted by the Bankruptcy Court, and the FCC has exclusive jurisdiction to determine whether and when the public interest warrants approval of the transfer applications. In the past, the Commission has explicitly considered whether transfers of control would help resolve bankruptcies as part of its public interest analysis.⁶

In the final paragraphs of your letter, you suggest that Sprint Nextel has no basis to continue its opposition to the transfer applications because of your client's commitment that it will not consummate the plan until four business days following receipt of FCC approval. Your suggestion is misguided and based upon your incorrect assumption that Sprint Nextel is opposing the transfer applications as a means to prevent consummation of the plan pending resolution of the appeal before the Second Circuit.⁷ As discussed above, however, Sprint Nextel believes the proposed transfers are not in the public interest and should be denied for that reason. Your client's commitment fails to address the fundamental basis of Sprint Nextel's objection.

In any event, the assurances provided by DBSD are illusory. As you well know, it is highly unlikely that any court would be able to fully address any stay motion that may be filed in a period of only three business days. If your client is truly amenable to permitting the stay issue to be fully briefed and adequately presented to a court for determination, then your client should be willing to agree that any stay motion be heard on an expedited basis and that your client would not consummate the plan until any stay application presented by Sprint Nextel is considered and resolved. Anything less is simply more posturing in an attempt to position your client to claim that the appeal is moot. If your client is willing to make those assurances, Sprint Nextel would commit to file any stay application no later than two business days after receipt of notice of any approval from the FCC, and would further commit to whatever expedited procedure your client would reasonably request.

⁵ Fed. R. Bankr. P. 1001 ("The Bankruptcy Rules and Forms govern procedure in cases under Title 11 of the United States Code.")

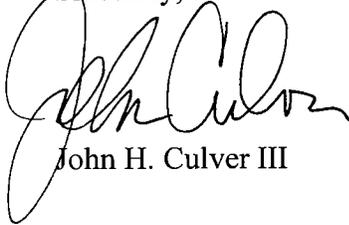
⁶ See, e.g., *In The Matter of Wireless Telecommunications, Inc.*, Memorandum of Opinion and Order, ¶ 1, 24 FCC Rcd. 3162, 3162, 2009 WL690095, *1 (Mar. 16, 2009).

⁷ The true state of affairs is that your client is seeking to expedite the transfer application process so as to moot the Second Circuit's consideration of the important issues raised by Sprint Nextel's appeal. Your colleagues have admitted as much, and the pressure that your client and others is bringing to bear on the FCC is transparently designed to accomplish that goal.

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I look forward to hearing from you as to my proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. Culver III". The signature is fluid and cursive, with a large initial "J" and "C".

John H. Culver III

EXHIBIT B

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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September 1, 2010

VIA EMAIL & FEDERAL EXPRESS

John Culver
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214 North Tryon Street, 47th Floor
Charlotte, North Carolina 28202

Re: In re DBSD North America, Inc., et al., Case No. 09-13061 (REG)

Dear John:

As you know, Kirkland & Ellis LLP represents the Debtors in the above-captioned proceeding. You and senior members of Sprint's management team have engaged in a campaign to delay the approval of the Debtors' routine license transfer applications (the "Applications") by the Federal Communications Commission ("Commission" or "FCC"). Sprint's inappropriate efforts before the FCC, both in writing and in person, are in flagrant violation of Sections 362 and 525 of the Bankruptcy Code. The Debtors have been and continue to be substantially harmed by these actions. Sprint's actions are clearly designed to block the Debtors' reorganization with the twin goals of coercing the Debtors to pay Sprint more on account of its Broadcast Auxiliary Service ("BAS") relocation expense claims than other similarly situated holders of general unsecured claims against the Debtors, in violation of the Bankruptcy Code, and eliminating the Debtors as business competitors. Sprint's improper actions have delayed the approval of the Applications far beyond the norm, thereby stalling consummation of the confirmed Plan and jeopardizing the Debtors' reorganization. The Debtors are informing you that such conduct should cease immediately. Further, the Debtors intend to hold you and your clients accountable and will pursue all rights and remedies available to them, including taking any action necessary to prevent Sprint's inappropriate conduct and to recover any damages incurred.

Sprint has repeatedly and forcibly argued to the FCC that grant of the Applications should be delayed until after: (i) the Debtors have located a strategic partner;¹ (ii) the FCC's

¹ See, e.g., Sprint Petition to Deny at 21-22.

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BAS rulemaking has concluded,² and (iii) the United States Court of Appeals for the Second Circuit has entered a decision on pending appeals from the order confirming the Plan.³ Each of these arguments violates the Bankruptcy Code. The first argument improperly asks the FCC to invade the Bankruptcy Court's jurisdiction by substituting its judgment for that of the Bankruptcy Court in determining when the Debtors should be permitted to reorganize. The second argument asks the FCC to delay the applications pending an FCC rulemaking that bears no relationship to the Applications. Sprint's efforts to convince the FCC that the Debtors' chapter 11 cases are a scheme among DBSD and its parent company to evade their prepetition obligations to reimburse certain of Sprint's BAS relocation expenses violates the automatic stay provision of the Bankruptcy Code. Moreover, as you know, the discharge of Sprint's prepetition claims against the Debtors is an impermissible ground for denying the Applications because it constitutes discrimination with respect to the grant of a license. *See* 11 U.S.C. § 525(a); *FCC v. Nextwave Pers. Commc'ns*, 537 U.S. 293 (2003). In addition, such arguments against the Applications ask the FCC to invade the Bankruptcy Court's jurisdiction by disregarding the Bankruptcy Court's factual finding that the Plan was proposed in good faith.

Finally, Sprint's attempt to block the FCC from ruling on the Applications until after the Second Circuit issues its decision is effectively a request for a *de facto* stay of the confirmation order, notwithstanding the requirement of Rule 8005 of the Federal Rules of Bankruptcy Procedure that such relief must be sought from the Bankruptcy Court, and the fact that the Bankruptcy Court and District Court have each denied similar relief. But Sprint's efforts to defer FCC action on the Applications cannot be justified by the concern that approval of the license transfer will moot the Second Circuit Appeal given the colloquy with Judge Gerber of the Bankruptcy Court and Judge Gerber's oral ruling on May 18, 2010.⁴

To eliminate any suggestion or argument by you that there is any uncertainty on this matter, you may consider this letter the Debtors' irrevocable commitment to the following: first, on the day that the Debtors are notified that the Commission has approved the Applications, DBSD will notify Sprint of same in compliance with the oral ruling of the Bankruptcy Court on May 18, 2010. Second, DBSD irrevocably commits that it will not consummate the Plan any earlier than the fourth business day following Commission approval of the Applications, regardless of whether DBSD's exit financing becomes available sooner. Since the Plan cannot be consummated without signatures from the Debtors at closing, your client is assured that Sprint

² *See, e.g.*, Letter from Marc S. Martin to Marlene H. Dortch, August 27, 2010

³ *See, e.g., Id.*

⁴ *See* Hr'g Tr. 69, *In re DBSD N. Am., Inc.*, Case No. 09-13061 (Bankr. S.D.N.Y. May 18, 2010) (requiring only "notice to Sprint when FCC approval has been obtained" but denying Sprint's request for a "notice period" or stay).

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will have three full business days during which, if it wishes to do so, it can make whatever applications it thinks appropriate to seek a stay from a court with jurisdiction over the bankruptcy estate. While we reserve all rights to oppose the entry of a stay, Sprint also will possess its rights, which have never been foreclosed, to seek a stay. Sprint will thus have more than an adequate opportunity to be heard on any timely application it makes.

Given this assurance by the Debtors, Sprint has no basis to continue its interference with Commission action on the Applications. Accordingly, we request that Sprint notify the FCC immediately that it is withdrawing its request to have the Commission defer action on the Applications until after the Second Circuit issues its decision on Sprint's appeal. Further, we ask you to certify in writing immediately on behalf of Sprint and its counselors and advisers that there will be no communications with the FCC inconsistent with the Bankruptcy Code's requirements as referred to in this letter, including no requests to the FCC or any other department or agency of the United States to defer or delay the Applications nor any claims that the Debtors will prevent Sprint from making a timely application for a stay if the FCC approves the Applications.

We would appreciate a prompt response to this letter given the exigent circumstances faced by my clients.

Sincerely,



Yosef J. Riemer