

September 17, 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:

Sprint Nextel Corporation (“Sprint Nextel”) responds to the recent *ex parte* communication submitted in the above-captioned proceedings by ICO Global Communications (Holdings) Limited (“ICO Global”), the parent company of New DSBD Satellite Services G.P., Debtor-In-Possession (with its debtor-affiliates, “DBSD”).¹ That submission included additional documents from a 2005 DBSD debt financing transaction (the “2005 Transaction”) pursuant to a request by the Federal Communications Commission’s (the “Commission’s”) Office of General Counsel.²

¹ See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 14, 2010) (“*ICO Global September 14 Notice of Ex Parte Presentation*”).

² ICO Global had previously submitted a self-selected and partial collection of 2005 Transaction documents, and argued that the 2005 Transaction was a transformative event that rendered parent company ICO Global a passive investor in DBSD and restricted ICO Global from being involved in the 2 GHz MSS system operations as it had been prior to the 2005 Transaction. See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession,

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I. ICO Global's Additional 2005 Transaction Documents Further Undermine Its Position

ICO Global's previously submitted 2005 Transaction documents were reviewed by Thomas F. Cooney, III, who has three decades of experience in drafting and negotiating debt transactions like the 2005 Transaction as a practicing corporate M&A and securities attorney, and 22 years of experience in teaching law students about similar transactions as an adjunct professor of law at George Washington University Law School.³ As discussed in the attached Memorandum of Law, Professor Cooney has now reviewed ICO Global's latest submission of materials related to the 2005 Transaction, and concludes that there is no legal or factual support in those additional documents for ICO Global's efforts to avoid compliance with the Commission's *Emerging Technologies* doctrine based upon its argument that the 2005 Transaction was a transformative event.

To the contrary, Professor Cooney determined that if those additional 2005 Transaction documents establish anything, they in fact provide *more evidence* of ICO Global's continued control and pervasive involvement in the operations of its Mobile

Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 3, 2010) ("*ICO Global September 3 Notice of Ex Parte Presentation*"). Sprint Nextel determined that ICO Global's contentions were wholly unsupported by those initial 2005 Transaction materials. *See* Sprint Nextel 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-20091222-1576, SAT-T/C-0091211-00144 (Sept. 10, 2010) ("*Sprint Nextel September 10 Notice of Ex Parte Communication*"). Although Sprint Nextel does speculate as to why the Office of the General Counsel requested the additional documents from ICO Global, Sprint Nextel was aware that the *ICO Global September 3 Notice of Ex Parte Presentation* was incomplete in several material respects. Sprint Nextel did not complain about the obvious omissions, however, because it was apparent even from the initial round of ICO Global's self-selected documents that the 2005 Transaction does not support its argument. As Professor Cooney's attached Memorandum of Law concludes, now that the record is more complete, the 2005 Transaction documents still fail to support the argument that ICO Global advances.

³ *See* Sprint Nextel September 10 Notice of *Ex Parte* Communication. In particular, Professor Cooney concluded from those initial materials that the lenders' restrictions only applied to DBSD's use of the proceeds, and in no way restricted ICO Global from being involved in and directly managing the licensed MSS operations.

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Satellite Service 2 GHz S band (“MSS”) operations after 2005.⁴ For instance, the new documents include a recognition that ICO Global would continue to vote all of its ownership interests in DBSD, absent a default, which means that ICO Global retained legal authority to control DBSD. The new documents also include a specific prohibition of any actions that might be taken on the lenders’ behalf that would result in the lenders assuming control of the MSS license from ICO Global without obtaining prior Commission consent – proof that the lenders understood in the 2005 Transaction that their loan would *not* change the status quo of ICO Global’s continued control over the licensed MSS operations.⁵ The restriction on the lenders’ activities that could cause a change of control is consistent with ICO Global’s contemporaneous applications to the Commission in 2005 for a *pro forma* transfer of control when it moved the license to the special purpose license holding subsidiary, which is now in bankruptcy as DBSD.⁶

Indeed, as Professor Cooney’s analysis shows, one of the fundamental business purposes of the 2005 Transaction was to ensure that DBSD could afford to *continue* to pay ICO Global for essential services that DBSD would remain dependent upon after the 2005 Transaction. The documents do not, as ICO Global asserts, restrict ICO Global’s involvement in DBSD, because it would have made no sense for DBSD’s lenders to preclude DBSD’s continued use of and reliance on ICO Global’s employees, expertise, and resources. Denying DBSD that critical support would only have eroded DBSD’s ability to repay its debt obligation to the lenders.

DBSD’s improved ability to pay for ICO Global’s services following the 2005 Transaction has no bearing on whether ICO Global bears direct responsibility for complying with the BAS reimbursement obligations of the MSS enterprise. Sprint Nextel has never contended that DBSD’s *ability to pay* for ICO Global’s services was a necessary aspect of ICO Global’s direct enterprise responsibility. The issue is actually much more straightforward: ICO Global has itself been consistently and pervasively involved in and held itself out as the owner and operator of the 2GHz MSS system. The supplemental 2005 Transaction documents only add to the existing record and evidence of ICO Global’s fully integrated, direct involvement in DBSD’s licensed operations.

⁴ See Professor Thomas F. Cooney, III, *Supplemental Analysis of Additional Materials Related to the 2005 DBSD Debt Financing Transaction*, at 2 (attached hereto as **Attachment A**).

⁵ *Id.* at 3-4.

⁶ See ICO Satellite Services G.P., Application for *Pro Forma* Transfer of Control, File No. SAT-T/C-20050906-00174; see also ICO Satellite Services G.P., Application for *Pro Forma* Assignment, File No. SAT-ASG-20050927-00185.

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Ultimately, ICO Global's 11th hour emphasis on the 2005 Transaction is simply another misguided effort to distract the Commission from the fundamental issue: (1) at its own expense, Sprint Nextel cleared the 2 GHz MSS spectrum that will enrich ICO Global directly as an equity holder in the entity emerging from bankruptcy, (2) ICO Global has been directly and pervasively involved in the operations of its MSS system continuously since at least the Commission's adoption of the BAS relocation decision in 2004 giving rise to Sprint Nextel's 2 GHz spectrum clearing obligation,⁷ (3) ICO Global has repeatedly held itself out for years to the public, the government and, in particular, the investment community, as the owner and operator of the MSS system,⁸ and (4) ICO Global has publicly exploited its professed status as the owner and operator of the MSS system in order to seek capital for the benefit of ICO Global and its investors.⁹

Indeed, ICO Global has argued to the Commission that the actions Sprint Nextel seeks in the above-captioned proceedings will "chill" future investment in wireless companies.¹⁰ That argument turns the equities of the present circumstances on their head. ICO Global cannot tout its MSS system as an "asset" to prospective ICO Global investors and at the same time claim that its investors would be surprised by the costs and regulatory obligations associated with that asset. In any event, the equities are plainly with Sprint Nextel in this case. Sprint Nextel expended approximately \$750 million to clear the spectrum, in reliance on Commission orders and long-standing precedent that it would be

⁷ See, e.g., Sprint Nextel Written *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (July 28, 2010), at 3-8 ("*Sprint Nextel July 28 Written Ex Parte Presentation*"); Sprint Nextel 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-20091222-1576, SAT-T/C-0091211-00144 (Sept. 1, 2010) ("*Sprint Nextel September 1 Notice of Ex Parte Communication*").

⁸ See, e.g., Sprint Nextel July 28 Written *Ex Parte* Presentation, at 7-8; Sprint Nextel September 1 Notice of *Ex Parte* Communication, at 4-7.

⁹ See Sprint Nextel September 1 Notice of *Ex Parte* Communication, Exhibits B, C, and D.

¹⁰ See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 10, 2010), Attachment at 2. ("*ICO Global September 10 Ex Parte Presentation*").

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subsequently reimbursed as the “first-mover,” on a *pro rata* basis by the two MSS operators. One court has already observed that, in light of Sprint Nextel’s band clearance efforts and the Commission’s reimbursement doctrines, the equities strongly favor Sprint Nextel.¹¹

What Sprint Nextel seeks in the above captioned proceedings is for the Commission to simply uphold and protect its own well established rules and policies. If the Commission fails to uphold and protect its *Emerging Technologies* doctrine in these circumstances, it will provide a roadmap and a strong incentive for others to continue to undermine the Commission’s doctrine in the future.¹² The parties who would be “chilled” would be the future parties facing the risk of clearing spectrum in reliance on such costs being reimbursed by a later entrant in compliance with the Commission’s rules and policies. Essentially, it would not be a rational business decision for any party to incur such relocation costs and risks in the future. Therefore, failing to uphold the Commission’s orders and the *Emerging Technologies* doctrine will clearly harm future spectrum clearance efforts, the full and efficient use of spectrum, and ultimately the public interest in increased innovation and service to the public.

¹¹ See Transcript of Motions Hearing, *Sprint Nextel Corp. v. New ICO Satellite Services G.P., et al.*, Case No. 1:08-cv-651 (E.D.Va. Aug. 29, 2008), at 17-18 (“[I]f Sprint has paid out hundreds of millions of dollars to clear this bandwidth from which the two defendants will ultimately -- and others perhaps will ultimately benefit and if the basic principle within the FCC is that there is a concept of fair reimbursement when subsequent licensees first enter into bandwidth that somebody else has cleared for them, then just from a basic what's fair and what's right standpoint, there ought to be some way of coming to some practical resolution”).

¹² Notably, at one time the MSS operators were strong proponents of the *Emerging Technologies* doctrine. For example, when earlier in the relocation process it was faced with the possibility of being the first entrant, ICO’s predecessor-in-interest was strongly in favor of ensuring that later entrants bore their fair share of the band clearing costs. See Comments of ICO Services Limited, ET Docket No. 95-18 (Feb. 3, 1999), at 13 (“... an MSS provider should only pay to relocate incumbents from the spectrum actually used by the MSS provider; *an operator should not be responsible for a proportion of the overall costs of relocating the entire 2 GHz spectrum. It simply makes no sense to burden MSS providers with the cost of relocating incumbent operators from spectrum that the MSS provider does not utilize ...*”) (emphasis added).

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II. ICO Global's Latest Attempt to Dismiss Its Certifications of the MSS System Milestones Is Equally Flawed

ICO Global has repeatedly and continuously held itself out to investors, regulators and the public as the owner and operator of a 2 GHz MSS license in the United States. Only now that the bill has come due for the cost of clearing the spectrum has ICO Global disavowed any control or interest in the 2 GHz MSS license.

Sprint Nextel previously documented how ICO Global – not its subsidiary companies – repeatedly certified compliance with the FCC's implementation milestones. These milestones are not trivial obligations; failure to satisfy these obligations can – and routinely has – lead to forfeiture of the valuable satellite authorization on which the entire MSS enterprise depends. In ICO Global's September 14 *Ex Parte* Presentation, ICO Global introduced several post hoc rationalizations to explain exactly why ICO Global provided all the actual milestone certifications for the MSS system, including the milestone certification that the Commission has tentatively concluded constitutes band entry.¹³ Sprint Nextel will therefore respond briefly to these new arguments, which again misstate the record while ignoring the actual language of the milestone certifications.

In its first attempt to escape the clear implication of its own milestone certifications, ICO Global chalked up the fact that it expressly certified every single MSS system milestone to the concession that, to put it mildly, ICO Global and DBSD personnel “may overlap in some cases.”¹⁴ Specifically, although ICO Global's Senior Vice President signed each milestone certification under penalty of perjury and in his express capacity as “Senior Vice President of ICO Global Communications (Holdings) Limited, the ultimate parent” of DBSD,¹⁵ ICO Global argued in a footnote that Mr. Schmitt was instead somehow working

¹³ See ICO Global September 14 Notice of *Ex Parte* Presentation, at 4-5.

¹⁴ See ICO Global, *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al* (filed Aug. 2, 2010) (“*ICO Global August 2 Ex Parte Communication*”).

¹⁵ ICO Global also helpfully maintains copies of all of its milestone certifications on its website at http://www.ico.com/_about/milestones/. Representative milestone certifications were also included as **Attachments A-F** to the Sprint Nextel July 28 Written *Ex Parte* Presentation.

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for DBSD at the particular moments he signed the certifications.¹⁶ That assertion was, of course, contradicted by the express language of the milestone certifications themselves.¹⁷

ICO Global does not deny that it was appropriate for ICO Global's Senior Vice President to provide ICO Global's first two milestone certifications, which further demonstrated the integrated nature of the relationship between ICO Global and DBSD.¹⁸ It is difficult to argue that the 2005 Transaction had any effect on ICO Global's prior integrated relationship and activities with DBSD, given that following the 2005 Transaction *nothing actually changed* and ICO Global's milestone certifications continued uninterrupted up to and including the final operational milestone on May 9, 2008. Nonetheless, ICO Global attempts to explain that the reason the 2005 Transaction had no effect on ICO Global's uninterrupted and continued submission of milestone certifications for nearly three (3) years following the transaction was because ICO Global made a mistake on every single one of the ten (10) subsequent milestone certifications.¹⁹ Specifically, according to ICO Global, every single milestone certification for the MSS system since January 2006, up to and including the final operational milestone, was wrong due to ICO Global's Senior Vice President's "mistaken[]" use of the "same form" employed before the 2005 Transaction.

ICO Global's characterization of its uninterrupted and repeated regulatory certifications over a three-year period following the 2005 Transaction – certifications essential to DBSD retaining its FCC licenses – as a harmless, three year typographical error that is not demonstrative of an ongoing integrated satellite enterprise is laughable. First, as a threshold matter, each milestone certification was not a form, but a certified affidavit tailored to fit the specific technical details of the particular milestone being certified. There was no standard "form" to be mistakenly grabbed and inadvertently modified, reviewed, executed, and filed by busy senior executives and reviewing counsel who might have been confused about which corporate entity they were working for on that particular day. These milestone certifications were of critical importance to the MSS system and its related licensing and compliance issues and, by ICO Global's own admission, scrutinized and submitted by

¹⁶ See ICO Global August 2 *Ex Parte* Communication, at 14 n.53. That this argument taken to its conclusion would indicate Mr. Schmitt repeatedly perjured himself in filings to the Commission does not appear to bother ICO Global in its pursuit of larger goals.

¹⁷ See, e.g., Sprint Nextel Written *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al* (filed Aug. 6, 2010), at 7-8 ("*Sprint Nextel August 6 Written Ex Parte Presentation*").

¹⁸ ICO Global September 14 Notice of *Ex Parte* Presentation, at 5.

¹⁹ See *id.*

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counsel.²⁰ It is absurd to propose that ICO Global's Senior Vice President and its counsel repeatedly made errors of such magnitude for years. The logical explanations are either that such milestone certifications were deliberate acts by ICO Global consistent with its control of and involvement in the MSS system's operations or, alternatively, that ICO Global and DBSD were so inextricably intertwined that no importance was placed on the capacity in which their common senior executive executed the milestone certifications – at least not until now when such certifications are “smoking gun” evidence in favor of holding ICO Global directly responsible for the 2 GHz BAS retuning costs that benefit the MSS enterprise. Either way, the fact remains that, as the milestone certifications themselves state, ICO Global provided each of the certifications for the MSS system. ICO Global's attempt to explain why similar ICO Global milestone certifications were continuously provided without regard to the 2005 Transaction actually provides further support for Sprint Nextel's point: the 2005 Transaction had *no restrictive effect* on ICO Global's central role in the development, operation, and administration of the MSS system, and none of the employees involved saw any need to preclude ICO Global from continuing to provide those milestone certifications.²¹

In short, there is no basis for ICO Global's current efforts to ignore the express language of the actual milestone certifications. To the contrary, the routine submission of ICO Global's certifications, as well as the completely interchangeable nature of both senior

²⁰ Indeed, were ICO Global's argument to have any merit, there would be significant regulatory issues raised by its contention that every single MSS system milestone certification since the 2005 Transaction was flawed.

²¹ Moreover, contrary to ICO Global's implications the transmittal letters for the milestone certifications routinely indicated that they simply enclosed a milestone certification – *without addressing the entity providing the certification itself*. See, e.g., Eighth Milestone Certification (Oct. 3, 2006) (“... New ICO Satellite Services G.P. ... submits a certification (attached hereto as Attachment 1)...”) (emphasis added); Eleventh Milestone Certification (Apr. 18, 2008) (same). The actual certification, of course, was always made by ICO Global. Finally, as Sprint Nextel has previously explained, there are numerous examples where even the transmittal letters were provided by Ms. Suzanne Hutchings Malloy *in her capacity as ICO Global's “Senior Vice President of Regulatory Affairs,”* rather than in her other apparent role as “Senior Regulatory Counsel” for the subsidiary. See Sprint Nextel August 6 Written *Ex Parte* Presentation, at 7-8; see also Eleventh Milestone Certification (Apr. 18, 2008) (transmittal letter by Suzanne Hutchings Malloy, “Senior Vice President of Regulatory Affairs”); Twelfth Milestone Certification (May 9, 2008) (same). ICO Global's assertions that (1) the transmittal letters somehow trump the language of the milestone certifications themselves and (2) that those letters suggest DBSD actually made the certifications are both belied by the facts.

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executives and counsel between the various entities and the manner in which ICO Global held itself out to the public, the government, and the investment community as central to the MSS system and enterprise, once again demonstrates the highly integrated nature of the corporate relationship, and ICO Global's extensive activities and responsibilities with respect to the MSS system. The fact that ICO Global's activities continued uninterrupted and unaltered following the 2005 Transaction is also clear evidence that the 2005 Transaction had no bearing on ICO Global's involvement in the MSS system and its operations.

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

Sincerely,

/s/ Marc S. Martin

Marc S. Martin

Counsel for Sprint Nextel Corporation

cc: Austin Schlick
Stewart Block
David Horowitz
Andrea Kearney
Sally Stone
Julie Veach
Gardner Foster
Karl Kensinger
Geraldine Matise
Jamison Prime
Nick Oros
Rick Kaplan
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Robert Nelson
Julius Knapp
Bruce Romano
Paul Murray
John Leibovitz
Mindel DeLaTorre
Roderick Porter
Charles Mathias
John Giusti
Louis Peraertz
Angela Giancarlo
Edward Lazarus

ATTACHMENT A

MEMORANDUM OF LAW

WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18
New DBSD Satellite Services G.P., Applications for Transfer of Control
File Nos. SAT-T/C-20091211-00144, *et al.*

Supplemental Analysis of Additional Materials Related to the 2005 DBSD Debt Financing Transaction

By: Thomas F. Cooney, III
K&L Gates LLP
Adjunct Professor of Law
George Washington University Law School

* * * *

I. INTRODUCTION

On September 3, 2010, ICO Global Communications (Holdings) Inc. (“ICO Global”) submitted an extensive, but incomplete, set of documents related to a 2005 debt financing transaction (the “2005 Transaction”) involving DBSD North America, Inc. (with its debtor-affiliates, “DBSD”).¹ As recounted during subsequent meetings with Commission staff and legal advisors to the Chairman and several Commissioners, I reviewed those initial materials and concluded that the 2005 Transaction was not, as a factual or legal matter, a transformative event that affected or restricted ICO Global’s controlling role with or involvement in DBSD.² To the contrary, the 2005 Transaction documents expressly recognized that ICO Global’s control of and direct involvement in DBSD after the transaction would continue.³ I further determined that unless and until the conversion rights held by the lenders are actually exercised, the lenders have no equity or equity-like rights, and therefore no reason to look at the impact of the 2005 Transaction on a fully-diluted basis; and that even on a fully diluted basis, ICO Global would

¹ See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 3, 2010) (“*ICO Global September 3 Notice of Ex Parte Presentation*”).

² See, e.g., Sprint Nextel 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-20091222-1576, SAT-T/C-0091211-00144 (Sept. 10, 2010) (“*Sprint Nextel September 10 Notice of Ex Parte Communication*”).

³ See Sprint Nextel September 10 Notice of *Ex Parte* Communication, at 2.

still be in control of DBSD by virtue of its ability to elect a majority of the Board of Directors of DBSD.⁴

Subsequently, in response to a request by Commission staff, on September 14, 2010 ICO Global provided additional documents related to the 2005 Transaction that were not included in its original submission.⁵ This Memorandum of Law discusses my further analysis of those supplemental materials, and my conclusions as to the implications those materials carry with respect to the 2005 Transaction. As further discussed below, I have determined that those supplemental materials likewise do not support ICO Global's claims that the 2005 Transaction was a transformative event. To the contrary, those supplemental materials actually provide additional support for my earlier conclusion that the 2005 Transaction did not cause or require a fundamental change in the pre-existing relationship between ICO Global and DBSD.

II. DISCUSSION

In its September 3 Notice of *Ex Parte* Presentation, ICO Global contended that the 2005 Transaction fundamentally changed the control relationship between ICO Global and DBSD and their operation of a common enterprise, which ICO Global has acknowledged was the case prior to the 2005 Transaction.⁶ Notably, in its September 14 Notice of *Ex Parte* Presentation ICO Global does not assert that the supplemental materials are supportive of its earlier position that the 2005 Transaction was transformative. Rather, ICO Global now asserts that the supplemental materials support three tangential (but misdirected) propositions: (1) that ICO Global and DBSD are legally separate entities; (2) that the supplemental materials show that ICO Global and DBSD did not have a commonality or unity of interest after the 2005 Transaction; and (3) that as a result of the 2005 Transaction DBSD was financially self sufficient with no need to rely on the resources of ICO Global.⁷

Each of these assertions is flawed or irrelevant. With respect to any legal separations between ICO Global and DBSD, Sprint Nextel Corporation ("Sprint Nextel") has never argued that DBSD is not a separate entity as a legal matter, but rather has argued consistently that the existence of legally separate entities is irrelevant to imposing enterprise wide liability for reimbursement of spectrum clearing expenses. Indeed, with respect to the second assertion, the supplemental materials were all part of the same 2005 Transaction that occurred for the *sole purpose* of funding ICO Global's ambitions to construct, launch, and operate the MSS business through its substantially wholly owned subsidiary DBSD. Finally, Sprint Nextel has never argued that DBSD did not have additional resources available to it as a result of the 2005 Transaction because, of course, that was the purpose of the financing; rather, Sprint Nextel has

⁴ *Id.*

⁵ See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 14, 2010) ("*ICO Global September 14 Notice of Ex Parte Presentation*").

⁶ ICO Global September 3 Notice of *Ex Parte* Presentation, at 2.

⁷ ICO Global September 14 Notice of *Ex Parte* Presentation, at 1.

argued that the fact that DBSD had additional resources available to it as a result of the 2005 Transaction in no way changed the relationship between ICO Global and DBSD.

In short, the supplemental materials do nothing to disturb my earlier conclusion that the interdependent relationship between ICO Global and DBSD continued after the 2005 Transaction. Below I analyze in more detail the matters raised by ICO Global in its September 14 Notice of *Ex Parte* Presentation.

A. The Supplemental Materials Further Demonstrate that ICO Global Retained the Ability to Control DBSD, and Expressly Limited Circumstances In Which Such Control Could Be Changed

As I explained above, the question of the legal separation of ICO Global and DBSD is a red herring that is irrelevant to the issue of ICO Global's direct liability for its own actions as part of the MSS operator and common enterprise. For the purposes of this Memorandum, the central question is whether the supplemental materials add to our understanding of whether the 2005 Transaction was a transformative event. As you will see below, those materials merely confirm my prior conclusion and advice that the 2005 Transaction did not change the control relationship between ICO Global and DBSD.

With respect to what the supplemental materials add, the two principal operative documents included therein are the Collateral Trust Agreement⁸ and the Pledge Agreement.⁹ Pursuant to the Collateral Trust Agreement, the Bank of New York, as the trustee under the Indenture, agreed to act as agent for the note holders for purposes of administering and enforcing all of the documents in the 2005 Transaction that created security interests in the stock of DBSD and that other collateral that secures repayment of the notes.¹⁰ Pursuant to the Pledge Agreement, the Bank of New York in its capacity as collateral agent agreed to act on behalf of the note holders in holding the collateral, creating the related security interests and dealing with the collateral in the event of a default.¹¹

In *no respect*, however, did either of these documents, or any related document, change or otherwise restrict the ability of ICO Global to control DBSD. In fact, the opposite is true. Section 6 of the Pledge Agreement makes it clear that unless there is a default, ICO Global retained the right to receive all cash dividends and distributions paid by DBSD with respect to the pledged stock and to exercise all voting rights with respect to the pledged stock.¹² Thus, the 2005 Transaction not only did not work to change the control of DBSD, but it also expressly limited the circumstances in which the collateral agent could cause a change of control. Indeed, pursuant to Section 7(c) of the Pledge Agreement, the collateral agent is affirmatively precluded from taking "any action hereunder that would constitute or result in any transfer of control or

⁸ ICO Global September 14 Notice of *Ex Parte* Presentation, Attachment 1A.

⁹ *Id.*, Attachment 1B.

¹⁰ *See* ICO Global September 3 Notice of *Ex Parte* Presentation, Attachment B5.

¹¹ *See* ICO Global September 14 Notice of *Ex Parte* Presentation, Attachment 1B, at 1-4.

¹² *Id.* at 4.

assignment of the Pledgor or any [Commission] licenses held or controlled by the Pledgor without obtaining all necessary [Commission] and other governmental authority approvals.”¹³

In its September 14 Notice of *Ex Parte* Presentation, ICO Global mistakenly refers to the pledge of ICO Global stock as reflecting the investor’s priority “ownership” in DBSD.¹⁴ In fact there was no priority ownership created pursuant to the supplemental materials. Rather, the supplemental materials only created a priority “lien” on the stock that could be converted into actual ownership of the stock only upon a default. No other document included among the supplemental materials contains any provision which is otherwise inconsistent with ICO Global’s continuing control of DBSD or which broadens the powers of the collateral agent to cause a change of control. I also note that the fact that the Pledge Agreement was non-recourse to ICO Global has no relevance to ICO Global’s continuing control of DBSD; rather it relates only to the sufficiency of the collateral that the note holders acquired to secure the indebtedness. Additionally, the fact that ICO Global did not guarantee DBSD’s credit facilities is also not relevant to determining whether ICO Global continued to control DBSD after the 2005 Transaction; but again is only relevant to the adequacy of the collateral that the note holders received.

B. The Supplemental Materials Establish Only That DBSD Could Finally Repay ICO Global For ICO Global’s Services, Not That The Relationship Between the Two Entities Changed

ICO Global’s September 14 Notice of *Ex Parte* Presentation focuses in large part on documents related to DBSD’s financial difficulties and ICO Global’s services and expenses.¹⁵ The items ICO Global highlights in fact establish only that after the 2005 Transaction DBSD was able to pay for services that ICO Global continued to provide, and not that the nature of the relationship between the parties changed. In fact, that information actually demonstrates the continuing interconnectedness of DBSD and ICO Global from and after the time of the 2005 Transaction, during which ICO Global was actually reimbursed for its services, and continuing through the bankruptcy proceeding wherein ICO Global agreed to provide transition services pursuant to the Support Agreement of the nature and kind ICO Global had all along provided to DBSD in exchange now for recognition of its continuing equity interest in DBSD. These materials make clear that interconnectedness included providing office space, insurance policy coverage, payroll costs and services, personnel, and professional and consulting services, among other matters.

In short, the disclosures that ICO Global highlights make it clear that the services provided by ICO Global post the 2005 Transaction were of the same nature and scope as provided prior to the 2005 Transaction, with the only difference being that until the commencement of the bankruptcy proceeding DBSD could actually reimburse ICO Global for the costs. ICO Global makes the point that it was convenient and cost efficient for it to provide these services to DBSD.¹⁶ Again, Sprint Nextel does not contend that it did not make good

¹³ *Id.* at 5.

¹⁴ ICO Global September 14 Notice of *Ex Parte* Presentation, at 1.

¹⁵ *Id.*, at 2-4.

¹⁶ ICO Global September 14 Notice of *Ex Parte* Presentation, at 3.

business sense for the note holders to encourage the parent to provide a wide range of services to its controlled subsidiary. But the use of commonly accepted business practices between a parent and a controlled affiliate, which was not precluded by the 2005 Transaction, cannot be somehow twisted for the proposition that as a result the two companies were not a part of the same business enterprise. Most importantly, the improved financial position of DBSD did not in any respect change the control relationship between the parties. In fact, the supplemental materials make it clear that the directors and key executive officers of the parent and DBSD continued to have substantial overlap after the 2005 Transaction, and at all times after the 2005 Transaction ICO Global was in a position to nominate all members of the Board of Directors of DBSD, other than the one member who could be appointed by the note holders but who had no veto authority over Board decisions.

C. Consolidated Tax Filing Further Undermines ICO Global's Contention That The Impact of The 2005 Transaction Should Be Viewed On A Fully Diluted Basis

ICO Global disingenuously suggests that its continuing to file consolidated tax returns after the 2005 Transaction was the result of a decision to file consolidated returns made prior to the 2005 Transaction, an election that it asserts remained binding after the 2005 Transaction.¹⁷ I am advised that if the 2005 Transaction resulted in ICO Global owning less than an 80% equity interest in DBSD, DBSD could not have been included in ICO Global's consolidated federal income tax return following the 2005 Transaction despite ICO Global's earlier election to file a consolidated federal income tax return. *See* IRC §§ 1501 and 1504(a); *see also* Treasury Regulation § 1.1502-75. This is consistent with my prior observation that although the note holders had the right to convert the notes and dilute ICO Global's ownership interest in DBSD, they never did so and therefore ICO Global's ownership interest never decreased.¹⁸

III. CONCLUSION

In summary, the supplemental materials and commentary provided by ICO Global in its September 14 Notice of *Ex Parte* Presentation continue to be employed to mischaracterize legal facts and circumstances, and misdirect attention from the real issues in this matter. Nothing in the September 14 Notice of *Ex Parte* Presentation supports a contention that the 2005 Transaction was a transformative event. Rather, when carefully considered and in context the supplemental materials actually provide additional support for my earlier conclusion that the 2005 Transaction did not cause or require a fundamental change in the relationship between ICO Global and DBSD.

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¹⁷ *Id.*, at 4.

¹⁸ *See, e.g.*, Sprint Nextel September 10 Notice of *Ex Parte* Communication, at 2.