

September 17, 2010

FILED ELECTRONICALLY

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

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

Dear Ms. Dortch:

ICO Global Communications (Holdings) Limited (“ICO Global”) hereby responds to the latest theory advanced by Sprint Nextel Corporation (“Sprint”) for imposing BAS cost-sharing obligations on ICO Global.^{1/}

Its prior efforts to lump ICO Global and DBSD together as a “common enterprise” engaged in the U.S. MSS business having foundered on facts, Sprint’s new theory would extend liability to any member of the same “corporate family” as the MSS licensee without regard to whether the licensee’s corporate affiliate was in fact engaged in the MSS business. Such an overbroad rule, without any showing that the affiliate was in fact deployed to evade FCC requirements, would be unprecedented, and the resulting uncertainty would deter investments in Commission licensees. While Sprint has argued that it is not seeking to pierce the corporate veil, its latest proposal would do just that. Adoption of such a requirement would also amount to unlawful retroactive rulemaking, given the determination of two Federal courts – and as demonstrated by the past actions of Sprint itself – that the Commission’s existing cost-sharing requirement applies *only* to the MSS licensee and does not impose joint and several liability.

^{1/} See *Sprint Nextel Corporation Notice of Ex Parte Presentation*, 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-0091211-00144, *et al.* (filed Sept. 10, 2010) (“*Sprint Sept. 10, 2010 Ex Parte*”); *Sprint Nextel Corporation Notice of Ex Parte Presentation*, 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-0091211-00144, *et al.* (filed Sept. 13, 2010) (“*Sprint Sept. 13, 2010 Ex Parte*”).

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Sprint's first theory for extending liability to ICO Global, advanced in its ex parte filing on July 8, 2010, was that ICO Global was a "beneficiar[y] of a relocation" and should be required to pay for its share of the BAS relocation costs.^{2/} ICO Global demonstrated, however, that no legitimate argument could be made that ICO Global was a "beneficiary." To the contrary, ICO Global (even prior to the formation of DBSD in 2005) never utilized the BAS spectrum or received any benefit from Sprint's delayed and inexplicably expensive band clearing activities, and it never will now that it has lost all but a minimal interest in DBSD following DBSD's exit from bankruptcy.

In response, Sprint shifted gears and argued that ICO Global should be liable because it and DBSD were "corporate entities that constitute a single MSS system."^{3/} This standard also proved unsupportable because ICO Global's global mid-earth orbit satellite system is wholly separate from and unrelated to DBSD's geosynchronous U.S. satellite system. Clearly, two different satellite initiatives cannot be defined as a single MSS system.

The next day, therefore, Sprint advanced yet another groundless theory, asserting that that affiliates of a licensee should be held liable if the affiliates play a "critical role in developing and constructing the MSS system, as well as [have] involvement and expertise with regard to key aspects of satellite planning, launch and operations."^{4/} In advancing this "critical role" standard, Sprint asserted that ICO Global and DBSD were "operationally, administratively, and functionally intertwined." Again, however, ICO Global demonstrated that the facts do not support imposing liability under this approach.

In a last ditch effort to find some basis to unjustifiably impose liability on ICO Global, Sprint now argues in its Ex Parte filing of September 10, 2010, that any entity that controls a licensee should be held jointly and severally liable for obligations imposed on the licensee by the Commission and that any member of the same corporate family as the licensee that provides "direct or indirect" support to the licensee should be "presumed" to be liable under this theory. This latest proposed liability standard is both legally unprecedented and untenable. While there may be limited, fact-specific circumstances in which it is appropriate for the Commission to extend a licensee's obligations to affiliates of the licensee, this is not one of them.

^{2/} *Sprint Nextel Corporation Notice of Ex Parte Presentation*, 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-0091211-00144, *et al.*, at page 2 (filed July 8, 2010) ("*Sprint July 8, 2010 Ex Parte*").

^{3/} *Sprint Nextel Corporation Notice of Ex Parte Presentation*, 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-0091211-00144, *et al.*, at page 3 (filed July 27, 2010) ("*Sprint July 27, 2010 Ex Parte*").

^{4/} *Sprint Nextel Corporation Notice of Ex Parte Presentation*, 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-0091211-00144, *et al.*, at page 6 (filed July 28, 2010) ("*Sprint July 28, 2010 Ex Parte*").

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Sprint equates ICO Global's majority ownership with control, and suggests that its ability to appoint a majority of the governing board of a subsidiary licensee is sufficient to impose liability on it.^{5/} But the self-serving and fundamentally erroneous nature of this argument is demonstrated by Sprint's own treatment of its investment in Clearwire. Just as ICO Global transferred assets and employees to a separately funded DBSD to pursue the MSS business, Sprint contributed spectrum, employees, equipment, equipment leases, and contracts into a joint venture – New Clearwire – that likewise obtained significant third party funding to build and operate a 4G network. Sprint retains a 54% ownership interest in the new venture.^{6/}

As Sprint's own conduct with respect to Clearwire demonstrates, potential control does not equate to actual control. The implication of Sprint's filings is that ICO Global controlled the business decisions of DBSD after 2005, but in fact ICO Global has not, at any time since then, sought to influence or compelled any of DBSD's directors to approve or disapprove decisions with respect to the U.S. MSS business; nor has ICO Global otherwise conducted itself as a common enterprise with DBSD. Without question, from and after the 2005 DBSD financing, ICO Global has maintained an arms-length relationship with DBSD, and has completely refrained from directing or otherwise participating in DBSD's business decisions. Moreover, there are numerous ways that the 2005 financing documents and the DBSD directors' fiduciary obligations limit ICO Global's ability to exercise control over such business decisions.

The analysis of the 2005 transaction by Thomas Cooney, put forward by Sprint as its expert in debt transactions, does not withstanding scrutiny – particularly his assertions that the covenants in the 2005 financing documents are “routine” and “standard.” One need look no farther than conventional debt transactions with which Sprint is intimately familiar, including Sprint's own loan agreements and Clearwire's loan agreements, to see that the covenants contained in the DBSD financing transaction are not routine or standard. For example, neither Sprint's nor Clearwire's lenders has appointed representatives to either company's board of directors. Neither Sprint's nor Clearwire's lenders holds a right of first refusal to provide any new debt financing to Sprint or Clearwire. Neither Sprint's nor Clearwire's lenders holds a right of first refusal to acquire any new stock from Sprint or Clearwire. Neither Sprint's nor Clearwire's lenders imposes restrictions on either company's ability to invest in new enterprises. Neither Sprint's nor Clearwire's lenders prohibits Sprint or Clearwire from engaging in new businesses. Neither Sprint's nor Clearwire's lenders imposes restrictions on the ability to obtain subordinated financing.^{8/}

^{5/} See *Sprint Sept. 10, 2010 Ex Parte* at 2.

^{6/} See Clearwire Corporation 2010 Quarterly Report on Form 10-Q (filed Aug. 5, 2010), at 22, available at <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5NTAxMjMtMTAtMDczNDgzL3htbA%3d%3d>.

^{8/} See <http://www.sec.gov/Achives/edgar/data/101830/000119312505246453/dex101.htm>.

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In response to Mr. Cooney's analysis, attached hereto is a letter from Joseph Weinstein, a partner with Davis Wright Tremaine, LLP and the chairman of his firm's executive committee. Mr. Weinstein has extensive experience in the creation, negotiation, and documentation of corporate finance arrangements. He reviewed the 2005 DBSD financing documents and Sprint's September 10 and 13 Ex Partes. Contrary to Mr. Cooney's cavalier conclusions, Mr. Weinstein opines that the extensive covenants in the DBSD investment documents "go well beyond what a lender would typically expect to receive in all or routine cases. [When the DBSD covenants are contrasted with Sprint's covenants to its lenders,] the sample excerpts from the Sprint financing document are considerably less restrictive on the business of Sprint than what is required of DBSD and provide no equity like protections. In other words, the lenders to Sprint have significantly less control over Sprint than the lenders to DBSD and the Sprint lenders have no interest other than repayment of their loans."

Sprint's latest proposed liability standard is also legally untenable. The Commission has never imposed liability on an entity based solely on common ownership. In instances where liability was imposed on a parent or sister corporation, it was because the parties had engaged in an act of bad faith or attempted to evade liability through a corporate shield. If merely having some degree of control over a licensee were found to be sufficient to impose liability for any obligations of the licensee, there would be a large universe of investors unpleasantly surprised to find themselves saddled with burdens they had no intention of assuming when they made their investment. While Sprint has argued that its attempt to impose liability on ICO Global does not require piercing the corporate veil, its latest filings would do just that. To do so here would stifle investment by creating a risk for future shareholders in Commission licensees that they could be held liable at some indeterminate future date for the licensee's obligations.

These flaws are exacerbated by the fact that in this case, the attempt to impose liability would be through a retroactive rulemaking. As Sprint itself notes, rulemakings may not "alter past legal consequences of past actions."^{9/} Sprint is flatly wrong, however, when it argues that imposing joint and several liability for BAS cost-sharing obligations would not alter past legal consequences. In the face of two Federal court decisions that the current BAS cost-sharing rules apply only to licensees,^{10/} there can be no plausible argument that expanding the definition of

^{9/} See *Sprint Sept. 10 Ex Parte* at 5 (citing *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. 2001)).

^{10/} *In re DBSD N. Am., Inc.*, No. 09-13061 (REG), at 18 (Bankr. S.D.N.Y. Sept. 30, 2009) (finding that "primary jurisdiction referral of the issue of [DBSD's] joint and several liability to the FCC is inappropriate, and that no basis exists under the facts...to impose joint and several liability on [DBSD]. Sprint's claims against any Debtor entities other than New Satellite Services are disallowed.") ("*2009 Bench Decision*"); see also *DBSB N. Am., Inc. v. Sprint Nextel Corp.*, No. 09-9144 (VM), at 21 (S.D.N.Y. Mar. 30, 2010) (decision and order affirming bankruptcy order) ("[T]he Court concludes that the Bankruptcy Court did not err in its statutory construction of the FCC Orders when ruling that those orders did not impose joint and several liability on the Debtors.") ("*2010 S.D.N.Y. Decision and Order*"). See also *ICO Global Ex Parte*

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“entrant” to include any affiliate of a licensee as well as the licensee itself would be anything other than a new rule.^{11/} Sprint itself conceded to the DBSD Bankruptcy Court that “there is nothing in the [Commission] orders that say that there is joint and several liability,”^{12/} and it did not appeal the Bankruptcy Court’s determination that the rules do not impose such liability. As we have noted before, moreover, Sprint also acknowledged that the liability was solely the responsibility of the licensee when it brought an action in Federal District Court to “enforce” the Commission’s reimbursement rules, telling the court that those rules imposed liability on “MSS licensees” and suing DBSD Satellite Services GP and not ICO Global.”^{13/} Only after these strategies failed did Sprint ask the Commission to impose reimbursement liability on ICO Global.

An affiliate of a licensee may be jointly and severally liable for the licensee’s BAS cost-sharing obligations, but only if the affiliate and the licensee are truly part of a common enterprise. A common enterprise is evidenced by the affiliate’s active participation in the licensee’s business decisions for or on behalf of the licensee and the affiliate’s ongoing provision of a substantial portion of the financial resources, technical capabilities, physical resources, and personnel to the licensee to enable the licensee to meet its FCC milestone obligations, such that the affiliate can reasonably anticipate that the nature of its decisionmaking authority and the ongoing provision of the resources of the licensee could render it liable for the licensee’s obligations. An entity is not part of a common enterprise merely because it holds a majority interest in the licensee if the majority interest holder does not also meet these tests.

By contrast, Sprint’s overbroad liability rule would extend cost-sharing obligations to any entity “involved in” the licensed business without regard to whether the entity has actual control over the business. Sprint’s proposed presumption that any entity in the same “corporate family” be viewed as part of the common enterprise, and therefore subject to the licensee’s cost sharing

Presentation, 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-0091211-00144, *et al.* (filed Aug. 2, 2010), at 9-10 (“*ICO Global August 2, 2010 Ex Parte*”); *ICO Global Ex Parte Presentation*, 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-0091211-00144, *et al.* (filed Aug. 23, 2010), at 2-3 (“*ICO Global August 23, 2010 Ex Parte*”).

^{11/} As ICO Global has explained, these determinations are binding on the FCC. *ICO Global August 2 Ex Parte* at 10-11. Contrary to Sprint’s characterization, the Bankruptcy Court did not find that the FCC’s orders were ambiguous on what “entrant” meant. *See id.* at 11 & n.41. Even if the FCC were not bound by the earlier court decision on the basis of issue preclusion, the Commission is still precluded from redefining “entrant” to mean all licensee affiliates by the prohibition on retroactive rulemaking.

^{12/} *2009 Bench Decision* at 7 (“In its most recent comments in response to the June 12 Order, Sprint asserted that the reimbursement obligation of Terrestar and New Satellite Services to Sprint should be shared by the affiliates and parents of those entities. Sprint has conceded in proceedings before me that ‘there is nothing in the [FCC] orders that say that there is joint and several liability.’”).

^{13/} *Complaint to Enforce Orders of the Federal Communications Commission*, Sprint Nextel v. New ICO Satellite Services, Civil Action No. 1:08cv651 (filed June 25, 2008); *see id.* ¶ 20.

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obligation, is contrary to long-standing principles of corporate law that treat each member of a corporate family as a separate legal entity for liability purposes – and contrary to Sprint’s own treatment of its position and investment in Clearwire. The liability – or the uncertainty over liability – that such a presumption would create will deter investments in FCC licensees.

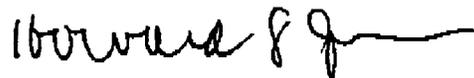
An entity must be able to reasonably anticipate that its provision of substantial and essential resources could render it liable for the licensee’s obligations. If the Commission is going to expand liability for cost-sharing beyond the MSS licensee, it may only do so for liabilities incurred going forward. To adopt any lesser standard would run afoul of the Supreme Court’s clearly established requirement that, absent express statutory authority for retroactive rulemaking, agency rulemaking may only be given future effect.^{14/}

Sprint is not a victim here. Nextel knowingly assumed the risks explicitly identified by the Commission and accepted by Nextel in the *800 MHz Order* in exchange for the extraordinary grant of 10 MHz of prime spectrum. It was Sprint’s delays in clearing the MSS band in the top 30 markets after it acquired Nextel that contributed to the financial downfall of DBSD, which could not commence commercial service until all 30 of the those markets were cleared – and ultimately to ICO Global’s loss of its investment in DBSD, and it was Sprint that demanded a definition of “enter the band” that fixed liability for cost sharing in 2008. Only after it realized that its actions had foreclosed reimbursement from DBSD did it decide to come after ICO Global. Sprint is solely responsible for the situation it now finds itself in, and the Commission should not reward it for its failures. Sprint should be told clearly and unambiguously that ICO Global is not responsible for DBSD’s relocation obligations.

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

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

Sincerely,



Howard J. Symons

Attachment

cc:

Austin Schlick

Stewart Block

^{14/} *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 204 (1988).

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Julie Veach
David Horowitz
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Karl Kensinger
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Bruce Romano
Geraldine Matise
Nicholas Oros

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John Leibovitz
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