Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Applications of **NEW DBSD SATELLITE SERVICES G.P., DEBTOR-IN-POSSESSION; AND TERRESTAR LICENSE INC., DEBTOR-IN-POSSESSION;** *Request for Rule Waivers and Modified Ancillary Terrestrial Component Authority.*	IB Docket No. 11-149
Applications of **DBSD NORTH AMERICA, INC., DEBTOR-IN-POSSESSION; NEW DBSD SATELLITE SERVICES G.P., DEBTOR-IN-POSSESSION; PENDRELL CORPORATION; AND** **TERRESTAR NETWORKS INC., DEBTOR-IN-POSSESSION; AND TERRESTAR LICENSE INC., DEBTOR-IN-POSSESSION; AND** **DISH NETWORK CORPORATION AND GAMMA ACQUISITION L.L.C.;** *Request to Acquire Control of Licenses and Authorizations.*	IB Docket No. 11-150

CONSOLIDATED OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

October 27, 2011

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DECLARATION OF THOMAS CULLEN

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I. INTRODUCTION AND SUMMARY

These transactions and the associated waivers requested by the Applicants[1] present the Federal Communications Commission ("Commission") with an immediate opportunity to

[1] "Applicants" refers to DISH Network Corporation ("DISH"); DISH's wholly owned direct subsidiary Gamma Acquisition L.L.C.; TerreStar Networks Inc., Debtor-in-Possession ("TSN DIP"); TSN DIP's wholly owned direct subsidiary TerreStar License Inc., Debtor-in-Possession ("TSL DIP") (and together with TSN DIP, "TerreStar"); Pendrell Corporation (formerly ICO Global Communications (Holdings) Limited); DBSD North America Inc., Debtor-in-Possession

advance one of its highest priorities – "deploying broadband networks to every American."[2] They will help alleviate the "spectrum crunch" that Chairman Genachowski recently characterized as "the single biggest threat to one of the most promising parts of our economy."[3] As one party noted, "the 40 MHz of 2 GHz [Mobile-Satellite Services ("MSS")] spectrum is one of the only viable near-term options remaining of the 300 MHz of spectrum identified in the [National Broadband Plan]" for the provision of mobile wireless services.[4]

DISH, a satellite operator with a proven track record of investment, competition, and innovation, seeks the transfer of underutilized spectrum and satellite resources from the hands of two bankrupt companies – a move that will put DISH on sure footing to begin to compete aggressively with entrenched nationwide wireless providers. Approval of these transactions and associated waivers will allow DISH to more fully utilize the 2 GHz MSS band by deploying a next-generation hybrid MSS/Ancillary Terrestrial Component ("ATC") network to provide expanded and improved mobile broadband while bringing added competition to the mobile broadband incumbents. The Commission has the authority, precedent, and appropriate procedure to seize this opportunity and approve the transactions and the associated waivers today.

("DBSD NA"); and New DBSD Satellite Services G.P., Debtor-in-Possession (together with DBSD NA, "DBSD").

"Applications" refers to DISH's proposed acquisitions of DBSD and the licenses held by TSL DIP, along with the requests for waivers filed by the two licensees in IB Docket Nos. 11-149 and 11-150.

[2] Julius Genachowski, FCC Chairman, Remarks on Broadband Adoption to Pew Charitable Trust Connect to Compete Initiative, at 1 (Oct. 12, 2011).

[3] Julius Genachowski, FCC Chairman, Remarks at the U.S. Chamber of Commerce, at 5 (Oct. 14, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305309A1.pdf ("Genachowski Chamber Speech").

[4] Petition of MetroPCS Communications, Inc. to Require Further Public Interest Showing or, in the Absence of Such a Showing, to Deny the Dish Network Corporation Applications, IB Docket No. 11-150, at 12 (Oct. 17, 2011) ("MetroPCS Petition to Deny").

The parties commenting in this proceeding recognize the significance of the 2 GHz MSS spectrum for mobile broadband, and several welcome DISH as a new entrant that will provide mobile broadband service. Two parties (Globalstar, Inc. ("Globalstar") and the U.S. GPS Industry Council ("GPS Council")) have filed comments supporting the Applications. The support of the GPS Council in particular confirms that the interference concerns hampering ATC service in another MSS band – concerns that directly implicate the global positioning system service – are totally absent here. Importantly, not a single party contends that the transactions would have anticompetitive effects, and no one disputes the competitive force that a hybrid satellite/terrestrial service across the entire 2 GHz MSS band would bring to mobile broadband.

Although some of the parties express varied concerns – which are readily addressed below – they echo the Commission's mobile broadband objectives and even recognize some of the benefits that DISH's plans promise. Nevertheless, two incumbent-carrier representatives, CTIA – The Wireless Association® ("CTIA") and T-Mobile USA, Inc. ("T-Mobile"), ask the Commission to place unnecessary, costly, and indefinite delay in the path of its effort to bring spectrum to market and achieve more mobile broadband competition. In advocating a rulemaking in lieu of consideration of Applicants' waiver requests on their merits, they present the Commission with a choice: whether to act promptly and open the path to a new and viable wireless venture that will compete against established mobile broadband providers or, on the other hand, to delay new entry and competition by debating extrinsic issues for years. The Commission – and the nation – cannot afford the delay.

The waivers requested by Applicants are fully justified based on the unique characteristics of DISH's plan, including DISH's commitments, continued support for a robust MSS and the dual-mode GENUS™ phone (or a successor device), the benefits of integrating the

band, and DISH's satellite background and experience. Contrary to some filers' assertions, the fact that Congress may, on some future date, give the Commission incentive auction authority provides no justification for the requested delay. Assuming Congress acts on this issue, incentive auctions are, by definition, voluntary, and Commission action here enabling DISH to provide new competitive broadband services will not stand in their way.

The supposed threat of interference "into adjacent PCS operations" cannot be cause for delay either. The Applicants seek no change to the applicable power or out-of-band emission limits below 2000 MHz. Additionally, the 3rd Generation Partnership Project ("3GPP"), with participation from CTIA members, reached a consensus agreement just a few months ago on interference protection standards for 2 GHz LTE devices, laying to rest any real interference concerns.

MetroPCS Communications, Inc. ("MetroPCS") and CTIA also incorrectly assert that the transactions and waiver requests would somehow produce a "windfall" or "unjust enrichment" for DISH. DISH submitted bids to acquire the equity of DBSD and assets of TerreStar out of bankruptcy pursuant to processes that were open to all interested parties, and, with approval of these transactions, DISH will pay approximately $2.8 billion in connection with these acquisitions. These outlays, moreover, are a mere down payment on the public interest benefits. Far from intending to "flip" the spectrum, DISH is fully prepared to invest substantial capital to deploy and maintain a nationwide satellite/terrestrial network.

The Applicants have also demonstrated that granting the transactions and associated waivers will yield concrete public benefits, despite criticism by MetroPCS that the benefits are too "speculative." The Applications' plans include bringing the two 2 GHz MSS providers out of bankruptcy, optimizing the use of underutilized spectrum, and delivering new competitive

broadband services over an LTE Advanced network. This showing more than supports a substantial public interest finding.

Finally, although Sprint Nextel Corporation ("Sprint") supports "the broad competition goals outlined in the proposed acquisition,"[5] it simultaneously makes gratuitous requests for an accelerated buildout schedule and other constraints such as pricing restrictions that will serve as a lose-lose-lose for the Applicants, the Commission, and the public alike. The Applicants have proposed a buildout condition modeled on the one to which Sprint itself was subject in the Nextel and Clearwire transactions. Moreover, the pricing restrictions requested by Sprint could make it more difficult for DISH to compete on price with Sprint's offerings, and would not be in the interest of competition or consumers.

The Commission should also reject Sprint's self-serving request to condition approval of the transactions on the payment of money to Sprint. Resolution of these disputes belongs to the bankruptcy courts overseeing the DBSD and TerreStar bankruptcies. The Commission's imposition of additional payment obligations upon DISH would contravene the bankruptcy process by improperly imposing on the purchaser the costs that could not be recouped from the debtors in bankruptcy.

For these reasons, the Commission should act promptly to approve the transactions and grant the associated waivers.

[5] Petition of Sprint Nextel Corporation to Condition Approval or to Deny, IB Docket No. 11-150, Summary (Oct. 17, 2011) ("Sprint Petition to Deny Transactions").

II. GRANT OF THE WAIVERS SERVES THE PUBLIC INTEREST, WHILE WAITING FOR RULEMAKINGS WOULD DISSERVE IT

A. The Record Reflects Broad Agreement on the Benefits of 2 GHz MSS Spectrum for Mobile Broadband

The parties commenting in this proceeding – even those few who criticize aspects of the Applications[6] – echo policymakers' calls to marshal more spectrum resources for mobile broadband services in the face of ever-growing demand. They also recognize that 2 GHz MSS spectrum is well-suited for mobile broadband. This is not surprising: the Commission has concentrated its attention on the need for additional mobile broadband spectrum and competition with increasing urgency in the past two years, and indeed since the filing of the Applications.

The National Broadband Plan warned that "[t]he growth of wireless broadband will be constrained if government does not make spectrum available."[7] Since then, each of the Commissioners has highlighted important aspects of the spectrum crisis and the need for prompt action. The record reflects these same views and acknowledges that 2 GHz MSS spectrum can be part of the solution. As Chairman Genachowski observed earlier this year:

> [T]he Broadband Plan placed unprecedented emphasis on mobile broadband, because no sector now holds more promise for opportunity, for economic growth, for improvements to our quality of life, and for our global competitiveness. . . . But there's a catch. This explosion in demand for mobile services places unsustainable

[6] Sprint filed a petition to condition or deny the transactions and a petition to condition approval of the waivers. MetroPCS filed a petition to require the Applicants to provide a further public interest showing or alternatively to deny the transactions. CTIA filed comments against the waivers, but did not request that the Commission condition or deny the transactions. T-Mobile did not file a petition or comments but submitted a brief letter addressing only the waiver requests. Mr. Aldo Perez, filing a letter in his capacity as a TerreStar Corporation shareholder, asked the Commission to deny Applicants' request for waivers.

[7] Federal Communications Commission, Connecting America: The National Broadband Plan 77 (2010) ("National Broadband Plan").

> demands on our invisible infrastructure – spectrum. Spectrum is the oxygen that allows all of these mobile innovations to breathe.[8]

And earlier this month, the Chairman reiterated, "The spectrum crunch is the single biggest threat to one of the most promising parts of our economy."[9] Nowhere is that crunch more acute than in the area of mobile broadband.

Commissioner Clyburn has agreed and also singled out the benefits of new entry as part of the challenge facing the Commission. The Commissioner has observed that the demand for more spectrum today is unprecedented, and additional spectrum resources could yield significant competitive benefits if new entrants are able to enter the market and deliver new consumer benefits, such as more affordable pricing:

> Wireless broadband service requires more and better spectrum to deliver at the speeds and quality necessary to offer a quality broadband experience for consumers. . . . Moreover, additional spectrum could foster more competition in the wireless space, which in turn could yield more affordable prices.[10]

Commissioner McDowell also has recognized the pressing urgency of the spectrum crunch. While pointing out that finding more spectrum is generally a long-term process, the Commissioner has emphasized that in the meantime the FCC must do what it can to find ways to enhance spectrum use:

> In practical terms, even if we could identify 500 megahertz of quality spectrum to reallocate *today*, the better part of a decade would transpire before we could write proposed auction rules and

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[8] Julius Genachowski, FCC Chairman, Remarks at CTIA Wireless 2011, at 4-5 (Mar. 22, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305309A1.pdf ("Genachowski CTIA Remarks").

[9] Genachowski Chamber Speech at 5.

[10] Mignon Clyburn, FCC Commissioner, Wireless Spectrum Needs: What is the Best Way to Serve All of the American People?, Remarks at the Rainbow Push Coalition 39th Annual Convention, at 2-3 (June 14, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298781A1.pdf.

> band plans, analyze public comment, adopt rules, hold an auction, collect the proceeds, clear the bands, and watch carriers build out and turn on their networks. So, in the meantime, helping innovators create and deploy new technologies to enhance more efficient use of the airwaves has to be a top priority for all of us.[11]

Commissioner Copps similarly has called for ways to rapidly deliver spectrum resources for mobile broadband: "We must work hand-in-hand – the Administration, the Congress, the Commission, industry and all stakeholders – to find ways to make additional spectrum available and to make better use of our supply by expanding flexibility and improving efficiency."[12]

Commenters in this proceeding agree on the acute need for additional spectrum for mobile broadband and the suitability of the 2 GHz band for that purpose. For example, T-Mobile recounts "the critical need for the FCC to make more spectrum available" and highlights the National Broadband Plan's judgment that 2 GHz MSS "is an additional potential source of wireless broadband spectrum."[13] And CTIA goes further, calling the 2 GHz MSS spectrum "ideally suited for the provision of terrestrial mobile broadband."[14] Sprint calls for "development of the underused 2 GHz MSS spectrum,"[15] and, in fact, supports "the broad

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[11] Robert M. McDowell, FCC Commissioner, Remarks ar FCC Spectrum Summit, at 3 (Oct. 21, 2010) ("McDowell Spectrum Summit Remarks"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302340A1.pdf (emphasis in original).

[12] Michael J. Copps, FCC Commissioner, Remarks at Federal Communications Bar Association Luncheon, at 4 (Feb. 15, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch /DOC-304681A1.pdf.

[13] Letter from Kathleen O'Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, Inc., to Marlene Dortch, Secretary, FCC, IB Docket No. 11-149, at 1, 3 (Oct. 17, 2011) (citation omitted) ("T-Mobile Letter").

[14] Comments of CTIA – The Wireless Association, IB Docket Nos. 11-149, 11-150, at 9-10 (Oct. 17, 2011) (citations omitted) ("CTIA Comments").

[15] *See* Petition of Sprint Nextel Corporation to Condition Approval or to Deny, IB Docket No. 11-150, at Summary (Oct. 17, 2011) ("Sprint Petition to Deny Transactions"); Petition of Sprint Nextel Corporation to Condition Approval, IB Docket No. 11-149, at Summary (Oct. 17, 2011) ("Sprint Petition to Condition Waivers").

competition goals outlined in the proposed acquisition."[16] Globalstar likewise states that DISH's entry, along with waiver of the integrated service rule, will "make new spectrum capacity available for mobile broadband services, a step that would help address the nation's urgent need for additional mobile broadband spectrum."[17]

MetroPCS, in turn, emphasizes the need for swift Commission action to unleash the potential of the 2 GHz MSS band for mobile broadband:

> [I]t is critically important that mobile wireless services be provided over this band, as the 40 MHz of 2 GHz MSS spectrum is one of the only viable near-term options remaining of the 300 MHz of spectrum identified in the [National Broadband Plan] as being necessary to satisfy mobile wireless demand over the next five years.[18]

Notably, MetroPCS also asserts that it has no objection to the requested waivers "as they make it more likely that the MSS spectrum can be put to productive use."[19] In the same vein, the GPS Council concludes, "[h]aving already conducted the necessary rulemaking proceeding and made an informed policy decision to establish a framework for terrestrial operations in the 2 GHz band, the Commission is now appropriately positioned to act favorably on the DBSD and TerreStar waiver requests."[20]

Thus, a common theme sounded among the parties is the need for more mobile broadband spectrum and the recognition that the 2 GHz MSS band must be part of the solution. The Commission cannot afford lengthy and potentially indefinite delay in unleashing the public

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[16] Sprint Petition to Deny Transactions at Summary.

[17] Comments of Globalstar, Inc., IB Docket No. 11-149, ET Docket No. 10-142, at 4 (Oct. 17, 2011) (citations omitted) ("Globalstar Comments").

[18] MetroPCS Petition to Deny at 12.

[19] *Id.* at 3 n.8.

[20] Comments of the U.S. GPS Industry Council, IB Docket No. 11-149, at 2 (Oct. 17, 2011) ("U.S. GPS Industry Council Comments").

interest benefits promised by the Applications. Rather, it should act promptly, as the National Broadband Plan states, to "take actions that will optimize license flexibility sufficient to increase terrestrial broadband use of MSS spectrum, while preserving market-wide capability to provide unique mission-critical MSS services."[21] Prompt approval of the Applications will advance these objectives and promote a competitive new service for national mobile broadband.

Yet two parties, CTIA and T-Mobile, even as they invoke these salutary goals, object to the efficient means of furthering them proposed by the Applicants.

B. The Commission Should Reject Calls for Delaying New Mobile Broadband Entry

In the face of these public interest imperatives, CTIA's and T-Mobile's call for rulemakings and a new comprehensive 2 GHz band plan will delay the creation of a robust, national competitor in mobile communications.[22] The current MSS and 2 GHz proceedings cited by CTIA and T-Mobile involve several different bands and a myriad of complex issues, including long-term calls to reallocate multiple services in the 2.1 and 1.7 GHz bands.[23] Such considerations are expected to take years to address. Deferring grant of the requested waivers until the Commission completes these or other separate proceedings would delay indefinitely, if not entirely foreclose, DISH's ability to provide competitive mobile broadband services.[24]

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[21] National Broadband Plan at 87 (Recommendation 5.8.4).

[22] CTIA Comments at 9-13; T-Mobile Letter at 3-5.

[23] *See* Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, *Notice of Proposed Rulemaking and Notice of Inquiry*, 25 FCC Rcd. 9481, 9492-94 ¶¶ 26-34 (2010) ("*MSS NOI*"); Spectrum Task Force Invites Technical Input on Approaches to Maximize Broadband Use of Fixed/Mobile Spectrum Allocations in the 2 GHz Range, Public Notice, 26 FCC Rcd. 7587 (2011) ("*2 GHz PN*").

[24] As MetroPCS described, leaving the spectrum fallow to rulemaking – as with the AWS-2 and AWS-3 spectrum – means that it will lay fallow for years. *See* MetroPCS Petition to Deny at 7 (describing the delays in FCC rulemakings aimed at deploying the AWS-2 and AWS-3 bands).

None of the reasons cited by either CTIA or T-Mobile in support of the rulemaking approach – the alleged need to evaluate broadly the ATC gating requirements,[25] the concomitant call to reconsider the 2 GHz band plan,[26] the "widespread support for incentive auctions,"[27] and the supposedly "significant potential for harmful interference"[28] – withstands close scrutiny. The Commission should reject the arguments for a rulemaking and instead approve the transactions and the waiver requests, allowing DISH to move forward in accomplishing the substantial and time consuming tasks of integrating two bankrupt satellite companies, optimizing the efficient use of their spectrum and satellite assets, and developing and deploying a robust wireless broadband business.

C. Waivers Are the Decidedly Superior Procedural Route

No party disputes the Commission's authority to proceed by adjudication and waive its MSS/ATC rules in an appropriate case, as it has done before. It is also well established that the waiver approach is often superior to rulemaking.[29] An agency "must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective,"[30] and should

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Ironically, by highlighting these delays in its Petition to Deny, MetroPCS makes the case for approving the Applications so that the spectrum can be put to use as quickly as possible without the long wait for rulemaking proceedings.

[25] CTIA Comments at 5 (noting that the "time has come for the Commission to address its ATC rules more broadly"); T-Mobile Letter at 4-5.

[26] CTIA Comments at 9; T-Mobile Letter at 3-4.

[27] CITA Comments at 12.

[28] *Id.* at 2.

[29] *SEC v. Chenery Corp.*, 332 U.S. at 202 ("[A]n administrative agency must be equipped to act either by general rule or by individual order."); *see also Pfaff v. U.S. Dep't of Housing and Urban Development*, 88 F.3d 739, 748 n.4 (9th Cir. 1996) ("Adjudication has distinct advantages over rulemaking when the agency lacks sufficient experience with a particular problem to warrant ossifying a tentative judgment into a black letter rule; other problems are so specialized and variable as to defy accommodation in a rule.").

[30] *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

do so, particularly when a waiver would not undermine the policy objective of the rule[31] and would better serve the public interest than requiring strict rule compliance.[32] In such cases, the agency not only may – but *should* – proceed by waiver: although "the choice between rulemaking and adjudication lies in the first instance with the [agency's] discretion,"[33] an agency can abuse its discretion if it fails "to waive a rule where particular facts would make strict compliance inconsistent with the public interest."[34] This is such a case.

The public interest compels grant of the waivers for three primary reasons:[35]

- The inevitable delay in completing a rulemaking that has not yet started would undermine many of the benefits that DISH's plan otherwise offers.
- The requested waivers are premised upon the Applicants' individual circumstances and will apply only to the Applicants.
- Granting the requested waivers will advance the general objectives of the ATC rules and will better serve the public interest than requiring strict rule compliance.

1. A Rulemaking Would Take Years to Complete and Undermine the Benefits of the 2 GHz MSS Spectrum

Integrating two bankrupt satellite companies, optimizing the efficient use of spectrum and satellite assets, and developing and deploying a next-generation wireless broadband business are substantial and time-consuming tasks. Shelving the waiver requests to await the outcome of rulemaking proceedings, which in turn may depend on uncertain Congressional action, will add

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[31] *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166-67 (D.C. Cir. 1990).

[32] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[33] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[34] *Northeast Cellular*, 897 F.2d at 1166.

[35] In addition, to ensure a thorough and authoritative process, the Applicants are ready to accept the additional layer of review required by full Commission action, a step that should not unduly delay grant of the requested waiver. Ultimately, the Applicants are confident that the facts and circumstances supporting their waiver requests are sufficiently compelling.

what could be the larger portion of "the better part of a decade" referenced by Commissioner McDowell[36] before this significant and time-intensive process can meaningfully proceed.

As an initial matter, the pending proceeding to maximize broadband use of MSS and other spectrum is merely at the notice of inquiry stage and therefore should not form the basis for delay of the waivers. The *MSS NOI* raises numerous wide-ranging issues involving the 2 GHz, Big LEO, and L-Bands, including whether or how the Commission should increase terrestrial use of the MSS bands; adopt incentives to help ensure that the public receives the maximum benefits from use of MSS spectrum; assess existing and future spectrum needs for MSS to ensure that public safety needs continue to be met; and ensure that the United States continues to have market-wide MSS capabilities.[37] The number, complexity, and broad scope of these issues render it uncertain when or even if the Commission will issue a notice of proposed rulemaking ("NPRM") and ultimately a final order establishing a comprehensive plan to alter its approach to these bands, even setting aside the uncertainties over whether Congress will pass, and the President will sign, an incentive auction law. Additionally, the Spectrum Task Force, in connection with the *MSS NOI*, issued a public notice seeking comments on numerous complex issues affecting 2 GHz MSS and other spectrum, including how certain band plan concepts may relate to other potential options involving 2 GHz spectrum, nearby bands (*e.g.*, AWS-3 spectrum at 2155-2175 MHz and paired AWS-2 H-block spectrum at 1915-1920 MHz and 1995-2000 MHz), and even spectrum in the 1.7 GHz band currently allocated for government use.[38]

Even at this preliminary stage, more than 20 parties filed comments or reply comments on the *MSS NOI*, and more than 15 parties filed comments or reply comments on the *2 GHz PN*.

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[36] McDowell Spectrum Summit Remarks at 3.

[37] *See MSS NOI*, 25 FCC Rcd. at 9492–94 ¶¶ 26-34.

[38] *See 2 GHz PN*, 26 FCC Rcd. at 7588-90.

Even assuming that the Commission decides to address some or all of these issues, resolving them would require the Commission to issue at least an NPRM (if not multiple NPRMs) before it may adopt a final order, a process requiring an indefinite number of years. Although the FCC should retain its focus on making available additional commercial spectrum, it disserves the public interest and the advancement of mobile broadband to delay action on these Applications and associated waivers until these complex proceedings are resolved.

In contrast, the issues raised in the Applicants' waiver requests are limited to the facts and circumstances of the 2 GHz MSS band as well as DISH's unique broadband deployment plan. Importantly, resolving these limited issues does not require any additional rulemaking to allocate spectrum or adopt new or revised service and licensing rules. As the GPS Council notes, the Applicants' waiver requests "follow the Commission's April 2011 Order adding co-primary terrestrial Fixed and Mobile allocations in the 2 GHz band, which the Commission observed would 'lay the groundwork for more flexible use of the band, including for terrestrial broadband services.'"[39] Consequently, the Commission "is now appropriately positioned to act favorably on the [Applicants'] waiver requests."[40]

Moreover, the waiver requests are a critical component of the relief that the Applications seek. Without the waivers, it is highly uncertain that DISH can commence wide-scale design and construction efforts for a terrestrial network, and it is certain that any design and construction activities that may be undertaken at all will have to proceed at a significantly slower pace.

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[39] U.S. GPS Industry Council Comments at 2 (citing Fixed and Mobile Services in the Mobile-Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, *Report and Order*, 26 FCC Rcd. 5710, 5710 ¶ 2 (2011) ("*MSS Spectrum Flexibility Order*")).

[40] *Id.*

First, to select the optimal technology for its network, DISH must know whether all devices on its network will be dual-mode, or whether the network will also support single-mode units. Multiple technologies and system architectures exist today to provide MSS/ATC services. But some are more efficient, cost less, and are better suited to networks that support both single mode and dual-mode devices. For example, dual-mode devices will consume satellite resources. Regardless of the amount of satellite service the end-users actually use, a network that supports devices that are all dual-mode must utilize capacity to maintain their ability to access the space segment. On the other hand, more efficient network architectures exist for a network that supports a mix of single- and dual-mode devices.[41]

Second, a network that offers only dual-mode devices, with their attendant higher costs and complexity, will attract fewer subscribers. Fewer forecasted subscribers means fewer consumer electronics manufacturers willing to expend the time and resources required to design and cost-effectively manufacture network and consumer equipment and chipsets to support this project. DISH has been in discussions with potential chipset, network equipment, and handset manufacturers. These suppliers continue to state that they cannot undertake development activities for the MSS/ATC network until all requirements, including support for single- and dual-mode devices, are finalized. Without the assurance of the waivers, the only options left to DISH are less efficient and more costly and would threaten DISH's ability to compete on service and price terms with incumbent operators. Grant of the waiver requests is, therefore, a prerequisite to DISH's commencing substantial buildout activities. Certainly, in the absence of

[41] Cullen Declaration ¶¶ 5-7.

such waivers, buildout could only be carried out at a very slow pace, if it could commence at all.[42]

2. The Waivers Are Premised on Individual Circumstances and Will Apply Only to the Applicants

Waiver is the proper procedural vehicle because the relief is based on the Applicants' individual circumstances and is limited to the Applicants. The requested waivers will have no impact on existing or future Big LEO and L-Band MSS/ATC licensees, such as Globalstar (whose ATC license has been suspended, but could be reinstated in the future), Iridium (a Big LEO MSS operator that could seek an ATC license in the future), and Inmarsat (an L-Band MSS operator that could seek an ATC license in the future). Such action is fully consistent with the Commission's prior waivers of various ATC rules on a case-by-case basis to individual licensees, including LightSquared and Globalstar.[43] These prior waivers were strictly limited to those licensees and their individual circumstances, and were not broadly extended to other ATC licensees, who of course remained free to make their own individualized showings in support of a waiver.

Here, the Applicants request specific waivers based upon their individual circumstances. These circumstances will ensure that, far from atrophying, the crucial MSS will be more robust and viable than it is today and will readily be available to anyone who wants it and needs it; and that it will be augmented and complemented by a nationwide terrestrial network. As discussed further in Section III, below, they include:

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[42] *Id.* ¶¶ 8-11.

[43] *See, e.g.*, Globalstar Licensee LLC; Application for Modification of License for Operation of Ancillary Terrestrial Component Facilities, *Order and Authorization*, 23 FCC Rcd. 15975 (2008); LightSquared Subsidiary LLC, Request for Modification of its Authority for an Ancillary Terrestrial Component, *Order and Authorization*, 26 FCC Rcd. 566 (2011) ("*LightSquared ATC Order*").

- DISH's commitments to providing a substantial satellite service (*e.g.*, offering devices with MSS capabilities to customers who want them, in addition to ensuring sufficient satellite capacity);

- DISH's plan to deploy a substantial terrestrial broadband network to create an advanced MSS/ATC integrated network;

- DISH's plan to consolidate and rationalize 2 GHz MSS spectrum to support full and efficient deployment of next-generation MSS/ATC services;

- TerreStar's and DBSD's substantial investment in MSS facilities to date, and TerreStar's ongoing provision of commercial MSS, including dual-mode GENUS™ phones (or subsequent devices), and plans to continue to offer these services and devices; and

- DISH's background as a preeminent satellite operator and the content that this background gives to DISH's commitment to provide high-quality MSS throughout the nation.

3. The Waivers Advance the ATC Rules' General Objectives and Better Serve the Public Interest

As more fully explained in Section III, below, given the Applicants' particular circumstances, granting the requested waivers advances the ATC rules' general objective and better serves the public interest than requiring strict rule compliance. The overall purpose of the ATC gating requirements is to ensure that MSS operators continue to "provide substantial satellite service to the public,"[44] while leaving licensees with sufficient leeway to "improve their services and efficient use of spectrum."[45] The requested flexibility furthers these goals by allowing DISH to use existing resources to deliver MSS and MSS/ATC services to the broadest possible customer base. It will enable DISH to offer devices and services that are better tailored to subscriber demand and thus acquire a sufficient number of subscribers to significantly decrease the per-subscriber network costs inherent in the satellite portion of the network. It also

[44] Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 1962, 2001 ¶ 72 (2003) ("*ATC Order*").

[45] *Id*. at 1965 ¶ 2.

will enable DISH to use existing, in-orbit satellites as mutual backup facilities in the event of service outages instead of sinking resources into unnecessary ground spares. These efficiencies, in turn, will help promote the ongoing viability, competitiveness, and maturation of the MSS offering. Additionally, the requested technical waivers will facilitate integrated use of the entire 2 GHz MSS band to support next-generation MSS and terrestrial broadband services that otherwise could not be provided by separate MSS/ATC systems using smaller, segregated blocks of spectrum. The waivers also will ensure the competitive deployment of a new terrestrial broadband network (as part of the larger integrated MSS/ATC network) under specific buildout commitments.

D. The Applicants' Proposals Do Not Stand in the Way of Incentive Auctions

CTIA, T-Mobile, and MetroPCS appear to present voluntary incentive auctions as a mutually exclusive alternative to grant of the requested waivers, and argue that a rulemaking is required to ensure full consideration of these options.[46] But there is no "either/or" relationship between incentive auctions and the requested relief. Nothing requested here stands in the way of Congress giving the Commission authority for an additional spectrum mining tool such as voluntary incentive auctions.

E. The Proposed Waivers Do Not Affect the Interference Limits

The final reason put forth by CTIA in support of rulemakings and their attendant delays is its assertion that DISH's plans for a national MSS/ATC network "places adjacent [Personal Communications Service ("PCS")] operations at significant risk of harmful interference,"[47] and that "[t]he numerous technical waivers sought by DISH will further raise the risk of

[46] CTIA Comments at 12; T-Mobile Letter at 4; MetroPCS Petition to Deny at 11.

[47] CTIA Comments at 13.

interference."[48] Grant of the Applicants' waiver requests, however, will not implicate applicable interference limits, which remain intact; nor will it create a risk of harmful interference to commercial mobile services operators. DISH's proposed ATC operations will remain subject to the same technical limits as exist today below 2000 MHz, which are designed to prevent harmful interference from ATC mobile transmitters to PCS mobile receivers. Specifically, the Applicants seek no increase in the radiated power or out-of-band-emission ("OOBE") limits for ATC mobile terminal ("MT") transmissions and emissions below 2000 MHz.

In the 2003 *ATC Order* adopting the existing radiated power and OOBE limits for 2 GHz ATC MT transmissions and emissions below 2000 MHz (all of which will remain applicable), the Commission concluded that these limits were sufficient to protect nearby PCS mobile receivers.[49] The Commission in fact adopted more stringent OOBE limits than originally proposed.[50] The Commission specifically found among other things that any potential for PCS receiver desensitization or overload caused by ATC MTs is overstated, and that any "interference problems that may develop over time as ATC is deployed can be mitigated by future PCS handset design modifications and through a cooperative effort by PCS and MSS ATC licensees to resolve these issues."[51]

In June 2011, the 3GPP completed standards for LTE deployment in the S-Band, including implementing PCS coexistence standards. With respect to broadband PCS, numerous participants in the 3GPP process, including operators and vendors that are CTIA members, reviewed the S-Band specifications during a year of deliberations and reached the consensus that

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[48] *Id.* at 4.

[49] *See ATC Order*, 18 FCC Rcd. at 2025-26 ¶¶ 119-20.

[50] *Id.* at 2025-26 ¶ 119.

[51] *Id*. at 2026 ¶ 120.

sufficient protection is provided to PCS C block (1975-1990 MHz) and G block (1990-1995 MHz) devices. The 3GPP participants agreed on a range of OOBE limits, performance characteristics for new PCS services, and further attenuation levels to address any residual concerns associated with legacy C-block receivers. Specifically, participants agreed that -40dBm/MHz at the 1995 MHz boundary is sufficient OOBE protection for the PCS mobile receivers operating in the 1990-1995 MHz range. The 3GPP participants also agreed that S-Band mobile transmissions should attenuate 10 dB further to -50 dBm/MHz at the 1990 MHz boundary to address any legacy concerns related to operating devices in the PCS C block. Thus, the 3GPP process resulted in OOBE specifications on ATC mobile devices, included blocking considerations for PCS devices, and optimized the power of ATC devices transmitting close to the 2000 MHz boundary. This combination of measures is sufficient to ensure that DISH and PCS operators can coexist in nearby bands free of harmful interference.

CTIA also mistakenly suggests that "widespread" terrestrial use of the MSS S-Band has the potential to affect PCS operations and somehow alter the technical conclusions reached by the Commission and 3GPP participants. The existing ATC rules impose no limit on the number of 2 GHz ATC MTs that can be deployed, and S-Band ATC user equipment manufactured in compliance with the 3GPP LTE specifications will meet the FCC rules for protecting nearby incumbent operations.[52] In addition, the 3GPP technical specifications process included separation and interference scenarios taking into account millions of mobile devices operating simultaneously on both networks. Thus, the interference protections developed by 3GPP will be

[52] This is particularly true where the FCC has urged licensees to work cooperatively to develop viable technical rules – a process that resulted in standards set in 3GPP. In adopting the ATC rules, the Commission took into account the likelihood that ATC handsets would operate in the identical environments in which PCS handsets operate (*e.g.*, in urban areas, indoors, etc.), and that in such environments ATC handsets would be in close proximity to PCS handsets. *Id*. at 2025 ¶ 118.

sufficient to prevent interference in an environment that includes a ubiquitous and successful hybrid MSS/ATC system. The potential for broad deployment is an argument for, not against, Applicant's proposed transactions and service plan.

CTIA's passing reference to the potential for interference from MSS operations into the AWS-2 H block also is misplaced.[53] As an initial matter, bands that currently do not have service rules, are not yet licensed, and are unused do not present the types of legacy receiver issues that can alter existing operations. Moreover, neither the proposed transactions nor the requested ATC technical waivers affect the status quo with respect to the H block, because the Applicants have not requested any change to the mobile OOBE limits adopted by the Commission in 2003.[54] The Commission is aware of the challenges to deployment of the AWS-2 H block posed both by adjacent PCS and MSS services and is working in a separate rulemaking to create service rules to alleviate these concerns.[55] That pending rulemaking, and not this proceeding, is the proper forum to address this matter.

Finally, grant of the ATC technical rule waivers is supported by the same rationale relied on by the Commission when it previously granted identical ATC technical waivers to DBSD.[56] In fact, applying different technical rules to DISH's ATC facilities depending on whether they

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[53] CTIA Comments at 10, 13-14.

[54] Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, 18 FCC Rcd. 25162 (2003).

[55] Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, *Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 9859 (2008).

[56] New ICO Satellite Service G.P., Application for Blanket Authority to Operate Ancillary Terrestrial Component Base Stations and Dual-Mode MSS-ATC Mobile Terminals in the 2 GHz MSS Bands, *Order and Authorization*, 24 FCC Rcd. 171, 185-89, 192-96 ¶¶ 40-49, 58-64, 69 (2009) ("*DBSD ATC Order*") ("As a general matter, we conclude that, insofar as the requested waivers would not result in harmful interference and would comport with the Commission's established requirements for comparable terrestrial services, granting the waivers will serve the public interest by enabling ICO to operate more efficiently and provide more valuable service.").

are transmitting in DBSD or TerreStar's licensed spectrum would be nonsensical, inefficient, and unduly burdensome. Moreover, the technical rules that the Applicants propose to waive were adopted to address intraband interference between multiple MSS S-Band licensees with adjacent operations.[57] Given DISH's proposal to unify the S-Band, this policy objective is mooted. Instead, the rules merely create technical obstacles to DISH's proposed ATC deployment without providing concomitant benefits to any other licensees.

As demonstrated above, the widespread use of ATC devices resulting from the successful deployment of DISH's proposed MSS/ATC network does not pose a threat of harmful interference to other licensees. To the contrary, the prospect of viable terrestrial mobile broadband competition, while a concern to T-Mobile and other CTIA members, is a real public interest benefit.

III. THE WAIVER REQUESTS SHOULD BE GRANTED ON THEIR MERITS

To leave no doubt that the waiver process is the better course for Commission action here, the Applicants explain in this section why each of the requested waivers is warranted. The Commission will grant waivers "for good cause shown,"[58] particularly when, in the individual circumstances presented, waiver would "better serve[] the public interest" than would strict application of the rule.[59] As discussed below, the challenges to the requested limited waiver of the integrated service rule are without merit, and the requests for waivers of certain technical rules and the spare satellite requirement were not seriously opposed. Furthermore, the

[57] *ATC Order*, 18 FCC Rcd. at 2021-22 ¶ 111.

[58] 47 C.F.R. § 1.3.

[59] *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Applicants' individual circumstances support grant of the waivers. Finally, contrary to the suggestion of some parties, the waivers will not generate a windfall for the Applicants.

A. Limited Waiver of the Integrated Service Rule Will Promote a Robust MSS Service and Not Undermine the Ancillary Nature of the Terrestrial Service

When the Commission adopted the integrated service rule in 2003, it explained that the rule and the other ATC gating requirements would ensure that MSS operators continue to "provide substantial satellite service to the public,"[60] while leaving licensees with sufficient leeway to "improve their services and efficient use of spectrum."[61] The requested waiver will advance these goals by ensuring the ongoing viability and continued development of the MSS offering, without undermining the "ancillary" nature of the terrestrial component.

First, affording DISH the flexibility to offer terrestrial-only handsets will advance, and not harm, the MSS component of DISH's service. Dual-mode terminals add cost and potentially weight to a device – cost and weight that some consumers have neither the need nor the wish to bear. By making alternatives available to these consumers that suit their particular needs, DISH can attract a larger subscriber base for its hybrid MSS/ATC network. A greater subscriber base means economies of scale can be met and savings passed on to consumers, which, in turn, means a more competitive offering overall and greater pressure on the prices and service quality of other operators – again to the benefit of consumers. A healthy business means ongoing support for MSS services, removing many of the uncertainties associated with limited revenue streams that can hinder smaller MSS operators. This hindrance is not speculative: uncertainty and market conditions led to the bankruptcy of the 2 GHz MSS providers and other MSS operators as well. By removing these uncertainties, DISH will make it easier for the primary users of the

[60] *ATC Order*, 18 FCC Rcd. at 2001 ¶ 72.

[61] *Id*. at 1965 ¶ 2.

MSS component of its services to rely on and plan around the long-term availability of S-Band MSS. Thus, as Globalstar observed, a grant of the waiver actually brings stability to the MSS side, both from an operator's[62] and a consumer's perspective.[63]

Second, contrary to the assertions of CTIA and T-Mobile, a widespread MSS/ATC service that offers its customers the option of a single-mode handset would not undermine the "ancillary" nature of the terrestrial component.[64] Whether ATC service qualifies as ancillary to satellite service under the Commission's ATC rules has nothing to do with which of the two services is in greater demand or which can achieve broader consumer appeal. MSS will be safeguarded in DISH's business plan by a number of simple principles: everyone who wants satellite service will be able to receive it; DISH will offer integrated, satellite/terrestrial services; and DISH will comply with the gating requirements except to the extent waived by the Commission.

The ability to provide ATC service has never been contingent upon a licensee's satellite service being the "predominant" or "primary" use of the MSS/ATC system.[65] That position was rejected in various contexts in both the Commission's *ATC Order* and *Second ATC Order on Reconsideration*. Such a rule, the Commission determined, would only lead to inefficient use of

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[62] *See* Globalstar Comments at 3 ("[B]y fostering the development of MSS ATC licensees' terrestrial offerings, relief from the integrated services rule could help ensure the existence of viable and robust MSS operations in the United States. Having received such relief, an operator's ATC services could generate the revenues and investment necessary to fund the substantial capital and operational costs of providing MSS.").

[63] *See id.* at 2-3 ("By allowing service to such lightweight, single-mode devices, relief from the integrated service rule will enable MSS licensees to attract the critical mass of MSS ATC subscribers necessary to establish a viable terrestrial offering. Application of this requirement, in contrast, would preclude arrangements with handset manufacturers, limit consumer choice, and stymie the growth of the MSS ATC customer base.").

[64] *See* CTIA Comments at 5-8; T-Mobile Letter at 4.

[65] *See ATC Order*, 18 FCC Rcd. at 2014-15 ¶ 99.

spectrum by MSS operators.[66] Nor would the predominant usage of ATC in a given area mean that the ATC service was no longer ancillary to the satellite service. As the Commission envisioned, the potentially greater use of ATC would merely "reflect various factors, such as higher population densities in urban areas or differences between satellite and terrestrial technologies, and the concentration of users need not imply that provision of satellite service is being degraded or diminished."[67]

B. Waiver of the ATC Technical Rules and Spare Satellite Rule Will Promote Investment in MSS and Enhance Utilization of the Band

As the Applications explained, grant of the requested waivers of certain ATC technical rules with respect to TerreStar's ATC authorization will better serve the public interest than requiring strict compliance with the rules. CTIA vaguely questions the requested technical waivers on potential interference grounds, but offers no technical analysis supporting this interference claim.[68] As discussed in Section II.E above, the requested waivers do not seek to change existing interference limits. Indeed, the Commission's rationale for previously granting identical ATC technical waivers to DBSD supports extension of the waivers to TerreStar.[69]

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[66] *See id.* ("The proposal to require 'predominant' satellite use would limit the MSS provider's flexibility and its concomitant spectrum efficiencies, e.g., by requiring predominant satellite coverage in geographic areas that can be more efficiently served by ATC, such as large cities."); Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz, *Opinion and Order and Second Order on Reconsideration*, 20 FCC Rcd. 4616, 4624 ¶ 20 (2005) ("*ATC Second Order on Reconsideration*") (rejecting calls "to require that a specific percentage of an MSS/ATC operator's capacity be reserved exclusively for MSS").

[67] *ATC Order*, 18 FCC Rcd. at 1983 ¶ 36.

[68] *See* CTIA Comments at 13-15.

[69] *DBSD ATC Order*, 24 FCC Rcd at 185 ¶ 40 ("As a general matter, we conclude that, insofar as the requested waivers would not result in harmful interference and would comport with the Commission's established requirements for comparable terrestrial services, granting the waivers will serve the public interest by enabling ICO to operate more efficiently and provide more valuable service.").

Similarly, the spare satellite waiver is justified as the in-orbit G-1 and T-1 satellites can serve as backups to each other. Only a single filer objected to the spare satellite waiver request, and this objection included no supporting rationale or analysis.[70] This lack of opposition is unsurprising: a waiver of the spare satellite rule will advance the rule's purpose to "provide some benefit in helping to ensure continued investment and innovation in an MSS licensee's space-station assets."[71] Under DISH's plan, each of the G-1 and T-1 satellites will provide sufficient backup capability for the other. Thus, in the unlikely event that either of the two in-orbit satellites malfunctions or fails, the remaining satellite would have sufficient capacity to support the services previously provided on both satellites. More broadly, DISH – as a committed satellite company – will fulfill the underlying purpose of the rule to ensure, even in the event of a satellite failure, that MSS remains a vibrant and robust offering.

C. The Applicants' Individual Circumstances Support Grant of the Waivers

As mentioned above, the Applicants' individual circumstances justify – indeed compel – proceeding by waiver, as described in greater detail below.[72]

DISH's Commitments. DISH has made several individualized commitments to support both the nascent MSS S-Band service while maturing this service and deploying a unique and innovative terrestrial broadband service. In particular, DISH has committed to providing substantial satellite service by continuing the commercial offering of the existing GENUS™ phone or a successor dual-mode device, and ensuring that sufficient satellite capacity is available to support a viable nationwide MSS offering.

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[70] Mr. Perez asked the Commission to deny Applicants' waiver requests. Mr. Perez does not offer any analysis or support for his assertions, which are refuted by the Applications and this opposition. Therefore, his arguments should be dismissed by the Commission.

[71] *See ATC Order*, 18 FCC Rcd. at 2006 ¶ 81.

[72] *See, supra*, at Section II.C.2.

DISH's Deployment Plan. DISH has also agreed to develop a reasonable, attainable terrestrial buildout schedule keyed to commercial availability of the LTE Advanced standard. And DISH has committed itself to creating a technically integrated network in which all network traffic, whether terrestrial or satellite, is processed and handled by the same integrated network and support systems.

The Benefits of Integrating the Band. DISH also proposes to consolidate the separate spectrum blocks assigned to DBSD and TerreStar, thus providing a single operator across the entire 2 GHz S-Band and access to a combined 40 MHz of spectrum. This effort will differentiate that spectrum from other MSS frequency bands, and ensure full and efficient deployment of next-generation MSS/ATC services. Each of DBSD's and TerreStar's spectrum assignments, standing alone, would not be sufficient to support a robust, nationwide mobile broadband service.[73] Allowing DISH to combine both spectrum assignments will facilitate more efficient use of the spectrum and enhance competition. Specifically, access to the combined 40 MHz of spectrum will enable DISH to meet the expanding bandwidth requirements of mobile broadband and to better compete against the terrestrial mobile broadband incumbents, which have vastly greater spectrum holdings. But, of course, unification of spectrum assignments and of disparate systems is its own significant challenge – one that DISH readily embraces.

Existing MSS Operations. DBSD and TerreStar each successfully launched an MSS satellite in April 2008 and July 2009, respectively. TerreStar has also provided commercial MSS since September 2010. Crucially, TerreStar invested significant time and money to develop the GENUS™ phone – North America's first dual-mode satellite/cellular smartphone – which is capable of standalone MSS use and for communication on any authorized GSM network using

[73] *See* Amendment to DBSD-DISH Application at 3; TerreStar-DISH Application at 26-27.

the 800, 900, 1800, and 1900 MHz mobile bands. DISH will continue to support the GENUS™ phone or a successor dual-mode device. These ongoing MSS operations will support the continued provision of ubiquitous, nationwide satellite services under DISH ownership. Moreover, both DBSD's and TerreStar's substantial investments in their MSS satellites and TerreStar's MSS service undercut any argument that a waiver of the integrated service rule to permit the use of single-mode handsets would undermine the MSS component of the service.

DISH's Satellite Background. DISH is a successful and experienced satellite operator with a proven record of building, launching, and operating satellites starting in the late 1980s, with its first satellite launched in 1995. DISH currently operates a satellite television system that includes a fleet of 13 owned and leased satellites and reaches approximately 14 million subscribing households – an award-winning service that its founder, Charles W. Ergen, built from scratch. DISH has the experience, the personnel, and the resources to build a vibrant MSS/ATC network and thereafter to carry out its MSS responsibilities and commitments.

D. The Waivers Do Not Generate a Windfall for the Applicants

Contrary to CTIA's and MetroPCS' suggestions,[74] DISH will receive no "windfall" under its plan and will obtain no additional spectrum "for free."[75] DISH submitted bids to acquire equity in DBSD and assets from TerreStar, and these bids were approved by the bankruptcy courts after completion of processes that were open to all other interested parties.[76] Thus, other interested parties could have submitted a higher offer on acceptable terms, but none did. At the

[74] *See* MetroPCS Petition at 12; CTIA Comments at 12 (suggesting that the Commission should be concerned about unjustly enriching DISH).

[75] MetroPCS Petition to Deny at 9.

[76] TerreStar, in fact, cancelled a scheduled auction because it received no competing bids that satisfied the requirements set forth in certain auction and sale procedures before the required deadline. *See* TerreStar-DISH Application at 18.

time of those open bidding processes, the potential for achieving more flexible spectrum rules to serve the public interest, and the attendant uncertainty of future regulatory and other developments, were both part of the market analysis and, hence, the fair market value of the relevant assets.

Indeed, this open process is akin to the competitive auction process CTIA suggests is the best way to assign spectrum and moots any concerns about unjust enrichment.[77] Furthermore, the proposed acquisitions are, in fact, consistent with the Commission's general policy of encouraging secondary market transactions to facilitate spectrum going to its highest valued use and are similar to the types of transactions that terrestrial wireless providers enjoy every day.[78]

DISH is required to pay approximately $2.8 billion in connection with these transactions. Of course, this large outlay is just a "down payment" on the substantial capital investment DISH must spend to fulfill its voluntary buildout commitments. DISH does not intend to sell these licenses. DISH also must spend considerable sums to fulfill the satellite-side responsibilities of MSS/ATC services – responsibilities that terrestrial-only wireless providers do not have to bear. Moreover, DISH is assuming substantial business, economic and regulatory risk in its undertaking to successfully execute its MSS/ATC business. In sum, any granted flexibility to serve the public interest is anything but a windfall given DISH's multi-billion dollar purchase

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[77] *See* CTIA Comments at 12 & n.37 (quoting Applications for License and Authority to Operate in the 2155-2175 MHz Band, Petitions for Forbearance Under 47 U.S.C. § 160, *Order*, 22 FCC Rcd. 16563, 16569-80 ¶¶ 10-11 (2007)).

[78] *MSS Flexibility Order*, 26 FCC Rcd. at 5712 ¶ 6 (noting that the Commission's secondary market policies are designed to "promote more efficient, innovative, and dynamic use of the spectrum, expand the scope of available wireless services and devices, enhance economic opportunities for accessing spectrum, promote competition among terrestrial wireless service providers, and eliminate regulatory uncertainty surrounding terrestrial spectrum leasing arrangements"); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fifteenth Report*, 26 FCC Rcd. 9664, 9828 ¶ 282 (2011).

price and the substantial capital required to create a network that will increase competition and alleviate spectrum shortages in the wireless industry.

IV. DISH'S COMMITMENTS SATISFY THE PUBLIC INTEREST WITHOUT THE IMPOSITION OF ADDITIONAL CONDITIONS

A. Approval of the Applications Will Yield Concrete Public Interest Benefits

No party has attempted to rebut any of the specific benefits that will arise from the transactions and DISH's deployment of a next-generation broadband network. Approval of the Applications will allow DBSD and TerreStar to complete their bankruptcy proceedings, indisputably usher in additional competition with no anticompetitive effects,[79] optimize the use of underutilized spectrum, enable efficient LTE deployment, and capitalize on DISH's existing service and network.[80] But MetroPCS nevertheless asserts that the Applications' benefit showing is too "speculative" to warrant grant of the Applications and professes concerns that failure by DISH to execute on its plan might cause the spectrum to remain fallow for an extended period.[81]

MetroPCS mistakes the Applicants' use of what MetroPCS describes as "hedging" language as a lack of concrete commitments by DISH. In fact, this language merely reflects the reality that participants in the mobile broadband industry, which is perhaps the fastest evolving industry in the U.S. economy, are required to be flexible and reactive when implementing their

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[79] As the Applicants previously noted, the benefits of this transaction will be no panacea for all of the ills afflicting the increasingly concentrated CMRS market today, and particularly for the problems that the proposed AT&T/T-Mobile combination bodes for competition.

[80] *See* Amendment to DBSD-DISH Application at 3; TerreStar-DISH Application at 3-4.

[81] MetroPCS Petition to Deny at 4-5. As part of its petition, MetroPCS assert that DISH might not have the financial qualifications to implement its plans. *Id.* at 15. This argument is not only irrelevant as financial qualifications are not part of the FCC's transaction review process, but also false. DISH is a Fortune 200 company with a firm financial footing and sustained track record of growth, profitability, and implementing its consumer service plans.

business plans. There is in fact nothing speculative about the benefits put forth by Applicants. The Applications do describe the Applicants' future plans and commitments – they could do nothing else.[82] The Applications contain an extensive discussion of the concrete public-interest benefits that will be derived from these plans. As DISH expressly states in the Applications, it is prepared "to work with the Commission to develop a reasonable, attainable buildout schedule keyed to commercial availability of the LTE Advanced standard" consistent with "the buildout principles established in the Sprint/Nextel and Sprint/Clearwire transaction decisions."[83] These benefits are substantial and amply support the Commission's approval of the Applications, especially given the lack of any public interest harms posed by the transactions.

Moreover, the Commission has recognized that some predicted benefits may not be certain or inevitable.[84] It is precisely for this reason that, as acknowledged by MetroPCS, the Commission applies a "sliding scale approach," meaning that, where potential harms are "both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than [the Commission] would otherwise demand."[85] But where (as here) the "potential harms appear less likely and less substantial, [the Commission] will accept a lesser showing."[86] In an analogous vein of cases, courts have recognized agencies' leeway to

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[82] DBSD-DISH Application at 12-15; Amendment to DBSD-DISH Application at 5-7; TerreStar-DISH Application at 25-30.

[83] *See* Amendment to DBSD-DISH Application at 15 (citing Nextel Commc'ns, Inc. and Sprint Corp., *Memorandum Opinion and Order*, 20 FCC Rcd. 13967 (2005); Sprint Nextel Corp. and Clearwire Corp., *Memorandum Opinion and Order*, 23 FCC Rcd. 17617 (2008); TerreStar-DISH Application at 49 (citing same).

[84] *See, e.g.*, News Corp, DIRECTV Group, Inc., and Liberty Media Corporation, *Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3331 ¶ 140-41 (2008) ("*News Corp.-Liberty Order*").

[85] *See* Applications of AT&T Inc. and Cellco Partnership, *Memorandum Opinion and Order*, 25 FCC Rcd. 8704, 8737 ¶ 76 (2010).

[86] *News Corp.-Liberty Order*, 23 FCC Rcd. at 3331 ¶ 141.

make forecasts.[87] When predictive judgments are involved, the D.C. Circuit recently explained, "certainty is impossible."[88]

The transactions will allow TerreStar and DBSD to emerge from bankruptcy and combine their assets to form a new MSS/ATC competitor that is financially and operationally viable for the long term. They also will enable the continued availability of the innovative hybrid MSS/cellular service currently offered by TerreStar in bankruptcy via the GENUS™ handset (or a successor device). The Commission consistently has found that license transfers effectuating bankruptcy-related restructurings provide *bona fide* public interest benefits by facilitating the retirement of debt, access to new capital, and the introduction of new services and the continuation of existing services.[89] In addition, the transactions will enable TerreStar and DBSD's creditors to realize a meaningful recovery on their debt holdings.

DISH's acquisition of TerreStar's and DBSD's MSS authorizations and assets will also place these underutilized assets under the control of a well-financed, capable, and recognized innovator in communications technology with unique experience in developing a greenfield competitive mass-market satellite service. Specific synergies will be derived by combining

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[87] *See, e.g.*, *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978).

[88] *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009).

[89] *See, e.g.*, Iridium Holdings LLC and GHL Acquisition Corp., *Memorandum Opinion and Order and Declaratory Ruling*, 24 FCC Rcd. 10725, 10736 ¶ 26 (2009) (finding that a transaction facilitating the retirement of debt and improving access to capital is likely to offer substantial public benefits); International Authorizations Granted, Public Notice, 19 FCC Rcd. 4079, 4080 (2004); Space Station Licensee, Inc. and Iridium Constellation LLC, *Memorandum Opinion and Order*, 17 FCC Rcd. 2271, 2288-89 ¶¶ 40-44 (2002); ICO-Teledesic Global Ltd., *Memorandum Opinion and Order*, 16 FCC Rcd. 6403, 6407 ¶ 10 (2001); *see also* Loral/Qualcomm Partnership, *Order*, 10 FCC Rcd. 2333, 2334 ¶ 12 (1995) (holding that, even if a "major" change of ownership occurs, it is in the public interest when it is motivated by a need for financing).

DBSD and TerreStar's assets and experience with those of DISH and its affiliates. DISH's existing base of approximately 14 million customers is a ready potential market for hybrid MSS/ATC services. DISH has more than two decades of experience providing retail direct-to-home services and has a bricks-and-mortar presence across the nation in sales, support, and maintenance. DISH's Blockbuster acquisition has further enhanced DISH's ability to reach consumers through 1,500 retail stores spread across the country. Further, DISH and its affiliates, including EchoStar Corporation and its subsidiaries, Hughes Network Systems and Sling Media, have existing relationships with suppliers and consumer electronics manufacturers that the MSS/ATC business can draw on. Moreover, the existing, robust revenue stream generated by DISH from its satellite television services, as well as DISH's access to the capital markets at competitive rates, will enable DISH to bring financial stability and leverage to DBSD and TerreStar's MSS/ATC operations.

DISH's plans to deploy a technically integrated advanced MSS/ATC system employing the latest in satellite and terrestrial technologies and using the full 40 MHz of S-Band spectrum will introduce a much needed, national competitor for mobile broadband. This use of the spectrum directly advances the Administration's and the Commission's priority to encourage the deployment of mobile broadband services.[90] At the same time, DISH's mere presence as a potential competitor may drive down existing mobile broadband prices. Because the incumbent providers will view DISH's entry as credible, these providers may lower prices and enhance service offerings in advance of DISH's actual entry in an effort to forestall the potential for lost

[90] *See, e.g.*, The White House, Presidential Memorandum: Unleashing the Wireless Broadband Revolution (June 28, 2010) ("Presidential Memorandum"), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution; Genachowski CTIA Remarks at 4.

market share.[91] Consequently, consumers may benefit almost immediately from DISH's presence in the field.

Finally, multiple economic advantages will flow from having a single provider operating a unified 40 MHz hybrid MSS/ATC network in the 2 GHz band in lieu of a bifurcated band between two operators. First, building and operating one network instead of two will naturally result in substantial savings. In buildout costs alone, these savings are in the billions of dollars for a national system. Second, with a single network and business, there will be no need to maintain two separate sales, support, installation, customer service, and maintenance infrastructures. Annual operating cost savings will be in the tens – if not hundreds – of millions of dollars. Third, a larger network with the potential for a larger customer base will allow DISH to achieve economies of scale discounts with network equipment and consumer device manufacturers that would not otherwise be achievable. DISH estimates that savings flowing from achievable economies of scale and end-user device development could range between 20 and 30 percent.[92] This same economy of scale translates again into lower per unit interconnection costs. Each dollar saved in capital expenditures, development costs, or operating expenses means lower prices for consumers.

On the ledger opposite these immense transaction-specific benefits, MetroPCS places a single item: the specter of "another failed implementation for the 2 GHz band."[93] As a threshold matter, this predicted harm would be the likely result of a denial by the Commission of the

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[91] *See* Austan Goolsbee and Chad Syverson, *How Do Incumbents Respond to the Threat of Entry? Evidence from the Major Airlines* 17-18 (National Bureau of Economic Research, Working Paper No. 11072) (Jan. 2005) (concluding that merely the threat of competitive entry is enough to make incumbents lower prices and improve services).

[92] Cullen Declaration ¶¶ 12-15.

[93] MetroPCS Petition to Deny at 5.

transactions and waiver requests rather than approval by the Commission. Moreover, the Commission is foreclosed statutorily from considering the alternatives that MetroPCS suggests, because it "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."[94] Furthermore, MetroPCS does not, and indeed cannot, contend that such a result is the likely outcome of the transactions. Thus, MetroPCS' assertions are precisely the type of speculative harm that the Commission previously has refused to entertain.[95]

B. Additional Conditions Would Be Detrimental to the Public Interest

Sprint asks the Commission to impose an aggressive implementation timeline as a condition to the Commission's grant of the Applications, but offers no adequate justification for imposing such a requirement, which is neither necessary nor practicable and will detract from the public interest. As an initial matter, the Commission should discount a request by an incumbent competitor to impose an unduly compressed buildout schedule – especially a buildout schedule that likely can only be fulfilled through an arrangement with such an incumbent, like LightSquared's $9 billion network deployment agreement with Sprint to "accelerate completion of LightSquared's nationwide 4G-LTE network."[96]

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[94] 47 U.S.C. § 310(d).

[95] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd. at 12380 ¶ 68 (rejecting a claimed harm because "is not clear whether the merged company will choose to use only one weather information service or, if so, which one that will be"); General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Ltd., *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 583, 585 ¶¶ 244, 248 (2003); Applications of Comcast Corp. and AT&T, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23308 ¶ 160 (2002).

[96] Press Release, Sprint Nextel Corporation, Sprint Nextel and LightSquared Announce Spectrum Hosting and Network Services Agreement (July 28, 2011), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=1989.

Sprint's proposal seems further misplaced given that the Applicants expressly proposed a buildout timeline based on the buildout conditions imposed on Sprint itself in the Nextel and Clearwire transactions and given Sprint's history of requesting a waiver of every deadline in the 800 MHz relocation.[97] In any event, such a "set up for failure" condition would be in no one's interest; it would be a lose-lose-lose for the Applicants, the Commission, and the public alike.

The Sprint/Nextel and Sprint/Clearwire precedents are more appropriate here for several reasons. First, there are substantial differences between the business models proposed by LightSquared and DISH.[98] Unlike DISH, LightSquared proposed exclusively to provide wholesale services. Wholesale providers are faced with less complex challenges than integrated retailers when building their businesses. Wholesalers are only required to deliver a broadband connection, which retail providers then integrate into commercial products and devices over time. In contrast, a facilities-based retail provider like DISH needs to offer from the start commercial products and devices that are fully integrated with respect to available spectrum

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[97] *See* Letter from Brett S. Haan, 800 MHz Transition Administrator, LLC., to David L. Furth, FCC, WT Docket No. 02-55 (filed May 13, 2011); Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (filed Feb. 11, 2011); Letter from Brett S. Haan, 800 MHz Transition Administrator, LLC., to David L. Furth, FCC, WT Docket No. 02-55 (filed Nov. 15, 2010); Letter from Brett S. Haan, 800 MHz Transition Administrator, LLC., to David L. Furth, FCC, WT Docket No. 02-55 (filed May 25, 2010); Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (filed Jan. 27, 2010); Letter from Brett S. Haan, 800 MHz Transition Administrator, LLC., to David L. Furth, FCC, WT Docket No. 02-55 (filed Nov. 2, 2009); Letter from Brett S. Haan, 800 MHz Transition Administrator, LLC., to David L. Furth, FCC, WT Docket No. 02-55 (filed May 1, 2009); Letter from Lawrence R. Krevor, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (filed June 25, 2008); Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (filed May 1, 2008); Letter from Lawrence R. Krevor and James B. Goldstein, Sprint Nextel Corporation, to Marlene H. Dortch, FCC, WT Docket No. 02-55 (filed Nov. 10, 2005).

[98] Sprint even acknowledges that these differences limit the potential applicability of the LightSquared conditions to DISH's business model. Sprint Petition to Condition Waivers at 14 n.50.

resources, device and infrastructure technologies, and multiple customer service offerings (*e.g.*, data, voice, and video). As a result, it takes substantially longer for a retail provider to launch a "greenfield" service than it may take for a proposed wholesale provider, such as LightSquared, to launch one.

In addition, in contrast with LightSquared, the proposed transactions here present the arduous challenge of integration. DISH will have to integrate two MSS licensees, two business plans and two nascent operations, while concurrently restoring TerreStar and DBSD's businesses to a solid financial footing. By contrast, the LightSquared acquisition did not involve the integration of multiple MSS/ATC licensees[99] or the challenges inherent in the emergence of an MSS provider from bankruptcy. Given these challenges – challenges that DISH is prepared to address – it is unnecessary to saddle DISH with the deployment milestones and other conditions to which LightSquared volunteered and which Sprint is now a partner in implementing.[100]

Second, an acceleration of DISH's proposed buildout schedule also disregards the expected schedule of continuing LTE standard-setting and commercial deployment. DISH anticipates building a competitive broadband network using the latest LTE Advanced technology, which will enable DISH to design a highly efficient terrestrial network that can be adapted to changing customer preferences and traffic patterns.[101] Efficiency is a significant

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[99] LightSquared withdrew its application to gain control over a second MSS operator. *See* Satellite Communications Services Information: Re: Actions Taken, Public Notice, Report No. SES-01253 (rel. June 16, 2010) (dismissing File No. SES-STA-20080822-01085).

[100] *See* Sprint Nextel and LightSquared Announce Spectrum Hosting and Network Services Agreement, Sprint News Releases (July 28, 2011), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=1989.

[101] LTE Advanced will offer important new enhancements, including the increased data speeds and network capacity that can be obtained through Carrier Aggregation (CA), Inter Cell Interference Coordination (eICIC), Relay, Cooperative Multipoint (CoMP), Self Optimizing Networks (SON), downlink Multi-User MIMO and uplink Single-User MIMO. These features are designed to enhance network capacity and simplify the process of testing and optimizing

concern for DISH because even after the consummation of the proposed transactions, DISH will hold substantially fewer spectrum resources than the terrestrial broadband providers with whom DISH hopes to compete.[102] Sprint calls for an ill-advised accelerated buildout schedule based on its view that DISH should launch with an LTE Release 8 network and later upgrade to LTE Advanced when the equipment designed for LTE Release 10 (or subsequent releases) becomes available.[103] By contrast, a realistic buildout schedule must take into account the unfolding timeline for the standardization of key LTE Advanced releases and the availability of commercial devices consistent with these standards. Sprint ignores these realities.[104] As discussed below, completing technical and frequency band standards and developing devices, base stations, and other core infrastructure will likely take DISH's partners at least 24-36 months. With such a timeframe, it would be imprudent to pursue LTE Release 8 rather than LTE Advanced.

Deploying with Release 8 equipment would not speed the delivery of wireless broadband services as much as Sprint suggests because the gating factor is the development of new equipment based on an optimized Band 23 (S-Band) definition. As a practical matter, frequency bands are independent of LTE release availability. The S-Band was approved as 3GPP Band 23

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networks, which are especially valuable for the deployment of a nationwide wireless network intended to compete against mature and entrenched incumbents.

[102] *See* TerreStar-DISH Application at 23-30 (demonstrating that the transaction will facilitate the more efficient use of 2 GHz MSS spectrum); Amendment to DBSD-DISH Application at 3-4 ("Combining the two 2 GHs MSS spectrum assignments will greatly increase DISH's ability to make efficient use of the S-band spectrum . . . ."). Another important standard-setting improvement that has yet to be undertaken is the support for certain potentially valuable combinations of MSS/ATC 2 GHz band and other spectrum.

[103] *See* Sprint Petition to Condition Waivers at 12-13.

[104] In addition, Sprint's own comments acknowledge the infirmity of its argument, acknowledging that predictions of backwards compatibility may not be fully met. *See* Sprint Petition to Condition Waivers at 13. Sprint argues nevertheless that DISH should be held to an unreasonable and inefficient buildout based on LTE Release 8.

in June 2011. This standard addresses all inter-band relationships and supported two intra-band operators. If the Commission approves the transactions and grants the requested waivers, the standard likely will be updated to harmonize the band for single operator use, including simplification of duplex spacing and the addition of support for all channel bandwidths. It is expected that this process would be completed by the June 2012 plenary meeting of 3GPP. Equipment vendors would only then be able to fully engage in the development process for S-Band equipment. S-Band device availability would be targeted for mid-2014, based on the minimum chipset development cycle times and device integration efforts. As a natural consequence, a realistic timeframe for the design and rollout of an entire network ecosystem based on either LTE Release 8 or LTE Release 10 is essentially the same – and neither can realistically be accomplished in the timeframe Sprint has proposed.

Investing in LTE Release 8 infrastructure ahead of the availability of LTE Release 10 devices would add considerable redeployment and configuration expense. Specifically, if DISH were to build a network based on Release 8, and then have to upgrade the entire network to Release 10 or 11 to remain competitive, software and likely hardware changes would be required affecting every single base station in DISH's network – a very steep upgrade cost.

Further, Sprint seeks the imposition of LightSquared's wholesale restrictions, pricing, leasing, and data traffic conditions.[105] DISH will continue to focus on the residential consumer rather than proposing a potential wholesale service as LightSquared did, thus obviating the need for wholesale restrictions. Specifically, DISH seeks to leverage and expand upon its experience and existing satellite operations so that it can become the provider of fixed and mobile video,

[105] *Id.* at 10-11.

data and voice services and the first to provide all those services on one bill to the consumer.[106] As even Sprint acknowledges, these differences mean that the LightSquared conditions really have no applicability.[107]

Sprint's proposed leasing and data restrictions are unwarranted. Sprint proposes that DISH be required to obtain prior Commission approval before DISH could lease spectrum to Verizon or AT&T or provide more than 25% of its terrestrial traffic to Verizon and AT&T combined in any Economic Area within a 12-month period, subject to quarterly reports regarding overall traffic amounts on the terrestrial network.[108] But since the LightSquared conditions were adopted, the Commission largely addressed the first point by extending the spectrum leasing rules to MSS/ATC, thereby giving the Commission the ability to intervene and evaluate a spectrum leasing arrangement with Verizon or AT&T if it deems such a review necessary.[109] Moreover, these conditions are not transaction-specific, and there is no need to impose these conditions because DISH seeks to compete with AT&T and Verizon, not support them.

Sprint's requested condition regarding satellite spectrum and reporting arising from the concern that DISH would not really offer satellite services is also misplaced.[110] There is no need to impose these conditions because DISH is an experienced provider of mass market satellite services with a long track record of business success.

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[106] *See* Tim Warren, *Spectrum Fees Would Slow MSS Spectrum Development, Say Ergen, Monroe*, Comm. Daily, Oct. 19, 2011, at 6-7 (citing DISH Chairman Charlie Ergen on DISH's plans for service following the acquisition of DBSD and TerreStar).

[107] *LightSquared ATC Order*, 26 FCC Rcd. 566.

[108] Sprint Petition to Condition Waivers at 10.

[109] *See, e.g.*, *MSS Flexibility Order*, 26 FCC Rcd. 5710.

[110] *See* Sprint Petition to Condition Waivers at 13-15.

Finally, the Commission should reject a competitor's call for a pricing condition. Sprint would indeed benefit from restrictions on DISH's pricing, particularly if the restrictions made it more difficult for DISH to underprice Sprint's offerings. Sprint offers no specific justification for imposing these conditions other than that they were imposed on LightSquared, and such restrictions would not be in the interest of competition or consumers.

C. Sprint's Demand for Money Belongs in the Bankruptcy Courts

The Commission is not the proper forum for Sprint's claims against DBSD and TerreStar, both of which are subject to bankruptcy court protection. Congress has made an unequivocal determination that the public interest is best served by exclusively empowering the bankruptcy courts to determine and discharge a debtor's pre-bankruptcy debt,[111] "even when the obligation to pay it is also a regulatory condition."[112] Section 1141(c) of the Bankruptcy Code requires that "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors . . . ."[113] Even if Sprint's turning to DISH as a supposedly fresh target were not an impermissible attempt to circumvent the restrictions of the bankruptcy process, this proceeding is most assuredly not the proper forum for Sprint's grievances.

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[111] The Supreme Court in *Local Loan Co. v. Hunt* said:

> One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

292 U.S. 234, 244-45 (1934) (internal citations omitted).

[112] *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 303 (2003).

[113] 11 U.S.C. § 1141(c).

1. The Requested Condition Is Unprecedented

Sprint fails to cite to a single example of the Commission conditioning a transfer of control on the payment of spectrum relocation reimbursement obligations. The reason for Sprint's failure is simple: there is no such precedent. The Commission has already rejected Sprint's contention that the MSS licensees' exit from bankruptcy should be conditioned on payment to Sprint when it approved the predecessor DBSD bankruptcy plan.[114] Instead of imposing such a condition, the Commission simply noted that it had already issued an opinion regarding Sprint's ability to seek reimbursement from DBSD in its *September 2010 Order*,[115] and saw no reason to revisit that decision in the context of the transactions.[116] As for the ATC authorization, the Commission merely indicated that Sprint's claim would be dealt with elsewhere.[117] Rather than help Sprint, this accentuates the point that this is an inappropriate forum for resolution of Sprint's claim.

Sprint's claims have yet to be determined in the underlying bankruptcy proceedings. Sprint's filing is another in a long line of attempts to highjack unrelated Commission proceedings to make collateral attacks on the bankruptcy process, despite the rebuffs issued to it by bankruptcy judges for Sprint's pursuit of this very same approach.[118]

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[114] New DBSD Satellite Services G.P., *Order*, 25 FCC Rcd. 13664 (2010) ("*New DBSD Order*").

[115] *See* Improving Public Safety Communications in the 800 MHz Band, *Fifth Report and Order and Declaratory Ruling*, 25 FCC Rcd. 13874, 13900 ¶ 63 (2010) ("*September 2010 Order*").

[116] *New DBSD Order*, 25 FCC Rcd. at 13669 ¶ 12.

[117] *See DBSD ATC Order*, 24 FCC Rcd. at 183 ¶ 34.

[118] In 2009, the Bankruptcy Court overseeing DBSD's bankruptcy refused to impose joint and several liability on DBSD's co-debtors and that decision was upheld despite Sprint's arguments that the Commission had decided that issue. *In re DBSD N. Am., Inc.*, No. 09-13061 (REG), 2009 Bankr. LEXIS 3036, at *12 (Bankr. S.D.N.Y. Sept. 30, 2009) ("[d]etermining the right of a party to assert a claim against a debtor is a classic function of the Bankruptcy Court"), *aff'd*, 427 B.R. 245 (S.D.N.Y. 2010). In August 2011, the Bankruptcy Court overseeing the TerreStar case rejected Sprint's contentions that its reimbursement claim should be treated specially and given

2. Sprint's Claims Belong in the Bankruptcy Courts

The validity and amount of Sprint's claims against DBSD and TerreStar are the subject of ongoing litigation that will ultimately be resolved by the respective bankruptcy courts having jurisdiction over the DBSD and TerreStar bankruptcy cases (unless resolved consensually by the parties to such litigation). In the DBSD case, the plan confirmed by the bankruptcy court contemplates payment in full of Sprint's claim, in whatever amount it is ultimately allowed.[119] Sprint's ultimate recovery on its claim against TerreStar will depend on the amount of value that is available for distribution to TerreStar's unsecured creditors after full satisfaction of all secured, administrative, and priority unsecured claims against TerreStar, and the allowed amount of Sprint's claim as compared to the aggregate amount of allowed unsecured claims against TerreStar.

The bankruptcy courts are reviewing the validity and amount of Sprint's claims based on Sprint's submissions of its relocation expenditure records and discovery undertaken in an

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priority over creditors holding a security interest in the value of TerreStar's licenses. Citing *Nextwave*, Judge Lane stated "If the FCC wished to expressly condition TerreStar's use of the license on full reimbursement, the FCC had several opportunities to do so. It did not. … Sprint's argument ignores that it is the role of the Bankruptcy Court, not the FCC, to determine the priority of Sprint's claim vis-à-vis other parties' claims."). *In re TerreStar Networks*, --- B.R. ----, 2011 WL 3654543, *15-16 (Bankr. S.D.N.Y. Aug. 19, 2011).

[119] Sprint's reliance on language in DBSD's bankruptcy proceedings as evidence that the Commission may consider Sprint's claim outside the bankruptcy process is unavailing. Sprint refers to the order confirming DBSD's plan of reorganization ("Plan"), which states that "[t]he Plan leaves unaltered the legal, equitable, and contractual rights to which the Sprint Claim entitled Sprint." But that passage means simply that the Plan does not alter Sprint's rights as they otherwise exist in bankruptcy. This language points to the difference between the bankruptcy concepts of unimpairment of a claim (*i.e.*, leaving a creditor's legal, equitable and contractual rights unaltered, whatever those rights may be) and allowance of a claim (*i.e.*, the determination the validity and amount of a creditor's claim). DISH's liability would be limited to paying in cash the full amount of the claim that is ultimately allowed by the DBSD Bankruptcy Court. Payment of the entire amount of the claim that the bankruptcy court allows in cash and in full is what makes Sprint's claim "unimpaired" because that is what Sprint would receive if it were to obtain an identical judgment in its favor outside of a bankruptcy court case.

adversarial setting. They are reviewing the legal right of Sprint to make its claims under applicable law, as well as the factual basis for the amount to which Sprint believes it is entitled. The Commission has determined previously that resolution of disputes arising over individual cost sharing obligations is more appropriate in a separate forum that will allow for the provision of evidentiary support.[120] In short, the bankruptcy courts are engaged in just the kind of full review of Sprint's claims that the Commission envisioned. Once the amounts of Sprint's allowed claims against TerreStar and DBSD, if any, are determined, Sprint will receive distributions on account of such claims in accordance with the chapter 11 plan confirmed in the DBSD case, any chapter 11 plan that is ultimately confirmed in the TerreStar case, and the Bankruptcy Code. Upon the making of such distributions by TerreStar and DBSD, Sprint's claims against such entities will be discharged forever, having been paid in full or otherwise fully satisfied and extinguished.

3. The D.C. Circuit Proceeding Is Fully Applicable to DISH

Sprint's claims also depend on the outcome of yet another proceeding – that pending before the Court of Appeals for the D.C. Circuit, which is reviewing the Commission's *September 2010 Order*.[121] This proceeding goes to the threshold issues of, among other things, the trigger to the reimbursement obligations and the sunset date for these obligations. In particular, DBSD and ICO have argued that the Commission has changed the rules that define that trigger and that sunset date with improper retroactive effect. Should DBSD's appeal prevail

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[120] *September 2010 Order*, 25 FCC Rcd at 13902 ¶ 69.

[121] *See ICO Global Communications (Holdings) Ltd. v. FCC*, Case No. 10-1322 (D.C. Cir.); *New DBSD Satellite Services G.P. v. FCC*, Case No. 10-1401 (D.C. Cir.). The issues before the D.C. Circuit have been fully briefed, and oral argument took place on Friday, October 14, 2011. The court took the cases under advisement after the hearing, and the parties are currently awaiting a ruling from the court.

on those grounds, Sprint's claim may either be altered or eliminated entirely – not only against DBSD and TerreStar, but also against DISH.

Sprint argues that, even if the *September 2010 Order* were retroactive for DBSD or TerreStar, it would not be retroactive as to DISH. But this strange concept of party-specific selective retroactivity has no relevance here. For example, if DBSD had not entered the band as of the cut-off date because it was not ready at that time to commence commercial service, the obligation to Sprint would not have been triggered with respect to DBSD's spectrum assignment, and that is as relevant to DISH as it is to DBSD.

4. Sprint Is Attempting to Subvert the Bankruptcy Process

Despite repeated rebuffs by the bankruptcy and other courts, Sprint's filing merely is another in a long line of attempts to misuse Commission proceedings to make collateral attacks on the bankruptcy process.[122] The Commission rejected Sprint's unsupported contention that the

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[122] *See In re DBSD N. Am., Inc.*, Case No. 09-13061 (Bankr. S.D.N.Y. Sept. 30, 2009), *aff'd* 427 B.R. 245 (S.D.N.Y. 2010); *In re TerreStar Networks, Inc.*, Case No. 10-15446 (SHL), 2011 WL 3654543, at *16 (Bankr. S.D.N.Y. Aug. 19, 2011). Sprint has repeatedly advanced these arguments before the FCC. *See* Petition to Deny of Sprint Nextel Corporation, File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-0091211-00144 (Jan. 14, 2010); Reply of Sprint Nextel Corporation To Opposition of New DBSD Satellite Services, G.P. to Petition to Deny, File Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-0091211-00144 (Feb. 3, 2010). Sprint also filed numerous *ex parte* notices emphasizing similar points in the above transactions. Sprint repeatedly raised the same arguments in the BAS relocation proceeding. *See, e.g.*, Sprint Nextel Corporation, Notice of Ex Parte, WT Docket No. 02-55, ET Docket Nos. 00-258 and 95-18 (Sept. 2, 2010); Sprint Nextel Corporation, Notice of Ex Parte, WT Docket No. 02-55, ET Docket Nos. 00-258 and 95-18 (Sept. 24, 2010) (summarizing the findings of Thomas F. Cooney III regarding liability of ICO Global for BAS relocation costs); *see also* Improving Public Safety Communications in the 800 MHz Band, *Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling*, 25 FCC Rcd. 13874, 13885-86 ¶ 29 (Sept. 29, 2010) ("In this proceeding, however, Sprint Nextel has asserted in numerous record submissions that ICO Global . . . is also liable to Sprint Nextel for the BAS relocation cost reimbursement . . . ."). Sprint has continued this line of argument in more recent rulemaking proceedings involving MSS spectrum. *See* Comments of Sprint Nextel Corporation, ET Docket No. 10-142, WT Docket Nos. 04-356 and 07-195, at 5-9 (July 8, 2011) (arguing that the FCC should confirm and enforce BAS relocation obligations

MSS licensees' exit from bankruptcy should be conditioned on a BAS reimbursement payment to Sprint when it approved the predecessor DBSD bankruptcy plan.[123] Instead of imposing a reimbursement condition, the Commission simply noted that it has issued an opinion regarding Sprint's ability to seek reimbursement from DBSD in its *September 2010 Order* concluding its longstanding efforts to relocate BAS from the 1990-2110 MHz band to the 2025-2110 MHz band,[124] and that it saw no reason to revisit that decision in the context of the transactions.[125]

Sprint, however, misinterprets the *September 2010 Order* by arguing that:

> an assignee would be considered a new entrant and is responsible for unpaid cost sharing associated with a particular portion of the spectrum. However, to the extent that a new entrant seeks to assign its license to a third party prior to satisfying its reimbursement obligation, the assignor and assignee would be jointly and severally liable for the reimbursement costs until paid.[126]

But Sprint gives short shrift to the footnote associated with this text, which states that the Commission does "not here address whether [it] may be required to modify application of this joint and several liability rule in particular cases consistent with the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq*."[127] The important carve-out set forth in this footnote is confirmed elsewhere in the order: "With respect to the DBSD bankruptcy, *any proceedings by Sprint Nextel on a claim for monetary recovery against a debtor in the DBSD bankruptcy case is a matter for*

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before an voluntary auction, return of spectrum rights, or similar approach regarding 2GHz MSS spectrum).

[123] *New DBSD Order*, 25 FCC Rcd. at 13669 ¶ 12.

[124] *See September 2010 Order*, 25 FCC Rcd. at 13900 ¶ 63.

[125] *New DBSD Order*, 25 FCC Rcd. at 13669 ¶ 12.

[126] *September 2010 Order*, 25 FCC Rcd. at 13900 ¶ 63 n.153.

[127] *Id*.

the Bankruptcy Court and is not addressed in this Report and Order and Declaratory Ruling."[128] It is also noteworthy that the Bankruptcy Court presiding over the DBSD bankruptcy cases previously has admonished Sprint Nextel for arguing in favor of FCC determinations of its claim while omitting this statement from the FCC's order.[129] Indeed, Sprint's efforts to bootstrap itself to the Commission's processes have so far failed several times, in both the DBSD and TerreStar proceedings, and before two different courts and should likewise be disregarded here.[130]

The Commission's carve-out to make allowance for the Bankruptcy Code was appropriate and, indeed, necessary. Section 525 of the Bankruptcy Code expressly prohibits governmental entities like the Commission from discriminating against entities, like DISH, because of their "association" with a debtor.[131] In *NextWave*, the Supreme Court determined that debts owed to the Commission as a result of statute or regulation were to be treated the same as other obligations.[132] Therefore, because the Commission had cancelled the debtor's licenses for

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[128] *Id.* at 13907 ¶ 79 (emphasis added); *see also id.* at 13885–86 ¶ 29 ("Sprint Nextel's recovery of any reimbursement claim against the bankrupt debtors will be governed by the proceedings in the bankruptcy court, rather than by this Commission or in the district court case initiated by Sprint Nextel.").

[129] The Court in the DBSD bankruptcy proceeding stated at a hearing:

> Also, I was surprised when I read the reply papers that there was language in the FCC ruling, and of course, I'm talking about paragraph 79, which was seemingly important to this controversy, and which those replying charged Sprint with not even mentioning, and when I went back, in fact, I couldn't find any mention of it by Sprint, and I would like help from Sprint as to why a matter of that seeming importance wasn't addressed in its papers.

In re DBSD N. Am., Inc., Case No. 09-13061 (May 4, 2011 Hearing Tr. 7:22-8:4).

[130] *In re DBSD N. Am., Inc.*, Case No. 09-13061 (Bankr. S.D.N.Y. Sept. 30, 2009), *aff'd* 427 B.R. 245 (S.D.N.Y. 2010); *In re TerreStar Networks, Inc.*, Case No. 10-15446 (SHL), 2011 WL 3654543, at *16 (Bankr. S.D.N.Y. Aug. 19, 2011).

[131] 11 U.S.C. § 525(a). DISH qualifies for protection under § 525 based on its association with DBSD and TerreStar.

[132] *NextWave*, 537 U.S. at 304.

lack of payment during the debtor's bankruptcy, the Court held that the Commission had violated § 525 of the Bankruptcy Code, which prohibits discrimination against debtors or persons associated with a debtor. Just as the Supreme Court rejected arguments that spectrum auction obligations were not debts because they arose from FCC regulations, the bankruptcy court overseeing the TerreStar bankruptcy has already determined that it is the arbiter of claim disputes in bankruptcy.[133]

The Commission, as it must, has been careful not to trespass on Congressional policy judgments embodied in the Bankruptcy Code. The restraint that the Commission displayed in the first DBSD case and the *September 2010 Order* is not a newly minted concept. The Commission has long acknowledged that it may not interfere in the operation of the bankruptcy process[134] and that it must "minimize conflict between its policies and other federal policies such as the bankruptcy statutes."[135] If the Commission were to resurrect debts discharged in the bankruptcy process by making their payment a condition to its approval of a post-bankruptcy transaction, it would subvert the very purpose of the bankruptcy process, which is to provide

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[133] *In re TerreStar Networks, Inc*., --- B.R. ----, 2011 WL 3654543 (Bankr. S.D.N.Y. Aug. 19, 2011) (holding that use of TerreStar's FCC license was not "conditioned" on full reimbursement of band-clearing expenses, and that it is the role of a bankruptcy court, not the FCC, to determine the priority of Sprint's claims vis-à-vis other parties' claims).

[134] *See* Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications Information Administration, 69 FCC 2d 1591 (1978) ("Of central importance is the Commission's lack of authority to interfere with Congressionally created bankruptcy procedures . . . .") (citing *LaRose v. FCC*, 494 F.2d 145 (D.C. Cir. 1974)); Applications of Roy M. Speer, *Memorandum Opinion and Order*, 11 FCC Rcd. 18393, 18419 ¶ 64 (1996) ("[W]e shall not interfere with the bankruptcy proceeding by preventing parties from pursuing procedural rights duly accorded them in that forum."); FOX Television Stations Inc., Licensee of Television Station WNYW, *Declaratory Ruling*, 8 FCC Rcd. 5341, 5349 ¶ 41 (1993) ("We do not intend by our decision here to interfere with the [bankruptcy] court's ongoing deliberative process, including its consideration of the possible existence of other buyers of the Post.").

[135] Applications of Martin W. Hoffman, Trustee-in-Bankruptcy, *Memorandum Opinion and Order*, 12 FCC Rcd. 5224, 5229 ¶ 11 (1997).

debtors "a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[136] The debtors' liability is therefore limited to paying in full any claim allowed by the bankruptcy courts.[137] DISH is not, and cannot be, independently liable as a transferee or assignee of the bankrupt entity for some other or greater amount as a result of these transactions. The Commission should again decline Sprint's invitation to disrupt the bankruptcy process and conclude that Sprint's BAS reimbursement claims are beyond the scope of this proceeding.[138]

Sprint also suggests in a footnote that DISH would be liable to Sprint for reimbursement costs on an enterprise liability theory. But Sprint cannot hope to justify conditioning this transfer under such a theory. As an initial matter, Sprint has not, and cannot possibly, offer any evidence sufficient to show DISH is presently acting jointly with DBSD and TerreStar as a single enterprise. In any event, the Commission expressly noted in the *September 2010 Order*, enterprise liability is an intensely fact-based determination that must be made through an

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[136] *Hunt*, 292 U.S. at 244; *NextWave*, 537 U.S. at 307 n.4 (according "a 'fresh start' … where there is a revocation of a license solely because of a bankrupt's failure to pay dischargeable debts").

[137] The level of underlying claims from which any reimbursement is derived has yet to be determined in the underlying bankruptcy proceedings. Sprint will receive a recovery on account of its claims based on the terms of the confirmed chapter 11 plans in the respective chapter 11 proceedings.

[138] In an attempt to provide a public interest motive to its request for cash money, Sprint contends that not conditioning the transactions would cause future licensees to be unwilling "to assume the burden and cost of clearing spectrum *quickly*" and that the public harm to the Emerging Technologies doctrine outweighs the transactions' benefits. *See* Sprint Petition to Deny Transactions at 13-15 (emphasis added). This claim is misplaced for three reasons. First, licensees undertake band clearing responsibilities for access to spectrum, not because of potential reimbursements. Second, Sprint's behavior has had the exact opposite effect from ensuring spectrum will be cleared "quickly" in the future, as Sprint has now more than doubled the time it was originally allowed to clear the 800 MHz (and the original time frame was what Sprint requested, not something imposed on Sprint). Rewarding Sprint would send the signal that future relocators can dawdle rather that act quickly and with diligence. Third, payment to Sprint is not a public benefit; it is merely a private payment to Sprint.

adversarial, discovery-based process. This proceeding is not the place for such a determination. Even if the Commission were somehow able and willing to evaluate the bankruptcy courts' determinations, this has never been done, and should not be done, in a license transfer proceeding.[139]

V. CONCLUSION

If approved, the proposed transactions and waiver requests will facilitate the development of a new mobile broadband network that promises to do its part to address the "spectrum crunch" facing the nation. The limited objections levied against the Applications represent attempts to thwart competition. Waiting for the unfolding of rulemaking proceedings of uncertain timing and outcome would vitiate the benefits that will flow from DISH's deployment and operation of an integrated MSS/ATC network across all 40 MHz of the 2 GHz MSS band. These benefits are real and concrete, and Applicants urge the Commission to approve the Applications expeditiously without the imposition of unwarranted and unrealistic conditions.

[139] The footnote acknowledges, at least implicitly, that section 363 of the Code (which allows asset sales free and clear) and section 1141(c) of the Code (which transfers all property under a plan free and clear) require a different approach by the Commission.

Respectfully submitted,

_____/s/_____

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Certificate of Service

I, Latoya Brisbane, hereby certify that on this 27th day of October, 2011, copies of the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments were served upon the parties below via First Class Mail and/or electronic mail (individuals receiving copies only by electronic mail noted by *) :

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DECLARATION

I, Jeffrey H. Blum, hereby declare under penalty of perjury that the facts asserted in the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments are true and correct as to DISH Network Corporation and Gamma Acquisition L.L.C. to the best of my information, knowledge and belief.

Executed on October 27, 2011.

Jeff Blum x A.M.

Jeffrey H. Blum
Senior Vice President and Deputy General Counsel

DECLARATION

I, Peter A. Corea, hereby declare under penalty of perjury that the facts asserted in the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments are true and correct as to DBSD North America, Inc., Debtor-in-Possession and New DBSD Satellite Services G.P., Debtor-in-Possession to the best of my information, knowledge and belief.

Executed on October 27, 2011.

/s/ Peter A. Corea
Peter A. Corea
Vice President, Regulatory Affairs
DBSD North America, Inc., Debtor-in-Possession and New DBSD Satellite Services G.P., Debtor-in-Possession

DECLARATION

I, Alexandra Field, hereby declare under penalty of perjury that the facts asserted in the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments are true and correct as to TerreStar Networks Inc., Debtor-in-Possession, and TerreStar License Inc., Debtor-in-Possession to the best of my information, knowledge and belief.

Executed on October 27, 2011.

Alexandra Field

Alexandra Field
SVP Law and Public Policy

DECLARATION

I, Timothy M. Dozois, hereby declare under penalty of perjury that the facts asserted in the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments are true and correct as to Pendrell Corporation to the best of my information, knowledge and belief.

Executed on October 27, 2011.

/s/ Timothy M. Dozois
Timothy M. Dozois
Acting General Counsel
Pendrell Corporation

DECLARATION RELATED TO ENGINEERING INFORMATION

I, John Yakemovic, hereby declare under penalty of perjury that I am the technically qualified person responsible for reviewing the engineering and technical information contained in the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments, that I am familiar with Part 25 of the Commission's rules, that I have either prepared or reviewed the engineering information submitted in this Opposition, and that it is complete and accurate to the best of my information, knowledge, and belief.

Executed on October 27, 2011.

John Yakemovic
Director,
DISH Network Corporation

DECLARATION OF THOMAS CULLEN

I, Thomas Cullen, being over 18 years of age, swear and affirm as follows:

1. I make this declaration in support of the Consolidated Opposition to Petitions to Deny and Response to Comments filed by DISH Network Corporation ("DISH") and other applicants in the proceedings to transfer control of DBSD North America, Inc. ("DBSD") and the FCC authorizations held by TerreStar License Inc., Debtor-in-Possession ("TerreStar") to DISH (Docket No. 11-150), and DBSD and TerreStar's related requests for certain waivers of the Commission's Ancillary Terrestrial Component ("ATC") rules (Docket No. 11-149). I also made a declaration in support of the Consolidation Application for Transfer of Authorizations dated August 22, 2011.

2. I am an Executive Vice President for DISH. I make this declaration based upon personal knowledge, information provided to me, and belief. I will provide a further description of DISH's plans for a nationwide MSS/ATC service, discuss the network deployment's dependency on the applicants' request for a limited waiver of the integrated service requirement to permit DISH to develop and market single-mode, ATC-only handsets, and address some of the benefits expected to come from operating a single MSS/ATC network across the entire 40 MHz of MSS S-band spectrum.

DISH's Network Plans

3. DISH plans to deploy an MSS/ATC system using the full 40 MHz of S-band spectrum with in-orbit active and spare capacity on TerreStar's T-1 and DBSD's G-1 satellites, subject to grant of TerreStar's and DBSD's modification applications and waiver requests, and using the latest in satellite and terrestrial technologies. These broadband services will be offered

over a single, technically integrated network for all satellite and terrestrial traffic. DISH expects the ATC component of this network to ultimately have a national footprint.

4. DISH will support dual-mode devices and, subject to receipt of the requested waivers, single-mode, devices for operation with its national MSS/ATC network.

Significance of Waiver Requests to DISH's Plans

5. To select the optimal technology for its network, DISH must know whether all devices on its network will be dual-mode, or whether the network will also support single-mode units.

6. Multiple technologies and system architectures exist today to provide MSS/ATC services. But some are more efficient, cost less, and are better suited to networks that support both single mode and dual-mode devices.

7. Dual-mode devices will consume satellite resources. Regardless of the amount of satellite service the end-users actually use, a network that supports devices that are all dual-mode must utilize capacity to maintain their ability to access the space segment. On the other hand, more efficient network architectures exist for a network that supports both single- and dual-mode devices.

8. A network that offers only dual-mode devices, with their attendant higher costs and complexity, will attract fewer subscribers. Fewer forecasted subscribers means fewer consumer electronics manufacturers willing to expend the time and resources required to design and manufacture network and consumer equipment in support of this project.

9. DISH has been in discussions with potential chipset, network equipment, and handset manufacturers. These suppliers continue to state that they cannot undertake

development activities for the MSS/ATC network until all requirements, including support for single- and dual-mode devices, are finalized.

10. Without the assurance of the waivers, the only options left to DISH are less efficient and more costly and would threaten DISH's ability to compete on service and price terms with incumbent operators.

11. Grant of the waiver requests is, therefore, likely a prerequisite to commencing substantial buildout activities. Certainly, in the absence of such waivers, buildout could only be carried out at a very slow pace, if it could commence at all.

Benefits from DISH's Planned Network

12. Building and operating one network instead of two will naturally result in substantial savings. In buildout costs alone, these savings are in the billions of dollars for a national system.

13. With a single network and business, there would be no need to maintain two separate sales, support, installation, customer service, and maintenance infrastructures. Annual operating cost savings would be in the tens – if not hundreds – of millions of dollars.

14. A larger network with the potential for a larger customer base will allow DISH to achieve economies of scale discounts with network equipment and consumer device manufacturers that would not otherwise be achievable. This same economy of scale translates again into lower per unit interconnection costs.

15. DISH estimates savings flowing from achievable economies of scale and end-user device development could range between 20 and 30 percent.

The foregoing declaration has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief. Executed on October 27, 2011.

Thomas Cullen
Executive Vice President