

November 30, 2011

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: IB Docket No. 11-149, New DBSD Satellite Service G.P., Debtor-in-Possession, and TerreStar Licensee Inc., Debtor-in-Possession, Request for Rule Waivers and Modified Ancillary Terrestrial Component Authority; IB Docket No. 11-150, DISH Network Corporation Files to Acquire Control of Licenses and Authorizations Held By New DBSD Satellite Services G.P., Debtor-in-Possession and TerreStar License Inc., Debtor-in-Possession

Dear Ms. Dortch:

The Applicants¹ submit the following additional information in support of their request for a limited waiver of the integrated service requirement. Specifically, the Applicants further respond to the contention of the Commercial Mobile Radio Service (“CMRS”) incumbents—including CTIA, T-Mobile, and AT&T—that the Commission’s use of its waiver authority is inappropriate in this instance because it would, in their opinion, effectively extend a waiver of the requirement to all entities affected by the rule.²

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

² See CTIA Comments at 4-13; CTIA Reply Comments at 2-9; T-Mobile Comments at 3-5; AT&T Reply Comments at 2-5. AT&T’s “Reply Comments” mark the company’s first appearance in these proceedings. Although AT&T attempts to style its pleading as some sort of response to comments filed by third parties, all of the issues raised by AT&T in its pleading could have and should have been raised in initial comments or a petition to deny in response to the Commission’s Public Notice. The Commission has made it clear that issues should not be raised by a party for the first time in reply comments. See 47 C.F.R. § 1.45(c) (limiting reply comments to matters raised in oppositions to motions, petition, or request); Applications of Comcast Corp. General Electric Co. and NBC Universal, Inc. for Consent to Assign or Transfer Control of Licensees, *Order*, 25 FCC Rcd. 7521, 7524 ¶ 9 (2010) (proclaiming it “the longstanding requirement in Section 1.45(c) of the Commission’s Rules that, to allow the target of a petition to deny the opportunity to respond to all allegations against it, a ‘reply shall be limited to matters raised in the opposition’”) (quoting 47 C.F.R. § 1.45(c)).

The CMRS incumbents attempt to stand the law on its head. A waiver does not become less appropriate because others have received it. As explained further below, the Commission has often used the waiver process to tailor its rules for individual licensees when the circumstances call for it—even when the result is that the majority, or even all, of the relevant licensees are operating pursuant to specific waivers. The Commission has even issued waivers that apply to an entire industry or to an entire class of people affected by a rule. The Commission has never refused to grant a waiver to an additional entity requesting it on the grounds that the grant would result in “too many” waiver recipients. There is good reason for this: where an applicant’s waiver showing meets or exceeds those of prior waiver recipients, such as the showing made by the Applicants here, denial of such a request would be improperly discriminatory, arbitrary, and capricious.³

I. THE COMMISSION FREQUENTLY WAIVES ITS RULES FOR MOST OR ALL OF THOSE GOVERNED BY THEM WHEN GOOD CAUSE IS SHOWN

Use of the Commission’s waiver authority is not prohibited simply because a number of licensees (and not just one) qualify for the waiver. Indeed, the Commission has often provided waivers to large classes of licensees, particularly when the purpose of its rules is better served by tailoring requirements to the particular circumstances of each licensee.

In the E911 context, for example, the Commission individually waived its Phase II compliance requirements for all five of the nationwide carriers.⁴ Under the Commission’s E911 Phase II rules, each of these carriers was required to provide Automatic Location Identification (“ALI”) according to a deployment schedule that varied depending on the technology used (network-based or handset-based).⁵ All five of the nationwide carriers concluded that the Phase II compliance requirements were not obtainable; yet each carrier requested a separate waiver of the Commission’s rules in order to tailor implementation requirements for the individualized circumstances of the carrier rather than requesting

³ See *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike.”).

⁴ See Request for Waiver by Cingular Wireless LLC, *Order*, 16 FCC Rcd. 18305 (2001) (“*Cingular Waiver Order*”); Request for Waiver by Verizon Wireless, *Order*, 16 FCC Rcd. 18364 (2001) (“*Verizon Waiver Order*”); Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc., *Order*, 16 FCC Rcd. 18277 (2002) (“*Nextel Waiver Order*”); Request for Waiver by AT&T Wireless Services, Inc., *Order*, 16 FCC Rcd. 18253 (2001) (“*AT&T Waiver Order*”); Request for Waiver by Sprint Spectrum L.P. d/b/a Sprint PCS, *Order*, 16 FCC Rcd. 18330 (2001) (“*Sprint Waiver Order*”).

⁵ See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Third Report and Order*, 14 FCC Rcd. 17388, 17405-17 ¶¶ 35-65 (1999) (“*E911 Third Report and Order*”).

reevaluation of the Commission's rules overall. The Commission granted each waiver request to the extent that it found it to be in the public interest.⁶

The Commission also granted several other waivers of its E911 rules across (or nearly across) the board in order to enable service providers to more readily and efficiently comply with the general purpose of the Commission's rules. For example, the Commission waived its interim rules for emergency call handling for all Video Relay Service providers, rather than amending those rules through the rulemaking process, after a provider offered a more efficient solution than that adopted by the Commission.⁷

The Commission's navigation device rules, and the Commission's waivers of them, provide another instructive example. Many of these waivers were nearly (or totally) industry wide. The Commission repeatedly gave cable operators waivers of the deadline for compliance with the ban on integrated set-top boxes.⁸ The Commission also provided extensive waivers of its ban on integrated set-top boxes to allow all of the major set-top box manufacturers to produce certain "one-way, low-cost, limited-capability set-top boxes," based on individualized showings by each manufacturer.⁹ Although the Commission subsequently pursued a rulemaking that in effect encompassed the waiver relief,¹⁰ in 2009 it nonetheless chose to follow a more nimble route and use its waiver authority to provide consolidated relief to the requesting manufacturers.¹¹

⁶ *Cingular Waiver Order*, 16 FCC Rcd. at 18305 ¶ 1; *Verizon Waiver Order*, 16 FCC Rcd. at 18364 ¶ 1; *Nextel Waiver Order*, 16 FCC Rcd. at 18277 ¶ 1; *AT&T Waiver Order*, 16 FCC Rcd. at 18253 ¶ 1; *Sprint Waiver Order*, 16 FCC Rcd. at 18330 ¶ 1. Indeed, the Commission used its waiver authority to alter the requirements for the nationwide carriers, even though it was simultaneously using its rulemaking authority to alter the Phase II compliance requirements for smaller carriers. *E911 Third Report and Order*, 14 FCC Rcd. at 17391 ¶ 8.

⁷ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers, Order*, 23 FCC Rcd. 13747 ¶ 2 (2008) (finding that the waiver request offered a "more efficient method of ensuring that emergency response personnel can re-establish contact with an emergency caller whose call has become disconnected").

⁸ See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, Report and Order*, 18 FCC Rcd. 7924, 7926 ¶ 4 (2003) (extending the effective date of the integration ban until July 1, 2006); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, Second Report and Order*, 20 FCC Rcd. 6794, 6813-14 ¶ 37 (2005) ("*2005 Deferral Order*") (extending the effective date of the integration ban until July 1, 2007).

⁹ See, e.g., *2005 Deferral Order* 20 FCC Rcd. at 6814 ¶ 37 (creating a streamlined process for obtaining individualized waivers of the integration ban for certain low-cost devices); *Requests for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Memorandum Opinion and Order*, 24 FCC Rcd. 10939, 10939 ¶ 1 (2009).

¹⁰ *Third Integrated Ban Order*, 25 FCC Rcd. at 14681 ¶ 49.

¹¹ See *Requests for Waiver of Section 76.640(b)(4)(ii)*, 25 FCC Rcd. 7539 (2010) (waiving the rule for all set-top boxes that include an IP-based interface pending the outcome of a future rulemaking).

In other proceedings, the Commission has repeatedly granted Sprint various waivers of its obligations related to its relocation of public-safety licensees and Broadcast Auxiliary Service operators—even though, by definition, Sprint is the only licensee affected by the rules being waived.¹² And once again in the E911 context, the FCC recently provided a temporary waiver of the information collection requirements of subsections 20.18(h)(1)(vi) and (2)(iii) for E911 location accuracy for all affected parties.¹³

As the above examples demonstrate, the Commission is not required to act through its rulemaking authority when a waiver request affects all—or potentially all—licensees subject to the relevant rule. Indeed, the Commission has not shied away from industry wide waivers. In fact, it would violate fundamental tenets of administrative law for the Commission to have a rule or policy against such waivers. The Commission could not properly say that it will continue granting waivers to entities that meet the applicable test until the last member of an industry requests one, or until the sum total of the waivers granted would make up a majority of industry participants. It is an axiom of administrative law that similarly situated parties should be treated the same.¹⁴ Denying a waiver to the last (or third or fourth) comer, even though it may be more qualified to receive one than its predecessors, would violate that rule.¹⁵

The spare-satellite requirement is a good illustration of this principle in the current proceeding. The Commission has already effectively waived the geosynchronous (“GSO”) spare satellite requirement for the only GSO MSS/ATC licensees not involved in the present transaction.¹⁶ LightSquared (the other GSO MSS/ATC licensee) received a waiver of the rule because Commission concluded that the ground-spare requirement is not the most efficient way of protecting the public from a long-term MSS outage.¹⁷ And, of course, no one in the proceeding has challenged the Applicants’

¹² See, e.g., Improving Public Safety Communications in the 800 MHz Band, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, *Order*, DA-11-1662, ¶ 1 (2011) (rel. Oct. 3, 2011).

¹³ See Wireless E911 Location Accuracy Requirements, *Order*, 26 FCC Rcd. 9238, 9240 ¶ 6 (2011).

¹⁴ See *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike.”).

¹⁵ See *id.* (“If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases”); see also *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) (“On the other hand, once an agency agrees to allow exceptions to a rule, it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar. A ‘sometime-yes, sometimes-no, sometimes-maybe policy of [deadlines] cannot . . . be squared with our obligation to preclude arbitrary and capricious management of [an agency’s] mandate.’”) (quoting *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984)).

¹⁶ The ground-spare rule requires GSO MSS operators to complete construction of a spare satellite within a year of beginning commercial operations—to be kept on the ground for emergency launch in case of a catastrophic failure of its in-orbit MSS satellite. 47 C.F.R. 25.149(b)(2)(ii).

¹⁷ See Mobile Satellite Ventures Subsidiary LLC; Application for Limited Waiver of On-Ground Spare Satellite Rule, *Order and Authorization*, 22 FCC Rcd. 20548, 20552 ¶ 12 (2007).

request to waive the spare satellite requirements on the grounds that it must be accomplished through a rulemaking. It would be wrong to stop short of granting a waiver when, as in this case, the public interest requires it, simply out of a concern that the waiver would apply across all affected parties.

If anything, the integrated service waiver offers even more unsuitable soil for such concerns. Such a waiver is currently in effect for only one other entity, out of the six total MSS licensees that have received (or could receive) an ATC license.¹⁸ The Commission should grant a waiver of that ATC rule, too, where a requesting party shows good cause based on its individual circumstances, as the Applicants have done here, regardless of the priority number of the request.

II. THE REQUESTED WAIVERS ARE THE ONLY COURSE OF ACTION THAT WILL ALLOW EXPEDITIOUS USE OF THE SPECTRUM

Not only is the Commission's use of its waiver authority procedurally appropriate in this case, it is also good public policy. The waiver process allows the Commission to craft targeted conditions to address the specific requests and circumstances of the Applicants and, as a result, to put the 2 GHz spectrum to use expeditiously. This is of particular significance here, given that the waivers requested and the circumstances presented in this instance differ from those of LightSquared and Globalstar, and given DISH's commitment to build a next-generation MSS/ATC network. As the D.C. Circuit has stated, "[t]he FCC has an obligation to seek out the 'public interest' in *particular* matters and *individualized* situations."¹⁹

Each applicant for a waiver of the integrated service requirement has presented the Commission with unique facts and circumstances that demand the tailored approach typified by the waiver process. First of all, there are significant technical differences among the various MSS bands themselves that require particularized determinations regarding ATC service—as the LightSquared and Globalstar proceedings demonstrate.²⁰ Second, each applicant thus far has come to the Commission with different business models and technical backgrounds, which dramatically alter the necessary scope of the waivers requested and the timing for network buildout. These differences are very difficult to adequately address in a rulemaking of general application. Indeed, to account adequately for the particular

¹⁸ While Globalstar previously received a waiver of the ATC gating requirements, that waiver has since been suspended. *See* Globalstar Licensee LLC, Application for Modification of License to Extend Dates for Coming into Compliance with Ancillary Terrestrial Component Rules, *Order*, 25 FCC Rcd. 13114, 13115 ¶ 1 (2010) ("*Globalstar ATC Order*").

¹⁹ *P&R Tamer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984) (*citing* *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)) (emphasis in original).

²⁰ *See* LightSquared Subsidiary LLC Request for Modification of its Authority for an Ancillary Terrestrial Component, *Order and Authorization*, 26 FCC Rcd. 566, 569 ¶ 9 (2011) (recognizing the unique interference issues the L-Band presents and other MSS bands do not); *Globalstar ATC Order*, 23 FCC Rcd. at 1581-82 ¶¶ 13-16 (citing Globalstar's inability to meet the specific technical requirements of the LEO band as a reason to for granting waiver of the gating requirements).

differences among the MSS bands, as well as among the MSS/ATC operators, the rulemaking would have to be so narrowly tailored to each licensee as to be an adjudication in all but name, defeating the purpose of conducting a rulemaking in the first place.

The requested waiver will also allow DISH to begin the long lead-time process of building its ATC network now, rather than beginning at some point in the indefinite future at the completion of a rulemaking. As the Applicants previously explained, DISH cannot invest the considerable time, effort, and expense required to build its proposed next-generation network until it has the regulatory certainty necessary to validate its proposed business model.²¹ The waiver process allows the Commission to put this spectrum to use expeditiously. Indeed, it is the prospect of a burgeoning competitive service—not the need for reevaluation of the integrated service rule—which has caused the CMRS providers to urge delay-by-rulemaking.²²

III. CONCLUSION

The Commission's use of its waiver authority here is procedurally appropriate, in the public interest, and, indeed, the best course available to put this valuable spectrum to use quickly. The Commission's previous grant of waivers to other ATC licensees does not prevent the Commission from granting relief to the Applicants here. To the contrary, it would be discriminatory for the Commission to deny subsequent waiver requests on the ground that other similarly situated entities had received similar waivers. For these reasons, the Applicants respectfully request the Commission's expeditious grant of these waiver requests.

²¹ See DBSD, TerreStar, and DISH Consolidated Opposition to Petitions to Deny and Response to Comments, at 14-15.

²² Nor is this cause of action precluded or inhibited in the least by the possibility of a rulemaking. In fact, Commission precedent dictates the consideration of a waiver request on the merits even where a pending rulemaking proceeding is contemplated or even underway. For example, even with a pending rulemaking proposing to eliminate the requirement that manufacturers specifically include an IEEE 1394 interface in cable set-top boxes, the Commission instructed the Media Bureau to process waiver requests seeking to include an IP-based interface instead "in the normal course of business." See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices and Compatibility Between Cable Systems And Consumer Electronics Equipment, *Fourth Notice of Proposed Rulemaking*, 25 FCC Rcd. 4303 ¶ 20 (2010) ("*Fourth FNPRM*"); Intel Corporation, Motorola, Inc., TiVo, Inc.; Requests for Waiver of Section 76.640(b)(4)(ii) of the Commission's Rules, *Memorandum Opinion and Order*, 25 FCC Rcd. 7539 ¶ 1 n.2 (2010) (citing *Fourth FNPRM*, 25 FCC Rcd. at 4311 n.50). "[W]hen the Commission receives a request for waiver that is 'stated with clarity and accompanied by supporting data,' such requests 'are not subject to perfunctory treatment, but must be given a hard look.'" *Id.* ¶ 6 (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)). The Bureau, thus, addressed and granted interim waivers for all set-top boxes that included an IP-based interface, even as a rulemaking was pending. *Id.* ¶ 1. Here, too, the Commission should act swiftly to address the merits of the pending waiver requests.

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