

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

In the Matter of )  
 )  
**LightSquared Subsidiary LLC** ) File No. SAT-MOD-20101118-00239  
 )  
Request for Modification of its Authority for )  
an Ancillary Terrestrial Component )  
  
To: The Commission

**APPLICATION FOR REVIEW**

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## SUMMARY

The Commission must reverse and vacate the International Bureau's Order modifying LightSquared Subsidiary LLC's L-Band mobile-satellite service ("MSS") license because the *Waiver Order* is in conflict with statute, regulation, case precedent and established Commission policy. The *Waiver Order* eviscerates a key component of the MSS Ancillary Terrestrial Component ("ATC") rules and is based on procedural error prejudicial to the Council. If allowed to stand, the *Waiver Order*'s terms will threaten the operation of millions of Global Positioning System ("GPS") receivers.

The Bureau's action exceeded the scope of its delegated authority by addressing novel issues not previously considered by the Commission and on which existing policy mandated a contrary result. The fundamental changes it makes to the MSS ATC rules should only have been undertaken by the Commission through a rulemaking proceeding after developing a full record. Such a proceeding is already underway, and by acting unilaterally to grant a single licensee modified authority, the Bureau has undercut the authority of the Commission.

Even if the Bureau could have proceeded via waiver, it failed properly to apply its own waiver standard and adhere to the Commission's procedures for evaluating waiver requests, which face a high hurdle at the outset. LightSquared failed to articulate any basis for waiver of the rule, and the Bureau failed to consider the adverse impact of the waiver with respect to the technical issues underlying the MSS ATC rules.

Adoption of the *Waiver Order* also was procedurally deficient because the Bureau did not follow the FCC's rules for soliciting public comment on a major modification to an FCC license. The truncated opportunity for comment unduly limited public participation.

Last, the Bureau prohibited only "commercial service," and not all service, pending completion of the working group's testing and evaluation of the GPS receiver desensitization

issue. Any operation has the very real potential to cause harmful interference to GPS. The Bureau also failed to specify, as is consistent FCC practice when service rules and spectrum sharing matters remain unsettled, that any expenditures by LightSquared in pursuit of its new terrestrial authority are at LightSquared's exclusive risk.

For these reasons, the *Waiver Order* should be reversed and vacated. If the Commission desires to consider fundamental changes to the MSS ATC rules to allow non-integrated, high-power terrestrial mobile broadband service in MSS frequency bands, it must proceed via the rulemaking process.

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**APPLICATION FOR REVIEW**

The U.S. GPS Industry Council, along with its members Trimble Navigation Limited and Garmin International, Inc. (such members and The U.S. GPS Industry Council collectively referred to herein as the “Council”) and the Air Transport Association of America, Inc., by their attorneys and pursuant to Section 1.115 of the rules of the Federal Communications Commission (“FCC” or “Commission”),<sup>1</sup> hereby seek Commission review of the Order and Authorization (“*Waiver Order*”) adopted by the International Bureau (the “Bureau”) on January 26, 2011 in the above-captioned proceeding.<sup>2</sup> In the *Waiver Order*, the Bureau granted LightSquared Subsidiary LLC (“LightSquared”) a waiver of the rules which modifies its previously granted authority to provide an Ancillary Terrestrial Component (“ATC”) to its licensed L-band mobile-satellite service (“MSS”).

The *Waiver Order* has the effect of fundamentally changing the Commission’s ATC rules, an action beyond the scope of the Bureau’s delegated authority that conflicts with the law

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<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> *LightSquared Subsidiary LLC Request for Modification of its Authority for an Ancillary Terrestrial Component*, Order and Authorization, 26 FCC Rcd 566 (2011) (“*Waiver Order*”).

and with Commission regulations, case precedent, and established policy.<sup>3</sup> The Bureau's action also came as a result of an abbreviated process that was procedurally defective and therefore prejudicial to the Council and its members. Accordingly, the Council respectfully requests that the Commission reverse and vacate the *Waiver Order*. If the Commission wishes to consider modification of the MSS ATC policy to allow non-integrated, high-power terrestrial mobile broadband service in MSS bands, it must proceed by rulemaking to consider such changes.<sup>4</sup>

If the *Waiver Order* is allowed to stand, the Council and its customers will suffer harmful interference that causes desensitization of Global Positioning System ("GPS") units.<sup>5</sup> A broad variety of industries rely on GPS technology: first responders (E911 systems, vehicle tracking and other functions); transportation (fleet management, intelligent vehicle-highway system operations, public transportation); scientific (earthquake and atmospheric monitoring, surveying, geographic information systems, mapping); maritime (vessel tracking, search and rescue, port management); railroad (fleet monitoring, train control and collision avoidance); and construction (facility inventory and maintenance, status monitoring). The disruption of these industries would

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<sup>3</sup> The Bureau's action granting LightSquared's requested waiver therefore provides adequate bases for this Application for Review. *See* 47 C.F.R. § 1.115(b)(2)(i), (v).

<sup>4</sup> The Council also filed a separate "Emergency Petition for Expedited Clarification" with respect to the Bureau's failure to address whether the Federal Advisory Committee Act ("FACA") applies to the working group described in the *Waiver Order*. *See* Emergency Petition for Immediate Clarification, SAT-MOD-20101118-00239, filed February 15, 2011. While the Council believes that the *Waiver Order* should be vacated, it submitted the Emergency Petition in the event that it is not. Even a full grant of the relief sought in the Emergency Petition, however, will not cure the deficiencies identified in this Application for Review.

<sup>5</sup> For purposes of this Application for Review, references to "GPS" shall include not only the Global Positioning System space and ground components, but also augmentations of the GPS system that operate with GPS in the 1559-1610 MHz band.

have a devastating effect on the United States economy and the safety of life and property of countless Americans.

**I. Background.**

The ATC regime was adopted in 2003 “to permit flexibility in the delivery of communications by MSS providers by enabling them to integrate ATC into their MSS networks.”<sup>6</sup> In particular, the Commission established certain prerequisites – specified in Section 25.149(b) and collectively known as the “gating criteria”– that an MSS operator must demonstrate it will satisfy in order to obtain ATC authority.<sup>7</sup> The “purpose of the gating criteria is to ensure that the added terrestrial component remains ancillary to the principal MSS offering.”<sup>8</sup>

Fundamental to the gating criteria is the requirement that an MSS operator provide “substantial” satellite service and offer “integrated” MSS and ATC service.<sup>9</sup> In order to establish

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<sup>6</sup> *Waiver Order* ¶ 14.

<sup>7</sup> *Waiver Order* ¶ 15.

<sup>8</sup> *Waiver Order* ¶ 15. *See also 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 n.5 (2003) (“*ATC Order*”) (“As we have repeatedly indicated, we intend to authorize ATC only as an ancillary service to the provision of the principal service, MSS”); *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*, Memorandum Opinion and Order and Second Order on Reconsideration, 20 FCC Rcd 4616 ¶ 19 (2005) (“*ATC Second Reconsideration Order*”) (“To ensure that ATC will be ancillary to provision of MSS, we adopted a requirement that MSS operators must provide substantial satellite service to be eligible for ATC authorization”); *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 ¶ 5 (2010) (noting that the Commission “requires MSS-ATC licensees to integrate their offering of ATC with their offering of MSS”); *Mobile Satellite Ventures Subsidiary LLC*, Order and Authorization, 19 FCC Rcd 22144 ¶ 19 (2004) (“An ATC applicant must demonstrate that it will integrate provision of ATC service with provision of MSS”).

<sup>9</sup> *Waiver Order* ¶ 15.

that it meets the integrated service requirement, an operator may satisfy a safe-harbor provision by offering only dual-mode handsets or alternatively, an operator not offering only dual-mode handsets may demonstrate other evidence of providing integrated service to the public, “through technical, economic or any other substantive showing that the primary purpose of the MSS licensee’s system remains the provision of MSS.”<sup>10</sup> Moreover, with respect to the integrated service requirement, the Commission has clarified that it “forbids MSS/ATC operators from offering ATC-only subscriptions”; rather, ATC services must be truly ancillary to the MSS services.<sup>11</sup>

LightSquared’s predecessor met the integrated service requirement through the safe-harbor provision. On November 18, 2010, however, LightSquared filed what it characterized as “an update of its plans for offering integrated service” under its MSS ATC authority.<sup>12</sup> LightSquared’s letter sought Commission affirmation that it could meet the requirements of the MSS ATC rules by providing other evidence of integrated service, *i.e.*, by providing information regarding technical integration efforts, pricing plans, and financial investments.<sup>13</sup> While maintaining that it would comply with the MSS ATC rules, in the last sentence of its letter, LightSquared stated that “[i]f notwithstanding these integrated service features the Commission

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<sup>10</sup> *Waiver Order* ¶ 17 (quoting *ATC Order* ¶ 88).

<sup>11</sup> *Waiver Order* ¶ 24; *ATC Second Reconsideration Order* ¶ 33.

<sup>12</sup> See Application of LightSquared for Modification of its MSS ATC Authority, SAT-MOD-20101118-00239, at 1 (filed November 18, 2010) (“November 18<sup>th</sup> Letter”).

<sup>13</sup> *Waiver Order* ¶¶ 8, 18.

believes that any element of LightSquared's showing requires a waiver, there is ample basis for granting one under the applicable standards."<sup>14</sup>

The Bureau's handling of LightSquared's November 18<sup>th</sup> Letter was unusual from its inception. Just one day after filing, the letter appeared on FCC Public Notice as a "modification application." Public comment was made subject to a truncated pleading schedule, with comments and petitions due in ten days, and replies one week later, thereby eliminating entirely the final step of the pleading cycle, wherein initial filers can respond to arguments made by the applicant.<sup>15</sup>

In the *Waiver Order*, the Bureau ultimately determined that LightSquared failed to satisfy the integrated service requirement in part because LightSquared's customers plan to use LightSquared's network to provide non-integrated, ATC-only services.<sup>16</sup> Notwithstanding this determination, the Bureau granted LightSquared a waiver of the integrated service rule.<sup>17</sup>

Of particular concern to the Council, the Commission's gating criteria and the technical requirements associated with the ATC rules set forth in Section 25.253 of the FCC's rules were specifically designed to alleviate the potential for interference to adjacent band GPS operations that would otherwise be caused by ATC operations.<sup>18</sup> By dramatically expanding the nature and

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<sup>14</sup> November 18<sup>th</sup> Letter at 10.

<sup>15</sup> FCC Public Notice, "Policy Branch Information: Satellite Space Applications Accepted for Filing," Report No. SAT-00738, at 1 (released November 18, 2010).

<sup>16</sup> *Waiver Order* ¶ 24.

<sup>17</sup> *Waiver Order* ¶ 29.

<sup>18</sup> See 47 C.F.R. § 25.253; see also, e.g., *Mobile Satellite Ventures Subsidiary LLC*, Order and Authorization, 19 FCC Rcd 22144 ¶ 27 (2004) (noting the Commission's adoption of band-specific technical rules to "ensure that ATC operation will not cause harmful interference"); *Globalstar Licensee LLC Application of Modification of License for Operation of Ancillary*

scope of LightSquared's terrestrial mobile operations, the *Waiver Order* will create the very desensitization to GPS receivers that those rules were intended to avoid. This type of interference would render GPS location determination capability inoperable with potentially disastrous results. Consequently, and as documented by the Council's previous filings and recognized by the Bureau in the *Waiver Order*, the Council has a significant interest in the outcome of this proceeding and hereby submits this Application for Review.<sup>19</sup>

**II. The *Waiver Order* Fundamentally Changes the FCC's ATC Rules in Contravention of FCC Statutes, Regulations, Precedent, and Policy.**

As the FCC and the courts have held, the FCC "must not eviscerate a rule by waiver,"<sup>20</sup> as the Bureau has here. In particular, "[t]he function of a waiver is not to change the general standard, a matter for which the opportunity for general comment is a prerequisite under the Administrative Procedure Act, but to justify an ad hoc exception to that standard in a particular

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*Terrestrial Component Facilities*, Order and Authorization, 23 FCC Rcd 15975 ¶ 39 (2008) ("Globalstar must manage self-interference in order to ensure that a viable MSS continues to exist, as required by Section 25.149((b)(3) of the rules.").

<sup>19</sup> As Section 1.115(a) of the Commission's rules provide, "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission [and] [a]ny person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.115(a). The Council's members Trimble Navigation Limited and Garmin International, Inc. participated in the earlier stages of the proceeding through their membership in and involvement with the Council. Indeed, Garmin's engineers performed tests in response to the LightSquared requests that are part of the record in this proceeding. Letter from Stephen D. Baruch, Counsel for the U.S. GPS Industry Council, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB File No. SAT-MOD-2010111800239 at Appendix 2 (filed Jan. 20, 2011).

<sup>20</sup> See, e.g., *WITN-TV v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("The Court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.").

case.”<sup>21</sup> Commonly understood, “administrative waivers are a mechanism to seek out the public interest in particular, individualized cases [and] they are not a device for repealing a general statutory directive.”<sup>22</sup> The Bureau has eviscerated the integrated service rule in the *Waiver Order* when it should have engaged in a rulemaking proceeding.

The Commission has specifically recognized that it cannot change its rules through waiver. For example, in 2007 XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. filed applications seeking to merge the two companies, despite the fact that the Commission had plainly stated that one of the two FCC satellite radio licensees “will not be permitted to acquire control of the other remaining satellite DARS license.”<sup>23</sup> In that case, rather than consider a waiver of the rule purely in the context of the application proceeding, the Commission issued a Notice of Proposed Rulemaking to solicit public comment on the issue.<sup>24</sup> Following its review

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<sup>21</sup> See *Maritel*, 3 FCC Rcd 4690, 4692 (1988). See also *WITN-TV, Inc. v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988) (“The waiver concept does not serve in this context, for the petitioner’s plea . . . is in essence one for agency reconsideration of existing policy.”).

<sup>22</sup> *Am. Trucking Ass’n v. FHA*, 51 F.3d 405, 414 (4th Cir. 1995) (internal quotations omitted).

<sup>23</sup> See *XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio Inc.*, MB Docket, No. 07-57, FCC File Nos. SAT-T/C-20070320-00053 & -00054 and SES-T/C-20070320-00379 & -00380; *Digital Audio Radio Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 (¶ 170) (1997).

<sup>24</sup> See *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.*, 22 FCC Rcd 12018 (2007) (“2007 SDARS NPRM”). The 2007 SDARS NPRM was adopted on June 25, 2007, and a summary was published in the Federal Register on July 12, 2007, 72 Fed. Reg. 38055. The Media Bureau then issued a Public Notice setting forth the deadlines for filing comments and reply comments to the 2007 SDARS NPRM. See Public Notice, “Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Ratio Inc., Transferee,” 22 FCC Rcd 13036 (Media Bur. 2007). Comments were due by August 13, 2007, and reply comments were due by August 27, 2007. This approach contrasts markedly with that followed in the LightSquared proceeding, in which interested parties had less than two weeks’ notice that comments were being requested on the LightSquared application and waiver request.

of the full record established in that proceeding, the Commission noted that “grant of a waiver clearly would eviscerate the rule and for that reason is not appropriate here.”<sup>25</sup> Nonetheless, the Commission found that it could appropriately repeal the rule if doing so would serve the public interest, “and we comply with rulemaking procedures.”<sup>26</sup>

The Commission must follow the same approach in this instance. As noted above, the stated purpose of the integrated service rule is “to ensure that the added terrestrial component remains ancillary to the principal MSS offering.”<sup>27</sup> In particular, the Commission made manifest in establishing the MSS ATC rules that non-integrated terrestrial service was, as a fundamental matter, technically incompatible with satellite operations in the same band and could create harmful interference to satellite operations in adjacent bands, and thus adopted the integrated service requirement.<sup>28</sup> In its *ATC Second Reconsideration Order*, the Commission discussed this issue at length and reiterated its prior conclusions in unequivocal terms:

We clarify that “integrated service” as used in this proceeding and required by 47 CFR § 25.149(b)(4) forbids MSS/ATC operators from offering ATC-only subscriptions. We reiterate our intention not to allow ATC to become a stand-alone system. The purpose of ATC is to enhance MSS coverage, enabling MSS operators to extend service into areas that they were previously unable to serve,

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<sup>25</sup> See *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.*, 23 FCC Rcd 12348, 12422 (¶ 162) (2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Waiver Order* ¶ 15.

<sup>28</sup> See *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*, 18 FCC Rcd 1962, 1995 (¶ 55) (2003) (“[W]e find that establishing shared usage between MSS and terrestrial services would likely compromise effectiveness to such a degree that neither service would prove cost-effective, and therefore would probably not be deployed. Therefore, we decline to adopt same-band, separate-operator sharing as an alternative to permitting MSS licensees in each of the three MSS bands at issue in this proceeding the option of adding ATCs in determining how they conduct their MSS operations”).

such as the interiors of buildings and high-traffic density urban areas. We will not permit MSS/ATC operators to offer ATC-only subscriptions, because ATC systems would then be terrestrial mobile systems separate from their MSS systems. We therefore clarify that “integrated service” as used in this proceeding and required by 47 CFR § 25.149(b)(4) forbids MSS/ATC operators from offering ATC-only subscriptions.<sup>29</sup>

The Bureau’s waiver of the integrated service rule eviscerates the rule by allowing LightSquared to offer wholesale terrestrial service only, without the MSS offering, effectively making the terrestrial service “ancillary” to nothing. Because this undermines the very purpose of the rule, to ensure provision of MSS, waiver “is not appropriate here.”<sup>30</sup> As the Commission and the courts have instructed, fundamental changes of this nature can only be accomplished through the rulemaking procedures specified in the Administrative Procedure Act. Consequently, the *Waiver Order* is contrary to law and therefore must be reversed and vacated.<sup>31</sup>

Ad hoc action by the Bureau was particularly unwarranted in that the Commission is already considering these issues in the context of the current inquiry concerning the potential general introduction of non-ATC terrestrial broadband services in several MSS bands.<sup>32</sup> LightSquared’s request could have been considered as part of this already-initiated *MSS Broadband NPRM/NOI*.<sup>33</sup> Rather than allowing the full development of the record and

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<sup>29</sup> *ATC Second Reconsideration Order* ¶ 33.

<sup>30</sup> *See XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.*, 23 FCC Rcd 12348, 12422 (¶ 162) (2008).

<sup>31</sup> 47 C.F.R. § 1.115(b)(2)(i).

<sup>32</sup> *See, e.g., 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*, 25 FCC Rcd 9481 (2010) (“*MSS Broadband NPRM/NOI*”).

<sup>33</sup> *See, e.g.,* Comments of the U.S. GPS Industry Council at 4-5; AT&T Comments at 7-10; Comments of CTIA at 6-8; Verizon Wireless Comments at 8-9; WCAI Petition at 10-13.

procedural protections afforded by a rulemaking, the Bureau instead acted unilaterally and prematurely in granting LightSquared the benefit of a rule change.

Because the *Waiver Order* was adopted without a rulemaking proceeding, it also has the effect of impermissibly circumventing the Congressional Review Act (“CRA”), which mandates Congressional review of agency regulations. Absent a Commission action, Congress is deprived of the opportunity for review. The CRA requires Congressional review of agency regulations and mandates that “major rules” must be subject to a 60-day post-adoption period during which Congress may consider disapproving the agency action.<sup>34</sup> A “major” rule is one likely to result in an annual effect on the economy of \$100 million or more.<sup>35</sup> The *Waiver Order’s de facto* changes to the ATC rules would have a major economic impact meeting this threshold.

LightSquared has indicated that it will spend up to \$7 billion over the next few years to construct its planned terrestrial wireless network.<sup>36</sup> At the same time, the GPS industry expects annual sales in excess of \$5 billion during the current year and the industry overall is expected to grow to \$70 billion by 2013,<sup>37</sup> and GPS services are vital to the operation of several entire sectors of the economy, including transportation and telecommunications. The sudden loss of GPS would cause substantial and unpredictable disruption of the many commercial and governmental activities that depend on GPS. Consequently, the changes proposed in the *Waiver Order* would have met the CRA threshold if properly adopted in a rulemaking proceeding.

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<sup>34</sup> 5 U.S.C. § 801(a)(1).

<sup>35</sup> *Id.*

<sup>36</sup> See Paul Taylor, *LightSquared wins waiver on 4G network*, FINANCIAL TIMES, January 27, 2011, available at <http://www.ft.com/cms/s/0/ef7a40bc-29ab-11e0-bb9b-00144feab49a.html#ixzz1EeCgcOwD>.

<sup>37</sup> Electronics.ca Publications, *World GPS Market Forecast to 2013*, (June, 2010) available at <http://www.electronics.ca/publications/products/World-GPS-Market-Forecast-to-2013.html>.

**III. The Bureau Did Not Properly Apply the Waiver Standard in Accordance with FCC Rules.**

**A. The Bureau Ignored LightSquared’s Failure To Provide Any Basis For A Waiver.**

It is well-established that “when an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.”<sup>38</sup> LightSquared’s waiver request was devoid of any specific showing in support of a waiver, let alone a showing sufficient to “warrant such action.” LightSquared simply included a statement in its application that if the Commission should determine that any element of LightSquared’s integrated service showing would require a waiver, “there is ample basis for granting one” under the Commission’s waiver standard.<sup>39</sup> Accordingly, the Bureau’s grant of LightSquared’s application absent a demonstration of the facts and circumstances supporting the waiver violated this established precedent.

Instead of requiring LightSquared to make the requisite showing, the Bureau found that “LightSquared’s filing provides sufficient basis for our addressing its request as one for waiver, given that the *Comment Public Notice* specifically sought comment not only on LightSquared’s request for ATC modification, but also on whether to waive the requirements of the integrated service rule,” and therefore that “commenters had adequate notice and opportunity to comment

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<sup>38</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

<sup>39</sup> *Waiver Order* ¶ 8. Several parties brought to the Bureau’s attention the deficiencies in this request. *See* Comments of Verizon Wireless at 7 & n.25; Comments of AT&T Inc. at 11; Petition to Deny of Wireless Communications Ass’n Int’l (“WCAI”) at 13-14.

on the issues raised by LightSquared.”<sup>40</sup> This cursory treatment fails to apply well-established precedent which should have prompted dismissal of the LightSquared application.<sup>41</sup>

**B. The Bureau Failed To Address the Adverse Impact of the Waiver on the Objectives of the MSS ATC Rule.**

Even the Bureau acknowledges that a waiver is appropriate only if special circumstances warrant a deviation from the general rule, and that such deviation will better serve the public interest than would strict adherence to the general rule.<sup>42</sup> Specifically, the Commission may grant a waiver only if the relief requested (1) would not undermine the policy objective of the rule in question and (2) would otherwise serve the public interest.<sup>43</sup> The Bureau’s *Waiver Order* fails to meet either prong of this test.

First, the Bureau did not even address whether waiving the integrated service rule would undermine the rule’s objectives. In fact, the opposite is true. Granting the waiver undermines the integrated service rule’s objective of promoting MSS deployment while keeping terrestrial services ancillary to the primary MSS services. In adopting the MSS ATC rule, the Commission determined that permitting MSS operators to integrate ATC into their operations on an ancillary basis would, among other things, enhance MSS spectrum efficiency, expand the consumer market for MSS, lead to greater economies of scale and lower prices for consumers, and enable operators to offer a single consumer device to communicate with both the satellite and terrestrial

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<sup>40</sup> *Waiver Order* ¶ 28.

<sup>41</sup> *The Boeing Company*, 16 FCC Rcd 13691, 13706 (¶ 40) (Int’l. Bur. 2001) (The consequence of a failure to show justification for a waiver is the dismissal of the deficient request).

<sup>42</sup> *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990).

<sup>43</sup> *WAIT Radio*, 418 F.2d at 1157.

network.<sup>44</sup> The *Waiver Order* undermines all of these objectives by allowing a licensee to develop terrestrial services independently from (and not ancillary to) MSS services. This will provide LightSquared with incentives to develop its terrestrial facilities without further developing or deploying its MSS systems, which is directly contrary to the purpose of the integrated service rule. Further, grant of the waiver does not bolster MSS services, does not provide any incentive for operators to offer dual-mode handsets, or further any of the Commission's stated objectives in establishing the integrated service rule. Moreover, as discussed above, grant of LightSquared's waiver not only undermines the policy objectives of the rule, it eviscerates the rule entirely.

Second, contrary to the requirement for granting a waiver, the Bureau's public interest determination merely summarized the Bureau's view of LightSquared's history as a good MSS licensee and touted the alleged benefits of LightSquared's proposed service.<sup>45</sup> The Bureau did not evaluate the public interest harms that would offset those ostensible benefits – and in particular, the harm that LightSquared's proposed operations would have on millions of GPS devices. Instead, the Bureau impermissibly left that determination for another day by delegating such evaluation to a non-agency working group.<sup>46</sup> The Bureau's failure to address the significant

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<sup>44</sup> See, e.g., *Waiver Order* ¶ 14 n.67; *ATC Second Reconsideration Order* ¶ 9.

<sup>45</sup> In essence, the waiver is premised on the following considerations with respect to LightSquared: (1) it has provided MSS and therefore can be construed as committed to the service; (2) it has made progress in meeting the unique challenges of providing service in its frequency band; (3) it has demonstrated a commitment to deployment of dual-use handsets; (4) it is subject to specific milestones for provision of terrestrial service under the *SkyTerra/Harbinger Order*; and (5) it has specifically agreed to accept certain conditions to ensure that MSS service and dual-use handsets will actually be offered in the L-band. See *Waiver Order* ¶¶ 29-38.

<sup>46</sup> *Waiver Order* ¶ 41. In particular, the Bureau ordered LightSquared to help organize and fully participate in such a working group to assess the extent and solvability of the GPS receiver desensitization issue and submit a report to the Bureau by June 15, 2011. *Id.* ¶ 42. Even the

public interest harms caused by LightSquared's proposed operations conflicts with long-standing precedent and creates prejudicial procedural error justifying further review.<sup>47</sup>

The Bureau certainly has the latitude to grant waivers of the Commission's rules under appropriate circumstances. However, the Bureau's evaluation of LightSquared's waiver request was required to be guided by the Court of Appeals' direction that an "applicant for waiver faces a high hurdle even at the starting gate."<sup>48</sup> The Bureau imposed no hurdles in front of LightSquared. Instead, the Bureau did precisely what the Court of Appeals prohibited: "[t]he agency may not act out of unbridled discretion or whim in granting waivers any more than in any other aspect of its regulatory function."<sup>49</sup> Accordingly, because the *Waiver Order* fails to comply with well-established waiver rules and standards, the Commission must reverse and vacate the *Waiver Order* as requested herein.

**IV. The Bureau's Failure to Allow the Full Public Comment Period Mandated by Statute Was Prejudicial Procedural Error.**

The Bureau's processing of LightSquared's application for modification failed to adhere to the procedures required under the Communications Act of 1934, as amended (the "Act") and the Commission's rules. Contrary to LightSquared's erroneous characterization, its application

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Bureau's direction that LightSquared organize a working group to address GPS receiver desensitization was flawed. As noted above, it failed to address whether the working group should be considered a Federal Advisory Committee and related procedural matters. It also failed to explain the findings that the working group should be required to make and failed to specify what will happen should the significant desensitization issues remain unresolved. Instead, the Bureau simply noted that the process "must be completed to the Commission's satisfaction" before LightSquared commences offering commercial service. *Id.*

<sup>47</sup> 47 C.F.R. § 1.115(b)(2)(i), (v).

<sup>48</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>49</sup> *Id.* at 1159.

was a request for a major modification under the Commission's rules, and not a minor modification, because of the effective change to the integrated service requirement.

Modification applications also are considered major under the Commission's rules when there is a potential for increased interference. In this instance, the application creates a substantial risk that the proposed operations will desensitize GPS receivers.<sup>50</sup>

Section 309(b) of the Act states that major modification applications shall not "be granted by the Commission earlier than 30 days following issuance of public notice by the Commission."<sup>51</sup> Section 309(d) of the Act, in turn, makes all such applications subject to the statutory 30-day time period for submission of comments, which provides that the time specified for such public comment shall be "no less than thirty days following the acceptance for filing of such application . . ."<sup>52</sup>

The FCC's rules likewise make it clear that any application for major modification must be placed on Public Notice,<sup>53</sup> and further that "no application that has appeared on public notice" pursuant to this rule "will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application."<sup>54</sup> In addition, Commission rules specify

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<sup>50</sup> See 47 C.F.R. § 25.116(b)(1); *Waiver Order* ¶ 39. Multiple parties participating in this proceeding have shown that the application was a major modification, and not a minor modification. The Council incorporates these arguments by reference and thus will not revisit them here. See, e.g., U.S. GPS Industry Council Comments at 7-9; AT&T Comments at 7; WCAI Petition at 6-10.

<sup>51</sup> 47 U.S.C. § 309(b).

<sup>52</sup> 47 U.S.C. § 309(d).

<sup>53</sup> 47 C.F.R. § 25.151(a)(3) ("At regular intervals, the Commission will issue public notices listing . . . [t]he receipt of applications for major modifications to station authorizations").

<sup>54</sup> 47 C.F.R. § 25.151(d). It has been standard procedure for the Bureau to place all space station modifications on 30-day Public Notice. LightSquared's application was the only such

that any comments or petitions regarding the application must be filed within the 30-day notice period.<sup>55</sup>

The *Waiver Order* attempts to justify the Bureau's failure to comply with these procedural requirements by asserting that Public Notice referencing the LightSquared application:

. . . specified that the filing schedules in Section 25.154 would apply to the applications listed therein, with the exception of "comments" and "replies" filed in response to LightSquared's modification application. In other words, the filing deadline date for "petitions to deny" LightSquared's application was 30 days after the [Public Notice], consistent with Section 25.154 . . .<sup>56</sup>

This is a superficial *post hoc* rationalization that does not evidence compliance with Commission rules.<sup>57</sup> The comment and petition deadlines are the same under Section 25.154, so that the Bureau's reference to the filing of comments by November 29 in the initial *Public Notice* necessarily applied to petitions as well; the notice provided no indication that the Bureau was decoupling the comment deadline and the petition deadline.

While the Bureau asserted that the pleading cycle was sufficient and did not cause any parties to suffer prejudice given the fact that a number of commenters "have filed full and complete pleadings,"<sup>58</sup> commenters are entitled to the full procedural protections afforded by the

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application filed during 2010 that the Bureau placed on Public Notice for a period less than the statutory 30-day period.

<sup>55</sup> 47 C.F.R. §§ 25.151, 25.154(a)(2)

<sup>56</sup> *Waiver Order* at 13 n.100.

<sup>57</sup> Indeed, this *post-hoc* rationalization is evidence that the Bureau recognized that LightSquared had submitted a major modification application which required the procedural safeguards noted above.

<sup>58</sup> *Waiver Order* ¶ 23.

Commission's rules, including the time periods for filing pleadings responsive to an application for major modification. As the D.C. Circuit has noted, "It is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action."<sup>59</sup> Consequently, the *Waiver Order* was the product of multiple prejudicial procedural errors, and therefore should be reversed and vacated.<sup>60</sup>

**V. The Bureau Exceeded Its Delegated Authority in Adopting the Waiver Order.**

The Bureau lacked authority sufficient to grant LightSquared a waiver of the integrated service rule. FCC rules state that the Bureau does not have the authority to act on any matter that "[p]resents new or novel arguments not previously considered by the Commission; . . . [p]resents facts or arguments which appear to justify a change in Commission policy; . . . or [c]annot be resolved under outstanding precedents."<sup>61</sup> In this case, the LightSquared application requested waiver of the integrated service requirement – a rule that the Commission has never before waived.<sup>62</sup> By requesting a waiver of the integrated service rule, LightSquared sought a significant departure from Commission rules and policies because such a waiver would allow LightSquared to deploy terrestrial facilities independently from (and not ancillary to) MSS

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<sup>59</sup> *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) (reversing license grants due to FCC failure to follow its rules), *citing Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C. Cir. 1976) ("It is well established that agencies are themselves bound by their rules and regulations and that they may not deviate on an ad hoc basis.").

<sup>60</sup> 47 C.F.R. § 1.115(b)(2)(v).

<sup>61</sup> 47 C.F.R. § 0.261(b)(1).

<sup>62</sup> The Bureau made no reference to any Commission precedent in support of its action.

facilities. Accordingly, this waiver request should not have been addressed by the Bureau at all. Because the Bureau acted without authority in contravention of the FCC's rules, the Commission must vacate and reverse the *Waiver Order*.

**VI. The Bureau Failed to Address the Effects of LightSquared's Operations Pending the Completion of Testing.**

**A. The Bureau's Prohibition on the Provision of Commercial Services Pending Completion of Testing Does Not Adequately Protect GPS.**

The *Waiver Order* offered no explanation of what the Bureau meant when it prohibited LightSquared from commencing to offer "commercial service" pursuant to waiver of the integrated service requirement.<sup>63</sup> The phrase "commercial service" has no accepted regulatory definition. There clearly are many conceivable levels of operation and deployment of non-integrated terrestrial broadband transmitters – from equipment testing at individual sites to area-wide deployments for market testing – which are not "commercial" service, but any and all of which have the very real potential to cause harmful interference that results in the desensitization of GPS receivers and renders them inoperable over broad areas, causing potentially dangerous disruption to installed users of GPS and other radionavigation-satellite service ("RNSS") spacecraft operating in the 1559-1610 MHz band. The Bureau's prohibition is ambiguous and threatens not only authorized users of systems operating in the RNSS bands, but the very process the Bureau established to assess that interference.

As the Council stated repeatedly in this proceeding, LightSquared's proposed non-integrated terrestrial mobile service offering will cause desensitization to GPS receivers. The

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<sup>63</sup> While this issue provides a basis for reversing and vacating the *Waiver Order*, the Council urges the Commission to address this issue immediately and in advance of the other matters raised here by prohibiting all operations of terrestrial transmitters authorized under the *Waiver Order* until these very serious desensitization concerns to GPS have been resolved.

compelling record shows that GPS receiver desensitization<sup>64</sup> is not dependent on whether the source is being operated in a commercial or a non-commercial manner; interference produced by a LightSquared-type terrestrial transmitter operating in a demonstration mode or under a location test will have just as dangerous and devastating an impact on a GPS device operating in the same vicinity as would a LightSquared-type transmitter in “commercial service.”

In permitting some services and operations of non-integrated terrestrial transmitters on a non-commercial basis prior to the consideration of the results of testing and analysis by the non-agency working group the Bureau ordered to examine the issue, the Bureau disregarded the admonitions of other federal agencies. For example, the Department of Defense asked that the National Telecommunications and Information Administration (“NTIA”) “advocate to the FCC to defer action on [LightSquared’s] waiver request and place this application under a Notice of Proposed Rule-Making [sic] to allow for the development of a robust public record and adequate interference analysis and mitigation options to protect GPS . . .”<sup>65</sup> NTIA similarly filed a letter

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<sup>64</sup> See, e.g., Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, NTIA, U.S. Department of Commerce, to Julius Genachowski, Chairman, FCC, at 1 (Jan. 12, 2011) (“NTIA Letter”) (noting, *inter alia*, that the “Departments of Defense, Transportation and Homeland Security . . . believe the FCC should defer action on the LightSquared waiver until these interference concerns are satisfactorily addressed”). See Letter from Danny Price, Director, Spectrum and Communication Policy, Office of the Assistant Secretary of Defense, Department of Defense, to Karl Nebbia, Associate Administrator, Office of Spectrum Management, National Telecommunications and Information Administration, Department of Commerce (Dec. 28, 2010), attached hereto as Exhibit A. See also, Report entitled “Experimental Evidence of Wide Area GPS Jamming that will Result from LightSquared Proposal to Convert Portions of L-Band 1 to High-Power Terrestrial Broadband,” filed via *ex parte* notification on January 20, 2011.

<sup>65</sup> See Letter from Danny Price, Director, Spectrum and Communication Policy, Office of the Assistant Secretary of Defense, Department of Defense, to Karl Nebbia, Associate Administrator, Office of Spectrum Management, National Telecommunications and Information Administration, Department of Commerce (Dec. 28, 2010), attached hereto as Exhibit A. For its part, the Council strongly opposed LightSquared’s request for conditional authorization, and noted that the Commission has no business granting *any* authorization, conditional or otherwise,

stating that LightSquared's proposal "raises significant interference concerns" and "that it is incumbent on the FCC to deal with the resulting interference issues before any interference occurs."<sup>66</sup> Despite these requests, the FCC adopted a condition that would allow interference to be caused to GPS prior to the completion of testing.

Nevertheless, by prohibiting only "commercial service" prior to the lifting of the condition, the Bureau has apparently authorized LightSquared to provide or allow provision of potentially widespread high-power terrestrial broadband service that falls short of "commercial" service but still has the potential to cause widespread and hard-to-predict interference to the installed GPS user base and other RNSS operations in the 1559-1610 MHz band. Such operations would pose a serious interference threat to GPS that is under investigation in the working group, will jeopardize GPS users wherever non-commercial operations occur (all of which would require no notice to or coordination of any kind with potentially affected services), and would be a distraction or worse during the working group's activities.

**B. The Commission Must Declare That Any Expenditures LightSquared Makes in Pursuit of Terrestrial Mobile Broadband Service Prior to Release of the GPS-Related Condition Are at LightSquared's Exclusive Risk and Are Without Prejudice to Contrary Commission Action.**

In addition to the flawed condition allowing LightSquared to provide what is not considered "commercial service," the Bureau failed to condition the grant on the fact that any expenditures, investments, agreements, or other actions LightSquared makes or takes while the

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that would permit terrestrial operations in the LightSquared MSS spectrum until the Commission can make the threshold determination that such terrestrial services are able to be operated without causing harmful interference that results in desensitization of GPS receivers and renders them inoperable. Council January 25 *Ex Parte* Letter at 3; U.S. GPS Industry Council Comments at 5-6.

<sup>66</sup> NTIA Letter at 1 (emphasis in original).

prohibition on terrestrial mobile broadband service is in place are at LightSquared's exclusive risk. The issue of interference from non-integrated terrestrial mobile broadband systems in the LightSquared MSS frequencies is an extremely challenging one, and prior successes in resolving interference issues such as unwanted emissions from MSS handsets, truly ancillary terrestrial devices, and femtocells may not necessarily presage success in resolving the current interference threat – notwithstanding all parties' bona fide efforts and good intentions. The Commission previously conditioned relief in circumstances, such as here, where a significant technical or regulatory issue remains unresolved.<sup>67</sup> The Commission also has stated in other contexts that investment based on a temporary authorization is risky before the Commission's final resolution of the underlying policy.<sup>68</sup> The Bureau should have taken the same approach here and its failure to do so merits the Commission's reversal of the *Waiver Order*. Any construction of facilities is

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<sup>67</sup> See, e.g., *Hughes Communications Galaxy, Inc.*, 10 FCC Rcd 10947 (¶ 5) (Int'l Bur. 1995) (applicant conditionally authorized, at own risk a without prejudice to adverse Commission action, to provide service to Latin America over a domestic satellite pending completion of rulemaking proceeding to address transborder service/separate systems). See also *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*, 18 FCC Rcd 1962, 2082 (¶ 249) (2003) (permitting construction of ancillary terrestrial component of mobile-satellite service systems at licensee's own risk prior to launch and operation of integrated satellite); *Application of Sirius XM Radio, Inc. for Special Temporary Authority to Operate Twenty SDARS Terrestrial Repeaters in the Commonwealth of Puerto Rico*, Order and Authorization, 24 FCC Rcd 11827 fn. 25 (2009) (conditioning a grant of special temporary authority on operations being at the applicant's own risk and on a non-harmful interference basis).

<sup>68</sup> See, e.g., *Comsat Corp. (Staten Island Teleport Facilities)*, Memorandum Opinion, Order and Authorization, 55 RR2d 1209 ¶ 23 (1984) (finding that "the grant of Comsat's applications should be conditioned on the ultimate outcome of the earth station ownership proceeding and that acceptance of authority to build and operate the station is, therefore, at Comsat's shareholder's own risk"); *Requests for Waiver of Various Petitioners to Allow the Establishment of 700 MHz Interoperable Public Safety Wireless Broadband Networks*, Order, 25 FCC Rcd 5145 ¶ 12 (2010) ("Our decision allowing a conditioned early build, at the Petitioners' own risk, remains subject to our later determinations and is without prejudice to our resolution of any of these issues in the broader rulemaking").

premature and absent an express statement by the Commission that construction is at LightSquared's risk, there is a significant risk that investors in LightSquared could be harmed if the Commission determines that there will be irresolvable desensitization caused by LightSquared to GPS receivers and therefore declines to remove the current condition on LightSquared's ability to proceed.<sup>69</sup>

**VII. Conclusion.**

For the reasons set forth herein, the Council respectfully requests that the Commission reverse and vacate the flawed *Waiver Order* consistent with the views expressed herein. If it wishes to consider changes to the MSS ATC rules, the Commission should begin the process anew in a rulemaking proceeding in which a complete record can be established.

Respectfully submitted,

**AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

**THE U.S. GPS INDUSTRY COUNCIL**

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<sup>69</sup> John Eggerton, *LightSquared Closes \$586M Round of Financing*, Broadcasting & Cable, Feb. 22, 2011, available at [http://www.broadcastingcable.com/article/464288-LightSquared\\_Closes\\_586M\\_Round\\_of\\_Financing.php](http://www.broadcastingcable.com/article/464288-LightSquared_Closes_586M_Round_of_Financing.php); Maisie Ramsay, *LightSquared Lands \$586M from UBS, JP Morgan*, wirelessweek.com, Feb. 22, 2011, available at <http://www.wirelessweek.com/News/2011/02/LightSquared-586M-UBS-JPMorgan-Business/>; Chris Snow, *LightSquared secures \$586 million debt loan*, TelecomEngine.com, Feb. 23 2011, available at <http://www.telecomengine.com/article/lightsquared-secures-586-million-debt-loan>.

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February 25, 2011

# **ATTACHMENT A**

Letter from Danny Price, Director, Spectrum and Communication Policy,  
Office of the Assistant Secretary of Defense, Department of Defense, to  
Karl Nebbia, Associate Administrator, Office of Spectrum Management, National  
Telecommunications and Information Administration, Department of Commerce  
(Dec. 28, 2010)



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
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DEC 28 2010

NETWORKS AND  
INFORMATION  
INTEGRATION

Mr. Karl Nebbia  
Associate Administrator  
Office of Spectrum Management  
National Telecommunications and Information Administration  
U.S. Department of Commerce  
Washington, D.C., 20230

Mr. Nebbia

I am concerned with the Draft Order and Authorization (O&A) the Federal Communications Commission (FCC) sent to National Telecommunication and Information Administration (NTIA) which would grant LightSquared a waiver of the FCC's rules in the 1525-1559 MHz band. This band is used by Federal and non-Federal Inmarsat users, is adjacent to 1559-1610 MHz used by Global Positioning Systems L1 (GPS L1), and 1435-1525 MHz used by Federal and non-Federal Aeronautical Mobile Flight Test Telemetry (AMT). The GPS L1 band is used for military, federal and all commercial applications. It is my understanding that interference to GPS, Inmarsat, and AMT operations from LightSquared's terrestrial mobile use, particularly from base stations, would likely result if the requested waiver is "conditionally granted" by FCC as it currently stands and the necessary studies are not completed and understood.

DoD is concerned with the O&A being conducted without the proper analysis required to make a well informed decision. Given the potential negative impacts to GPS, Inmarsat, and AMT operations, request NTIA advocate to the FCC to defer action on the waiver request and place this application under a Notice of Proposed Rule-Making to allow for the development of a robust public record and adequate interference analysis and mitigation options to protect GPS, Inmarsat, AMT and any other Federal operations in and adjacent to the band.

Thank you for your time regarding this matter and if you have any questions please feel free to contact me or my point of contact Mr. Kenneth Turner at 703-607-0735.

Sincerely

Danny Price  
Director, Spectrum and Communication Policy



CERTIFICATE OF SERVICE

I, Genevieve F. Edmonds, hereby certify that on this 25th day of February, 2011, a copy of the foregoing Application for Review is being sent via first class, U.S. Mail, postage prepaid, to the following:

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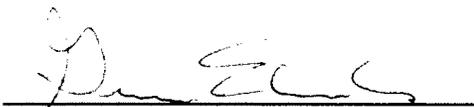
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