In the Matter of)

LightSquared Subsidiary LLC  ) File No. SAT-MOD-20101118-00239
Magnavox Mobile, Inc.  )
Request for Modification of its Authority for  )
an Ancillary Terrestrial Component  )

To: The Commission

APPLICATION FOR REVIEW

On January 26, 2011, the International Bureau (the “Bureau”) adopted an Order and Authorization (the “Order”){1} in the above-captioned proceeding that waived, for a single party – LightSquared Subsidiary LLC – the requirement that a mobile-satellite service (“MSS”) ancillary terrestrial component (“ATC”) licensee must “offer an integrated service of MSS and MSS ATC.” 47 C.F.R. § 25.149(b)(4). The American Congress on Surveying and Mapping (ACSM),{2} pursuant to Section 1.115 of the Commission’s Rules (47 C.F.R. § 1.115), hereby seeks Commission review of that Order. In issuing the Order, the Bureau overstepped the bounds of its delegated authority, violated standard and longstanding notice-and-comment procedures, and disregarded the legal analysis that is mandatory for processing requests for waivers of

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{2} ACSM’s interest in this proceeding arises from concern about interference to reception of GPS signals critical to the efficient collection and use of data that are vital to the services provided by geospatial and/or licensed professionals in their service to the public.
Commission rules. As such, the Order is legally and procedurally unsound, and demanding of review and correction by the full Commission.

I. **Background**

Despite numerous industry and government comments and concerns filed with the Bureau regarding the potential for adverse effects on existing GPS operations if LightSquared's application to provide non-integrated terrestrial service in the L-Band were to be approved,\(^3\) the Bureau proceeded to fashion, on an abnormally hurried and truncated schedule, grant of the application by concocting a waiver that can only be described as *sua sponte* and unprecedented. As a result of that waiver, LightSquared will be permitted to proceed with its plan to provide *non-integrated* service, in clear contravention of a long line of Commission rules and orders mandating that MSS ATC licensees provide *only integrated* service. Meanwhile, in a true demonstration of “cart-before-the-horse” reasoning, the fundamental issue of potential harmful interference of the new LightSquared service to the vital, well-established GPS service has been relegated to an after-the-fact analysis, headed by LightSquared itself. This, of course, is a backward approach. The Bureau *must* analyze such critical interference issues prior

\(^3\) See, e.g., Letter from Lawrence E. Strickling, Assistant Sec'y for Communications and Info., U.S. Dept. of Commerce, to Julius Genachowski, Chairman, Federal Communications Comm. (Jan. 12, 2011) (stating that LightSquared’s proposal would create a “new interference environment and it is incumbent on the FCC to deal with the resulting interference issues before any interference occurs”); Letter from Barry Lambergerman, Dir. of Gov't Affairs, Motorola Inc., to Marlene H. Dortch, Sec'y, Federal Communications Comm. (Dec. 22, 2010).
to granting an application that could, by the Bureau's own admission, generate severe harmful interference to existing GPS users.  

II. The International Bureau Did Not Have Authority to Grant the Waiver.

Besides the clear command of 47 C.F.R. § 25.149(b)(4) that that MSS ATC licensees “shall offer” only integrated service, Commission orders forbid the very type of non-integrated operation that the Bureau, through its Order, now endorses for LightSquared. The Commission’s sentiments on this issue could not be more unambiguous. The Commission “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.” The purpose of ATC is to enhance MSS coverage,” not to serve as a standalone service, and therefore, the FCC “forbids MSS/ATC operators from offering ATC-only subscriptions.” Moreover, and tellingly, the Commission has never before “waived” the requirement that MSS ATC operators provide integrated-only service.

The Bureau, through its Order, has therefore abrogated Commission law and policy, and in doing so, vastly overstepped the bounds of its authority. The Bureau is expressly prohibited by Commission rule from “act[ing] on any application . . . or other

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4 At a bare minimum, the Bureau, or the Commission, must explain what is meant by the Order's requirement that LightSquared not commence “commercial service” prior to completion of the interference analysis. “Commercial service” is not a defined term. Potential interference to GPS is not dependent upon whether LightSquared is providing “commercial” or “non-commercial” service.

5 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, 20 FCC Rcd 4616, 4628 (2005) (emphasis added).

6 Id. (emphasis added).
request that ... [p]resents facts or arguments which appear to *justify a change in Commission policy*; ... or [c]annot be *resolved under outstanding precedents.*" The drastic, unprecedented reversal of Commission policy endorsed by the Order clearly exceeds the scope of the Bureau’s delegated authority. The policy change sanctioned by the Order can only come about at the behest of the full Commission, either through review of a formal waiver request, or through full notice-and-comment rulemaking.\(^8\)

**III. The International Bureau Violated Notice-and-Comment Requirements in Adopting the Order.**

The peculiar, truncated schedule under which the Bureau adopted the Order is well-documented.\(^9\) The peculiar, post-hoc response by the Bureau to objections voiced about the abbreviated opportunity for public notice and comment\(^10\) fails to mollify the genuine concern that potentially interested and adversely affected parties were denied

\(^7\) 47 C.F.R. § 0.261(b)(1) (emphasis added).

\(^8\) ACSM notes that the Bureau is making new Commission law with the grant of the Order. Prior to the Order, MSS ATC licensees could not provide standalone ATC service. Now they can, if they seek and obtain Bureau permission. Such a sweeping change is not properly accomplished via a waiver. "The 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 case." *State of Michigan Request for Waiver, DA 11-226 n.24* (2011). If the full Commission wants to overturn Commission precedent and annul the integrated service rule, it may do so, but only with the safeguards of a proper proceeding.

\(^9\) See Order at 12-13 (listing parties who objected to the lack of a full 30-day notice and comment cycle).

\(^10\) The Bureau’s attempt to justify the curtailed timetable by explaining that the Bureau only meant for comments and replies, and not petitions to deny, to follow the expedited schedule, is particularly hollow. The applicable sections of the Commission’s rules, 25.154 and 25.151, provide for no distinction in the time limitations applicable to comments and petitions.
adequate procedural due process by the Bureau's hasty and unexplained rush to issue the Order.

LightSquared's application to the Bureau was, quite obviously, a request for a major modification of its operating conditions. As a request that “increased the potential for interference,” 47 C.F.R. § 25.116(b)(1), the application was, by definition, a “major” change. As such, the Bureau was obligated by Commission rules to place the application on public notice and to provide for a minimum of 30-days for public comment. 11 Sections 25.151 and 25.154 of the Commission's rules provide for 30 days from the date of public notice for the filing of comments and petitions for relief, such as petitions to deny. These rules are firmly based in section 309(j) of the Communications Act, which prescribes a minimum 30-day window for submission of comments prior to Commission action on applications.

Here, rather than follow these simple, longstanding and well-known procedural prerequisites, the Bureau mandated, without explaining the need for such hastiness, that comments be filed 10 days after public notice (such 10 days to include two weekends and the Thanksgiving holiday), and reply comments one week later. 12 No amount of after-the-fact explanation by the Bureau 13 can sidestep the simple fact that, in

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13 Particularly unavailing is the Bureau's dismissive reasoning that, because the LightSquared application was granted pursuant to a waiver, any infirmities in the pleading cycle are to be discounted, because “there is no set pleading cycle for waiver requests.” Order at 13.
granting the LightSquared application on such a hurried timetable, the Bureau failed to follow the simple, established notice-and-comment directives prescribed by both Commission rules and the Communications Act.

IV. The Bureau Violated Legal Precedent and Standards for Processing Waivers

The Bureau granted LightSquared's application pursuant to an elaborate, far-reaching waiver that, in effect, eviscerates the proscription of the integrated service rule. Yet LightSquared never even formally sought such relief. Its application made only the most fleeting reference to a waiver, meekly asserting that "there is ample basis for granting" a waiver if one might be necessary.\(^{14}\) Such a passing reference is clearly an insufficient basis on which to fashion the sweeping waiver of the integrated service rule that resulted from the Order. An applicant who seeks waiver of a rule "must plead with particularity the facts and circumstances which warrant such action."\(^{15}\) Here, LightSquared did not "plead" at all for grant of a waiver, and it provided absolutely no "particularity" regarding facts in support of a waiver. Rather, the Bureau seemingly took the highly unorthodox step of considering the waiver sua sponte. And then, the Bureau botched, or omitted, analysis of the well-established standard for grant of waivers.

It is a cardinal principle of administrative law that an agency "may grant a waiver of its rules in a particular case only if the relief requested would not undermine the

\(^{14}\) Application of LightSquared for Modification of its MSS ATC Authority, SAT-MOD-20101118-00239 (Nov. 18, 2010).

\(^{15}\) \textit{WAIT Radio v. FCC}, 418 F2d 1153, 1157 (DC Cir 1969).
policy objective of the rule in question and would otherwise serve the public interest."$^{16}$ The Order, however, is utterly silent on this critical facet of the law governing waivers. There is absolutely no discussion of whether the waiver would "undermine the policy objective of the rule in question." The policy objective of the integrated service rule is, as has been unmistakably and forcefully enunciated by the Commission, to prevent and proscribe the development of ATC as a stand-alone system.$^{17}$ Thus, the Bureau would need to fashion a most creative argument to support any claim that granting the waiver to LightSquared of the prohibition against ATC-only service would not undermine the very rule designed to prevent ATC-only service.

V. **Conclusion**

For the foregoing reasons, ACSM respectfully requests that the Commission review, and vacate the Order.

Respectfully submitted,

American Congress on Surveying and Mapping

By: ____________________________

Curtis W. Sumner, LS
Executive Director

February 25, 2011

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$^{16}$ *See, e.g., DIRECTV Enterprises, LLC, 24 FCC Rcd 9408, 9413-14 (Int'l Bur. 2009), citing WAIT Radio, 418 F.2d at 1157 (emphasis added).*

$^{17}$ *See supra nn.5-6.*
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:

Jeffrey J. Carlisle
Executive Vice President
Regulatory Affairs & Public Policy
LightSquared
10802 Parkridge Boulevard
Reston, VA 20191-4334

*Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Commissioner Robert McDowell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Julius Knapp
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Robert G. Nelson
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Mindel De La Torre
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Lawrence E. Strickling
Department of Commerce
NTIA
1401 Constitution Avenue, NW
Washington, DC 20230

Paul K. Mancini, Esq.
AT&T Inc.
1120 20th Street, NW
Washington, DC 20036

Brian M. Josef
Director, Regulatory Affairs
CTIA
1400 Sixteenth Street, NW, Suite 600
Washington, DC 20036

Diane J. Cornell
Vice President Government Affairs
Inmarsat
1101 Connecticut Avenue, NW, Suite 1200
Washington, DC 20036

Donna Bethea Murphy
Vice President, Regulatory Engineering
Iridium Satellite LLC
1750 Tysons Boulevard, Suite 1400
McLean, VA 22102
Barry Lamberger  
Director, Government Affairs  
Motorola, Inc.  
1455 Pennsylvania Avenue, NW, Suite 900  
Washington, DC 20004

Jeffrey R. Leventhal, Esq.  
Open Range Communications Inc.  
6430 S. Fiddler's Green Circle, Suite 500  
Greenwood Valley, CO 80111

Dean R. Brenner  
Vice President, Government Affairs  
Qualcomm Incorporated  
1730 Pennsylvania Avenue, NW, Suite 850  
Washington, DC 20006

Rebecca Murphy Thompson  
General Counsel  
Rural Cellular Association  
805 15th Street, NW, Suite 401  
Washington, DC 20005

Alexandra M. Field  
TerreStar Networks  
12010 Sunset Hills Road, 6th Floor  
Reston, VA 20191

Kathleen O’Brien Ham  
T-Mobile USA, Inc.  
401 Ninth Street, NW, Suite 550  
Washington, DC 20005

John T. Scott, III  
Verizon Wireless  
1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Fred B. Campbell, Jr.  
Wireless Comm. Association International  
1333 H Street, NW, Suite 700 West  
Washington, DC 20005

Chris Riley, Esq.  
Free Press  
501 Third Street, NW, Suite 875  
Washington, DC 20001

Regina Kenney, Esq.  
Lawler, Metzger, Keeney and Logan, LLC  
2001 K Street, NW, Suite 802  
Washington, DC 20006  
Counsel for Globalstar, Inc.

Peter A. Corea  
Vice President, Regulatory Affairs  
New DBSD Satellite Services G.P.,  
11700 Plaza American Drive, Suite 1010  
Reston, VA 20190

Jack J. Pelton  
Chairman, President and CEO  
Cessna Aircraft Company  
One Cessna Boulevard  
Wichita, KS 67215

Edward M. Bolen  
President and CEO  
National Business Aviation Association  
1200 18th Street NW, Suite 400  
Washington, DC 20036

Ralph A. Haller  
National Public Safety Telecomm. Council  
8191 Southpark Lane, Number 205  
Littleton, CO 80120-4641

Dr. Frederick A. Tarantino  
Universities Space Research Association  
10211 Wincopin Circle, Suite 500  
Columbia, MD 21044-3432

*Via Hand-Delivery*

[Signature]
Genevieve F. Edmonds