

September 24, 2012



VIA ELECTRONIC FILING

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

Re: **Ex Parte Communication & Request for Action**
IB Docket Nos. 08-184, 11-109; ET Docket No. 10-142; IBFS File No. SAT-
MOD-20101118-00239

Dear Ms. Dortch:

In March 2010, as part of the Commission's approval of the acquisition of LightSquared, LightSquared Subsidiary LLC and its affiliates (collectively, "LightSquared") by investment funds managed by Harbinger Capital Partners ("Harbinger"), the Commission and Harbinger agreed to a set of conditions, including that LightSquared would meet stringent build-out and coverage milestones to construct a network to provide "commercially viable mobile broadband services."¹ In January 2011, the Commission constrained LightSquared's ability to offer commercial service on its L-band frequencies until certain concerns relating to GPS were resolved.² In February 2012, based on those GPS concerns, the Commission proposed to suspend indefinitely or revoke all of the ATC-related authorizations on which LightSquared's terrestrial network is premised.³ Proceedings relating to this proposal are still pending before the Commission.

The *February 2012 Public Notice* did not expressly address the build-out milestones set forth in the *Harbinger Transfer Order*. However, for the reasons set forth below, LightSquared believes that it is necessarily relieved of the obligation to meet the build-out milestones set forth in the *Harbinger Transfer Order* in view of the Commission's broader action and proposed actions set forth in the *February 2012 Public Notice*, and the real-world consequences that such actions engendered for the company. By this letter, LightSquared respectfully requests confirmation from the Commission that the build-out milestones contained

¹ *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee*, 25 FCC Rcd 3059, at ¶ 72 & Attachment 2 (2010) ("*Harbinger Transfer Order*").

² *LightSquared Subsidiary LLC*, 26 FCC Rcd 566, at ¶ 48 (2011) ("*Conditional Waiver Order*").

³ *Public Notice: International Bureau Invites Comment on NTIA Letter Regarding LightSquared Conditional Waiver*, IB Docket No. 11-109, DA 12-214 (rel. Feb. 15, 2012) ("*February 2012 Public Notice*"). In proposing this action, the Commission did not propose any alternative path that would enable LightSquared to move forward with its network deployment.

in the *Harbinger Transfer Order* no longer apply, and that LightSquared is relieved of those milestones until they are reassessed once the status of LightSquared's ATC authorizations is clarified. These actions also will permit the Commission to consider alternative proposals that promote the strong public interest in facilitating the deployment of LightSquared's wireless broadband network, while also fostering co-existence of that network with GPS receivers.

I. BACKGROUND

LightSquared has proposed – and still desires – to deploy a terrestrial wireless network that will inject much needed wholesale capacity, competition, and innovation into the wireless broadband marketplace. The *Harbinger Transfer Order* incorporated a set of conditions to ensure that the expected competitive benefits of LightSquared's terrestrial network would be realized.

These conditions included certain network build-out milestones. These build-out requirements would have required LightSquared to build and operate, in less than five years, a nationwide broadband terrestrial network as extensive as that of other major national carriers. The first of these would have required LightSquared to provide terrestrial coverage to at least 100 million people in the United States by December 31, 2012.⁴ Accordingly, LightSquared needed to marshal significant financial, technical, and business resources.

To this end, immediately after the issuance of the *Harbinger Transfer Order* in March 2010, LightSquared began its work in earnest. For example,

- LightSquared raised over \$2 billion in equity and debt capital from September 2010 to July 2011.
- LightSquared triggered the first phases of its Cooperation Agreement with Inmarsat in August 2010 to begin the process of rationalizing its spectrum to support a viable terrestrial and satellite broadband network at a cost of over \$500 million.
- LightSquared built two next-generation satellites that were specifically designed to support its planned terrestrial and satellite network at a cost of \$1.1 billion and launched the first of those satellites in November 2010.
- LightSquared entered into an innovative commercial arrangement in June 2011 to co-build its terrestrial network with that of a major national wireless carrier and made over \$240 million in payments to that carrier.
- LightSquared signed contracts to provide wireless network capacity to over 30 customers, who were attracted by LightSquared's innovative wholesale model.

⁴ *Harbinger Transfer Order*, Attachment 2, ¶ 5. LightSquared also was to provide terrestrial coverage to at least 145 million people in the United States by December 31, 2013, and to at least 260 million people in the United States by December 31, 2015. *Id.*

In the *February 2012 Public Notice*, however, citing GPS concerns, the Commission proposed to suspend indefinitely or revoke all of the ATC-related authorizations on which LightSquared's terrestrial network is to be built. LightSquared continues to believe that it should be permitted to deploy its network, and that a solution that both facilitates that deployment and that accommodates concerns regarding GPS compatibility is possible. Nevertheless, it is undeniable that the *February 2012 Public Notice* has placed LightSquared's ATC authorizations in jeopardy and has rendered the deployment of LightSquared's network impossible for the time being.

II. REQUESTED ACTION

LightSquared respectfully requests confirmation from the Commission that the build-out milestones in the *Harbinger Transfer Order* no longer apply because of the effect of intervening Commission actions since those build-out milestones were first imposed. LightSquared believes that its build-out requirement should be revisited once GPS questions over LightSquared's ATC authority have been resolved and the path forward has been charted for the company.

LightSquared submits that the course it proposes here is consistent with basic principles of reasoned agency decision-making.⁵ In this case, the *February 2012 Public Notice* has rendered it unreasonable and a practical impossibility for LightSquared to meet its build-out milestones, because it proposes the revocation or suspension of the very regulatory authorization on which the build-out of LightSquared's network is premised. Indeed, in 2011, the Commission did state that the agency would not permit LightSquared to begin commercial service without first resolving GPS interference concerns.⁶ Put simply, LightSquared cannot be expected to build and deploy a network where the authorization to deploy and operate that network has been proposed to be suspended or revoked.⁷ LightSquared can make plans to meet any set of build-out requirements – including rebuilding its financial capacity and restarting the process of rationalizing its spectrum – only after the GPS issues are ultimately resolved and the status of its ATC authorizations is clarified.

Additionally, were LightSquared to determine to commence network deployment notwithstanding the *February 2012 Public Notice*, LightSquared cannot predict what technical

⁵ In other circumstances, regulatory agencies have granted relief when they recognized that compliance with a legal requirement is made impossible because of the impact of other intervening regulatory requirements. *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991); *see also Dep't of Health & Human Servs. v. RxUSA Wholesale, Inc.*, 285 F. App'x 809, 811 (2d Cir. July 10, 2008).

⁶ *See* Letter from Chairman Julius Genachowski to the Hon. Charles E. Grassley (May 31, 2011) (“[T]he Commission will not permit LightSquared to begin commercial service without first resolving the Commission’s concerns about potential widespread harmful interference to GPS devices.”).

⁷ For example, in recognition of the fact that it was no longer practical or viable for LightSquared to continue network deployment efforts in the wake of the *February 2012 Public Notice*, in March 2012, LightSquared's principal network contractor, a major wireless carrier, terminated its contract to co-build LightSquared's network.

parameters should apply such that the equipment used in its terrestrial network will be consistent with the resolutions identified to the GPS compatibility question. Under these circumstances, it would be imprudent and impractical for LightSquared to build a network under its existing ATC authorizations at significant cost that the Commission may nonetheless determine to be incompatible with GPS devices and inconsistent with the Commission's later directives. Moreover, at such time as the GPS issues are ultimately resolved, LightSquared may need to calibrate its plans to take account of changes in the marketplace and technology, especially in light of rapid changes in the mobile wireless industry, to ensure that any business plans are commercially viable.

The Commission has granted relief from deadlines in situations that are far less compelling than those presented here. Specifically, in a number of cases, the Commission has provided relief to licensees that are unable to meet construction requirements, in large part, as a result of "a lack of viable, affordable equipment."⁸ In the current circumstances, however, LightSquared is not merely experiencing difficulties in obtaining equipment due to the technical uncertainties currently surrounding a resolution of the GPS issues, but, until those issues are resolved, the *February 2012 Public Notice* proposes to suspend or vacate the very spectrum authorizations on which LightSquared is to build its network. That the Commission has granted relief in other, less compelling situations strongly illustrates that LightSquared cannot properly be expected to satisfy the milestones in the circumstances presented here.⁹

LightSquared also believes that relief from the milestones is consistent with the Commission's general policy on build-out requirements. Build-out requirements ensure that licensees put to use the country's valuable and scarce spectrum resources. If a licensee fails to do so, the Commission can give others an opportunity, so those resources do not lie fallow.¹⁰

⁸ *Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service*, 25 FCC Rcd 10097, 10102 (2010) (stating that "we find that the record demonstrates that there is a lack of viable affordable equipment"); *see also Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd 14134, 14139 (2006) (noting that "deployment attempts using available equipment have been marred by technical problems or proved to be economically infeasible"); *Applications Filed By Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time To Construct and Demonstrate Substantial Service*, 23 FCC Rcd 5894, 5905 (2008) (citing "difficulties in obtaining viable, affordable equipment" as a leading factor on which relief was granted); *Warren G. Havens*, 19 FCC Rcd 12994, 13000 (2004) (finding that it is not "reasonable to fault licensees who obtained licenses and then faced an unexpected loss of equipment").

⁹ *See Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C. Cir. 1985) (citing *Nat'l Labor Relations Bd. v. Wash. Star. Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984)).

¹⁰ *See, e.g.*, 47 U.S.C. § 309(j)(4)(B) (authorizing Commission to adopt construction requirements that "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services").

Here, until issues of GPS compatibility are resolved, those resources will necessarily lie fallow simply because no party is in a position to deploy a terrestrial network in the L-band. Additionally, regardless of any GPS issues, LightSquared will continue to be the MSS provider in the L-band, making it extremely cumbersome if not impossible for an independent licensee to provide service on that spectrum. Finally, once GPS concerns are ultimately resolved, LightSquared will be uniquely positioned to resume the build-out and deployment of a terrestrial network using the L-band, as it has worked for a decade to develop the technical expertise and capability necessary to do so – experience and expertise that no other party possesses. In short, recognition that LightSquared’s authorizations are no longer dependent on the milestones would further the Commission’s policy to manage spectrum resources so that they are most likely to be put to use for the public good, and would thereby further the public interest.

Finally, if the Commission were to treat LightSquared’s authorizations as forfeited by a failure to satisfy the milestones, it would, as a practical matter, obviate the additional process contemplated by recent Commission statements to resolve the concerns surrounding the deployment of LightSquared’s network,¹¹ as well as the further proceedings proposed by the *February 2012 Public Notice* itself.¹² If LightSquared’s authorizations were revoked because it is no longer reasonable, if not a practical impossibility, for LightSquared to meet these build-out milestones, the constructive process contemplated by these recent Commission statements would end before it began, thereby depriving LightSquared of its due process under the *February 2012 Public Notice*.

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LightSquared remains committed to fulfilling the Commission’s vision of providing competitive wireless broadband to all Americans. LightSquared remains committed to finding a solution that allows it to deploy a wireless network in a manner that addresses concerns

¹¹ In response to a Congressional inquiry regarding the Commission’s consideration of authorizing LightSquared to use alternative spectrum for commercial broadband use, Chairman Genachowski stated that LightSquared had not at that time submitted a petition regarding such use. *See* Letters from Chairman Julius Genachowski to the Hon. James P. Moran, the Hon. Steven R. Rothman, the Hon. Maurice D. Hinchey, the Hon. Ander Crenshaw, and the Hon. Rodney Alexander (Aug. 13, 2012). Chairman Genachowski further stated: “Should that change, the Commission will coordinate with NTIA as necessary, and consider any proposals carefully.” *Id.* LightSquared looks forward to beginning such a process that will lead to a comprehensive and integrated proposal.

¹² *See February 2012 Public Notice* at 4. Moreover, if the Commission were to treat a failure to reach the milestones as grounds to revoke LightSquared’s ATC authorizations, it would, in effect, be allowing the *February 2012 Public Notice* to consummate an outcome that that document merely proposed, and submitted for public comment. The *February 2012 Public Notice* caused LightSquared to delay further investment of the network, as any rational economic actor would. To now revoke LightSquared’s authorization because the company paused pending a final outcome would be inconsistent with rational agency decision-making.

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raised by the GPS industry. The actions requested here will provide needed clarity and help all parties to these proceedings explore a path forward whereby they might work with the Commission to achieve these goals.

Respectfully submitted,

/s/ Jeffrey J. Carlisle

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