

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

In the Matter of	)	
	)	
Applications of Sprint Nextel Corporation, Transferor	)	IB Docket No. 12-343
	)	
and	)	
	)	
SOFTBANK CORP., and Starburst II, Inc., Transferees	)	
	)	
for Consent to Transfer of Control of Licenses and Authorizations	)	

**OPPOSITION TO REQUEST TO HOLD PROCEEDING IN ABEYANCE**

Pursuant to section 1.45(d) of the Commission’s rules,<sup>1</sup> Sprint Nextel Corporation (“Sprint”), Starburst II, Inc. (“Starburst II”), and SOFTBANK CORP. (“SoftBank”) (collectively, the “Applicants”) hereby oppose the Request to Hold Proceeding in Abeyance (“Request”) filed by DISH Network L.L.C. (“DISH”) on January 16, 2013. DISH requests that the Commission hold in abeyance its review of SoftBank’s proposed acquisition of an approximately 70 percent controlling interest in Sprint (the “SoftBank/Sprint Transaction”) and

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<sup>1</sup> 47 C.F.R. § 1.45(d). The Applicants will treat DISH’s filing as made pursuant to section 1.45(d), which governs requests to stay an order or for “other temporary relief.” Pursuant to the truncated filing requirements of section 1.45(d), the Applicants have seven days to file their opposition. No replies or filings other than an opposition are permitted, including comments in support. *Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices*, Order, 10 FCC Rcd 894, ¶ 5 (IB 1994). By treating the filing as a request for temporary relief, however, Applicants do not concede that DISH raises issues that require expedited treatment.

Sprint's proposed acquisition of the remaining shares of Clearwire Corporation ("Clearwire") that Sprint does not already own (the "Sprint/Clearwire Transaction").

The Commission should deny the Request. DISH provides no legal or factual basis for delaying the Commission's review of these proposed transactions. The Commission routinely processes transfer of control applications notwithstanding the existence of shareholder litigation or closing contingencies, such as the need for shareholder approval. The Applicants have submitted complete license transfer applications pursuant to two binding, fully effective transaction agreements. Contrary to well-established Commission precedent,<sup>2</sup> DISH's abeyance request is an effort to manipulate the Commission's processes to gain leverage in an attempted corporate takeover. The Commission should reject this abuse of its processes, adhere to its current pleading schedule, and complete its review of the proposed transactions expeditiously.

***DISH's "Offer" to Clearwire.*** DISH argues that the Commission should delay its review of the pending applications because DISH has made an unsolicited, non-binding business proposal to Clearwire. DISH's argument, however, is based on a misleading picture of the facts and is contrary to well-established Commission precedent.

The applications at issue in this proceeding are the subject of two separate, fully effective agreements. SoftBank and Sprint entered into a binding agreement for the SoftBank/Sprint Transaction on October 15, 2012.<sup>3</sup> Contrary to DISH's suggestion,<sup>4</sup> the SoftBank/Sprint

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<sup>2</sup> See, e.g., *Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d (P & F) 1536 (1986).

<sup>3</sup> See Agreement and Plan of Merger among SOFTBANK CORP., a Japanese kabushiki kaisha; Starburst I, Inc., a Delaware corporation; Starburst II, Inc., a Delaware corporation; Starburst III, Inc., a Kansas corporation; and Sprint Nextel Corporation, a Kansas corporation, Dated as of October 15, 2012, attached as Exhibit 2.1 to Current Report (Form 8-K) of Sprint Nextel Corp. (Oct. 15, 2012), *available at*: <<http://www.sec.gov/Archives/edgar/data/101830/000119312512423540/d424642dex21.htm>>.

<sup>4</sup> Request at 4.

Transaction is *not* contingent on the closing of the Sprint/Clearwire Transaction. The SoftBank/Sprint Transaction remains fully in effect, and the Applicants have sought Commission consent to the license transfers contemplated by this transaction in the applications that are the subject of the Public Notice issued on December 27, 2012.<sup>5</sup> DISH has offered no basis whatsoever for delaying the Commission’s consideration of this transaction.

Sprint and Clearwire similarly entered into a binding agreement (the “Sprint/Clearwire Merger Agreement”) for the Sprint/Clearwire Transaction on December 17, 2012.<sup>6</sup> DISH disingenuously describes the Sprint/Clearwire Merger Agreement as merely an “offer” by Sprint to acquire the remaining shares of Clearwire.<sup>7</sup> On the contrary, it is a *definitive agreement* between Sprint and Clearwire which was “unanimously approved by Clearwire’s board of directors upon the unanimous recommendation of a special committee of the Clearwire board consisting of disinterested directors not appointed by Sprint.”<sup>8</sup> The Sprint/Clearwire Merger Agreement requires the parties to take all necessary steps to obtain regulatory approval for the transaction and to take all actions to “consummate and make effective the transactions contemplated by this Agreement as promptly as practicable.”<sup>9</sup> The parties have taken such steps, including requesting the Commission’s consent to the transaction by amending the pending

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<sup>5</sup> Public Notice, DA 12-2090, IB Docket No. 12-343, at 4 (Dec. 27, 2012).

<sup>6</sup> See Agreement and Plan of Merger by and among Sprint Nextel Corporation, Collie Acquisition Corp. and Clearwire Corporation Dated as of December 17, 2012, Exhibit 2.1 to Current Report (Form 8-K) of Sprint Nextel Corporation, Dec. 18, 2012, *available at*: <<http://www.sec.gov/Archives/edgar/data/101830/000119312512505717/d456262dex21.htm>> (“Sprint/Clearwire Merger Agreement”).

<sup>7</sup> Request at 1.

<sup>8</sup> Clearwire Press Release, *Sprint to Acquire 100 Percent Ownership of Clearwire for \$2.97 per Share* (Dec. 17, 2012), *available at*: <[http://files.shareholder.com/downloads/CLWR/2078828157x0x622061/c49b05ea-d4ad-44c0-94da-45474675d1cd/CLWR\\_News\\_2012\\_12\\_17\\_General\\_Releases.pdf](http://files.shareholder.com/downloads/CLWR/2078828157x0x622061/c49b05ea-d4ad-44c0-94da-45474675d1cd/CLWR_News_2012_12_17_General_Releases.pdf)>.

<sup>9</sup> Sprint/Clearwire Merger Agreement § 4.4(a).

SoftBank/Sprint applications. The Sprint/Clearwire Merger Agreement remains fully effective and binding on the parties thereto and should be processed by the Commission in accordance with its December 27, 2012 Public Notice.<sup>10</sup>

DISH's "offer" to Clearwire provides no basis for delaying the Commission's review of the transactions. Although the special committee of the Clearwire board has determined that its fiduciary duties require it to evaluate DISH's latest offer, it has also made clear that it "has not made any determination to change its recommendation of the current Sprint transaction."<sup>11</sup> Thus no basis exists for the Commission to delay its consideration of the pending applications.

DISH's latest offer to Clearwire is, in fact, an illusory, non-viable distraction that is irrelevant to the Commission's review of the applications in this proceeding.<sup>12</sup> Under well-established Commission precedent, DISH's groundless speculation that "Clearwire may be acquired by a party other than Sprint" or enter into alternative transactions provides no basis for

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<sup>10</sup> The transactions are subject to shareholder approval and other customary closing conditions, as are nearly all comparable merger agreements presented to the Commission for regulatory approval. The Commission routinely processes transfer of control and license assignments applications that are subject to such closing conditions.

<sup>11</sup> Clearwire Press Release, *Clearwire Corporation Provides Transaction Update* (Jan. 8, 2013), available at: <<http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=732316>> ("January 8 Clearwire Press Release"). Clearwire also opposes DISH's Request. As Clearwire has explained in announcing the DISH proposal, the Sprint/Clearwire Merger Agreement is "definitive" while DISH's offer "is only a preliminary indication of interest and is subject to numerous, material uncertainties and conditions, including the negotiation of multiple contractual arrangements being requested by DISH (some of which, as currently proposed, may not be permitted under the terms of Clearwire's current legal and contractual obligations)." *See id.*

<sup>12</sup> DISH's offer is a non-binding, complex mix of proposed spectrum purchases, governance changes, commercial agreements, and debt and equity arrangements that are subject to a range of interrelated and unrealistic conditions. It ignores the legal and contractual rights Sprint has acquired in return for valuable consideration as a significant shareholder, vendor, and customer of Clearwire since 2008. *See* January 8 Clearwire Press Release (summarizing Sprint's response to DISH proposal).

holding this proceeding in abeyance.<sup>13</sup> The shareholder litigation cited in the Request similarly fails to warrant any delays in the Commission’s review.<sup>14</sup> The Commission has “consistently held that it is not the proper forum for the resolution of such private disputes . . . . Absent the issuance of an injunction or stay against the sale by a local court, the Commission has routinely granted assignment applications that are the subject of private legal disputes.”<sup>15</sup> The Commission also has rejected arguments that a license transfer should be denied or delayed because a third party alleges that it has made a better offer to buy the licensee. The Commission found that entertaining such arguments would violate the statutory prohibition against the Commission considering “whether the public interest, convenience and necessity may be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”<sup>16</sup>

DISH’s citation to the *Tribune* proceeding is disingenuous.<sup>17</sup> Contrary to DISH’s suggestion, the Commission specifically rejected requests, similar to those made by DISH here,

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<sup>13</sup> Request at 3-4.

<sup>14</sup> *Id.* at 3, note 7.

<sup>15</sup> *KETX(AM)*, Letter Ruling, 23 FCC Rcd 12687 (MB 2008) (“*KETX(AM)*”); *see also Domestic Section 214 Granted; Domestic Section 214 Application Filed for the Transfer of Control of Stanacard, LLC*, Public Notice, 27 FCC Rcd 2381 (2012) (approving transfer of control notwithstanding claim that the ownership of shares were in dispute and subject to two state court proceedings).

<sup>16</sup> *KETX(AM)*, citing 47 U.S.C. § 310(d). *See also Application of Citadel Communications Company, Ltd. (Assignor) and ACT III Broadcasting of Buffalo, Inc. (Assignee) for Assignment of License of Television Station WUTV (TV), Buffalo, New York*, Memorandum Opinion and Order, 5 FCC Rcd 3842, ¶ 16 (1990) (finding that the FCC “cannot consider whether some other proposal might comparatively better serve the public interest”); *Applications of MMM Holdings, Inc. for Transfer of Control of LIN Broadcasting Corp.*, Memorandum Opinion and Order, 4 FCC Rcd 6838, ¶ 8 (1989); S. Rep. No. 82-44, at 8 (1st Sess. 1951) (adopting the prohibition on comparative analysis upon a finding that such a practice is “an unwise invasion by a governmental agency into private business practice”).

<sup>17</sup> Request at 6.

to delay processing of Tribune’s applications due to uncertainty as to which parties ultimately would gain control of Tribune as a result of the ongoing bankruptcy proceeding.<sup>18</sup> Parties in the Tribune proceeding had urged the Commission to stop its review, arguing that the applications “are not ripe for grant because of significant looming changes in the ownership structure of the Applicants” and that “[s]ignificant litigation remains before Tribune’s future (and new) owners will be known.”<sup>19</sup> The *Tribune Order* rejected this argument:

As a preliminary matter, Wilmington Trust and the Public Interest Petitioners have both asserted that we should delay our consideration of the applications until after the Bankruptcy Court issues its order. Wilmington Trust states that some parties and their ownership interests may change as a result of the Examiner’s Report and the Bankruptcy Court’s order regarding confirmation of the DCL Plan. The Applicants and JPMCB both argue correctly that the Commission regularly accepts and reviews applications prior to the issuance of the Court’s plan confirmation order so as to facilitate the efficient operation of the bankruptcy process. Applications of a company in bankruptcy, like all applications, are subject to amendment prior to the issuance of the Commission’s decision.<sup>20</sup>

Instead of focusing on the relevant findings in the *Tribune Order*, DISH cites a letter issued by the Media Bureau almost a year-and-a-half after the Tribune applications were filed, informing the parties that it was retroactively stopping the FCC’s shot-clock to reflect the fact that the bankruptcy proceeding was taking far longer than the 180-day time period contemplated by the Commission’s informal processing benchmark for transactions.<sup>21</sup>

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<sup>18</sup> *Applications of Tribune Company and Its Licensee Subsidiaries, Debtors-in-Possession*, Memorandum Opinion and Order, 27 FCC Rcd 14239, ¶ 8 (2012) (“*Tribune Order*”).

<sup>19</sup> Reply of Petitioner Wilmington Trust Company, MB Docket 10-104, at 2 (Aug. 30, 2010).

<sup>20</sup> *Tribune Order* ¶ 8 (citations omitted).

<sup>21</sup> The ICC precedents cited by DISH are also unavailing and, if anything, undermine DISH’s Request. Request at 7. In one of those cases, the ICC *denied* a request for stay; in the other, the ICC suspended a previously adopted procedural schedule but did not hold in abeyance the entire “proceeding,” as DISH claims. See *Union Pacific Corp.*, Request for Informal

***Spectrum Aggregation.*** DISH also argues that the Commission should delay its review of the proposed transactions until the Applicants submit certain data concerning the aggregation of the Sprint and Clearwire spectrum holdings. Sprint and Clearwire, however, already provided the relevant data concerning their spectrum holdings as part of their applications seeking approval of the 2008 Sprint/Clearwire transaction. The Commission reviewed that data, and the complete record developed in that proceeding, and concluded that the aggregation of Sprint’s and Clearwire’s spectrum holdings served the public interest.<sup>22</sup> *Clearwire’s spectrum has been attributed to Sprint ever since that decision for spectrum screen competitive analysis purposes.* DISH has offered no public policy or public interest rationale for the Commission to rehash the same issues. In establishing the pleading cycle in this proceeding, the Commission already has found that the SoftBank/Sprint applications, as amended, are complete and acceptable for filing.<sup>23</sup> There is no need for the Applicants to submit any additional data concerning their spectrum holdings.<sup>24</sup>

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Opinion-Voting Trust Agreement, ICC Finance Docket No. 32619, *Decision* (Jan. 5, 1995); Union Pacific and Chicago and North Western Holdings Corp., ICC Finance Docket No. 32133, *Decision No. 6* (May 28, 1993); Request at 7. DISH’s reliance on the FCC’s Omnipoint order fares no better. Request at 6. While DISH is correct that the FCC found the concept of ripeness to be a potentially “useful analogy” in that order, DISH fails to point out that the FCC expressly limited application of this analogy to a single narrow context – namely, the FCC’s “discretion to issue declaratory rulings.” *Omnipoint Communications, Inc., New York MTA, Frequency Block A, Amendment of the Commission’s Rules, to Establish New Personal, Communications Services*, Memorandum Opinion and Order, 11 FCC Rcd 10785, ¶ 9 (1996).

<sup>22</sup> *Sprint Nextel Corporation and Clearwire Corporation; Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 17570, ¶ 3 (2008).

<sup>23</sup> Public Notice, DA 12-2090, IB Docket No. 12-343, at 4 (Dec. 27, 2012).

<sup>24</sup> DISH also asserts that the Applicants should submit “network usage data” and “a showing of how the technology will migrate to support the additional spectrum.” Request at 5. DISH, however, provides no rationale for this assertion other than to state that the applicants in the AT&T/T-Mobile proceeding were asked to submit such data. DISH ignores, however, the fact that the serious anti-competition concerns raised by the proposed merger of the second and

***Reconsideration Petitions Filed in Separate Proceedings.*** Finally, DISH argues that the Commission should grant its abeyance request because DISH and another party have petitioned the Commission to reconsider its grant of *pro forma* applications concerning Sprint’s acquisition of Eagle River Holdings, LLC’s (“Eagle River”) interest in Clearwire (the “Eagle River Transaction”). As demonstrated in the oppositions filed by Clearwire, however, those reconsideration petitions are meritless.<sup>25</sup> The Eagle River Transaction involved routine *pro forma* applications that were properly processed and approved by the Commission; that approval provides no basis for delaying the Commission’s review of the SoftBank/Sprint Transaction and the Sprint/Clearwire Transaction.<sup>26</sup> The FCC’s consideration of transactions would be subject to unacceptable delay and abuse if parties were able to halt FCC action by submitting a petition for reconsideration; such tactics are clearly barred by the Commission’s rules.<sup>27</sup>

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fourth largest wireless carriers in the nation do not exist in the proposed SoftBank/Sprint Transaction (where SoftBank has no wireless operations in the United States) or in the proposed Sprint/Clearwire Transaction (where Clearwire’s spectrum is already attributed to Sprint and Sprint is Clearwire’s only significant wholesale customer).

<sup>25</sup> See Clearwire Opposition to Petition for Reconsideration, File Nos. 0005480932, et al. (filed Jan. 14, 2013); Clearwire Opposition to Petition for Reconsideration, File Nos. 0005480932, et al. (filed Jan. 22, 2013).

<sup>26</sup> See *LIN Broadcasting Corp.*, Order, DA 89-726, ¶ 5 (MB 1989) (1989 FCC LEXIS 1020) (concluding that it would “inappropriately thrust the FCC into the midst of [a] hostile tender offer” if the FCC did not follow its normal procedures and grant a *pro forma* transfer application). Moreover, for the sake of argument, even if the petitions for reconsideration had any merit, there would be no effect at all on this proceeding or on the Sprint/Clearwire Transaction. The Sprint/Clearwire Transaction is not contingent on the consummation of the Eagle River Transaction and if that transaction were undone (which it should not be), the only consequence would be that Eagle River’s shares would be included in the shares purchased under the Sprint/Clearwire Merger Agreement, instead of being purchased separately.

<sup>27</sup> An FCC staff order subject to a petition for reconsideration will only be stayed at the FCC’s discretion, a step that is rarely taken. See 47 C.F.R. sec. 1.102(b)(2).

**Conclusion.** DISH is seeking to manipulate the Commission’s processes to advantage its own offer to acquire all of Clearwire. The Commission has long held that it must remain neutral with respect to non-FCC related disputes and that the Commission will not allow its transfer of control procedures to be used to favor one party over another in corporate takeovers.<sup>28</sup> Contrary to this well-established policy, DISH’s Request seeks to subvert the Commission’s normal license transfer review process so that DISH can advance its own private commercial interests.<sup>29</sup> The SoftBank/Sprint Transaction and the Sprint/Clearwire Transaction will provide concrete, substantial benefits to consumers. Delaying Commission review of these transactions because of the private commercial disputes raised by DISH will only undermine the Commission’s public interest objectives. The Commission should accordingly reject DISH’s request.<sup>30</sup>

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<sup>28</sup> See, e.g., *Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d (P & F) 1536 (1986).

<sup>29</sup> See e.g., Todd Shields and Alex Sherman, *Dish Network Asks FCC to Pause Its Sprint-Softbank Review*, BLOOMBERG, Jan. 17, 2013 (“‘This is a negotiating tactic for [DISH],’ Amy Yong, an analyst at Macquarie Securities in New York, said in an interview. ‘[DISH] wants to force Sprint into talks on sharing airwaves,’ Yong said.”), available at: <<http://www.bloomberg.com/news/2013-01-17/dish-network-asks-fcc-to-pause-sprint-softbank-merger-review.html>>.

<sup>30</sup> Three Educational Broadband Service (“EBS”) licensees have filed a letter in support of the DISH Request (see Letter from Rudolph Geist, RJGLaw LLC, to Marlene Dortch, FCC Secretary, IB Docket No. 12-343 (filed Jan. 17, 2013) (“Geist Letter”)), but this letter offers no reason to extend the current pleading cycle or otherwise delay this proceeding. Contrary to the letter’s conclusory assertions, the Commission is providing parties a full opportunity to comment on the proposed transaction, which will benefit EBS licensees as well as consumers. In any event, as noted *supra*, DISH’s Request is a request for temporary relief, and no other pleadings other than an opposition are permitted under the FCC’s rules. See 47 U.S.C. § 1.45(d); *Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices*, Order, 10 FCC Rcd 894, ¶ 5 (IB 1994). The Commission should accordingly strike the Geist Letter from the record.

Respectfully submitted,

**SPRINT NEXTEL CORPORATION**

/s/ Regina M. Keeney

Regina M. Keeney  
A. Richard Metzger, Jr.  
Charles W. Logan  
Lawler, Metzger, Keeney & Logan, LLC  
2001 K St., N.W., Suite 802  
Washington, DC 20006  
(202) 777-7700  
*Its Counsel*

**SOFTBANK CORP.  
STARBURST I, INC.  
STARBURST II, INC.**

/s/ John R. Feore

John R. Feore  
Michael Pryor  
J.G. Harrington  
Dow Lohnes PLLC  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 776-2000  
*Its Counsel*

January 23, 2013

## Certificate of Service

I hereby certify that on this 23rd day of January, 2013, I caused true and correct copies of the foregoing Opposition to Request to Hold Proceeding in Abeyance to be served by electronic mail to:

Andrew W. Guhr  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
aguhr@steptoe.com  
*Counsel for DISH Network L.L.C.*

Nadja Sodos-Wallace  
Clearwire Spectrum Holdings, LLC  
1250 Eye Street, NW, Suite 901  
Washington, DC 20005  
nadja.sodoswallace@clearwire.com

Viet D. Dinh  
Bancroft PLLC  
1919 M Street, NW, Suite 470  
Washington, DC 20036  
vdinh@bancroftpllc.com  
*Counsel for Crest Financial Limited*

Howard J. Symons  
Russell H. Fox  
Angela Y. Kung  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY AND POPEO, PC  
701 Pennsylvania Ave. NW, Suite 900  
Washington, DC 20004  
HJSymons@mintz.com

*Counsel for Clearwire Corporation*

Rudolph J. Geist  
RJGLaw LLC  
7910 Woodmont Avenue, Suite 405  
Bethesda, MD 20814  
rgeist@rjglawllc.com  
*Counsel to EBS Licensees*

Brandon Sazue  
Crow Creek Sioux Tribe  
P.O. Box 50  
Fort Thompson, South Dakota 57339  
UtilitiesAuthority@CrowCreekSiouxTribe.com

Chris Gleason and Aaron Sokolik  
Taran Asset Management  
527 Madison Avenue  
New York, NY 10022  
chris.gleason@taranasset.com

David Krech  
International Bureau  
Federal Communications Commission  
David.Krech@fcc.gov

Kathleen Collins  
International Bureau  
Federal Communications Commission  
Kathleen.Collins@fcc.gov

Aaron Goldschmidt  
Wireless Telecommunications Bureau  
Aaron.Goldschmidt@fcc.gov

Paul Murray  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Paul.Murray@fcc.gov

Wayne McKee  
Media Bureau  
Federal Communications Commission  
Wayne.McKee@fcc.gov

Christopher Sova  
Wireline Competition Bureau  
Federal Communications Commission  
Christopher.Sova@fcc.gov

Neil Dellar  
Office of General Counsel  
Federal Communications Commission  
TransactionTeam@fcc.gov

Best Copy and Printing, Inc.  
FCC@BCPIWEB.COM

Additionally, a copy was mailed by U.S. mail to:

Steven A. Zecola  
108 Hamilton Rd.  
Sterling, VA 20165

/s/ Ruth E. Holder  
Ruth E. Holder