Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Applicability of NVNG MSS Frequency Assignments Outside the National Territory Of the United States	IB Docket No. 21-___
March 10, 2021, International Bureau Satellite Division Letter Declaratory Ruling	ORBCOMM Licensee Corp., IBFS File No. SAT-MOD-20070531-0076, FCC Call Sign S2103 Swarm Technologies, Inc., IBFS File No. SAT-LOA-20181221-00094, SAT-MOD-20200501-00040, SAT-AMD-20200504-00041, FCC Call Sign S3041

OPPOSITION OF SWARM TECHNOLOGIES, INC. TO THE REQUEST FOR STAY OF ORBCOMM LICENSE CORP.

Kyle Wesson, Ph.D.
Lead Regulatory Engineer
Swarm Technologies, Inc.
435 N. Whisman Rd.
Mountain View, CA 94043

Scott Blake Harris
Shiva Goel
Jason Neal
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Suite 800
Washington, D.C. 20036
Tel: 202-730-1300
Fax: 202-730-1301
sbharris@hwglaw.com
sgoel@hwglaw.com
jneal@hwglaw.com

Counsel for Swarm Technologies, Inc.

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EXECUTIVE SUMMARY

Swarm Technologies, Inc. opposes the stunningly frivolous request by ORBCOMM to stay the March 10, 2021 Declaratory Ruling clarifying ORBCOMM's "permissible operations outside of the U.S. under the terms of its Commission License."[1] ORBCOMM cannot possibly believe this request—let alone its argument for an "automatic stay"—has any hope of success. But its true audience is not the Commission. Rather, ORBCOMM is posturing to confuse foreign regulators and delay Swarm's competitive entry internationally. The Commission has rejected ORBCOMM's stall tactics twice already. It should do so again with this latest request, and with whatever foolishness ORBCOMM thinks to file next.

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After the Commission issued Swarm's license in 2019 over ORBCOMM's objections, ORBCOMM began a global effort to prevent Swarm from actually using its license as the Commission intended. ORBCOMM refused to comply with the express condition in its FCC license requiring it to vacate Swarm's frequencies and began telling foreign regulators that the condition did not apply outside of the United States. ORBCOMM has with some success used this fiction to block and delay Swarm from receiving landing rights overseas. It has done so by demanding that Swarm coordinate with ORBCOMM in the very frequencies the Commission has prohibited ORBCOMM from using, only to then claim that Swarm's system design makes such coordination infeasible.

The International Bureau correctly put an end to this anticompetitive charade by issuing the Declaratory Ruling on March 10, 2021 to "terminat[e]" the "controversy" ORBCOMM manufactured. ORBCOMM now hopes to derail the Declaratory Ruling until after dozens of foreign jurisdictions rule on Swarm's pending applications for market access. As explained below, ORBCOMM does not come close to meeting a single factor of the four-prong test required for a stay. The Commission should deny the stay and consider punitive action to address ORBCOMM's blatant disregard of its license.

No automatic stay. After losing at the Commission, ORBCOMM has resorted to manufacturing confusion about whether the Declaratory Ruling is even effective. It thus has claimed that the mere filing of its Application for Review "automatically stayed" the Declaratory Ruling pending further review. But such relief is only available in rare "hearing matters

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[1] Letter from Karl A. Kensinger, Acting Chief, Satellite Division, International Bureau, FCC, to Scott Blake Harris et al., IBFS File No. SAT-MOD-20070531-00076 (IB Mar. 10, 2021) ("Declaratory Ruling" or "Ruling"); Request for Stay of ORBCOMM Licensee Corp. ("ORBCOMM"), IBFS File No. SAT-MOD-20070531-00076; Swarm Technologies, Inc. ("Swarm"), IBFS File Nos. SAT-LOA-20181221-00094, SAT-MOD-20200501-00040, SAT-AMD-20200504-00041 (filed Apr. 9, 2021) ("ORBCOMM Stay Request"); Application for Review of ORBCOMM Licensee Corp., IBFS File No. SAT-MOD-20070531-00076; Swarm Technologies, Inc., IBFS File Nos. SAT-LOA-20181221-00094, SAT-MOD-20200501-00040, SAT-AMD-20200504-00041 (filed Apr. 9, 2021) ("Application for Review").

conducted pursuant to Part 1, Subpart B of the Commission's rules,"[2] and no hearing was conducted, required, or even requested here. The last operator to make this argument wound up being sanctioned by the Commission.[3] That may be appropriate here too.

No irreparable harm or favorable equitable factors. ORBCOMM utterly fails to justify the "extraordinary equitable relief of a stay."[4] Its alleged "harm" is that foreign authorities will allow Swarm to operate in Swarm's assigned frequencies—but that is precisely what the FCC licensed Swarm to do. Any so-called "harm" thus arises from Swarm's license, not the Declaratory Ruling, and should be welcomed by the Commission, consumers, and competition. ORBCOMM has not shown how Swarm's landing rights will injure it in any event. It makes no claim that its services would be affected—or that it even *uses* the spectrum it refuses to vacate.

The Application for Review is facially defective. On the merits, ORBCOMM's Application for Review does not even contain the elements required under Section 1.115(b).[5] Bureaus are not only empowered but encouraged to dismiss such applications summarily.[6]

The Declaratory Ruling is procedurally sound. ORBCOMM manufactured this controversy and extensively briefed its position. It now cries prejudice because Swarm did not file a document entitled "Petition for Declaratory Ruling." But Section 1.2(a) empowers the Commission to issue Declaratory Rulings "on its own motion,"[7] and the International Bureau has the delegated authority to do the same on matters within its jurisdiction. In any event, the Bureau treated Swarm's letter requesting relief effectively as a petition.

The Commission can regulate U.S. satellite operators' global operations. ORBCOMM claims that the Commission cannot specify frequencies of operation for *any* U.S. satellite in the Earth-to-space direction, especially for signals received from outside the United States. In other words, ORBCOMM seeks to end what for decades has been standard Commission practice. Unsurprisingly, the Commission has repeatedly rejected these same arguments before.

A 1994 licensing decision does not save ORBCOMM. ORBCOMM resorts to relying on a snippet of text from a 1994 licensing decision stating that the Commission was not adopting a global bandplan for NVNG licensees "at th[at] time."[8] But the 1994 bandplan was replaced by a global one in 1997. Even if it were somehow still in effect, ORBCOMM would still need Commission authority to operate in frequencies beyond those specified in its U.S. license.

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2 *Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, Order, 28 FCC Rcd. 431, ¶ 3 (Media Bur. 2013 ("*Massillon Order*").

3 *See id.* ¶ 2 (formally "admonish[ing]" the cable operator Massillon).

4 *LightSquared Technical Working Group Report*, Order Denying Motion for Stay, 36 FCC Rcd. 1262, ¶ 9 (2021) ("*2021 LightSquared Order*").

5 47 C.F.R. § 1.115(b).

6 *Amendment of Parts 0 and 1 of the Commission's Rules*, Order, FCC 21-17, 36 FCC Rcd. 731, ¶ 2 (2021) ("*Order Updating Delegations of Authority*").

7 47 C.F.R. § 1.2(a).

8 *Application of Orbital Communications Corp.*, Order and Authorization, 9 FCC Rcd. 6476, ¶ 3 (1994) ("*Orbital 1994 Order*").

ARGUMENT

The Declaratory Ruling is effective unless and until the Commission grants ORBCOMM's request to stay its effect. To justify a stay request, a party must show (1) that it will suffer irreparable harm without a stay; (2) that it is likely to succeed on the merits; (3) that a stay will not substantially injure other interested parties; and (4) that the public interest supports a stay.[9] None of factors are met here.

I. THE DECLARATORY RULING IS EFFECTIVE AND WILL REMAIN EFFECTIVE UNLESS THE COMMISSION STAYS IT.

Under the Commission's rules, the Declaratory Ruling will remain in effect until and unless the Commission grants a stay, the requirements for which are extraordinary and obviously unmet. ORBCOMM's argument for an "automatic stay" is frivolous to the point of bad faith—indeed, the last operator to invoke it was formally admonished by the Commission.[10]

A. The Declaratory Ruling Remains Effective Unless a Stay is Granted.

The Commission issued the Declaratory Ruling on delegated authority pursuant to Section 1.2 of its rules.[11] It did not designate the matter for a hearing (such hearings are exceedingly rare in FCC practice[12]), and ORBCOMM did not even ask for a hearing in its many filings in the proceeding. As a "[n]on-hearing . . . action[] taken pursuant to delegated

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9 *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 525-26 (2009); *Washington Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, Order, 35 FCC Rcd. 5807, ¶ 6 (2020) ("*C-Band Stay Denial*").

10 *See Massillon Order* ¶¶ 2-3.

11 Declaratory Ruling at 1.

12 It is by now well-settled that the Commission was under no obligation to hold a hearing; indeed, most of its proceedings are resolved without one. *See*, *e.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 625-26 (1973) (agencies need not conduct an individualized hearing before issuing a declaratory ruling under 5 U.S.C. § 554(e)); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996).

authority," the ruling became effective upon its March 10, 2021 release pursuant to Section 1.102**(b)** of the Commission's rules.[13] Under the same rule, the mere filing of an application for review does not suspend the effect of the decision. Rather, the Commission "may in its discretion stay the effect" of the decision pending its review of an application for review[14] and will determine whether a stay is warranted by applying the exceptionally stringent four-factor test outlined above.[15] Thus, the Declaratory Ruling is effective and remains so until and unless the Commission otherwise rules.

ORBCOMM nevertheless claims that the ruling was stayed automatically pursuant to Section 1.102**(a)** of the Commission's rules.[16] But this argument is absurd. Section 1.102(a) only applies in "hearing matters conducted pursuant to Part 1, Subpart B of the Commission's rules,"[17] where a presiding officer oversees witness testimony and document production,[18] conducts a trial-type hearing,[19] and recommends an "initial decision"[20] to "a commissioner, or a panel of commissioners,"[21] who then issue a "final decision" following review of the initial

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13 47 C.F.R. § 1.102(b)(1).

14 *Id.* § 1.102(b)(3).

15 *See*, *e.g.*, *Complaint of Dianne Feinstein, John Seymour, and Thomas Hayes Against Station KABC-TV Los Angeles, California*, Memorandum Opinion and Order, 9 FCC Rcd. 2698, ¶ 6 (1994) (applying traditional factors to request for stay under Rule 1.102(b)(3)).

16 ORBCOMM Stay Request at 2.

17 *Massillon Order* ¶ 3 ("[T]he automatic stay provision in Section 1.102(a) applies when an Application for Review is filed of a 'final decision of a commissioner, or panel of commissioners following review of an initial decision.' This rule applies to hearing matters conducted pursuant to Part 1, Subpart B of the Commission's rules.").

18 *See* 47 C.F.R. §§ 1.250, 1.311-325.

19 *Id.* §§ 1.253-1.264.

20 *Id.* § 1.267

21 *Id.* § 1.271.

recommendation.[22] Like most Commission proceedings, however, the ORBCOMM license matter was not designated for a hearing, and no hearing was requested, let alone conducted. As a result, there was no "initial decision" to speak of, nor any "final decision" issued by a "commissioner or panel of commissioners" after review of that decision.[23] Section 1.102(a)'s automatic stay therefore does not apply, and there is no plausible argument that it might apply.

B. The Commission Should Consider Appropriate Action to Address ORBCOMM's Evasion of a Binding Decision.

Relying on the fiction of an "automatic stay," ORBCOMM has disclaimed any obligation to comply with the Declaratory Ruling (or the terms of its U.S. license, which the Declaratory Ruling merely confirmed). It has attempted to portray the Ruling as nonbinding to some foreign regulators, while professing to others an absolute right to interrupt the decision's legal effectiveness by the mere filing of routine paperwork. If ORBCOMM succeeds in sowing confusion over the Ruling's legal status for even a month, it could delay Swarm's entry in many markets for a matter of years. Working groups conducting preparatory studies will wrap up their 2021 meetings soon, and regulators could rule on Swarm's pending applications for market access as soon as this summer.

The last operator to disregard a bureau decision by frivolously invoking Section 1.102(a) was reprimanded for its misconduct on far more sympathetic facts.[24] In *Fox Sports Net Ohio v. Massillon*, the cable operator Massillon "fail[ed] to comply with" a Media Bureau decision vacating an award issued in an arbitration held pursuant to a condition imposed in an FCC

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[22] *Id.* § 1.282.

[23] *Id.* § 1.102(a).

[24] *Massillon Order* ¶ 2.

transaction approval.[25] Massillon "claim[ed] that the filing of its Application for Review automatically stayed the requirements of the Bureau's [decision] pursuant to Section 1.102(a) of the Commission's rules," arguing that the arbitration qualified as a hearing for the purpose of the rule.[26] The Commission rejected Massillon's defense, finding "no basis for its apparent position that an arbitration proceeding . . . is a hearing proceeding conducted pursuant to Part 1, Subpart B of the Commission's rules."[27] However, "[g]iven the passage of time and the fact that the parties ha[d] settled their dispute," the Commission merely "admonish[ed] Massillon for its violation rather than pursuing alternative enforcement action."[28]

Because Massillon evaded a decision related to an arbitration, it had a more colorable claim that Section 1.102(a) applied than ORBCOMM does here, where no type of hearing-like proceeding was held at all. Moreover, ORBCOMM's efforts to evade the Declaratory Ruling remain ongoing, while issues around Massillon's misconduct had been "settled" by the time it was sanctioned. ORBCOMM's actions therefore warrant attention from the Commission. While ORBCOMM has avoided any concrete statement that it is actually using the spectrum at issue—which makes its anticompetitive posturing *even worse*—the Commission knows enough already to consider admonishing ORBCOMM. It also should consider whether an investigation or "alternative enforcement action" would be appropriate to identify and punish any instances of unauthorized operation.[29]

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[25] *Id.* ¶ 2.

[26] *Id.* ¶ 3.

[27] *Id.*

[28] *Id.* ¶ 2 n.6.

[29] *Id.*

II. ORBCOMM WILL NOT BE HARMED IRREPARABLY.

A. The Possibility that Other Jurisdictions May Act Pending Review of the Declaratory Ruling Is Not Irreparable Harm.

ORBCOMM asserts that it will be harmed if, "well prior to the Commission's disposition of the Application For Review," the European Conference of Postal and Telecommunications Administrations ("CEPT"), "CEPT member countries, ANATEL Brazil, and other foreign regulatory authorities" read the Declaratory Ruling and conclude that ORBCOMM's U.S. licenses do not permit it to operate outside the frequencies where it is primary.[30] This cannot possibly amount to irreparable harm.

First, the alleged "harm" would not be caused by the Declaratory Ruling. The foreign regulators at issue here can authorize Swarm operations even in the absence of the Declaratory Ruling. The instrument that allows Swarm to seek landing rights in these frequencies is its 2019 Commission authorization.[31] ORBCOMM knew full well that Swarm's license authorized global service but did nothing to appeal or seek reconsideration of that decision. Moreover, ORBCOMM's license does not permit it to use frequencies where it is not primary, and the Declaratory Ruling merely confirms that fact. ORBCOMM argues as though the Declaratory Ruling changes the rights of the parties,[32] when in fact it merely "remov[es] uncertainty" that ORBCOMM has created by its misrepresentations to regulators like CEPT "regarding the terms of its U.S. license."[33]

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30 ORBCOMM Stay Request at 5.

31 *Swarm Technologies, Inc.*, Memorandum Opinion, Order and Authorization, 34 FCC Rcd. 9469, ¶ 2 (IB 2019) ("*2019 Swarm Grant*").

32 *See* ORBCOMM Stay Request at 4-5.

33 Declaratory Ruling at 1.

Second, the "harm" is too conditional to be "irreparable." The Commission has repeatedly explained that "[i]n order to demonstrate 'irreparable harm,' the party must show that the alleged harm is 'both certain and great; . . . actual and not theoretical. . . . Bare allegations of what is likely to occur' are not sufficient, because the test is whether the harm 'will in fact occur.'"[34] ORBCOMM asserts that it is "highly likely" other regulators will authorize Swarm to commence operations in frequencies where ORBCOMM is not entitled to operate under its license. Swarm hopes that is the case. But ORBCOMM's prediction simply requires too much conjecture to meet the high bar for a stay.[35]

ORBCOMM also glosses over the timelines and processes required for those foreign regulators to act. Irreparable harm must be certain and immediate.[36] Yet CEPT's normal schedule would suggest action on Swarm's authorization no earlier than June 2021, and it is unlikely ANATEL Brazil would act more quickly. For purposes of establishing irreparable harm to support the "extraordinary equitable relief of a stay,"[37] ORBCOMM's predictive assertions about prospective actions do not suffice.

Third, the harm is not irreversible. ORBCOMM's speculation that "it is far from clear that it will be easy to return to the *status quo*" if the Commission ultimately grants the Application for Review[38] stacks conjecture upon conjecture. CEPT and ANATEL Brazil, as the Commission knows, have processes for reviewing decisions they have made, and ORBCOMM

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34 *Implementation of Section 224 of the Act*, Order, 26 FCC Rcd. 7792, ¶ 6 (WCB 2011) ("*Pole Attachment Stay Denial*") (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

35 *C-band Stay Denial* ¶¶ 8-9.

36 *Id.*

37 *2021 LightSquared Order* ¶ 9.

38 ORBCOMM Stay Request at 5.

identifies nothing about authorizations for Swarm to operate that would uniquely set them in stone in perpetuity. Regardless, Swarm terminals use software-defined radios, with the ability to cease operations in particular frequencies should a need arise. There is no circumstance under which the status quo could not be restored in the exceedingly unlikely event ORBCOMM's application were granted. Consequently, any harm alleged is not "irreparable."[39]

B. ORBCOMM Has Not Demonstrated *Any* Impact on its Operations—Let Alone the Impacts Required to Demonstrate Irreparable Harm.

Finally, there is nothing inherently irreparable or harmful about the possibility that foreign regulators will authorize Swarm to operate in its FCC-licensed frequencies. Third parties routinely act in response to Commission decisions for which applications for review, petitions for reconsideration, or petitions for review in federal court are pending. These mere acts alone do not establish irreparable harm.

Conspicuously missing from ORBCOMM's request is any explanation of how the Declaratory Ruling will actually *injure* it absent a stay. It does not claim the Ruling will impede existing ORBCOMM operations in these foreign jurisdictions, let alone cause the vast losses necessary to even arguably show irreparable harm.[40] ORBCOMM never even claims to *use* the non-primary frequencies at issue, beyond positing that it might one day be required to "cease transmit operations in certain uplink frequency bands[.]"[41]

Even assuming ORBCOMM *does* operate in those frequencies, it does not claim it would suffer any losses by vacating them—because it won't. Less than two months ago, ORBCOMM told investors that its "satellite network capacity remains multiple times more capable than

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[39] *Pole Attachment Stay Denial* ¶ 6.

[40] *See Wisconsin Gas*, 758 F.2d at 674; *Pole Attachment Stay Denial* ¶ 6.

[41] ORBCOMM Stay Request at 5.

current demand," and that its second-generation satellites "are meeting our capacity needs with just two downlink channels per satellite."[42] Late last year, it confirmed to Swarm that it had ceased operations in non-primary frequencies in the United States.[43] There is no reason to believe that ORBCOMM cannot manage the same abroad, assuming it has even been using this spectrum in the first place.

C. ORBCOMM, Not Swarm, Has Been Misrepresenting the Declaratory Ruling Internationally.

ORBCOMM claims Swarm has "erroneously represented by written submission to foreign regulatory authorities that the [Declaratory Ruling] is a Final Order of the FCC."[44] This is not an argument of irreparable harm. But we will not let this baseless accusation go unrefuted. ORBCOMM, not Swarm, misrepresented the Declaratory Ruling to CEPT administrations in discussions, at one point claiming that the Ruling is not even an order or binding decision on the merits of the dispute.[45] In response, Swarm accurately described the Declaratory Ruling as an "official ruling that 'terminate[s]' the 'controversy' over ORBCOMM's permissible operations

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[42] *See* Annual Report of ORBCOMM Inc., Form 10K (rel. Feb. 25, 2021) ("ORBCOMM 2020 Annual Report"), https://investors.orbcomm.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=14747186. The frequencies at issue here are uplink frequencies, but satellites are largely mirrors in space. And what goes up must come down.

[43] *See* Email from Walter Sonnenfeldt, Vice President, Regulatory Affairs, ORBCOMM Inc., to Scott Blake Harris and Shiva Goel, Counsel to Swarm (Oct. 19, 2020), attached as Exhibit A.

[44] ORBCOMM Stay Request at 4.

[45] Of course, declaratory rulings are plainly "orders" under the Administrative Procedure Act. *See* 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); *see also id.* 5 U.S.C. § 551(6) (defining an "order" to mean "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing").

outside of the United States."[46] Swarm quoted the Declaratory Ruling, provided excerpts from the Declaratory Ruling, and attached a copy of the Declaratory Ruling. Swarm did not state or imply that ORBCOMM could not attempt a meritless legal challenge.

III. THE EQUITIES DO NOT FAVOR A STAY.

A. Paving the Way for Swarm to Make Full Use of Its FCC License Advances the Public Interest.

The FCC granted Swarm its license because it determined that doing so would serve the public interest. The Commission concluded decades ago that its objective for "Little LEO" systems was "to accommodate multiple licensees to increase competition," and thus when the Commission modified ORBCOMM's license in 2008 to allow the use of "additional radio-frequency spectrum," it imposed the "specific condition that required ORBCOMM to forego use of the additional frequencies upon commencement of operations by another U.S.-licensed system."[47] Swarm has commenced operations, and ORBCOMM must forego use of those frequencies. The Declaratory Ruling expressly serves the Commission's "stated goal to promote competition" by rejecting ORBCOMM's misreading of its license, which the Ruling explained "would have the anticompetitive effect of limiting Swarm's access to its licensed frequencies outside of the United States."[48]

In practical terms, the Declaratory Ruling also removes uncertainty (created by ORBCOMM) in foreign jurisdictions regarding the scope of ORBCOMM's license. It clears the way for Swarm to receive authorizations in those jurisdictions consistent with its rights under its

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[46] *FCC Letter on Swarm-Orbcomm Band Segmentation,* Swarm CEPT SE40 submission, Document SE40(21)011 (March 22, 2021), https://www.cept.org/ecc/groups/ecc/wg-se/se-40/client/meeting-documents/?flid=28532 (quoting Declaratory Ruling at 1).

[47] *Id.* at 2.

[48] *Id.* at 4.

U.S. license. Upon receiving those authorizations, Swarm will be ready to provide the global coverage that U.S. consumers need, at a very low cost. Permitting ORBCOMM to continue to block Swarm in those frequencies, by contrast, would benefit *nobody* but ORBCOMM. As noted above, ORBCOMM does not appear even to be making much (if any) use of the frequencies—meaning its efforts to obstruct Swarm serve only itself.

B. ORBCOMM's Offer to "Negotiate in Good Faith" Is Another Delay Tactic.

ORBCOMM claims that "Swarm will not be harmed by issuance of a stay" because ORBCOMM will "negotiate in good faith with Swarm to reach a sharing agreement" in the relevant frequencies.[49] But ORBCOMM's pitch merely shows why a stay should be denied.

***First*,** if ORBCOMM truly believes an agreement is feasible, Commission precedent *compels* denying a stay. As the Commission has held, ORBCOMM's professed "alternative" of "private negotiation" makes its claims of harm "all the more speculative both in terms of their likelihood and their magnitude."[50]

***Second*,** the continued effect of the Declaratory Ruling is the best way to promote coordination in the future. For so long as ORBCOMM can block Swarm based on misrepresentations of its U.S. license rights, ORBCOMM has no incentive to agree to share with Swarm on any reasonable terms. The Declaratory Ruling's confirmation that ORBCOMM's license means what it says, by contrast, situates the parties to negotiate based on their actual rights and bargaining positions. ORBCOMM asserts that "making it more likely that the

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[49] ORBCOMM Stay Request at 6.

[50] *Pole Attachment Stay Denial* ¶ 10.

affected parties will be able to negotiate a sharing agreement" will "serve the public interest."[51] To best meet that end, the Commission should deny the stay, not grant it.

***Third*,** the procedure ORBCOMM proposes to supposedly "ensure that all of the parties negotiate in good faith"[52] is nothing more than a request for six more months of ORBCOMM obstruction. It would allow ORBCOMM a period to "negotiate" based on rights it does not possess, followed by an indeterminate mediation period of some kind. It follows the ORBCOMM playbook perfectly: delay, confuse, and delay some more.

ORBCOMM's promise to negotiate in good faith has been illusory in any event, as it has proven itself time and time again to be a bad-faith negotiator. It misrepresented its rights under its U.S. space station license to foreign regulators, as the Declaratory Ruling clearly demonstrates.[53] It has since misrepresented the nature and effect of the Declaratory Ruling to regulators. And while ORBCOMM claims it has "supported Swarm's efforts to commence service in Europe,"[54] it in fact opposed allowing Swarm to operate in its FCC-licensed bands, save for a single 50 kHz channel representing about 10% of Swarm's authorized uplink bandwidth. Even then, ORBCOMM attempted to condition Swarm's use of that channel on a poison pill "that would make certain advanced services sought by U.S. customers—including U.S. government customers—virtually impossible to deliver."[55]

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51 ORBCOMM Stay Request at 6.

52 *Id.*

53 *See id.* at 1.

54 *Id.* at 5.

55 *See* Letter from Scott Blake Harris and Shiva Goel, Counsel to Swarm, to Marlene H. Dortch, Secretary, FCC, at 3 IBFS File Nos. SAT-MOD-20070302-00041, SAT-MOD-20070531-00076 and SAT-AMD-20071116-00161, Call Sign: S2103; Swarm Technologies, Inc., IBFS File No. SAT-LOA-20181221-00094, Call Sign S3041 (filed Jan. 15, 2021).

Furthermore, while claiming to be an evangelist of sharing, ORBCOMM has filed interference studies in the United States claiming ORBCOMM and Swarm's systems are incompatible.[56] Its negotiating position thus appears to be that (1) Swarm should be required to operate co-frequency with ORBCOMM, (2) Swarm is incompatible with ORBCOMM, and (3) therefore Swarm cannot operate. Charlie Brown would have a better chance of good-faith negotiations with Lucy over how to kick a football.

In sum, ORBCOMM cannot have it both ways, and the Declaratory Ruling makes it even clearer that ORBCOMM doesn't. Confirming that the band segmentation between the two systems applies globally, as the Commission has done, will be far more productive than the delay tactics proposed and employed by ORBCOMM.

C. The Declaratory Ruling Advances the Commission's Relationships with Foreign Sovereigns.

ORBCOMM also asserts that a stay would serve the public interest by "ensur[ing] that foreign Administrations have a clear understanding of the true legal status of" ORBCOMM's license rights.[57] That is precisely what the Declaratory Ruling has achieved, and a stay would only undermine the certainty it offers. In addition, by adopting ORBCOMM's position and requiring individual foreign administrations to resolve sharing between two U.S. licensees piecemeal around the globe, the United States would foist U.S. responsibilities onto other countries, while allowing ORBCOMM to continue impeding Swarm's progress and competition. The FCC, and not regulators abroad, is responsible for ensuring compatibility between U.S.-

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[56] Reply of ORBCOMM License Corp. at 8-11 & Attachment 1, IBFS File Nos. SAT-MOD-20200501-00040 & SAT-AMD-20200504-00041 (filed Sept. 14, 2020).

[57] ORBCOMM Stay Request at 6-7.

licensed satellites systems.[58] Even ORBCOMM acknowledges that "the FCC, as [its] notifying administration, is responsible for coordinating [its] VHF LEO Satellite System."[59]

The Declaratory Ruling does not, as ORBCOMM implies,[60] limit the sovereignty of foreign administrations with respect to U.S. licensees. U.S. licensees must still obtain landing rights before operating in other jurisdictions, and they must comply with their U.S. licenses *and* any additional requirements imposed by a local authority.[61]

IV. ORBCOMM HAS NO CHANCE OF SUCCESS ON THE MERITS.

A. The Application for Review Is Facially Defective.

ORBCOMM's Application for Review does not even include the elements required under Section 1.115 of the Commission's rules. As the Commission recently confirmed in its *Order Updating Delegations of Authority*, the Bureau is therefore empowered—and encouraged—to dismiss ORBCOMM's "procedurally defective" application.[62]

Section 1.115(b) of the Commission's rules requires every application for review to include a concise and plain statement of the questions presented.[63] The questions presented are critical to bring focus to the matters raised on appeal and to allow Commissioners to quickly determine whether an application warrants their scarce attention. ORBCOMM's application, however, does not contain *any* statement of the questions presented. It entirely omits this basic requirement of an administrative appeal.

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58 Declaratory Ruling at 3 n.12.

59 ORBCOMM 2020 Annual Report at 16.

60 *See* ORBCOMM Stay Request at 7; Declaratory Ruling at 7.

61 Declaratory Ruling at 6, 7.

62 *Order Updating Delegations of Authority* ¶ 1.

63 47 C.F.R. § 1.115(b).

Instead of forcing Commissioners to dig through a morass of lengthy, and often unclear, set of arguments to determine whether ORBCOMM's pleading warrants consideration, the International Bureau can and should dismiss ORBCOMM's application on delegated authority. As the Commission just determined in the *Order Updating Delegations of Authority*, the International Bureau has long possessed the authority "to dismiss Applications for Review that do not comply with the procedural requirements of Sections 1.115(a), (b), (d) or (f) of [FCC] rules,"[64] while other Commission bureaus have lacked it. The Commission therefore adopted a "uniformly applicable standard" for all bureaus, which made the International Bureau's already clear authority even more explicit.[65] Under the new rules, which took effect prior to ORBCOMM's filing,[66] "the Chief of the International Bureau may dismiss any such application that does not contain any statement required under § 1.115(a) or (b)."[67] ORBCOMM's Application for Review is thus not only deficient, but subject to immediate dismissal without review by the full Commission.

Importantly, in addition to *clarifying* their power to dismiss defective applications for review, the Commission encouraged its bureaus to actually *exercise* that authority. Recognizing the importance of Section 1.115's required statements, the Commission observed that its new rules would "aid in the expeditious dismissal of procedurally defective Applications for Review."[68] Thus, the risk of immediate dismissal is not just hypothetical, but likely. Due to the

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64 *Order Updating Delegations of Authority* ¶ 1 & n.2.

65 *Id.* ¶ 1.

66 *Id.* ¶ 2 ("These amendments to the rules will apply to all Applications for Review filed on or after the effective date of the amendments set forth below"); *id.* ¶ 8 (rules effective as of April 5, 2021, which was "30 days after publication in the Federal Register").

67 *See* 47 C.F.R. § 0.261(b)(3).

68 *Order Updating Delegations of Authority* ¶ 2.

procedural deficiencies of ORBCOMM's filing, it cannot possibly demonstrate a likelihood of success on the merits.

B. The Declaratory Ruling Was Procedurally Sound.

Disregarding the procedural failings of its own application, ORBCOMM claims that the Declaratory Ruling was procedurally improper.

ORBCOMM is wrong. ORBCOMM argues that, under Section 1.2(b) of the Commission's rules, Swarm was required to file a letter captioned as a "petition for declaratory ruling," and that the Commission was required to docket the pleading and issue a public notice seeking comment.[69] But ORBCOMM practically ignores Section 1.2**(a)** of the Commission's rules, which allows the Commission to issue declaratory rulings "on its own motion."[70] Here, the on-the-record exchanges between Swarm and ORBCOMM apprised the Commission of an "uncertainty" and "controversy" created by ORBCOMM's misrepresentation of its license obligations.[71] The Commission responded by issuing "a declaratory ruling terminating [that]

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69 Application for Review at 3-5; *see* 47 C.F.R. § 1.2(b).

70 47 C.F.R. § 1.2(a).

71 *See* Letter from Scott Blake Harris, Counsel to Swarm Technologies, Inc., to Karl Kensinger, Acting Chief, Satellite Division, International Bureau, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Oct. 16, 2020); Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Karl Kensinger, Acting Chief, Satellite Division, International Bureau, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Oct. 29, 2020); Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Karl Kensinger, Acting Chief, Satellite Division, International Bureau, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Nov. 5, 2020); Letter from Scott Blake Harris, Counsel to Swarm Technologies, to Marlene H. Dortch, Secretary, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Dec. 23, 2020); Letter from Scott Blake Harris, Counsel to Swarm Technologies, Inc., to Karl Kensinger Acting Chief, Satellite Division, International Bureau Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Nov. 6, 2020); Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM

controversy [and] removing [that] uncertainty," which it is empowered to do regardless of whether a formal petition was filed.[72] In sum, "[t]he literal language" of Section 1.2 "and the fact that the rule contemplates action by the Commission *sua sponte* remove any doubt that the Commission's action in issuing the declaratory order was in accordance with its own procedural regulations."[73] As the Supreme Court has held, agencies may issue declaratory rulings without extensive proceedings, because their authority to "terminate a controversy or remove uncertainty" often "must be exercised with dispatch"[74] to resolve issues like the matter at hand.

In a footnote (*see* Application for Review at n.4), ORBCOMM suggests that Section 1.2(a) does not empower the *Bureau* to issue declaratory rulings on its own motion. But the Commission's delegations of authority, and not Rule 1.2, govern the powers of the International Bureau. Those delegations give the Bureau explicit authority to "interpret and enforce" prior decisions,[75] "administer policies, rules, standards, and procedures for the authorization and regulation of . . . satellite systems,"[76] and ensure compatible global operations among U.S. licensees,[77] using the procedural tools available to the Commission. Those powers are subject only to the limitations enumerated in Section 0.261(b)—which make no mention of declaratory

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License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Jan. 12, 2021); Letter from Kyle Wesson, Ph.D., Regulatory Engineer, Swarm Technologies, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Jan. 15, 2021).

72 47 C.F.R. § 1.2(a).

73 *Chisholm v. FCC*, 538 F.2d 349, 365 n. 336 (D.C. Cir. 1976).

74 *Weinberger*, 412 U.S. at 626; *see also Wilson*, 87 F.3d at 397.

75 47 C.F.R. § 0.261(a)(15).

76 *Id.* § 0.51(c).

77 *Id.* §§ 0.51(l).

rulings.[78] Just as the Commission's bureaus may issue waivers on delegated authority,[79] so too can they issue declaratory rulings on their own motion on matters within their jurisdiction.

In any event, the procedure observed by the Commission was more than fair to ORBCOMM and met the optional procedures set forth in Section 1.2(b). As an initial matter, Section 1.2(b) merely employs non-mandatory language to encourage certain procedures when a formal petition for declaratory ruling is filed. Under the recommended procedure, the Bureau "should docket" the petition "within an existing or current proceeding," "should seek comment on the petition via public notice," and should allow 45 days for response and reply, though shorter periods are permissible.[80]

While Section 1.2(b)'s recommendations are not required for the Declaratory Ruling, the Commission followed the materially same procedure here. First, Swarm filed a letter apprising the Commission of the controversy and requesting relief, which the Bureau appears to have treated as similar to a petition for declaratory ruling. Second, the Bureau docketed the letter in the proceedings in which it was filed, all of which relate to ORBCOMM and Swarm's licenses. Third, Swarm served the letter on ORBCOMM. Fourth, well more than 45 days prior to ruling, the Commission issued a public notice indicating that the matter had been designated as "permit-but-disclose," meaning that input from interested parties was welcome so long as it was documented on the record.[81] In fact, even prior to the public notice, the Commission *directly*

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78 *See id.* § 0.261(b).

79 *Id.* § 1.3 (permitting "the Commission" to waive its own rules).

80 47 C.F.R. § 1.2(b).

81 *Satellite Policy Branch Information: Actions Taken*, Public Notice, Report No. SAT-01520, DA No. 21-26 (Jan. 8, 2021) (designating a "proceeding relating to the terms of a space station license held by ORBCOMM License Corp." and "associated with [IBFS File No SAT-LOA-20181221-00094], as well as IBFS File Nos. SAT-MOD-20070302-0041, SAT-

contacted ORBCOMM (along with Swarm and another operator, Myriota Pty. Ltd.) to confirm that the proceedings were permit-but-disclose and thus open for input, which ORBCOMM had *already* been providing as of that date.[82]

In the end, ORBCOMM had no trouble commenting under the procedure employed. It understood all-too-well the nature of the controversy it itself created and submitted numerous letters—often detailed and lengthy—arguing for a favorable result.[83]

C. The Commission Rejected ORBCOMM's Arguments About Statutory Authority Long Ago.

1. The FCC Can Regulate Both Downlink and Uplink Operations of a U.S. Satellite Operator Globally.

When applying for space station licenses, ORBCOMM has consistently sought Commission approval to operate its satellites in specific Earth-to-space frequencies in the United States and abroad.[84] Notwithstanding its own practices—and those of the entire satellite

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MOD-20070531-00076, and SAT-AMD-200711600161" to be "'permit-but-disclose'" to "facilitat[e] the resolution of broad policy issues raised in the proceeding").

82 Email from Karl Kensinger, Acting Chief, Satellite Division, FCC International Bureau, to the parties (sent Dec. 22, 2020), attached as Exhibit B.

83 Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Karl Kensinger, Acting Chief, Satellite Division, International Bureau, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Oct. 29, 2020); Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Karl Kensinger, Acting Chief, Satellite Division, International Bureau, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Nov. 5, 2020); Letter from Walter H. Sonnenfeldt, Esq., Regulatory Counsel, ORBCOMM License Corp. & Vice President, Regulatory Affairs, ORBCOMM Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Jan. 12, 2021); Letter from Kyle Wesson, Ph.D., Regulatory Engineer, Swarm Technologies, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, IBFS File No. SAT-MOD-20070531-00076 (filed Jan. 15, 2021). *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 726 (D.C. Cir. 2003) (harmless procedural errors do not warrant reversal).

84 *See* Declaratory Ruling at 6 & nn.23-24.

industry—ORBCOMM now claims that the "Commission lacks statutory authority to regulate . . . uplink frequencies at this time," especially with respect to signals received from stations located outside the United States.[85] ORBCOMM's meritless argument disregards multiple statutory provisions authorizing precisely such regulation, and reams of precedent confirming the very powers it disputes.

Statute. As explained in the Declaratory Ruling, Sections 151, 152, 153, 301, and 303 of the Communications Act provide ample authority to specify receive frequencies of U.S. satellites on a global basis.[86]

First, the Commission's grants of general jurisdiction demonstrate that its authority over U.S. licensees does not stop at U.S. borders and expressly extends to the precise type of activity ORBCOMM claims is beyond the agency's reach. Section 151's expansive account of the Commission's purpose shows that Congress empowered it to regulate interstate and foreign communications and to bring wireless services with "world-wide" reach to U.S. consumers.[87] Section 152(a), in turn, specifically allows the Commission to regulate "interstate *and foreign* communication by wire or radio and all interstate and *foreign* transmission of energy by radio" that "originates and/*or is received* within the United States."[88] A communication received aboard a U.S. satellite is received within the United States, which retains jurisdiction over objects launched into outer space under its authority.[89] Section 153 underscores that foreign communications subject to Commission regulation include transmissions from foreign countries

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[85] Application for Review at 6.

[86] Declaratory Ruling at nn.12, 26.

[87] 47 U.S.C. § 151.

[88] *Id.* § 152(a) (emphasis added).

[89] United Nations Outer Space Treaty art. 8, Oct. 10, 1967, 610 U.N.T.S. 205.

to U.S. satellites.[90] It also makes clear that the Commission may regulate facilities "incidental to transmission," including, "among other things," the "receipt, forwarding, and delivery of communications."[91]

Second, as the Declaratory Ruling cogently explained, the Commission's responsibilities as a licensing and notifying administration under international treaty require it to specify the "permissible range of frequencies on which" space stations "may operate," for both "transmit and receive" operations, and for both domestic and global service.[92] And under Section 303(r), the Commission may prescribe "such restrictions and conditions" necessary to "carry out the provisions of . . . any international radio or wire communications treaty or convention."[93] The Commission may impose such conditions on any station license, an instrument that Section 301 requires operators like ORBCOMM to obtain before launching and operating a U.S. communications satellite.[94]

Other provisions of Title III empower the Commission to "assign frequencies for each individual station" and "[p]rescribe the nature of the service to be rendered by . . . each station," without regard to the direction of communication.[95] They also authorize the Commission to

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[90] 47 U.S.C. § 153(21) (defining "foreign communication" to include such transmissions); *id.* § 152(a) (empowering the FCC to regulate "foreign communication").

[91] 47 U.S.C. § 153(40) (defining "radio communication" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission"). *See also id.* § 153(57).

[92] Declaratory Ruling at 6.

[93] *Id.* at n.12; *see* 47 U.S.C. § 303(r).

[94] Declaratory Ruling at n.12.

[95] 47 U.S.C. §§ 303(b), (c).

"prevent interference between stations," without regard to the location of the source of interference.[96]

Precedent. Previous Commission decisions, too, have rejected ORBCOMM's argument—over and over again, and then some more. For example, in 2003, the International Bureau rejected Globalstar's argument that the Commission lacked authority to regulate the operations of Iridium, a U.S.-licensed satellite operator, "in non-U.S. territories."[97] It concluded that "Iridium is authorized to operate satellites on frequencies specified in its [FCC] authorization," adding that the "Commission has jurisdiction with respect to those satellites pursuant to, inter alia, 47 U.S.C. §§ 151, 152, 301, 303(r)."[98] Nothing in the decision was limited to downlinks; indeed, the decision granted Iridium additional spectrum globally for "both uplink and downlink" operations.[99] Later in the proceeding, Globalstar again "assert[ed] that the Communications Act does not authorize the Commission to mandate what frequencies Iridium uses for service to the Middle East."[100] Yet again, the Bureau rejected the argument, relying in part on Section 151.[101]

In 2008, the full Commission confirmed that a U.S. space station may "transmit to *and receive signals from* [a] non-U.S. earth station only within the operating parameters set out in its

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96 *Id.* § 303(f); *see also id.* § 302a.

97 *Modification of Licenses held by Iridium Constellation, LLC and Iridium, US LP for a Mobile Satellite System in the 1.6 GHz Frequency Band,* 18 FCC Rcd. 11480, ¶ 5 (2003).

98 *Id.* ¶ 8 n.18.

99 *Id.* ¶ 2.

100 *Request for Special Temporary Authority Iridium Constellation, LLC for a Mobile Satellite System in the 1.6 GHz Frequency Band*, 18 FCC Rcd. 25814, ¶ 13 (2003) (citing 47 U.S.C. § 151).

101 *Id.*

U.S. space station license."[102] It reiterated that as a matter of "general Commission policy," U.S. space station licensees are required "to operate their space stations in a manner consistent with their U.S. licenses, regardless of whether the end user of the communication service is using an earth station subject to the territorial jurisdiction of another country."[103] On the issue of its statutory authority, the Commission relied on its "mandate under Sections 151, 152, 301, and 303(r) of the Communications Act,"[104] citing the Bureau's prior decisions on the same subject.

More recently, the Commission imposed a default sharing rule for NGSO FSS systems—in both uplink and downlink bands—that "govern . . . operations both within and outside the United States."[105] And in many other licensing decisions—including ORBCOMM's own—the Commission has explicitly authorized Earth-to-space operations between U.S. space stations and terminals located outside of the United States, as the Declaratory Ruling noted.[106] Indeed, with respect to the NVNG MSS specifically, the Commission previously adopted a band-sharing plan governing both uplink and downlink frequencies with obvious global reach.[107] It also expressly prohibited NVNG licensees from pursuing exclusive agreements for market access in foreign jurisdictions, thereby regulating their conduct overseas.[108]

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[102] *Globalstar Licensee LLC and Iridium Constellation LLC*, Order of Modifications, 23 FCC Rcd. 15207, ¶ 37 (2008) ("*Globalstar Order*").

[103] *Id.* ¶ 32.

[104] *Id.* ¶ 32 n.81.

[105] *Update to Parts 2 and 25 Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters*, 32 FCC Rcd. 7809, ¶53 (2017).

[106] *See* Declaratory Ruling at nn.13, 23, & 26.

[107] *See id.* at 5 & n.19; *id.* at 4 n.15.

[108] *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Report and Order*, 13 FCC Rcd. 9111, ¶¶ 127-28 (1997) ("*Second Processing Round Order*").

2. ORBCOMM's Contrary Arguments Are Frivolous.

Against the sheer force of ordinary meaning and decades of binding precedent, ORBCOMM has precious little to offer. It relies on comments submitted in response to a *Notice of Inquiry*, which are both unauthoritative and inapposite. At issue there was the Commission's authority to promulgate standards for receivers, including receivers in devices that do not transmit.[109] The issue here, however, is what the Commission may require of licensees operating satellites that *do* transmit. To the extent the *Notice of Inquiry* bears on this dispute at all, it *supports* the Declaratory Ruling's decision about Commission authority. It states that the Commission "believe[s] [it] has the necessary statutory authority to promulgate receiver immunity guidelines and standards under Sections 4(i), 301, 302(a), 303(e), (f), and (r) of the Communications Act of 1934, as amended."[110]

Much of ORBCOMM's remaining arguments rely on the same fundamental misunderstanding. ORBCOMM states that Section 301 does not require a license simply to receive, and that ITU regulations require the FCC to regulate "transmit stations" licensed and notified by the United States.[111] But ORBCOMM's satellites do not simply receive; they *are* "transmit stations" that require a license and Commission oversight. And for the reasons explained, the bounds of that oversight clearly extend to the assignment of receive frequencies

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[109] *Interference Immunity Performance Specifications for Radio Receivers,* 18 FCC Rcd. 6039 (2003).

[110] *Id.* ¶ 22.

[111] Application for Review at 7-8. For the same reason, ORBCOMM's reliance on *American Library Association v. FCC* is misplaced. *See* 406 F.3d 689, 703-04, 708 (D.C. Cir. 2005) (examining the Commission's authority to regulate non-transmitting consumer broadcast receivers). The court had no occasion to explore the Commission's authority under Title III to specify receive frequencies of a transmitting station, and in any event recognized that the Commission may regulate receivers "engaged in the process of receiving" a transmission under Title I. *Id*. at 692.

on a global basis. Just because a license is not required to engage in a particular activity does not mean that the FCC cannot regulate that activity in a license condition, so long as it does so to advance its statutory aims.[112]

ORBCOMM then asks the Commission to recognize a new exception to its authority in cases where it has not formally concluded that "co-frequency co-sharing . . . is not feasible."[113] But ORBCOMM fails to provide *any* statutory basis for why a such finding would be necessary to assign and regulate the space station receive frequencies. That is not surprising, because there is no logic to the argument that if two operators can share, then the Commission lacks authority to regulate them. The Commission regularly exercises oversight over operators to encourage coordination, create sharing regimes, and enforce sharing requirements in the face of operator disagreements, all of which presume sharing is technically feasible—and all of which would be statutorily impermissible under ORBCOMM's view of the world.[114]

In any event, ORBCOMM itself filed an interference study claiming that it is *infeasible* to share spectrum with Swarm.[115] ORBCOMM's position thus appears to be that Swarm should be required to operate co-frequency with ORBCOMM, but since Swarm is incompatible with ORBCOMM, Swarm should not operate at all. That might be a useful gimmick to shield an

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[112] *See*, *e.g.*, 47 U.S.C. § 303(r) (providing expansive authority to condition licenses).

[113] Application for Review at 8-10.

[114] Even if the feasibility of sharing were statutorily relevant, the ability of two systems to share spectrum effectively *down the line* says nothing about the Commission's authority to regulate their operations *now*. Whether the cause of a present inability to share is permanent technical infeasibility, or the intransigence of an incumbent operator, makes no difference from the perspective of the Commission's statutory objectives. In both cases, the Commission must attempt to resolve mutual exclusivity and allow entry to promote competition and the availability of new services.

[115] *See supra* note 56 & accompanying text.

aging network against new competition, but it is completely frivolous as a matter of statute or spectrum management policy.

For much the same reason, ORBCOMM's remaining quibbles over the efficiency of the Commission's interim band-segmentation approach are irrelevant.[116] Its complaints ave nothing to do with FCC authority, and they are also dead wrong as a matter of policy. As ORBCOMM's own conduct shows, the Commission wisely decided to ensure compatible operations between Swarm and ORBCOMM using band segmentation at this time. Provided that ORBCOMM's delay tactics are successfully defused, the Commission's approach will enable Swarm to provide services quickly—without prejudicing future coordination should it occur.

In any event, ORBCOMM has waited too long to voice its disagreement with band segmentation in an application for review. The decisions resulting in band segmentation—the *ORBCOMM 2008 Authorization* [117] and the *2019 Swarm Grant*[118]—were decided long ago, and ORBCOMM did not challenge either decision on reconsideration or full Commission review. In sum, ORBCOMM has had 13 years to plan for the eventuality that a second U.S. licensee would commence operations outside of its primary bands. Its remorse over the arrangement now hardly merits the Commission's attention.

ORBCOMM's claim that the global band-segmentation arrangement impedes foreign sovereignty also fails.[119] It is the responsibility of the United States, and not other jurisdictions, to ensure compatible operations between two U.S. systems.[120] Forcing other countries to assume

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[116] *See* Application for Review at 14–15.

[117] *Globalstar Order* ¶ 11, 23.

[118] *2019 Swarm Grant* ¶ 12.

[119] Application for Review at 13.

[120] *See* Declaratory Ruling at 3 & n.12.

U.S. responsibilities therefore would hinder, not advance, respect for other nations. Moreover, foreign jurisdictions continue to exercise significant control over the deployment of services within their own borders.[121] As the Declaratory Ruling makes clear, NVNG licensees must obtain landing rights before commencing services overseas and comply with any additional requirements imposed by local authorities.[122]

D. The Declaratory Ruling Reasonably Concluded that the NVNG MSS Band Plan Applied Globally to U.S. Licensees—and that the Issue Is Irrelevant to ORBCOMM'S Licensed Rights.

ORBCOMM continues to claim (*see* Application for Review at 10–13) that a 1994 decision not to impose a global band-sharing plan "at th[at] time" somehow permits it to exceed the scope of its Commission license decades later. The argument remains unclear, but appears to be that (1) the *Orbital 1994 Order*'s adoption of a U.S.-only band plan permitted ORBCOMM to operate in whatever frequencies it wished outside the United States without further Commission approval, and (2) the *Orbital 1994 Order*'s U.S.-only band plan was never subsequently disbanded or replaced.

The Declaratory Ruling properly rejected both claims. The Ruling explained that the *Orbital 1994 Order*, in adopting a U.S.-only band plan, "simply recognized the autonomy of other countries to decide whether to allow service within their borders from U.S. systems on frequency bands the Commission had specifically authorized in the license," and "did not provide authority for Little LEO licensees to operate throughout the Little LEO spectrum outside

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[121] *See Globalstar Order* ¶ 23 n.60 (explaining that "[c]ountries have full discretion to decide whether to use a U.S.-licensed satellite to provide … service in their country," and that a U.S. space station "that has received such 'landing rights' from another country may then transmit to, and receive transmissions from, earth stations located within and licensed by that country," but "may operate with those earth stations only on those frequency bands authorized for operation in its U.S. license, or on a subset of those frequency bands").

[122] *See id.* at 6 & n.27.

of the U.S. without further Commission approval."[123] Because ORBCOMM has never obtained Commission approval to operate outside of its primary assignments after a second U.S. system like Swarm has commenced operations, the 1994 decision provides it with no help at all. ORBCOMM has no response to this aspect of the Declaratory Ruling, giving the Commission no reason to second-guess the Bureau's understanding of its own decision. Indeed, as the Declaratory Ruling noted, the full Commission previously interpreted similar language in a satellite license in the exact same way.[124] So too has ORBCOMM, which "itself recognized the need to seek [FCC] authority to operate on additional frequencies, including for operations outside of the U.S., beyond those contained in its 1994 license."[125]

In any event, the *Orbital 1994 Order* was in fact replaced with global operating arrangements. As the Declaratory Ruling explains, the "Commission's subsequent policies and licensing decisions pertaining to U.S.-licensed Little LEO systems clearly indicates that they apply on a global basis."[126] The *Second Processing Round Order* in particular "adopted a spectrum sharing plan on a global basis,"[127] evidenced by its statement that "Little LEO systems subject to the proceeding could serve 'customers anywhere in the world,'" and provisions addressing "coordination and compatibility with U.S. Department of Defense and National Oceanic and Atmospheric Administration systems on a global basis, as well as sharing with French and Russian systems internationally," all of which formed "an inherent part of the

[123] Declaratory Ruling at 4-5.

[124] *Id.* at n.17 (citing *Globalstar Order* ¶ 14 n.43).

[125] *Id.* at 6.

[126] *Id.* at 5.

[127] *Id.*

spectrum sharing plan adopted."[128] "Moreover, [the *Second Processing Round Order*] did not include any statements limiting the applicability of the spectrum sharing plan to only U.S. operations," and thus, "both by its terms and through the omission of any limitation of its scope, was intended to apply to the full range of operations of U.S. licensed systems, including those with earth stations outside the United States."[129]

ORBCOMM's only response is to completely distort a single paragraph of the *Second Processing Round Order*. ORBCOMM claims that in paragraph 128, "the Commission acknowledged the right of foreign Administrations to determine which NVNG MSS systems would be able to operate uplinks within their country, and on what frequencies."[130] But that is not what paragraph 128 says. Paragraph 128 merely explains that U.S. licensees may not enter into agreements with foreign jurisdictions to be the exclusive NVNG MSS provider within their borders.[131] It also explains that a U.S. licensee would not violate the prohibition against exclusive arrangements if it were the "sole service provider in a particular market" for reasons beyond its control, such as a country's independent decisions making entry by more than one operator impossible.[132] Nothing in the paragraph disclaimed the FCC's authority to specify the outer limits of the frequencies a U.S. space station may use on a global basis. And nothing in it permitted a U.S. operator to use frequencies in another country that were disallowed by its FCC license.

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[128] *Id.*

[129] *Id.*

[130] Application for Review at 11.

[131] *Second Processing Round Order* ¶ 128.

[132] *Id.*

CONCLUSION

The Commission should reject ORBCOMM's stay request. In light of ORBCOMM's absurd position regarding the "automatic stay," the Commission also should consider punitive action to address ORBCOMM's evasion of its licensed obligations.

Respectfully submitted,

Kyle Wesson, Ph.D.
Lead Regulatory Engineer
Swarm Technologies, Inc.
435 N. Whisman Rd.
Mountain View, CA 94043

Scott Blake Harris
Shiva Goel
Jason Neal
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, N.W.
Suite 800
Washington, D.C. 20036
Tel: 202-730-1300
Fax: 202-730-1301
sbharris@hwglaw.com
sgoel@hwglaw.com
jneal@hwglaw.com

Counsel for Swarm Technologies, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2020, I caused a true and correct copy of the foregoing "OPPOSITION OF SWARM TECHNOLOGIES, INC. TO THE REQUEST FOR STAY OF ORBCOMM LICENSE CORP." to be sent by first class mail and email to the following:

Walter H. Sonnenfeldt, Esq.
Vice President, Regulatory Affairs
ORBCOMM Inc.
395 West Passaic Street
Suite 325
Rochelle Park, New Jersey 07662
Direct Tel: (585) 461-3018
E-Mail: sonnenfeldt.walter@orbcomm.com
Counsel for ORBCOMM License Corp.

Stephen L. Goodman
Stephen L. Goodman PLLC
532 North Pitt Street
Alexandria, Virginia 22314
(202) 607-6756
E-Mail: stephenlgoodman@aol.com
Counsel for ORBCOMM License Corp.

Eric Graham
LMI Advisors
2550 M Street, NW, Suite 300
Washington, DC 20037
Counsel for Myriota Pty. Ltd.

/s/ Shiva Goel
Shiva Goel
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, N.W., Suite 800
Washington, D.C. 20036
Tel: 202-730-1300
sgoel@hwglaw.com

Counsel for Swarm Technologies, Inc.

EXHIBIT A

From: Walter Sonnenfeldt
To: Scott Blake Harris; Shiva Goel
Cc: StephenLGoodman[redacted]
Subject: RE: Swarm Technologies, Inc. Commencement of Operations
Date: Monday, October 19, 2020 9:58:48 PM

Scott & Shiva:

Please send me a reply E-Mail to confirm your receipt of this message.

I am sending this E-Mail to follow up on my October 5th call with Shiva acknowledging receipt of your October 5th letter to us advising of us Swarm's commencement of operations. We note that Swarm's two earlier September 8th letters to the Commission indicated that (i) "in-orbit testing for SPACEBEE-10 to SPACEBEE-21 is complete," and (ii) that "the operation of an initial space station is compliant with the license terms and conditions of the Swarm Grant and that the space station has been placed in its authorized orbit." Consistent with our license conditions, now that we have been notified that Swarm commenced operations, we have shut down ORBCOMM user terminal operations in the United States in the uplink bands in which Swarm was licensed to operate last year. There is no overlap between authorized ORBCOMM downlink operations and the 137.0250-137.1750 MHz, 137.3275-137.3750 MHz, 137.4725-137.5350 MHz, 137.5850-137.6500 MHz, and 137.8125-138.0000 MHz downlink bands currently authorized for Swarm downlink operations, so no action by ORBCOMM is required.

As you are aware, we respectfully disagree with Swarm's assertions in your October 5th letter, as reiterated an augmented in your October 16th letter to the Commission, regarding the applicability of the FCC's NVNG MSS band plan outside of the United States. We will be submitting a detailed response on these matters to the Commission.

We also stand ready to continue the preliminary discussions that commenced with Swarm late last month to work towards a mutually agreeable resolution of spectrum sharing matters. As you know, the Commission has a strong preference for parties to resolve conflicts outside of the formal process. The CEPT has also urged Swarm and ORBCOMM to reach a mutually acceptable "operator to operator" agreement on spectrum sharing in the CEPT member countries.

Please contact me if there are any questions or if any additional information is needed.

Best Regards,

Walter Sonnenfeldt
Vice President, Regulatory Affairs
ORBCOMM Inc.
[redacted]

EXHIBIT B

From:	Karl Kensinger
To:	Walter Sonnenfeldt; Scott Blake Harris; Shiva Goel; egraham[redacted]
Cc:	Merissa Velez; Sean O"More; David Konczal
Subject:	Swarm's October 16th letter and related filings
Date:	Tuesday, December 22, 2020 12:25:22 PM

Gentlemen,

The above-captioned matter is hereby formally designated as permit-but-disclose, effective today. An informative Public Notice will also be issued at a later date concerning this change as part of the Satellite Divisions regular "actions taken" public notice.

Best regards,

Karl Kensinger
Acting Chief, Satellite Division
FCC International Bureau