

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

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

To: The Commission

**EMERGENCY PETITION FOR IMMEDIATE CLARIFICATION**

The U.S. GPS Industry Council (the “Council”), by its attorneys and pursuant to Sections 1.2 and 1.117(c) of the Commission’s Rules (47 C.F.R. §§ 1.2 & 1.117(c)), hereby petitions the Commission for an immediate declaratory ruling clarifying key provisions of the Order and Authorization adopted by the International Bureau (the “Bureau”) in the above-captioned proceeding (the “Waiver Order”).<sup>1</sup> The Waiver Order grants LightSquared Subsidiary LLC (“LightSquared”) fundamental modifications to its previously-granted authority to provide an Ancillary Terrestrial Component (“ATC”) to its licensed L-band mobile-satellite service (“MSS”), expanding the scope of its authorization via a waiver of the MSS ATC integrated service rule (47 C.F.R. § 25.149(b)(4)). In the Waiver Order, the Bureau also establishes a working group to evaluate potential overload interference impact upon Global Positioning System (“GPS”)<sup>2</sup> receivers that may result from the modified operations allowed for the first time by the Waiver Order.<sup>3</sup>

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<sup>1</sup> *LightSquared Subsidiary LLC*, DA 11-133, slip op. (IB, released January 26, 2011).

<sup>2</sup> For purposes of this Emergency Petition, references to “GPS” shall include not only the Global Positioning System space and ground components, but also augmentations of the GPS system that operate with GPS in the 1559-1610 MHz band.

<sup>3</sup> The interference issue involves the potential for high-power non-integrated terrestrial mobile transmitters on frequencies authorized to LightSquared to desensitize and ultimately overload any GPS

This Emergency Petition is necessitated by the fact that the Bureau has not addressed whether the working group lies outside the scope of the Federal Advisory Committee Act (“FACA”), although that seems to be the Bureau’s conclusion.<sup>4</sup> The absence of explanation on this point appears to be having an adverse impact on the potential for relevant federal government agencies to participate in the process. Broad participation by affected government agencies that are GPS users is critical to ensuring that the working group fully considers potential interference issues. LightSquared and the Council have nonetheless begun to organize the working group with the object of meeting the highly-expedited timetable set forth in the Waiver Order, which requires a final report to be filed “no later than June 15, 2011,” just four months from today. *See* LightSquared Waiver Order at 21-22 (¶ 43).

Accordingly, the Council respectfully requests that in order to ensure the participation of affected federal agencies critical to the working group, the Commission should explain the reasoning underlying the Waiver Order with respect to the inapplicability FACA. Assuming that FACA requirements do not apply, the Commission should take concrete steps to ensure openness and transparency in the working group’s activities, including a directive that the final working group report will be placed on public notice with at least a 45-day period permitted for comments to be filed by all interested parties and subsequent opportunity for reply. Because there is no provision in the Waiver Order for public participation in the working group process, only with these protections can the Commission ensure that the expedited working group process the

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devices that are attempting to operate in the vicinity of such transmitters, rendering the GPS devices inaccurate or inoperable. The issue is referred to in the Waiver Order as “overload interference,” but can more accurately be termed GPS receiver “desensitization,” which is used in this Petition.

<sup>4</sup> 5 U.S.C. App. 2. FACA requirements for a chartered advisory committee include a defined purpose; a fairly balanced membership; independence from the appointing agency and any special interests; adequate staff and funding; a schedule for submission of reports; and a defined duration.

Bureau has established will lead to a reliable, record-based final FCC determination on whether the condition on LightSquared's license limiting its operations may be removed.<sup>5</sup>

Time is of the essence in clarifying these issues due to the expedited timetable set forth in the Waiver Order. The Council therefore respectfully requests that a clarifying order be issued no later than Wednesday, February 23, 2011, two days in advance of the date the Waiver Order requires filing of the group's Work Plan with the Commission.

### **I. Statement of Interest**

The Council's interest in this matter is clear. The Council has been an active participant in the proceeding before the Bureau, making plain the concern of its members that the dramatically expanded terrestrial mobile operations contemplated by LightSquared's modified service proposal will cause significant GPS receiver desensitization, an issue that has not previously been examined in past technical discussions involving the Council and LightSquared.

Given the importance of the integrity of the GPS service for a wide variety of government, industry and consumer users across every sector of our national economy and infrastructure, as recognized in the Waiver Order, the Council and its members are committed to working diligently to study this issue on an accelerated basis, and pledge to give maximum effort toward finding workable solutions that may be available to address the problem. Success in this endeavor, however, is critically dependent on the clarifications requested in this Petition.

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<sup>5</sup> In addition to the fact that definitive guidance is required on these matters at the earliest possible date, this Petition is directed to the Commission because the Bureau itself lacks delegated authority to establish a federal advisory committee without consultation with the Chairman's office and the Office of the Managing Director. *See* FACA, § 9; FCC FACA Directive (FCCINST 1126.1); 47 C.F.R. § 0.231(g) (providing, in part, that the Managing Director has the power, in consultation with the Chairman to "establish, renew, and terminate all Federal Advisory Committees").

## II. Background

In Order to address the concerns raised by the Council and, among others, the National Telecommunications and Information Administration (“NTIA”),<sup>6</sup> the Waiver Order conditioned grant of LightSquared’s modified authorization on the outcome of post-grant testing “as LightSquared moves forward with plans to deploy and commence commercial operations on its network.” Waiver Order at 21 (¶ 41). Although the outcome of this testing is critical to the establishment of criteria to ensure that GPS does not suffer harmful interference, and to the removal of the condition on LightSquared’s modified authority, the Bureau devotes only a few paragraphs to outlining the structure and work program for the “working group.”

The Bureau states “that establishing a working group that brings LightSquared and the GPS community together to address these interference issues expeditiously would serve the public interest,” and that “Commission staff will work with NTIA, LightSquared and the GPS community, including appropriate federal agencies, to establish” the group “to fully study the potential for overload interference to GPS devices and to identify any measures necessary to prevent harmful interference to GPS.” Waiver Order at 21 (¶ 41). The Bureau also expresses its expectation of “full participation by the GPS industry in the working group.” *Id.* (¶ 42). It notes that the process “must be completed to the Commission’s satisfaction before LightSquared commences offering commercial service” pursuant to the waiver, with the working group tasked to provide critical “recommendations on steps that can be taken going forward to permit broadband wireless services to be provided in the L-band MSS frequencies and coexist with GPS devices.” *Id.* Finally, the Waiver Order sets forth an ambitious reporting schedule, imposed on

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<sup>6</sup> Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Julius Genachowski, Chairman, FCC, at 1 (filed January 12, 2011) (“NTIA Letter”) (The NTIA Letter notes, *inter alia*, that the “Departments of Defense, Transportation and Homeland Security ... believe the FCC should defer action on the LightSquared waiver until these interference concerns are satisfactorily addressed”).

LightSquared alone, with a final report “that includes the working group’s analyses of the potential for overload interference to GPS devices ...” to be delivered to the agency “no later than June 15, 2011.” Waiver Order at 21 (¶ 43). These directives are insufficient to facilitate full participation in the working group and to ensure that the working group’s outputs reflect full public participation.

**III. The Commission Must Clarify Whether the Bureau Was Correct that FACA Need Not Be Followed by the Working Group Established in the Waiver Order.**

Preliminary discussions between the Council and LightSquared over the structure, objectives, and working methods of the working group have been productive; LightSquared seems to agree with the Council on the need for the working group to be an objective and transparent forum for the assessment of the desensitization/overload interference issue. This agreement is essential, but does nothing to alleviate the significant concerns whether the working group should be considered a federal advisory committee, which has lead to uncertainty for all who have a stake in the resolution of the GPS receiver desensitization issue. Questions left unanswered by the Bureau’s Waiver Order include:

- Would the requirements of the Waiver Order be met if some of the federal agency entities the Bureau expects to participate in the group refuse to do so due to FACA-related concerns about its structure and legality?
- In the absence of specific FACA requirements that address working group recordkeeping, and submission of the minutes of group meetings for the record, how do the FCC’s *ex parte* rules apply to group meetings that include an FCC staff member?
- What mechanism short of a FACA process does the FCC intend to use to assure that a final report, which is to be prepared and submitted by LightSquared alone, is subject to public comment after filing and before the FCC renders any decision on its sufficiency? (This is an essential step that should provide opportunity for input from any stakeholders interested in the GPS receiver desensitization issue that does not participate in the testing process.)

A successful resolution of these questions, which the Waiver Order failed to address, is essential not only to promote participation by all interested parties, but to ensure the integrity of the process itself.

**A. The Commission Must Explain Why FACA Does Not Apply to the Working Group.**

In light of the sparse discussion of the procedures for public participation in the working group and public comment upon its final report, there remain questions as to whether the terms of FACA apply. Specifically, the FCC's description of the "working group" seems to include the key elements necessary for FACA to apply. Under FACA, an "advisory committee," the type of entity the creation of which requires specific guidelines and procedures to be followed, "means *any* committee . . . or other similar group . . . *established* . . . by [an] agenc[y], in the interest of obtaining *advice or recommendations*." FACA § 3. Here, the Bureau states that it is "*establishing* a working group" (Waiver Order at 21 (¶ 41) (emphasis added)), which ultimately will advise the Bureau by "providing *recommendations* on steps that can be taken to reduce the risk of overload interference to GPS devices" (*id.* (¶ 42) (emphasis added)). This determination, in turn, is directly relevant to the status of the modified LightSquared license. On its face, therefore, the Bureau appears to have formed a group on which it intends to rely exclusively in its final licensing decision.<sup>7</sup>

But for the Commission's decision to form the working group, the group would not exist. The working group is not a pre-existing entity to which the FCC is turning for advice,<sup>8</sup> nor is it a

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<sup>7</sup> *Food Chemical News v. Young*, 900 F.2d 328, 332 (D.C. Cir. 1990) ("established" indicates "'a Government-formed advisory committee'"); *Heartwood v. Forest Service*, 431 F. Supp. 2d 28, 34 (D. D.C. 2006) ("An advisory panel is established when it has been formed by a government agency").

<sup>8</sup> *Compare Public Citizen v. Dept. of Justice*, 491 U.S. 440, 465 (1989) (finding the issue of FACA's applicability to the American Bar Association's Standing Committee on the Federal Judiciary "a close question," but determining FACA to be inapplicable, although primarily in consideration of Constitutional separation of powers concerns).

creation of LightSquared or any other party to the application proceeding, either under contract to the FCC or otherwise.<sup>9</sup> LightSquared simply stated that it was “willing to accept ... the creation of a process to address interference concerns regarding GPS.”<sup>10</sup> It was the FCC that created the process by “establishing a working group.” Moreover, the Bureau intends that the members of the working group cooperate in reaching conclusions regarding “operational measures that can be implemented to reduce the risk of overload interference to GPS devices.” Waiver Order at 21 (¶ 42).<sup>11</sup> Thus, it appears that the objective of assembling the group is to obtain “advice or recommendations” for use by the agency.<sup>12</sup>

The Commission’s ability successfully to demonstrate that FACA obligations are inapplicable to the Bureau’s working group concept is uncertain. The Commission must therefore provide the requested clarification before the group begins its task, so that the working group will be structured fairly and achieve full participation. The Commission must remove any uncertainty about FACA’s applicability at the outset, so that lingering questions do not undermine the group’s effectiveness or compromise the integrity of its results. The Commission must also embrace the spirit of FACA and the Administrative Procedures Act – even if FACA does not apply – by requiring that before the Bureau may draw or rely upon any conclusions

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<sup>9</sup> Compare, e.g., *Food Chemical News v. Young*, 900 F.2d 328, 331 (D.C. Cir. 1990) (an independent contractor, a federation of major biomedical research organizations, that formed a committee to provide advice on its work “falls under the main rule, made clear in [FACA’s] legislative history, that the ‘Act does not apply to persons or organizations which have *contractual* relationships with federal agencies’”) (emphasis added).

<sup>10</sup> LightSquared January 21 *Ex Parte* Letter at 2.

<sup>11</sup> See Steven P. Croley, “Practical Guidance on the Applicability of the Federal Advisory Committee Act,” 10 ADMIN. L.J. AM. U. 111, 155 (Spring 1996) (“Providing collective policy advice to an agency on a specific issue renders an agency-established assemblage a group under the FACA, no matter how informally organized that group may be.”)(“Croley”); *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994).

<sup>12</sup> See, e.g., *Nat’l Nutritional Foods Ass’n v. Califano*, 603 F.2d 327, 336 (2<sup>nd</sup> Cir.1979) (“If an agency wishes to rely publicly on the backing of an advisory committee, it must do what [FACA] commands”); Croley at 156 (“If an agency receives solicited advice or recommendations concerning a rather specific issue or problem which the agency itself has identified, the Act will very likely apply”).

from the working group report, the report will be placed on public notice to allow at least 45 days for public comment, along with an appropriate period for reply. Only then would the Bureau have adequate input on which to make an informed decision.

**B. Failure To Explain Why FACA Has Been Held Inapplicable To The Working Group Would Adversely Impact The Group's Work.**

The consequences of failing to address the FACA issue at the outset could ultimately negate work done by the working group and harm the process significantly. Non-compliance with FACA where adherence is required can lead to injunctive relief that prevents the product of a defectively-constituted committee from being considered.<sup>13</sup> This risk is already undermining the successful formation of the working group, with the Bureau's failure to address FACA directly giving pause to non-FCC federal stakeholders in the GPS receiver desensitization issue about participating in the working group. It appears as well that the gravity of the risk could be significantly greater in this proceeding than in the typical rulemaking context because the process outlined by the Bureau currently contemplates only FCC consultation with NTIA concerning the working group's final report, and does not indicate further opportunity for public review and comment.<sup>14</sup>

Accordingly, absent immediate clarification by the Commission regarding FACA, it is likely that federal agency stakeholders critical to the working group's success will not

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<sup>13</sup> See, e.g., *Alabama-Tombigbee Rivers Coalition, v. Dept. of Interior*, 26 F.3d 1103, 1107 (11<sup>th</sup> Cir. 1994) ("to allow the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act. ... We find injunctive relief as the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements."); Croley at 174 ("To the extent courts are willing to grant more than declaratory relief, agencies run the risk of judicial invalidation of any agency decision predicated on advice or recommendations gathered in violation of the Act").

<sup>14</sup> Compare *Seattle Audubon Society v. Lyons*, 871 F. Supp 1291, 1310 (W.D. Wash. 1994) (Court rejected plaintiffs' request for an injunction prohibiting use of a report produced by committee that failed to comply with FACA primarily because the committee's report "was circulated during [a] ninety-day comment period and was subjected to public comments and criticisms," including some from the plaintiffs).



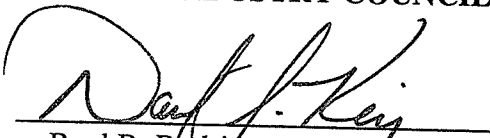
participate. The Commission should therefore clarify on the record why FACA's requirements do not apply. If the Commission does not issue such clarification, the working group process established by the Bureau will inevitably fail to achieve its goals.

#### **IV. Conclusion**

The Council respectfully requests that the Commission review the working group structure on an urgent basis and issue a decision on this matter no later than Wednesday, February 23, 2011 (two days prior to the date on which LightSquared is obliged to provide its Work Plan for the conduct of working group activities), clarifying whether FACA applies to the MSS ATC Working Group outlined in the Waiver Order, and assuming it does not, establishing other procedures to ensure that there is full opportunity for public participation in the working group, through direct involvement by affected parties and through comment on the final working group report by other interested parties. In connection with a determination that FACA obligations do not apply, the Commission should also clarify the *ex parte* obligations of participants in the working group process when FCC staff members are present.

Respectfully submitted,

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

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February 15, 2011

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CERTIFICATE OF SERVICE

I, Deborah Morris, hereby certify that on this 15th day of February, 2011, a copy of the foregoing Emergency Petition for Immediate Clarification is being sent via first class, U.S. Mail, postage prepaid, to the following:

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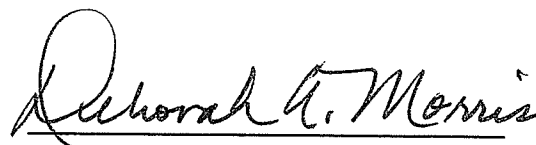
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