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

In the Matter of Swarm Technologies, Inc. Petition for Declaratory Ruling to Access the U.S. Market using NVNG UHF MSS Spectrum	IBFS File No. SAT-PDR-20200228-00021 Call Sign S3064

PETITION TO DEFER OR DIMISS

Hiber Inc. ("Hiber") respectfully requests the Federal Communications Commission ("FCC" or "Commission") to defer or, alternatively, dismiss the late-filed petition of Swarm Technologies, Inc. ("Swarm") seeking U.S. market access for the provision of non-voice, non-geostationary mobile satellite services in the 399.9-400.05 MHz and 400.15-401 MHz bands ("400 MHz Band").[1] Swarm missed, by over four months, the cut-off deadline for consideration in the 400 MHz Band processing round and has provided no valid justification for waiver of the well-established processing round rules. Indeed, any grant of a waiver of the cut-off deadline would undermine the FCC's processing round goals of creating regulatory and business certainty for satellite companies, potentially chilling investment and diminishing growth and innovation in the provision of satellite services. Accordingly, the FCC should defer the Swarm Petition until the FCC initiates a new, second processing round for the 400 MHz Band and evaluate Swarm's market access request in that proceeding. Alternatively, the FCC should dismiss the Petition as untimely filed.[2]

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[1] Petition for Declaratory Ruling, Swarm Technologies, IBFS File No. SAT-LOI-20200228-00021 (filed Feb. 28, 2020) ("Swarm Petition").

[2] 47 C.F.R. § 25.112(a)(2); *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No.

I. SWARM'S PETITION IS UNTIMELY AND SHOULD BE CONSIDERED ONLY IN A NEW PROCESSING ROUND OR, ALTERNATIVELY, DISMISSED

On August 15, 2019, the Commission released a public notice initiating a processing round for the 400 MHz Band and invited all interested parties to submit applications or petitions for market access by October 15, 2019.[3] In the public notice, the Commission identified three parties that had already submitted applications or petitions seeking to use the 400 MHz Band, including Hiber.[4] In response to the cut-off notice and prior to the specified deadline, two additional parties filed responses. Kinéis submitted a petition for U.S. market access, and Astro Digital filed a letter requesting that its pending application in the 400 MHz Band also be considered in the 400 MHz Band processing round.[5]

Swarm filed its petition on February 28, 2020, more than four months after the October 15, 2019 cut-off deadline. As a result, under the FCC's rules, Swarm has no right to be treated equally with the five timely filed participants in the 400 MHz Band processing round ("First-Round Participants").[6] Consistent with precedent,[7] the FCC instead should consider the Swarm Petition only after it initiates a new, second processing round with respect to the 400 MHz Band.[8]

02-34, and First Report and Order in IB Docket No. 02-54, 18 FCC Rcd 10760, ¶ 30 (2003) ("After the cut-off date has passed, we would dismiss any applications that are not 'acceptable for filing.'") ("*2003 Space Station Licensing Reform Order*").

[3] *Myriota Pty. Ltd. Petition Accepted for Filing, IBFS File No. SAT-PDR-20190328-00020 Cut-Off Established for Additional NVNG MSS Applications or Petitions for Operations in the 399.9-400.05 MHz and 400.15-401 MHz Bands*, Public Notice, 34 FCC Rcd 7185 (2019).

[4] *See id*.

[5] *See* Kinéis, Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20191011-00113 (filed Oct. 11, 2019); Letter from Chris Biddy, CEO, Astro Digital, to Marlene H. Dortch, Secretary, FCC, IBFS File No. SAT-LOA-20170508-00071 (filed Oct. 15, 2019); *see also Hiber Inc., Petition for Declaratory Ruling to Access U.S. Market Using the Hiberband Low-Earth Orbit System*, Order and Declaratory Ruling, IBFS File No. SAT-PDR-20180910-00069, DA 20-491, ¶ 4 n.15 (rel. May 6, 2020) ("*Hiber Order*").

[6] *See* 47 C.F.R. §§ 25.155(b) ("A license application . . . will be entitled to comparative consideration with one or more mutually exclusive applications only if the application is

In recognition of the procedural defectiveness of its filing, Swarm requests waiver of the FCC's cut-off deadline.[9] As discussed below, that waiver should be denied.

II. WAIVER OF THE PROCESSING ROUND RULES WOULD UNDERMINE THE COMMISSION'S GOALS TO PROVIDE REGULATORY CERTAINTY AND FOSTER INVESTMENT IN SATELLITE SYSTEMS

The processing round framework is designed to "ensure orderliness, expedition and finality in the licensing process" while also achieving "fairness among applicants and permit[ting] the rapid dispatch of Commission business."[10] In establishing these rules, the Commission emphasized its twin goals of establishing "licensees' operating rights clearly and quickly" and ensuring "that there is the most efficient use of the satellite spectrum and orbit resources."[11] Part and parcel to this approach is the establishment of a cut-off date and the requirement that a party must file before the established cut-off date to be considered in the applicable processing round.[12]

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received by the Commission in a condition acceptable for filing by the 'cut-off' date specified in a public notice.") (emphasis added); 47 C.F.R. § 25.157(c)(A) (defining "competing application" as one "filed in response to a public notice initiating a processing round.").

[7] *See, e.g., Cut-Off Established for Additional NGSO FSS Applications or Petitions for Operations in the 10.7-12.7 GHz, 12.75-13.25 GHz, 13.8-14.5 GHz, 17.7-18.6 GHz, 18.8-20.2 GHz, and 27.5-30 GHz Bands*, Public Notice, Report No. SPB-279, DA 20-325 (rel. Mar. 24, 2020) (initiating a second Ka-band and Ku-band frequency processing round); *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, ¶ 7 (1997).

[8] As Swarm recognizes, any rights Swarm obtains as part of any such new processing round must fully protect first-round parties. Swarm Petition at 34.

[9] Swarm Petition at 33-35.

[10] *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 14300, ¶ 5 (2001), *recon. denied*, 17 FCC Rcd 8305 (2002) ("*EchoStar Order*").

[11] *2003 Space Station Licensing Reform Order* ¶ 7.

[12] 47 C.F.R. §§ 25.155(b), 25.157(c)(2); *see also 2003 Space Station Licensing Reform Order*.

As a general matter, the waiver of a rule is appropriate where the particular facts "make strict compliance inconsistent with the public interest."[13] The waiver should not undermine the purpose of the rule, and there must be a stronger public interest benefit in granting the waiver instead of applying the rule.[14] Here, the precedent established by any grant of Swarm's waiver request would undermine the very goals of orderliness and finality the FCC intended to support in implementing its processing round rules.

For example, grant of a waiver of the cut-off deadline would create regulatory and business uncertainty with respect to the rights of the First-Round Participants, as well as future processing round participants more generally. Diminishing those rights could chill investments and diminish the potential for growth and innovation in the provision of satellite services, contrary to the FCC's stated goals in establishing the processing round licensing regime. Further, grant of the waiver request of the cut-off deadline and Swarm Petition would create uncertainty about the coordination obligations for the First-Round Participants, both respect to Swarm and also potential future entrants seeking to operate in the 400 MHz Band.

III. NONE OF SWARM'S JUSTIFICATIONS FOR A WAIVER OF THE PROCESSING ROUND CUT-OFF DEADLINE SUPPORT GRANT OF THE WAIVER

In its filing, Swarm argues that granting the waiver of the cut-off deadline would facilitate competition and the rapid provision of service.[15] Such a generic justification could apply to essentially any late-filed party and cannot be a basis for granting a waiver.[16] Similarly,

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[13] *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[15] Swarm Petition at 35-37.

[16] *See, e.g., EchoStar Order* (denying applicant's request to modify its application after the processing round deadline); *Final Analysis Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 21463 (2001) (affirming the International Bureau's "decision

Swarm neither acknowledges nor explains why it did not or could not timely file a petition, making it impossible for the Commission to distinguish Swarm's waiver request from any other future applicant that inexplicably misses a processing round deadline.[17] Indeed, the extraordinarily lax waiver standard that Swarm supports, which would allow late filers to receive equal rights with timely filed processing round participants, would eviscerate the purpose of the cut-off deadline, as discussed above, and diminish the value of timely submitting filings in response to processing round cut-off deadlines.

Swarm also argues that "[t]he Commission has noted that the purpose of the processing round is to 'prevent one applicant from unreasonably precluding additional entry by other operators in the requested frequency band.'"[18] But this language is simply the justification for opening a processing round to allow competing applications to be filed during a filing window,[19] it is not a basis for keeping a processing round open indefinitely, as Swarm essentially argues here.[20]

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that most of [the applicant's] . . . amendments were [unnecessary, non-conforming] major amendments and as such, they could not be considered in the processing round"); *Universal Service High-Cost Filing Deadlines,* Order, 29 FCC Rcd 13754, at n.48 (2014) (holding that a minimal threshold for the "the public interest prong of the waiver standard" would "effectively negate the public interest requirement" and lead to an "exception [that] swallow[s] the rule").

[17] Given that Swarm was (during the relevant period) and continues to be represented by knowledgeable FCC counsel, the Commission must assume that Swarm elected at the time not to participate in the processing round, and it must now abide by its decision. *See, e.g.*, *Swarm Technologies, Inc.*, Order and Consent Decree, 33 FCC Rcd 12773, ¶ 7 (2018) (identifying Swarm's FCC regulatory counsel in the context of an Enforcement Bureau proceeding requiring Swarm to pay a penalty of $900,000).

[18] Swarm Petition at 36.

[19] *2003 Space Station Licensing Reform Order* ¶ 25 ("The Commission recognized the possibility that the first applicant in the queue could seek authority for so much spectrum that future service providers could be unreasonably precluded from the market.").

[20] Swarm Petition at 36-37.

In any event, five parties filed before the cut-off deadline, and three of those parties have proposed to provide Internet-of-Things services.[21] Thus, there can be no concern that a single applicant is unreasonably precluding entry.[22] To the extent that Swarm is asking the FCC to conclude that its services would be provided more expeditiously than others and at a fraction of the cost,[23] that type of comparative analysis is exactly what the FCC intended to avoid in its satellite licensing process nearly two decades ago in adopting the processing round regime,[24] and it should be rejected here as well.

Further, contrary to Swarm's assertions, the First-Round Participants would be prejudiced by any special treatment allowing Swarm to participate in the closed processing round on an equal basis with First-Round Participants.[25] Since the close of the processing round, the First-Round Participants have been in active coordination discussions to share the 400 MHz Band among the relevant parties. In the uplink band, there are essentially three commercial systems (Hiber, Kinéis, and Myriota) attempting to share a relatively small global allocation of *120 kHz*[26] with

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[21] *See Hiber Order*; Kinéis, Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20191011-00113 (filed Oct. 11, 2019); Myriota Pty. Ltd., Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20190328-00020 (filed Mar. 28, 2019).

[22] There is also no merit to Swarm's self-serving contention that the First-Round Participants are unlikely to deploy systems, whereas Swarm will. Swarm Petition at 36. Indeed, all but one of the five First-Round Participants already have operational satellites.

[23] Swarm Petition at 35-36.

[24] *Amendment of the Commission's Space Station Licensing Rules and Policies*, Notice of Proposed Rulemaking and First Report and Order, 17 FCC Rcd 3847, ¶ 65 (2002) ("[T]he Commission historically has never used comparative hearings to select among satellite applicants.").

[25] Swarm Petition at 34.

[26] As the Commission is aware, the upper 30 kHz of the band has been reserved for higher-powered TT&C use under the decision of WRC-19, and the coordination efforts of the First-Round Participants using the band for data collection services has, accordingly, been limited to the lower 120 kHz. *See* Final Acts, ITU World Radiocommunication Conference 2019, at 17 (2020), https://www.itu.int/dms_pub/itu-r/opb/act/R-ACT-WRC.14-2019-PDF-E.pdf.

each other and government users, with whom the parties are required to coordinate. The fundamental bases of those discussions have centered on the certainty of the processing round and the belief that the results of the coordination would lead to a final and equitable agreement that the First-Round Participants could rely upon for the foreseeable future. Such certainty has been a critical factor in discussions with investors and is required to ensure capital investment.

Designing a technical solution and reaching an agreement to accommodate all users will be a feat of complex engineering. The First-Round Participants are working toward this goal and believe it is possible.[27] But at this stage, adding a new party into the mix with equal coordination rights as the First-Round Participants – contrary to the very rationale for having a processing round – would jeopardize the progress made thus far and would raise concerns about the finality of any such solution or agreement, if late-filed parties could simply insert themselves into the process at any time.

Additionally, although Swarm commits to operate on a non-harmful interference basis, it provides no concrete technical demonstration that its proposed operations would adequately protect First-Round Participants from harmful interference.[28] In lieu of a technical demonstration, Swarm essentially relies on representations made by the First-Round Participants that their systems could operate or be coordinated with others in the 400 MHz Band.[29] But those representations to share and coordinate spectrum were made by the First-Round Participants

[27] Indeed, all five of the First-Round Participants – Hiber, Kinéis, Myriota, Spire, and Astro Digital – are currently in active coordination discussions.

[28] *Id.* Any grant of Swarm's market access request must be conditioned on Swarm's commitment to operate strictly on a non-interference basis with respect to the First-Round Participants. Swarm should not be permitted to claim equal status with other First-Round Participants at some later date.

[29] *Id.*

either in support of a waiver of the processing round requirement[30] or with respect to other timely filed First-Round Participants.[31] Thus, reliance on such statements does not support Swarm's contention that its operations would not cause harmful interference to other parties.

IV. CONCLUSION

For the above reasons, Hiber requests that the Commission hold in abeyance the Swarm Petition until such time as the FCC initiates a new, second processing round for the 400 MHz Band and evaluate the market access request in that proceeding. Alternatively, the FCC should dismiss the Petition as untimely filed.

Respectfully submitted,

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[30] *See, e.g.*, Letter from Bruce Henoch, Hiber, to Marlene H. Dortch, Secretary, FCC (filed Sept. 16, 2019) ("Given the decision to initiate a processing round and essentially deny the [processing round] waiver request, the Commission should disregard Hiber's statement [regarding accommodation of future systems]. The statement was made in support of the grant of the waiver request and, accordingly, is no longer applicable. In short, Hiber should be treated the same, and have all the same rights and benefits, as all other timely-filed processing round participants."); Myriota Pty. Ltd., Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20190328-00020, at 3 (filed Mar. 28, 2019) (stating in its processing round waiver request that its "system has the flexibility and spectral efficiency to be able to operate harmoniously with Orbcomm and other NVNG systems.").

[31] *See, e.g.*, Kinéis, Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20191011-00113 at 12 (filed Oct. 11, 2019) ("The Kinéis system also has the flexibility and spectral efficiency to operate harmoniously with other NVNG MSS systems in this band, both those previously licensed and those with applications pending.") (emphasis added).

Certificate of Service

I, Bruce Henoch, hereby certify that, on May 18, 2020, a true and correct copy of the foregoing letter was sent by United States mail, first-class postage prepaid, to the following:

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