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FILED VIA IBFS

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

**Re: Swarm Technologies, Inc, Petition for Declaratory Ruling
IBFS File No. SAT-PDR-20200228-00021**

Dear Ms. Dortch:

This letter is submitted on behalf of Kinéis in response to the above-referenced petition for declaratory ruling (“Petition”) filed on February 28, 2020 by Swarm Technologies, Inc. (“Swarm”) seeking U.S. market access to provide non-voice, non-geostationary Mobile-Satellite Service (“NVNG MSS”) at 399-400.05 MHz and 400.15-401 MHz, which are among the frequency bands Kinéis is seeking to access through its own petition for declaratory ruling filed last year.¹ Kinéis comments on one discrete aspect of Swarm’s petition – its request that the Commission waive Section 25.155(b) of the Commission’s Rules, and implicitly Sections 25.156(a) and 25.157, to permit its Petition to be considered “as a comparative application” in the current processing round.²

Grant of a waiver of the Commission’s Rules is appropriate only if special circumstances warrant deviation from the general rule and such deviation will otherwise serve the public interest.³ In general, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested but identify and explain how the particular circumstances are

¹ Kinéis is a petitioner seeking U.S. market access in the ongoing NVNG MSS processing round. *See* Kinéis Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20191011-001114 (Call Sign S3054).

² *See* Swarm Petition at 37 (quote) and 33-38 (generally).

³ *See, e.g., Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).



distinct from the typical application of the rule and justify different treatment.⁴ Swarm has failed to make that case in this circumstance.

Swarm offers as a rationale for waiver the same grounds offered previously by companies that have filed NGSO applications where no processing round has been initiated and sought to have their application treated as a standalone request, on a first-come, first-served basis, without the issuance of a Public Notice to solicit other interested applicants. The FCC has occasionally granted such waivers *to standalone applicants*.⁵ But this is not the circumstance here, where an NVNG MSS processing round was initiated more than eight months ago, and new applications and petitions were cut-off as of October 15, 2019.⁶ In the Public Notice, the Commission stated:

Applications and petitions filed by **October 15, 2019** will be considered together with the Myriota, Hiber, and Spire Global requests. Requests filed after this date may not be entitled to shared use of this spectrum with equal status with respect to any grant of applications or petitions filed prior to the cut-off date.⁷

In issuing this Public Notice, the FCC effectively rejected requests for waiver filed by Hiber, Inc. and Myriota Pty. Ltd.⁸ premised on grounds similar to Swarm's request and instead established the ongoing processing round. Having rejected these earlier waiver requests and proceeded in accordance with Sections 25.155(b), 25.156(a) and 25.157 of its Rules, the Commission cannot reasonably prejudice the rights of all parties acting in reliance on that Public Notice, including Kinéis, by reopening the round and accepting a new petition many months later.

Among other considerations, Commission precedent offers no support for such an approach, and Swarm accordingly cites no case law that supports its waiver request. Indeed, the Commission has consistently rejected reopening closed satellite processing rounds to allow late-filed applications after a cut-off notice has been issued.⁹

⁴ See, e.g., *New Skies Satellites*, 16 FCC Rcd. 7482, 7499 (2001), citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d at 1166 and *WAIT Radio*, 418 F. 2d at 1157.

⁵ See *Streamlining Licensing Procedures for Small Satellites*, Notice of Proposed Rulemaking, 33 FCC Rcd 4152, 4171 (¶ 42) (2018).

⁶ See FCC Public Notice, "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, DA 19-779, Report No, SPB-277 (rel. Aug. 15, 2019).

⁷ *Id.* at 2.

⁸ See Hiber, Inc. Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20180910-00069, at 7-8; Myriota Pty. Ltd. Petition for Declaratory Ruling, IBFS File No. SAT-PDR-20190328-00020, Waiver Requests at 1-6.

⁹ See, e.g., *EchoStar Satellite Corp.*, 16 FCC Rcd 14300, 14304-05 (IB 2001), *recon. denied*, 17 FCC Rcd 8305 (IB 2002); *LEOSAT Corporation*, 8 FCC Rcd 668, 670-71 (1993).



Deferral of Swarm’s Petition until the current processing round is completed is the only equitable result under these circumstances and the applicable precedent. Swarm will suffer no prejudice by having its Petition processed according to the FCC’s normal processing rules. Moreover, Swarm’s coordination filing with the International Telecommunication Union (“ITU”) is very recent and is listed on the ITU website simply “as received.” It has not yet been officially published in the ITU Radiocommunication Bureau’s International Frequency Information Circular (“BR IFIC”). This submission post-dates all relevant filings for the applicants and petitioners being considered in the current processing round, such that Swarm will be required to coordinate with these operators prior to launch and would not be disadvantaged by the other applicants and petitioners obtaining licenses or U.S. market access before its request is considered. Considering that the four-month period during which National Administrations may comment on the Swarm filing will only commence after the filing has been published in the BR IFIC, it is unlikely that coordination could be finalized before the end of this year. Furthermore, the European Conference of Postal and Telecommunications Administrations (CEPT) has not included Swarm to date in any of its ongoing discussions relating to systems’ compatibility in the 399.9-400.05 MHz band in connection with its update of ERC Decision (99)06.¹⁰

Kinéis expresses no opinion regarding whether the FCC might waive Sections 25.155(b), 25.156(a) and 25.157 of its rules to permit processing of Swarm Petition after all applications in the current processing round have been acted upon, but without issuance of a new cut-off notice to initiate a further processing round. The Commission may determine that such a waiver to allow “first-come, first-served” processing of the Swarm Petition is appropriate, and Kinéis has no objection to a waiver of that nature should the Commission determine that it is appropriate. However, at that time it will need to provide additional information and analysis regarding its means of avoiding harmful interference to other NVNG MSS systems, as the proposed mechanism is not fully described in the current technical materials.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,

s/ David S. Keir

David S. Keir
Counsel to Kinéis

¹⁰ See ERC Decision of 10 March 1999 on the harmonized introduction of satellite personal communication systems operating in the bands below 1 GHz (S-PCS<1GHz) (ERC/DEC/(99)06).



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