

**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

REPLY

Hiber Inc. (“Hiber”) respectfully replies to Swarm Technologies, Inc.’s (“Swarm”) opposition.¹ The Swarm Opposition provides no new information or justifications that warrant a waiver for Swarm’s untimely market access request. Swarm again failed to explain why a waiver would not undermine the certainty that the processing round framework deadlines are intended to provide. Swarm has also provided no factual bases to distinguish it from any other late filer. Rather than address these fatal defects, Swarm makes the extraordinary claim that the requests by Hiber, as well as other processing round participants,² for fair and equal application of the Commission’s longstanding processing-round rules are “frivolous” and “punitive.”³ Swarm’s derision for playing by the rules should not be encouraged by grant of a waiver here.⁴

¹ Consolidated Opposition and Response of Swarm, IBFS File No. SAT-PDR-20200228-00021 (filed June 1, 2020) (“Swarm Opposition”); *see also* Petition for Declaratory Ruling, Swarm, IBFS File No. SAT-PDR-20200228-00021 (filed Feb. 28, 2020) (“Swarm Petition”).

² *See* Petition to Defer or Dismiss of Hiber, IBFS File No. SAT-PDR-20200228-00021 (filed May 18, 2020) (“Hiber Petition”); Petition to Defer and Comments of Myriota Pty. Ltd., IBFS File No. SAT-PDR-20200228-00021 (filed May 18, 2020) (“Myriota Petition”); Letter from David S. Keir, Counsel, Kinéis, to Marlene H. Dortch, Secretary, FCC, IBFS File No. SAT-PDR-20200228-00021 (filed May 18, 2020) (“Kinéis Letter”).

³ Swarm Opposition at 1-2.

⁴ *See, e.g., Swarm Technologies, Inc.*, Order and Consent Decree, 33 FCC Rcd 12773, ¶¶ 7, 19 (2018) (requiring Swarm to pay a penalty of \$900,000). After settling with the Commission an

For these reasons and those stated in Hiber’s Petition, the Commission should defer the Swarm Petition until the FCC initiates a new processing round or, in the alternative, dismiss the Petition as untimely.

I. DISCUSSION

The Hiber Petition demonstrates that Swarm has failed to show good cause why a waiver is warranted⁵ and that grant of a waiver would undermine the certainty sought by timely processing round participants in the UHF proceeding and timely filers in future processing rounds.⁶ Nothing in the Swarm Opposition addresses these critical flaws. Instead, doubling down on vague public interest benefits, Swarm argues that a waiver grant would further Federal communications policy objectives.⁷ But such a generic justification could apply to essentially any late-filed party and cannot be a basis for granting a waiver.⁸

enforcement action for an unauthorized launch of satellites, the consent decree specifically required Swarm to hire a regulatory compliance director to ensure that Swarm would abide by the Communications Act and the Commission’s rules. *Id.* ¶ 13. Such regulatory compliance director should have recognized the need to file within the processing round window if Swarm wished to participate. A grant here would amount to condoning Swarm’s repeated, flagrant disregard for FCC rules.

⁵ See 47 CFR § 1.3 (providing for suspension, amendment, or waiver of Commission rules, in whole or in part, “for good cause shown”); see also *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁶ Kinéis Letter at 2 (“[T]he Commission cannot reasonably prejudice the rights of all parties acting in reliance on [the processing round public notice] . . . by reopening the round and accepting a new petition many months later.”); Myriota Petition at 5 (“[A]ctive coordination discussions among Myriota, Hiber, and Kinéis have progressed in reliance on the Commission’s processing round rules”); Hiber Petition at 4 (“[G]rant of a waiver of the cut-off deadline would create regulatory and business uncertainty with respect to the rights of the First-Round Participants”).

⁷ Swarm Opposition at 8.

⁸ Hiber Petition at 4-5; see also Myriota Petition at 6 (“Swarm did not explain why a waiver in this instance would not undermine the purpose of the rule. A waiver in such circumstances would simply invite additional late-filed system proposals after the cut-off date, undermining if not eliminating regulatory certainty for processing-round participants.”).

With nothing to distinguish Swarm from other late-filed applicants, a grant of a waiver here would establish a precedent that renders processing round deadlines meaningless. Nothing in the Swarm Opposition explains why Swarm was unable to timely file or otherwise addresses this issue. Grant of a waiver here effectively would create precedent allowing any future party to miss a processing round deadline by months *for no stated reason* and legitimately argue they should be given the same rights as timely filed processing round participants. This would conflict with the very purposes of the Commission’s processing round framework, which is to “ensure orderliness, expedition and finality in the licensing process.”⁹

Swarm’s efforts to distinguish the *EchoStar Order* are unavailing.¹⁰ Swarm argues that, although it was four months late, it was not four years late, like EchoStar, and thus the *EchoStar Order* does not apply.¹¹ Swarm’s argument should be readily rejected. FCC precedent establishes that a processing round deadline missed by three weeks is too long,¹² and in any event, Swarm cites *no precedent* to support its contention that missing a processing round deadline by “only” four months is grounds for a waiver.¹³ Moreover, while four months is indeed shorter than four years, it is not a *de minimis* amount of time and cannot reasonably be considered a “narrowly missed” deadline.¹⁴

⁹ *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 14300, ¶ 5 (2001), *recon. denied*, 17 FCC Rcd 8305 (2002) (“*EchoStar Order*”).

¹⁰ *Id.*

¹¹ Swarm Opposition at 5.

¹² *LEOSAT Corporation*, Order, 7 FCC Rcd 2469 (1992) (dismissing an application that was re-filed 21 days after a satellite processing round deadline to correct a deficiency associated with the initial filing), *recon. denied*, 8 FCC Rcd 668 (1997).

¹³ See Kinéis Letter at 2 (“Commission precedent offers no support for such an approach, and Swarm accordingly cites no case law that supports its waiver request.”).

¹⁴ *Id.* at 2. In other application contexts, the FCC has waived deadlines that were “narrowly missed” by several hours or a few days, where the applicant has demonstrated that there was a

Swarm also seeks to distinguish the *EchoStar Order* by arguing that EchoStar proposed to offer the “same service offerings as a substantial number of processing round applicants,” while “Swarm’s innovative constellation provides a necessary alternative to traditional satellite service.”¹⁵ But Hiber also seeks to use the spectrum to provide innovative connectivity for rural, remote, and network-independent Internet of Things and other applications.¹⁶ In any event, Swarm essentially asks the Commission to undertake the type of comparative analysis of the proposed services that the processing round framework is intended to avoid.¹⁷ Moreover, as the Commission is aware, Swarm is already licensed to deploy a satellite constellation using other frequency bands, and all of the purported public interest benefits identified by the Swarm Petition are exactly the same.¹⁸

computer error or other logistical unanticipated issue beyond its control. *See, e.g., Requests for Waiver or Review of Decision of the Universal Service Administrator by Indiana Telehealth Network et al.*, Order, 33 FCC Rcd 12341 (2018) (granting waiver “where the petitioner . . . demonstrated that it was unable to file the Healthcare Connect Fund invoice form on a timely basis due to a USAC technical system issue that prevented the filing of the invoice form”); *Christine M. Busby Late-Filed Applications for Renewal and Requests for Waiver of Section 1.949 for Stations WPVG926 and WPVG927*, Order, 28 FCC Rcd 1012, ¶ 8 (2013) (“We have also granted waiver of the deadline for filing renewal applications where the licensee provided documentation showing that it had attempted in good faith, but failed to file a renewal application in a timely manner, or dismissal of the renewal application stemmed from a technical problem in ULS beyond the licensee’s control.”).

¹⁵ Swarm Opposition at 5.

¹⁶ *See* Hiber Petition at 6; Petition for Declaratory Ruling, Hiber, IBFS File No. SAT-PDR-20180910-00069, at 2 (filed Sept. 10, 2018); *see also* Petition for Declaratory Ruling, Myriota Pty. Ltd., IBFS File No. SAT-PDR-20190328-00020, at 2-3 (filed Mar. 28, 2019); Petition for Declaratory Ruling, Kinéis, IBFS File No. SAT-PDR-20191011-00113, at 2-4 (filed Oct. 11, 2019).

¹⁷ Hiber Petition at 6.

¹⁸ Indeed, the public interest benefits identified by the two Swarm filings are essentially word-for-word. *Compare* Application Narrative, Swarm, IBFS File No. SAT-LOA-20181221-00094, at 28-32 (filed Dec. 21, 2018) *with* Swarm Petition at 27-32.

Swarm also misunderstands the Commission’s holding in *Final Analysis*.¹⁹ There, the Commission upheld the International Bureau’s decision not to consider, in a satellite processing round, an applicant’s amendments filed after the close of the processing round because the proposed amendments would “increase the potential for interference.”²⁰ Swarm’s late filed market access request also failed to demonstrate that its system would not increase the potential for interference to other timely filed systems, and so too should its application be rejected.

With respect to its operations, Swarm had baldly claimed in its market access request that it could operate on a non-interference basis.²¹ But in response to the requests of Hiber and others for additional technical information to assess Swarm’s claim,²² Swarm is now silent.²³ Swarm instead relies on the statements of the timely processing round participants that their systems could operate or be coordinated with others.²⁴ But those representations to share and coordinate

¹⁹ *Final Analysis Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 21463 (2001) (“*Final Analysis*”).

²⁰ *Id.* ¶ 42.

²¹ Swarm Petition at 34.

²² Myriota Petition at 7 (“There is no channelization plan or transmit timing requirements imposed on NVNG UHF systems so it is not certain how CSMA/CA can avoid interference from Swarm’s proposed system into other NVNG UHF systems.”); Kinéis Letter at 3 (noting Swarm would “need to provide additional information and analysis regarding its means of avoiding harmful interference to other NVNG MSS systems”); Hiber Petition at 7 (“[A]lthough 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.”).

²³ This is all the more problematic because Swarm now appears to have retreated from its position that it can operate on non-interference basis. *Compare* Swarm Petition at 33 (“Swarm is willing to operate on a non-interference basis with other users of the spectrum.”) *with* Swarm Opposition at 6-8 (arguing the FCC should require that Swarm be included in coordination discussion with timely filed processing round participants).

²⁴ Swarm Opposition at 7-8.

spectrum were made either in support of a waiver of the processing round requirement²⁵ or with respect to other timely filed parties.²⁶

Moreover, as Hiber and others have explained, since the close of the processing round, the timely filed participants in the UHF processing round have been making plans, investing, and engaging in coordination discussions.²⁷ That the FCC did not take action on any of the applications or market access requests until after Swarm’s filing is irrelevant.²⁸ Indeed, if that were the relevant factor for a processing round deadline, there would be no certainty in a processing round deadline, defeating the very purpose of the processing round framework.²⁹

Finally, with respect to Swarm’s contention that failure by the FCC to grant its waiver request would be “burdensome” and “punitive,”³⁰ Swarm incredibly seeks to shift all

²⁵ See, e.g., Letter from Bruce Hensch, Hiber, to Marlene H. Dortch, Secretary, FCC IBFS File No. SAT-PDR-20180910-00069 (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.”).

²⁶ 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). For the same reasons, Swarm’s absurd suggestion that these statements are potential grounds for misrepresentation should be rejected. Swarm Opposition 7-8.

²⁷ Hiber Petition at 6 (“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.”); Myriota Petition at 5 (“Participants in the NVNG UHF processing round have made substantial progress since filing their petitions for U.S. market access last year. For example, active coordination discussions among Myriota, Hiber, and Kinéis have progressed in reliance on the Commission’s processing round rules and in anticipation of near-term grant, and the processing-round participants expect to reach an agreement in due course.”).

²⁸ Swarm Opposition at 2.

²⁹ See *supra* note 6.

³⁰ Swarm Opposition at 10.

responsibility for complying with the FCC's rules away from itself.³¹ Swarm had notice of the deadline yet for no stated reason ignored it for four months. There would be no "burden" on Swarm if it simply followed the same rules that every other company in the processing round did. Instead, Swarm now asks the FCC to rescue it from its own decision not to timely file. The Commission should decline this invitation.

II. CONCLUSION

For the reasons stated above and in the Hiber Petition, Hiber requests that the Commission defer the Swarm Petition until the FCC initiates a new, second processing round for the UHF band and evaluate the market access request in that proceeding. Alternatively, the FCC should dismiss the Petition as untimely filed.

Respectfully submitted,

/s/ Bruce Heno

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³¹ *Id.* at 7-8.

CERTIFICATE OF SERVICE

I, Bruce Henoch, hereby certify that, on June 11, 2020, a true and correct copy of the foregoing was sent by United States mail, first-class postage prepaid, to the following:

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