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BY ELECTRONIC DELIVERY

Milton Brown
Office of Chief Counsel
National Telecommunications and Information Administration
U.S. Department of Commerce
Herbert C. Hoover Building, Room 4713
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Relocation of and Spectrum Sharing by Federal Government Stations - Technical Panel and Dispute Resolution Board

Dear Mr. Brown:

Squire Sanders (US) LLP hereby submits the following comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the National Telecommunications and Information Administration ("NTIA"). The NPRM seeks comments regarding the development of a Technical Panel and Dispute Resolution Board to assist with the relocation of, and spectrum sharing by, Federal Government stations. Squire Sanders provides these observations based on its experience managing the alternative dispute resolution ("ADR") process, involving both public and private sector spectrum licensees, as a part of the reconfiguration of the 800 MHz band by the Federal Communication Commission ("FCC"). To date, Squire Sanders mediators have successfully resolved more than 1,700 disputes that have arisen in connection with the reconfiguration of the 800 MHz band.

The ADR process that Squire Sanders developed for the 800 MHz reconfiguration process was based on three guiding principles. First, the process was designed with flexibility so that it could adjust to unforeseen changes or developments, as well as differences in the types of disputes. Second, the process was designed to be transparent to promote confidence that the process was fair and equitable. In this regard, we prepared, and made part of the public record, an ADR Plan that detailed the process. Third, the process was designed to be scalable to address the fact that the number of mediations that would be required was unknown and would likely vary greatly throughout the 800 MHz reconfiguration process. During the course of the reconfiguration of the 800 MHz band, the disputes that have arisen broadly fall into two categories: (1) those involving the costs of relocation and (2) those involving the comparability of the facilities to which licensees were relocated. The majority of such disputes,

however, involve disagreements regarding the costs necessary to reconfigure a radio system. Such cost disputes often present complex questions arising from the replacement of older, legacy radio systems with newer technologies that offer greater capacity and functionality.

As noted in the NPRM, the Middle Class Tax Relief and Job Creation Act of 2012 ("Act") requires a Dispute Resolution Board to resolve disputes within a 30-day period following a request for dispute resolution assistance. As NTIA recognizes, the brief period provided by the statute "will likely impact a board's ability to convene, meet with the parties, and adequately address complex cases." Squire Sanders agrees that such a compressed deliberation period could create significant challenges for a well-functioning dispute resolution process. Although NTIA expects "only a minimal number of serious conflicts to arise, if any," the incidence of such conflicts is unknown at this time. There may be more conflicts than expected, and multiple conflicts may arise at the same time, requiring the prompt availability of significant resources on short notice. Moreover, many of the disputes that may be presented to a Dispute Resolution Board for consideration are likely to be complex and highly fact-specific. As a consequence, whatever structure NTIA ultimately decides to adopt, should be scalable to respond to what could be periods of high and low demand for dispute resolution assistance.

The combination of a relatively short dispute resolution period, the potential for multiple disputes to arise at the same time, and the potential complexity of these disputes highlight the need for NTIA to adopt a process that provides a Dispute Resolution Board and parties with the ability to resolve their disputes in an efficient and equitable manner. The NPRM clearly acknowledges the difficulties presented by a 30-day dispute resolution process and proposes several possible solutions to these concerns.

First, the NPRM proposes that an initial request for dispute resolution assistance include "sufficient information to enable a fair and timely decision by a dispute resolution board," including "a concise and specific statement of the factual allegations sufficient to support the relief or action requested." Although this approach may work in some cases, our experience is that an early briefing of arguments often does not generate productive written materials. The ADR Plan that Squire Sanders developed for the 800 MHz reconfiguration process, for example, allowed mediators to require disputing parties to prepare and submit opening briefs before the start of active discussions. We soon discovered, however, that in many cases the parties had not clearly defined the issues in dispute at the start of the mediation process. In other cases, the parties devoted inordinate attention to matters that were collateral to the issues that needed to be resolved. As a result, our mediators largely discontinued the use of opening briefs and instead deferred the preparation of briefs until the disputing parties had engaged in meaningful discussions that enabled them to clarify the issues, resolve those disagreements that could be promptly addressed, and narrow the gap regarding the issues that remained.

Second, the NPRM proposes to address the 30-day deadline on the resolution of disputes by allowing disputing parties and a Dispute Resolution Board to mutually agree under certain circumstances to extend the dispute resolution period. In our experience, however, it is sometimes difficult to achieve mutual agreement between disputing parties on extending dispute resolution periods, particularly in highly contentious disputes. These difficulties could be exacerbated if one of the parties places into question whether such extensions are permissible under the Act.

Third, the NPRM proposes to encourage disputing parties "to use expedited alternative dispute resolution procedures, such as non-binding arbitration or mediation, before submitting a written request to establish a dispute resolution board." The lessons learned in the 800 MHz transition are relevant here as well. The FCC offered parties involved in the 800 MHz reconfiguration process the option of employing independent ADR resources to resolve disagreements. We are not aware of any 800 MHz licensee that utilized such an outside process. The principal reason appears to be the fact that the cost of participating in the mandatory ADR process established by the FCC was not borne by licensees subject to reconfiguration, whereas recourse to independent ADR resources was voluntary and at the parties' own expense. Since that same dynamic would appear to be present here, offering parties the ability to pursue alternative dispute resolution options would not likely be embraced by most parties.

A more efficient alternative may be for NTIA to require disputing parties to mediate their claims before an NTIA-sponsored mediation resource prior to seeking an NTIA referral to a Dispute Resolution Board. In many cases, such a process could be expected to resolve the disputes. Indeed, in the 800 MHz program, more than 95 percent of all disputes have been resolved during the mediation process without requiring referral to the FCC. In those cases in which the parties are not able to reach full agreement during mediation, the issues in dispute can be identified, discussed, and narrowed with the assistance of a mediator before they are referred to a Dispute Resolution Board. This would give a Dispute Resolution Board the benefit of well-focused briefs from the parties and a detailed recommendation from a mediator to assist a Board to adopt a fair and equitable resolution to the dispute within the 30-day period.

NTIA has multiple options available to structure the relationship between a Dispute Resolution Board and an additional NTIA-sponsored mediation resource. For example, NTIA might be able to designate mediation resources as administrative support service for its Dispute Resolution Boards under Section 6701 of the Act.

We encourage NTIA to consider additional alternatives that would ensure that the dispute resolution process is speedy, flexible, transparent, and scalable. We would be pleased to meet with NTIA to discuss our experiences in greater detail.

Respectfully submitted,

SQUIRE SANDERS (US) LLP

/s/ Joseph P. Markoski
By: Joseph P. Markoski
Partner