IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

UBIQUITEL INC. and UBIQUITEL OPERATING COMPANY, Plaintiffs, v. SPRINT CORPORATION, SPRINT SPECTRUM L.P., WIRELESSCO, L.P., SPRINT COMMUNICATIONS COMPANY L.P., SPRINT TELEPHONY PCS, L.P., SPRINT PCS LICENSE, L.L.C., and NEXTEL COMMUNICATIONS, INC., Defendants.	)	Civil Action No. 1489-N
HORIZON PERSONAL COMMUNICATIONS, INC., an Ohio corporation, and BRIGHT PERSONAL COMMUNICATIONS SERVICES, LLC, an Ohio limited liability company, Plaintiffs, v. SPRINT CORPORATION, a Kansas corporation, WIRELESSCO, L.P., a Delaware limited partnership, SPRINT SPECTRUM L.P., a Delaware limited partnership, SPRINTCOM, INC., a Kansas corporation, SPRINT COMMUNICATIONS COMPANY L.P., a Delaware limited partnership, NEXTEL COMMUNICATIONS, INC., a Delaware corporation, PHILLIECO L.P., a Delaware limited partnership, and APC PCS LLC, a Delaware limited liability company, Defendants.	)	Civil Action No. 1518-N

MEMORANDUM OPINION

Submitted: December 19, 2005
Decided: January 4, 2006

REVISED COVER PAGE

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PARSONS, Vice Chancellor.

These cases arise out of the merger of Nextel Communications, Inc. ("Nextel") with and into a subsidiary of Sprint Corp. ("Sprint"). Plaintiffs, UbiquiTel Inc. and UbiquiTel Operating Co. (collectively "UbiquiTel") and Horizon Personal Communications, Inc. ("Horizon") and Bright Personal Communications Services, LLC ("Bright"),[1] have asserted claims of anticipatory breach of contract against the combined entity. Both sides have moved for partial summary judgment. For the reasons set forth below, the Court denies Plaintiffs' motion for summary judgment with respect to the G Block and, further, dismisses without prejudice Plaintiffs' claims for declaratory judgment and anticipatory breach with respect to the G Block as unripe for adjudication. All other motions for summary judgment are denied.

I. BACKGROUND

A. The Parties

Plaintiffs are Affiliates of Sprint, independent companies that agreed to build out portions of Sprint's nationwide wireless network in exchange for the right to do business using Sprint's spectrum licenses in certain designated areas.[2]

Before the merger, Sprint operated a nationwide wireless network in the 1900 MHz frequency range and used a digital technology called Code Division Multiple

[1] The Court will refer to all four of the plaintiffs collectively as "Plaintiffs." Although the Court has not formally consolidated Civil Action No. 1489-N (*UbiquiTel Inc., et al. v. Sprint Corp., et al.*) and Civil Action No. 1518-N (*Horizon Personal Commc'ns, Inc., et al. v. Sprint Corp., et al.*), Plaintiffs moved for summary judgment collectively. Plaintiffs base their claims on substantially similar contracts and, as such, the Court will not distinguish between individual plaintiffs for purposes of this opinion.

[2] Nielsen Aff. ¶¶ 4–5.

Access ("CDMA") to provide cellular telephone and other communications services.[3] Before the merger, Nextel operated a nationwide wireless network in the 800 MHz and 900 MHz spectrum ranges and used integrated Digital Enhanced Network ("iDEN") wireless technology to provide cellular telephone and other communications services.[4]

B. The Management Agreements

When Plaintiffs became Affiliates of Sprint, they entered into Management Agreements that, for purposes of the motions at issue, are identical. These agreements provide that Plaintiffs

> will be the only person or entity that is a manager or operator for Sprint PCS with respect to the Service Area and neither Sprint PCS nor any of its Related Parties will own, operate, build or manage another Wireless Mobility Communications Network in the Service Area so long as this agreement remains in full force and effect . . . .[5]

The Management Agreement defines Sprint PCS as the group of entities that signed the Management Agreements or hold the 1900 MHz licenses for Plaintiffs' Service Areas.[6]

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3 *Id.* ¶ 6.

4 *Id.* ¶ 7.

5 PX 1.10 at 5 (UbiquiTel); PX 1.11 at 5 (Horizon); PX 1.12 at 5 (Bright). For purposes of this opinion, the Court will reference exhibits attached to Plaintiffs' motion for summary judgment with the numbers 1.xx, exhibits attached to Plaintiffs' opposition to Defendants' motion with the numbers 2.xx and exhibits attached to Plaintiffs' reply with the numbers 3.xx. "Wireless Mobility Communications Network" was not capitalized in the original Management Agreements; the parties capitalized the term in later addenda to the contracts. *See, e.g.*, Aff. of Jason A. Cincilla ("Cincilla Aff.") Ex. A., Ex. 3 at 16 (Add. VIII to Horizon Management Agreement).

6 *See, e.g.*, PX 1.10 at Schedule of Definitions 10; Cincilla Aff. Ex. A., Ex. 9 at 76 (Add. X to UbiquiTel Management Agreement).

Wireless Mobility Communications Network ("WMCN") means "a communications system operating in the 1900 MHz spectrum range under the rules designated as Subpart E of Part 24 of the FCC's rules."[7]

C. The Merger

On December 15, 2004, Sprint announced that it intended to merge with Nextel. The merger closed on August 12, 2005. The combined entity is known as Sprint Nextel Corp. ("Sprint Nextel"). It continues to operate both the legacy Sprint CDMA network and the legacy Nextel iDEN network and to be bound by the Management Agreements.

D. The G Block

In 2004, the Federal Communications Commission ("FCC") authorized Nextel to operate on ten megahertz of spectrum in the 1900 MHz band, specifically at 1910-1915 and 1990-1995 MHz.[8] The parties have referred to these paired frequency blocks as the "G Block" because they follow blocks of spectrum designated as Blocks A through F by the FCC.[9] Before Sprint Nextel may use the G Block, it must relocate the existing users of that portion of the spectrum.[10]

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7 *See, e.g.*, PX 1.10 at Schedule of Definitions 13; Cincilla Aff. Ex. A., Ex. 9 at 77 (Add. X to UbiquiTel Management Agreement).

8 Sprint Defs.' Consolidated Mem. of Law in Opp'n to Pls.' Mots. For Partial Summ. J. ("DAB") Ex. 17 ¶¶ 5, 223 (*In the Matter of Improving Pub. Safety Commc'ns in the 800 MHz Band; Consolidating the 800 and 900 MHz Indus./Land Trans. & Bus. Pool Channels*, 19 FCC Rcd 14969 (Aug. 6, 2004)).

9 *See* 47 C.F.R. 24.229 (listing frequency blocks designated A through F followed by "the paired frequency blocks 1910-1915 MHz and 1990-1995 MHz").

10 DAB Ex. 17 ¶¶ 239, 250.

E. The Motions for Summary Judgment

Plaintiffs moved for summary judgment on several issues, including for a declaration that "any network that Sprint Nextel builds, owns, manages, or operates using the G Block frequencies is a network 'under the rules designated as Subpart E of Part 24 of the FCC's rules' and violates Plaintiffs' exclusivity rights."[11] In response, Sprint argues that this Court should deny Plaintiffs' request because Sprint "has no current plans to own, operate, or manage a wireless network operating in the G Block in Plaintiffs' Service Areas, and it will not even have the theoretical capability of doing so for several years."[12] Consequently, Sprint contends, Plaintiffs' claims are not ripe for adjudication.

Sprint also moved for summary judgment on several other issues and Nextel joined Sprint's motion. Having considered the briefs and arguments on both Plaintiffs' and Defendants' motions, the Court is not firmly convinced that any of the issues is such that there are no genuine issues of material fact and that either side is entitled to judgments as a matter of law on the merits of those issues on the present record. Further, because trial will commence within one week from the issuance of this opinion and because the Court would benefit from the presentation of the evidence at trial, the Court

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[11] [Pls.'] Joint Opening Br. in Support of their Mots. For Partial Summ. J. ("POB") at 18.

[12] DAB at 12.

declines to grant summary judgment as to any of the issues,[13] with the exception of the ripeness issue.

II. ANALYSIS

A. Legal Standard

"In order for a court to exercise declaratory judgment jurisdiction, there must be an 'actual controversy.'"[14] "The existence of an actual controversy between the parties is a jurisdictional fact in actions for declaratory judgment . . . ."[15] The four prerequisites of an actual controversy are well-established:

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[13] *See Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) ("[I]t is not infrequently held that a summary judgment [motion] will be denied even though the court cannot identify a specific material fact in dispute, so that the legal question presented may be assessed in the more highly textured factual setting of a trial.") (internal citation omitted); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948) ("We consider it part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.").

[14] *Gannett Co. v. Bd. of Managers of the Del. Criminal Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

[15] *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964). Delaware cases do not make clear what evidentiary standard is appropriate to decide whether an actual controversy exists. Given the present procedural posture of this dispute, the Court will use the familiar summary judgment standard: Summary "judgment will be granted where the moving party demonstrates that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law. When determining whether to grant summary judgment, a court must view the facts in the light most favorable to the nonmoving party." *Seinfeld v. Verizon Commc'ns, Inc.*, 2005 WL 3272365, at *2 (Del. Ch. Nov. 23, 2005) (internal citation omitted).

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[16]

Sprint argues only that the fourth prerequisite of an actual controversy—ripeness—is absent.

B. Ripeness

The ripeness of a dispute is a matter entrusted to the discretion of the trial court.[17] The Court must engage in "a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten."[18] As this Court stated in *Cantor Fitzgerald, L.P. v. Cantor*,

> The Court must weigh these considerations against its interests in postponing resolution of the issues presented. These interests include the prospect of future factual development that might affect the determination to be made, the need to conserve scarce judicial resources, and a due

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16 *Schick*, 533 A.2d at 1238 (quoting *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660 (Del. 1973)); *accord Gannett*, 840 A.2d at 1237.

17 *N. Am. Philips Corp. v. Aetna Cas. & Surety Co.*, 565 A.2d 956, 961 (Del. Super. 1989) ("When deciding whether an issue is ripe for adjudication the Court must do a balancing test. The Court must use its judicial discretion based on the factors of each case . . . ."); *see also Gannett*, 840 A.2d at 1237 ("This Court reviews for abuse of discretion the Superior Court's decision to exercise declaratory judgment jurisdiction over a case.").

18 *Schick*, 533 A.2d at 1239.

> respect for identifiable policies of the law touching upon the subject matter of the dispute.[19]

The Court engages in this balancing of interests because of its desire to avoid issuing advisory opinions.[20] In *Stroud v. Milliken Enterprises, Inc.*, the Delaware Supreme Court explained why Delaware courts decline to render "hypothetical opinions":

> First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal action [appropriate for judicial resolution]. Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment. Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.[21]

Thus, when "future events may obviate the need for declaratory relief, [] the dispute is not ripe, and declaratory relief should not be granted."[22]

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19 1999 WL 413394, at *4 (Del. Ch. June 15, 1999) (citing *Schick*, 533 A.2d at 1239).

20 *See Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) ("The law is well settled that our courts will not lend themselves to . . . render advisory opinions.") (internal citation omitted).

21 *Id.* (internal citations and quotations omitted).

22 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 631–32 (Del. Ch. 2005) (dismissing claim for declaratory judgment with respect to right to indemnification because party seeking declaration did not yet have a judgment against it) (internal citation omitted).

1. The legal question sought to be determined

"The first step in this process of practical evaluation is the identification of the legal question sought to be determined."[23] The legal question here is whether Subpart E of Part 24 of the FCC's rules governs the G Block spectrum. If it does, then the Management Agreement would appear to prohibit Sprint Nextel from owning, operating, building or managing a WMCN operating in the G Block spectrum in Plaintiffs' Service Areas. If it does not, then Sprint Nextel arguably would have greater flexibility in terms of how it could use the G Block spectrum licenses it owns.

2. Plaintiffs' interests in resolution of this question

Plaintiffs argue rather persuasively that Subpart E of Part 24 of the FCC's rules governs the G Block spectrum.[24] Sprint attempts to sidestep this issue, characterizing it only as "a matter of potential dispute."[25] The possible absence of dispute on this point lessens considerably Plaintiffs' interest in judicial resolution of this question. "The purpose of the statute on declaratory judgments is to afford relief from uncertainty with

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23 *Schick*, 533 A.2d at 1239.

24 *See, e.g.*, POB at 16 ("The [FCC] has stated that their recent decision in the *800 MHz Report and Order* provided that the licenses to be created in the 1910-1915 MHz and 1990-1995 MHz bands would be subject to the Part 24 Rules, which are applicable to broadband service.") (internal citation omitted); *id.* at 15 ("The FCC's revised rules specifically add the 1910-1915 and 1990-1995 G Block frequencies. . . . Indeed, the only references to the G Block frequencies in Part 24 are in Subpart E.") (internal citations omitted).

25 DAB at 14.

respect to rights."[26] There may be some uncertainty here, but maybe not. Regardless, this Court does not have the time, the resources or the inclination to attempt to resolve all uncertainties that might exist with respect to contractual rights and obligations, especially where, as here, both sides are capable of evaluating the comparative risks of each position and acting accordingly. If the parties to a contract are able to evaluate their rights and obligations under the contract and manifest an understanding of them, then there is much less uncertainty with respect to rights and obligations and this Court has little need to confirm or explain them. In fact, doing so might amount to the granting of an advisory opinion.[27]

3. Hardship

Plaintiffs have not identified any particular hardship that would inure to them if the Court declined to address the G Block issue now. Further, because Plaintiffs' rights under the Management Agreements with respect to the G Block arguably are clear and Sprint has not yet taken a definitive position on that question, it is dubious whether this case presents a situation of doubtful or questionable rights and obligations that gives rise to uncertainty as to how parties to a contract may act. If at some point in the future Sprint

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[26] *Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755 (Del. Ch. 1995) (citing 10 *Del. C.* § 6512).

[27] *Cf. In re Dean v. Meyer*, 1997 WL 525754, at *1 (Del. Ch. July 7, 1997) (dismissing plaintiff's request for declaratory judgment regarding defendants' obligations under demand notes when demand notes were not yet due and defendants had not yet failed to meet their obligations under the notes and holding that plaintiff's belief "in the existence of future delay and harm does not provide the basis for relief in this Court.").

Nextel breaches the Management Agreement by virtue of activity relating to the G Block, or manifests the requisite intent to act in a way that Plaintiffs would have a claim for anticipatory breach, Plaintiffs may seek relief as to Sprint Nextel's actions at that time.

4. The Court's interest in avoiding premature consideration of this issue

The Court's reluctance to address the status of the G Block in terms of Subpart E of Part 24 of the FCC's rules and the Management Agreements stems from the very real possibility that this question will never need to be decided. Sprint Nextel must clear the G Block spectrum before it can use it. Sprint Nextel has committed to completing that task within 18 to 36 months.[28] It also has committed to supplying "substantial service" in the G Block within *10 years*.[29] Sprint Nextel has not committed, however, to using the G Block in Plaintiffs' Service Areas or evidenced an intention to do so. Plaintiffs suggest otherwise, noting that "Nextel told the FCC that Sprint [would] initiate *relocation* in a market by conducting a market kick-off meeting with all BAS licensees in the market. . . . Sprint has in fact initiated the relocation process in many of Plaintiffs' Service Areas. . . ."[30] But, initiating relocation, which Sprint Nextel must do, is not owning, operating, building or managing a WMCN. Similarly, Plaintiffs allege that "Sprint is

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[28] PX 1.28 ¶ 55 (*In the Matter of Improving Pub. Safety Commc'ns in the 800 MHz Band; Consolidating the 800 and 900 MHz Indus./Land Trans. & Bus. Pool Channels*, 19 FCC Rcd 25120 (Dec. 24, 2004)) (FCC agreeing to eighteen and 36 month benchmarks with starting dates "for computation of the benchmarks . . . thirty days after the issuance of said *Public Notice*.").

[29] PX 1.27 ¶ 347.

[30] Pls.' Joint Reply Br. in Support of Pls.' Joint Mot. for Partial Summ. J. ("PRB") at 9 (internal quotations and citations omitted) (emphasis added).

moving forward with clearing the G Block frequencies in Plaintiffs' service areas. As soon as those areas are clear, Sprint will be free to own and operate a network in those markets using the frequencies."[31] Again, being *free to* own, operate, build or manage is a far cry from actually *doing* what arguably is prohibited by the Management Agreements. Finally, Sprint Nextel plausibly contends that it can provide substantial service in the G Block without owning, operating, building or managing a WMCN in Plaintiffs' Service Areas.[32]

At most, Plaintiffs have presented evidence that Sprint Nextel could begin owning, operating, building or managing a WMCN in the G Block spectrum at some future point. Testimony by Sprint Nextel officers that "obviously we have plans for the G Block"[33] is insufficient to create a present, actual controversy. Arguing that an actual controversy exists, Plaintiffs cite a case observing that "' [a] clear indication of a party's intent not to perform their obligation'" makes the party "'guilty of anticipatory breach.'"[34] This quotation may accurately state the law, but it has no application here because Plaintiffs have not presented evidence of either a present breach by Sprint Nextel or of a clear indication on the part of Sprint Nextel of an intent not to perform their obligations under

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31 *Id.* at 10.

32 *See* DAB Ex. 13 at 128 (Foosaner Dep.) ("Substantial use can and has been interpreted to be pops, number of population, so that if you ended up potentially just operating in the top 20 markets that would bring you in full compliance.").

33 PX 3.4 at 31 (West Dep.).

34 PRB at 8 (quoting *R.D. Arnold Constr. v. Dutt*, 2001 Del. C.P. LEXIS 1, at *4 (Del. Ct. Com. Pl. Mar. 28, 2001)).

the Management Agreements. In fact, Sprint Nextel has presented evidence that equipment to utilize the G Block would not be available for about eighteen months.[35] Thus, Sprint Nextel could not begin to build or own a WMCN in the G Block for at least eighteen months.

In arguing that this Court has declaratory judgment jurisdiction, Plaintiffs cite *Western Air Lines, Inc. v. Allegheny Airlines, Inc.*,[36] which held that a "'threatened breach of contract . . . coupled with a legitimate need of plaintiffs to seek the protection of injunctive relief, would justify equitable jurisdiction.'"[37] Assuming that this is a correct statement of the law, it is inapposite because it establishes circumstances under which equitable jurisdiction exists.[38] Equitable jurisdiction, not declaratory judgment jurisdiction, was one of the principal issues in *Western Air Lines*.[39] Before discussing equitable jurisdiction, the *Western Air Lines* court concluded, without explanation, that it

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35 DAB Ex. 7 at 196 (West Dep.). Plaintiffs' citation to testimony regarding the availability of handsets that would operate on the G Block spectrum, PRB at 11 (citing PX 3.7 at 127 (Barlik Dep.)), does not change the fact that the equipment necessary to build a WMCN in the G Block will not be available for at least eighteen months.

36 313 A.2d 145 (Del. Ch. 1973).

37 PRB at 7 (quoting *W. Air Lines*, 313 A.2d at 150).

38 It is also inapposite because Plaintiffs have neither shown a threatened breach of contract nor a legitimate need for injunctive relief with respect to the G Block.

39 313 A.2d at 148 ("Allegheny asserts that this Court lacks jurisdiction because all the issues raised herein are properly cognizable in a court of law.").

had an actual controversy and thus declaratory judgment jurisdiction.[40] The court likely so concluded because the defendant had already refused to perform under the contract at issue.[41] Thus, the finding of an actual controversy on the facts of *Western Air Lines* is distinguishable from the facts of this case and provides no support for Plaintiffs' contention that the G Block issue is ripe for resolution.

C. Ripeness Conclusion

In summary, Plaintiffs' interest in a prompt resolution of the G Block issue is not compelling. It appears to relate more to improving Plaintiffs' leverage in their negotiations with Sprint than to any need for immediate determination of a real and adverse controversy between the parties. Moreover, even assuming a controversy does exist, Plaintiffs have not shown that they would suffer any substantial hardship from a delay in resolution of it until a time when the perceived threat of a breach of the Management Agreements is more imminent.

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[40] *Id.* at 149 ("It is clear from the record that this action satisfies the [actual controversy] standards. However, that does not automatically guarantee this Court's jurisdiction. Unless the record indicates some special, traditional basis for equity jurisdiction, this Court does not have jurisdiction in a declaratory judgment action."). *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, which Plaintiffs also cite, PRB at 7, is similarly distinguishable. In *Diebold*, the court observed that "it being sufficient ground of judicial interference that the defendant, as of [the time relief is sought], claims and insists upon his right to do the act complained of." 267 A.2d 586, 590 (Del. 1970). Even viewing the facts in the light most favorable to Plaintiffs, the Court does not find that Sprint Nextel has claimed or insisted upon a right to use the G Block spectrum in Plaintiffs' Service Areas. *See* PX 1.40 (Bottoms Dep.) (agreeing that if Subpart E of Part 24 of the FCC's rules governs the G Block, then the G Block would fall within the definition of WMCN in section 2.3 of the Management Agreements).

[41] *W. Air Lines*, 313 A.2d at 148.

In the Court's opinion, those considerations are outweighed by other factors that favor postponing resolution of the G Block issue. Those factors include the prospect of future developments that might moot the controversy or affect the determination to be made, such as a possible sale of the G Block by Sprint or a limitation of its use to places other than Plaintiffs' Service Areas. Eschewing immediate consideration of the issue also would serve the important public policy against rendering advisory opinions. Thus, the Court holds that the G Block issue is not ripe for determination at this time.

III. CONCLUSION

For the reasons stated, the Court grants Defendants' motion for summary judgment that the claim for a declaratory judgment as to the G Block is not ripe for adjudication. Accordingly, that aspect of Plaintiffs' claims for declaratory judgment is dismissed without prejudice. If the facts change and the situation with respect to the G Block ripens into an actual controversy, Plaintiffs may seek appropriate relief at that time.

Plaintiffs' and Defendants' motions for summary judgment with respect to all other issues are denied.

IT IS SO ORDERED.