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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
SkyTerra Communications, Inc., Transferor ) IB Docket No. 08-184  
 )  
and ) FCC File Nos.:  
 )  
Harbinger Capital Partners Funds, Transferee ) ITC-T/C-20080822-00397  
 ) SAT-T/C-20080822-00157  
Application for Consent to Transfer of Control of ) SES-T/C 20080822-01089  
SkyTerra Subsidiary, LLC ) SES-T/C-20080822-01088  
 ) 0003540644  
 ) 0021-EX-TU-2008 and  
 ) ISP-PDR-20080822-00016

To: The Chief, International Bureau  
The Chief, Office of Engineering and Technology  
The Chief, Wireless Telecommunications Bureau

**PETITION FOR PARTIAL RECONSIDERATION**

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April 1, 2010

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## SUMMARY

On March 26, 2010, the International Bureau, the Office of Engineering and Technology, and the Wireless Telecommunications Bureau (collectively, the “Bureaus”) issued an Order granting authority to transfer control of SkyTerra Subsidiary LLC (“SkyTerra”) from SkyTerra Communications, Inc. to Harbinger Capital Partners Funds (“Harbinger,” and, with SkyTerra, the “Applicants”). The Order adopted conditions restricting arrangements between SkyTerra and “either of the two largest terrestrial providers of CMRS and broadband services” – namely, Verizon Wireless and AT&T. Verizon Wireless was not a party to the proceeding and, until the same day the Order was adopted, the record contained no indication whatsoever that these conditions were under consideration. The Bureaus’ Order, moreover, offers no record evidence or rationale for these conditions. In fact the conditions are not related in any way to the transaction itself.

Verizon Wireless does not challenge the transaction approved by the Order, nor would the relief it seeks here hinder SkyTerra and Harbinger from pursuing their business plans. Verizon Wireless does, however, seek reconsideration and revocation of the conditions that directly implicate it. The Bureaus’ decision to restrict the rights of two wireless carriers who were not parties to the proceeding is a troubling departure from the open and transparent decision-making that this Commission has emphasized. Here, the course of dealings among the Bureaus and the Applicants circumvented all due process protections by denying Verizon Wireless any notice of the conditions or affording the company an opportunity to be heard.

The Order also suggests that the Bureaus may have prejudged significant issues relating to wireless competition and spectrum policy. In connection with the National Broadband Plan, the Commission has recognized a looming spectrum crisis and has announced plans to conduct a

series of rulemakings to address spectrum-related matters. These proceedings will almost surely address issues at the heart of the conditions challenged here, including how to ensure a continuation of the robust competition that characterizes the American wireless market today. Yet the Order reflects Bureau-level *conclusions* as to these issues, apparently determining (without any discussion) that Verizon Wireless's access to spectrum must be restricted. The underlying issues warrant consideration upon a full record, subject to the procedural protections demanded by the APA, not cursory resolution in the context of this transaction – and by the full Commission, not by the Bureaus.

The conditions, moreover, are unlawful for multiple reasons:

- ***The conditions deprive Verizon Wireless of its due process rights.*** Government actors must afford parties due process before taking action that directly curtails their rights. Here, the Bureaus have taken action in an adjudication in derogation of Verizon Wireless's rights, without any such notice or opportunity for comment. Moreover, they have imposed on Verizon Wireless a completely standardless and thus unlawful approval mechanism. Existing rules do not contain any such approval procedures. In effect, the Bureaus have bypassed the mandatory APA rulemaking process by adopting new regulation without satisfying the procedural requisites.
- ***The conditions do not address transaction-specific harms.*** The Commission has repeatedly stated that its public interest authority permits it to impose and enforce only *narrowly tailored, transaction-specific* conditions in the context of its transaction review. Here, however, the Bureaus imposed conditions bearing no relationship whatsoever to any purported harms arising from the SkyTerra/Harbinger transaction.
- ***The conditions are arbitrary and capricious.*** Administrative agencies are required to articulate satisfactory explanations for their actions, establishing “a rational connection between the facts found and the choice made.” The Bureaus' Order utterly fails to do so. Among other defects, the Order makes no findings as to why the conditions are appropriate; fails to explain why the conditions apply only to two companies and not other large national wireless providers with substantial spectrum holdings; and fails to even consider whether other providers owned in part by Harbinger (including Sprint and Leap) should be subject to those conditions.
- ***The conditions violate Section 202(a) of the Act.*** Section 202(a) of the Act makes it unlawful for a common carrier to unreasonably discriminate. Yet the conditions

mandate that SkyTerra – a common carrier – engage in the very discrimination forbidden by that section. As the Commission appeared to recognize when rescinding a comparable condition initially applied in the AT&T/BellSouth transaction, it may not impose conditions that require behavior contrary to the Act.

- ***The Bureaus lacked delegated authority to impose the conditions.*** The Order's attempt to impose new regulatory obligations on two specific providers presents new and novel issues of law and policy not previously considered by the Commission. As such, the Bureaus lacked delegated authority to impose the conditions.

For these reasons, the Bureaus should immediately rescind the conditions. Indeed, given the gravity of the issues presented here, should the Bureaus *not* immediately eliminate the conditions, Verizon Wireless respectfully requests that the Commission itself take up this matter and issue an order doing so.

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To: The Chief, International Bureau  
The Chief, Office of Engineering and Technology  
The Chief, Wireless Telecommunications Bureau

**PETITION FOR PARTIAL RECONSIDERATION**

Pursuant to Section 1.106 of the Commission's rules,<sup>1</sup> Verizon Wireless hereby requests that the International Bureau, the Office of Engineering and Technology, and the Wireless Telecommunications Bureau (collectively, the "Bureaus") reconsider and remove two conditions imposed in their Order granting authority to transfer control of SkyTerra Subsidiary LLC ("SkyTerra") from SkyTerra Communications, Inc. to Harbinger Capital Partners Funds ("Harbinger").<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 1.106.

<sup>2</sup> *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184 et al., *Memorandum Opinion and Order and Declaratory Ruling*, DA 10-535 (rel. Mar. 26, 2010) ("Order").

This Petition does not challenge the underlying transaction, nor would granting the relief it seeks prevent SkyTerra and Harbinger from fully pursuing their business plans. The Petition addresses only those two conditions that unlawfully affect Verizon Wireless – a non-party to the proceeding – absent any analysis or reasoning. Specifically, the Order adopted conditions restricting arrangements between SkyTerra and “either of the two largest terrestrial providers of CMRS and broadband services” – namely, Verizon Wireless and AT&T. Condition 1 provides that any such arrangement involving certain use of SkyTerra’s spectrum by these providers requires prior Commission approval at the agency’s “sole discretion.” Condition 3 provides that any such arrangement whereby the combined traffic of these providers accounts for more than 25 percent of the annual total SkyTerra terrestrial traffic in any Economic Area requires prior Commission approval, again at the agency’s “sole discretion.”

The public record in this proceeding contained no suggestion that such conditions might be imposed. The first mention of the conditions was made in a filing submitted on March 26 – *the same day the Order was adopted and released* – a filing not even made available in the Commission’s Electronic Comment Filing System until three days after the Order’s release.<sup>3</sup> Verizon Wireless thus had no way to know of this filing in advance of seeing the Order, much less any opportunity to comment on it.

The Bureaus’ adoption of the two conditions is a significant departure from this Commission’s commitment to transparent and fact-based decision-making. The Order contravenes fundamental due process principles by imposing conditions that single out two non-

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<sup>3</sup> The document was posted in ECFS on Monday, March 29, 2010. *See* Letter from Henry Goldberg and Joseph A. Godles, Counsel for the Harbinger Capital Partners Funds, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 08-184 *et al.*, (Mar. 26, 2010) (“Commitment Letter”).

parties to the transaction for discriminatory treatment, absent any notice. Equally troubling, the conditions bear no relation to any issues presented by the transaction or considered in the Order. Indeed, nothing in the record of the proceeding could conceivably support the conditions. The Order is contrary to law (including the Commission's own rules) in many other respects as well. Unless corrected, the Order raises troubling questions as to whether the Bureaus prejudged critical issues relating to wireless competition and spectrum policy that the Commission may consider in future proceedings, including rulemakings to implement the National Broadband Plan. For these reasons, the Bureaus must immediately eliminate the two conditions, and if they do not, the Commission should do so.

#### **BACKGROUND**

In March 2009, SkyTerra and Harbinger (together, the "Applicants") filed a series of applications for authority to transfer control of SkyTerra Subsidiary, LLC and its respective licenses and authorizations from SkyTerra to Harbinger.<sup>4</sup> SkyTerra operates a Mobile Satellite Service ("MSS") system in the L-band, and has authority to operate an Ancillary Terrestrial Component ("ATC"). Harbinger, a private investment firm, holds significant interests in two other MSS licensees, TerreStar Corporation and Inmarsat plc, as well as interests in other wireless companies, including Leap Wireless International, Inc. ("Leap") and Sprint Nextel Corp. ("Sprint").

Verizon Wireless did not participate in the year-long proceeding, did not express a view with respect to the transaction at issue, and had neither constructive nor actual notice at any point that it might be directly affected under the Commission's ruling.

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<sup>4</sup> See generally Order at ¶ 1 & n.1.

On March 26, 2010, the Bureaus adopted the Order, which granted the requested transfers. The Order found that the transaction on balance served the public interest because Harbinger plans to offer 4G wireless broadband service, creating “a new facilities-based broadband player that will serve more than 80 percent of the U.S. population by the end of 2015.”<sup>5</sup>

The Order referenced and attached a letter that Harbinger filed that day detailing three commitments by the Applicants.<sup>6</sup> One commitment was to a build-out schedule for the 4G network. Without explanation, Harbinger included two other commitments that expressly affect the rights of Verizon Wireless and AT&T, the largest and second-largest terrestrial wireless providers:

**Condition 1.** SkyTerra shall not, directly or indirectly, enter into any agreement to make its spectrum used by its terrestrial network in the 1525-1559 MHz/1626.5-1660.5 MHz band (“L-band”) available to an entity that, at the time the agreement is entered into, is the largest or second largest wireless provider without receiving prior Commission approval. Approval shall be at the sole discretion of the Commission (or one of its Bureaus, acting on delegated authority). For purposes of this Order, the largest or second largest wireless provider means the largest or second largest provider of commercial mobile radio services (“CMRS”) and wireless broadband services (including the provider’s Affiliates) measured by aggregate nationwide revenues of the provider and its Affiliates for such services. This Condition 1 shall not restrict SkyTerra’s customers from roaming on the network of the largest or second largest wireless provider.

... Violation of this Condition 1 shall render SkyTerra’s authorizations null and void without any further action required by the Commission. ....

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<sup>5</sup> Order at ¶ 72.

<sup>6</sup> See Commitment Letter at Att. 2, appended to Order as Appx. B.

**Condition 3.** SkyTerra shall not, in any Economic Area, in any rolling 12-month period (as determined at the end of every calendar quarter), directly or indirectly, provide via its terrestrial network, to any combination of the largest and second largest wireless providers (as defined in Condition 1), or any of their respective Affiliates, traffic accounting for more than 25 percent of total bytes of data carried on its terrestrial network, without prior Commission approval. Commission approval shall be at the sole discretion of the Commission (or one of its Bureaus, acting on delegated authority). For purposes of this Condition 3, “terrestrial network” shall have the same meaning as in Condition 2. Compliance with the 25 percent limit contained in this Condition 3 shall be determined separately for each Economic Area and shall be calculated at the end of each calendar quarter by dividing the total bytes of traffic carried on SkyTerra’s terrestrial network in an Economic Area on behalf of the largest and second largest wireless providers and their Affiliates during the previous twelve months (the numerator) by the total bytes of traffic carried on SkyTerra’s terrestrial network in that Economic Area during the same period (the denominator) and multiplying by 100 to express the result as a percentage.....

... If SkyTerra exceeds the 25 percent limit contained in this Condition 3: (1) in the case of an initial violation, the violation shall be treated as a continuing violation, and SkyTerra shall be subject to a forfeiture of up to the maximum amount specified in Section 1.80(b)(3) of the Commission’s rules ... and (2) in the case of a subsequent violation in the same Economic Area, SkyTerra’s authorizations shall be rendered null and void without any further action required by the Commission. Each violation in an Economic Area shall be considered a separate act or failure to act and the forfeiture shall be calculated separately for each Economic Area.

The Order adopted these commitments as conditions, notwithstanding the absence of any public comment or any notice that particular third parties would be affected by the Applicants’ commitments. Indeed, the record contained no suggestion whatsoever that such conditions would be imposed. Moreover, the Order itself included no analysis of the conditions, and did not explain why they were, in the Bureaus’ view, necessary to the public interest. The Order stated only:

Harbinger made a number of commitments to the Commission ... that give us greater confidence that the promised benefits will

occur. Because our conclusion that Harbinger's acquisition of SkyTerra is in the public interest is dependent on those benefits being achieved, we are adopting Harbinger's commitments ....<sup>7</sup>

These conditions substantively curtail the rights of Verizon Wireless and AT&T – but no other wireless service providers – by imposing a new prior FCC approval requirement (applying an undefined process lacking any standards for review) for leasing, roaming, resale, or traffic carriage agreements with SkyTerra. These conditions effectively modified Commission rules to include prior approval procedures where none had existed. For example:

- **Leasing.** Prior Commission approval is not generally required for leasing of satellite or ATC spectrum, provided that the leasing arrangement does not result in a transfer of control.<sup>8</sup> A similar leasing arrangement between SkyTerra and Verizon Wireless would now require prior FCC approval.
- **Roaming.** Prior Commission approval is not required if wireless providers want to enter into roaming agreements. Now, however, if Verizon Wireless seeks to enter into a roaming agreement for its customers to roam on SkyTerra spectrum, prior FCC approval could be required. Conversely, however, the conditions “shall not restrict SkyTerra's customers from roaming on the network of the largest or second largest wireless provider”<sup>9</sup> – a unique double-standard that the Order does not explain.
- **Resale.** Currently, wireless providers are free to enter into MVNO/resale agreements without the need for prior Commission approval. Now, however, before any such agreement can be entered into by Verizon Wireless and SkyTerra, FCC approval will be required.
- **Traffic Limit.** Current Commission rules permit a wholesale business model for wireless service with no limit on the amount of traffic one provider may carry for another. Now, however, Verizon Wireless and SkyTerra are strictly limited in that traffic; SkyTerra is subject to sanctions if the combined level of Verizon Wireless and AT&T traffic on its network exceeds 25 percent of SkyTerra's total traffic in a market, absent Commission approval.

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<sup>7</sup> Order at ¶ 72 (footnote omitted).

<sup>8</sup> See *Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities, Report and Order*, 22 FCC.2d 86, 93-94 ¶ 19 (1970); see also *Globalstar Licensee LLC, Order and Authorization*, 23 FCC Rcd 15975, 15985-88 ¶¶ 24-27 (2008), *recon. pending*.

<sup>9</sup> Commitment Letter, Att. 2 at ¶ 3.

In effect, the Bureaus have unlawfully subjected Verizon Wireless to new rules that may restrict Verizon Wireless's ability to obtain sufficient spectrum capacity to meet the growing needs of its customers, at the same time the Commission has recognized a looming spectrum crisis. These new restrictions, which effectively change existing Commission rules, potentially discourage parties from shouldering the burden and uncertainty of having to undergo a time-consuming and standardless approval process, and SkyTerra will have any number of other potential lessees, roaming partners, and other entities with whom to negotiate without this burden.<sup>10</sup>

## DISCUSSION

### I. THE BUREAUS' ORDER CONFLICTS WITH THE COMMISSION'S COMMITMENT TO OPEN, PARTICIPATORY PROCEDURES AND DATA-DRIVEN DECISIONMAKING.

This Commission has made openness and transparency the hallmarks of its administrative procedures, and has consistently emphasized the importance of the sound, data-driven decision-

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<sup>10</sup> Any such conditions, moreover, are wholly inconsistent with the *SkyTerra ATC Modification Order*, adopted the very same day, reaffirming the "longstanding Commission policy" of "refraining from interfering unnecessarily with licensees' business negotiations." *SkyTerra Subsidiary LLC, Application for Modification Authority for an Ancillary Terrestrial Component*, DA 10-534, *Order and Authorization*, at ¶ 29 & n.78 (IB rel. Mar. 26, 2010) ("*SkyTerra ATC Modification Order*"). Likewise, the conditions undermine the development of the "robust secondary market in spectrum" urged by the Commission's National Broadband Plan just weeks ago. *See* Connecting America: the National Broadband Plan at 80 ("National Broadband Plan"), available at <http://www.broadband.gov/plan/national-broadband-plan.pdf>. Specifically, the Plan finds that "the pressing spectrum requirements" associated with wireless broadband "necessitate" action, and therefore encourages the Commission to "identify and address barriers to more productive allocation and use of spectrum through secondary markets." *Id.* at 83. Instead, the Bureaus have erected a new barrier to the efficient operation of secondary markets, in direct contravention of the Report's recommendations.

making that results from such a participatory approach.<sup>11</sup> This commitment is central to protecting the due process rights enshrined in the Administrative Procedure Act (“APA”) and the Communications Act (the “Act”).<sup>12</sup>

Under this Commission, moreover, new policy initiatives have been driven by this commitment to open, transparent processes. In February, the Commission unanimously adopted two Notices of Proposed Rulemaking expressly designed to further this central Commission goal. In one, the Commission sought “comment on proposals to improve our *ex parte* and other procedural rules to make the Commission’s decision-making processes more open, transparent, and effective.”<sup>13</sup> In the other, it sought comment on proposals that were “intended to ... enhance the openness and transparency of Commission proceedings....”<sup>14</sup>

The Commission has also emphasized the importance of giving affected parties a full opportunity to respond to a public record. In circumstances particularly relevant here, in the *Tower Shot Clock Order* issued just a few months ago, the Commission declined to consider a filing made on the last day prior to the sunshine rules going into effect and “strongly encourage[d] parties to submit relevant evidence as early as possible in the course of a proceeding ... so that it may be subjected to the crucible of a response.”<sup>15</sup>

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<sup>11</sup> See, e.g., Julius Genachowski, Chairman, Federal Communications Commission, Remarks to the Staff of the Federal Communications Commission at 4 (June 30, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291834A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf).

<sup>12</sup> See *infra* Section III.A (discussing due process).

<sup>13</sup> *Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43, *Notice of Proposed Rulemaking*, FCC 10-31, at ¶ 1 (rel. Feb. 22, 2010).

<sup>14</sup> *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44, *Notice of Proposed Rulemaking*, FCC 10-32, at ¶ 1 (rel. Feb. 22, 2010).

<sup>15</sup> *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All*  
(continued on next page)

The Bureaus' adoption of Conditions 1 and 3 is contrary to the Commission's own standards for openness and fact-driven decisions. Rather than pursuing an open and transparent course, the proposed commitments were made public on the very day the Bureaus adopted the Order, with those commitments included as conditions to the grant. This was the first public indication in the course of the year-long proceeding that the rights of non-parties would be curtailed. The filing of a letter of commitments on the same day the Order was adopted involving affected companies that were never a part of the proceeding deprived those companies of any opportunity to participate. Moreover, neither the last-minute letter nor the Order attempt to link the conditions to any issues raised in the record. The Order thus undermines the Commission's often-stated commitment to transparent and data-driven decision-making.

## **II. ABSENT CORRECTION, THE BUREAUS' ORDER APPEARS TO PREJUDGE SIGNIFICANT ISSUES RELATED TO WIRELESS COMPETITION AND SPECTRUM.**

The conditions suggest that the Bureaus may have prejudged the state of competition in the wireless marketplace, with far-reaching ramifications for the market and Verizon Wireless. This is particularly troubling as the Commission will soon consider the Mobile Wireless Competition Report and prepares to embark on a next-generation spectrum policy framework, as outlined in the National Broadband Plan.<sup>16</sup> The Plan highlighted the critical need to make additional spectrum available in order to meet the growing demand for mobile broadband services and achieve the Commission's goals for expanded broadband options for consumers. To address that need, it proposed that the Commission conduct a series of rulemakings to

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*Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling*, 24 FCC Rcd 13994, 14006 ¶ 34 n.108 (2009) (“*Tower Shot Clock Order*”).

<sup>16</sup> See National Broadband Plan at Chapter 5.

identify, allocate and license additional spectrum for wireless broadband. Questions as to how to foster continued robust competition in the wireless industry, how to ensure consumers can gain access to the wireless services they want, and how companies can meet the needs of their customers, will be front and center in many of those proceedings.

The conditions, however, seem to prejudge these key issues. They single out the two providers, while refraining from encumbering the rest of the wireless sector, including nationwide providers T-Mobile, Clearwire, and Sprint (in which Harbinger has an interest). Rather than conduct the rulemaking process and develop a record that potentially could support the adoption of rules newly regulating wireless providers' business arrangements with MSS providers, the Bureaus appear to have used the leverage that SkyTerra's application provided to request conditions that enable the Commission to scrutinize in advance (and potentially block) future business arrangements between SkyTerra and two companies. While Verizon Wireless firmly believes that the conditions are not appropriate or needed under any circumstances, at a minimum creating these new restrictions can only be taken up in an open and transparent rulemaking<sup>17</sup> – not buried in an adjudicatory decision without analysis or debate.<sup>18</sup>

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<sup>17</sup> See National Broadband Plan at 79 (“Spectrum policy starts with transparency – disclosure about spectrum allocations, licensing and utilization. Transparency further increases the quality of policymaking by allowing outside parties – including citizens, companies, other government agencies and investors – to engage in the allocation process on an ongoing basis.”).

<sup>18</sup> See *supra* Section III.A; cf. *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (cautioning the Commission “not to bury what it believes to be the heart of its order in the last line of a footnote”).

### III. THE BUREAUS' ORDER IS ARBITRARY AND CAPRICIOUS, CONTRARY TO PRECEDENT, AND OTHERWISE UNLAWFUL.

#### A. Adoption of the Conditions Violates Due Process, Impermissibly Regulates the Actions of Non-Parties, and Is Contrary to Precedent.

The conditions disregard Verizon Wireless's due process rights. It is fundamental that due process is required whenever a government actor seeks to affect a party's rights.<sup>19</sup> Due process requires both adequate notice and an opportunity to be heard.<sup>20</sup> These due process rights are embodied in both the APA<sup>21</sup> and the Act,<sup>22</sup> and are designed to safeguard against lack of fair notice. Of particular relevance here, "a person cannot be deprived of his legal rights in a proceeding to which he is not a party."<sup>23</sup>

But that is exactly what the Bureaus have done in this case. The Bureaus decided in an adjudication that two non-party companies should uniquely be subjected to restricted access to

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<sup>19</sup> See, e.g., *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use, Third Order on Reconsideration*, 11 FCC Rcd 6835, 6844 (1996) (citing *Tulsa Professional Collection Service v. Pope*, 485 U.S. 478 (1988); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)) (subsequent history omitted).

<sup>20</sup> See, e.g., *Tarver v. Smith*, 402 U.S. 1000, 1003 (1971) (rights cannot be "reduced or terminated without notice and an opportunity to be heard") (citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337); *Salisbury v. Kroyer Heating & Air Conditioning, Inc.*, 844 F.2d 789 (6th Cir. 1988) (rights cannot be taken away without notice and an opportunity to be heard) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); see also *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

<sup>21</sup> See, e.g., 5 U.S.C. § 554(b), (c) (requiring notice and an opportunity to be heard in adjudications required to be determined on the record after a hearing); § 558(c) (requiring "due regard for rights and privileges of all interested parties" in licensing proceedings, and notice and opportunity to participate in revocation proceedings); § 553(b), (c) (requiring notice and comment prior to the adoption of rules).

<sup>22</sup> See, e.g., 47 U.S.C. § 316 (requiring notice and opportunity to be heard prior to license modification); § 312 (requiring notice and opportunity to be heard prior to license revocation); § 309(e) (requiring notice and opportunity to be heard in contested application proceedings requiring a hearing).

<sup>23</sup> *Martin v. Wilks*, 490 U.S. 755, 758 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Landgraf v. Usi Film Prods.*, 511 U.S. 244, 251 (1994).

L-Band MSS spectrum – under an undefined regulatory review process and for unexplained reasons – while other large national providers (some of which hold even more spectrum) remain free from such restrictions. At no time was there any attempt to provide Verizon Wireless with notice and an opportunity to be heard or to inform the public of the possible conditions. As a result of the decision, Verizon Wireless’s rights and ability to deal freely with SkyTerra to access L-Band spectrum and deliver traffic over that network has been compromised, with no opportunity to subject the conditions “to the crucible of a response.”<sup>24</sup>

While the agency has discretion to decide whether to proceed by rulemaking or adjudication in making policy decisions,<sup>25</sup> that discretion does not allow it to ignore parties’ fundamental right to notice and comment.<sup>26</sup> It is well-settled that the APA’s rulemaking requirements “may not be avoided by the process of making rules in the course of adjudicatory proceedings.”<sup>27</sup> Here, by making a decision with far-reaching competition policy ramifications

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<sup>24</sup> *Tower Shot Clock Order*, 14 FCC rcd at 14006 n.108.

<sup>25</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

<sup>26</sup> *See Florida Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989) (“Due process ... guarantees that parties who will be affected by the general rule be given an opportunity to challenge the agency’s action. When the rule is established through formal rulemaking, public notice and hearing provide the necessary protection. But where, as here, the rule is established in individual adjudications, due process requires that affected parties be allowed to challenge the basis of the rule.”); *1998 Biennial Regulatory Review, Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 16673, 16691 ¶ 39 (2000) (“We agree with Ad Hoc Committee that the Commission has discretion to proceed by means of rulemaking, waiver, declaratory ruling, or even adjudication in making policy, *so long as all interested parties are afforded notice and an opportunity to present their position.*”) (emphasis added).

<sup>27</sup> *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); *see also Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“[A]n administrative agency may not slip by the notice and comment rule-making requirements ... through adjudication.”).

in an adjudication, the Bureaus have conducted an unlawful end-run around the APA's notice and comment protections.<sup>28</sup>

This new regulation imposes a significant, non-routine approval process with unwieldy traffic benchmarks against arrangements with two companies, prejudicing their ability to negotiate spectrum leases or roaming or service arrangements, without any notice or opportunity to comment, and absent any record support or explanation. The regulation conflicts with existing Commission rules that do not call for any such approval processes. The fact that the conditions in question were agreed to by the transferee is not a sufficient ground for approval of those conditions, when they adversely affect non-parties.

The Bureaus' adoption of transaction conditions that directly curtail the interests of individual non-parties is also contrary to Commission precedent. In the 2006 AT&T/BellSouth transaction, the Commission imposed a condition whereby certain special access price reductions made by the Applicants would apply to most entities automatically, but would only apply to certain providers if they themselves made similar reductions (the so-called "Reciprocity Limitation"). Under similar circumstances, the Reciprocity Limitation was publicly disclosed for the first time only one day before approval of the transaction. Two of the affected providers

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<sup>28</sup> See generally, *Farrell v. Dept. of Interior*, 314 F.3d 589, 590 (Fed. Cir. 2002) (agency actions "intended to impose obligations or to limit the rights of members of the public" are "subject to the Administrative Procedure Act, and, with certain exceptions, must be published in the Federal Register as a regulation" or they are "invalid"); see also *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (agency must give clear notice before penalizing an FCC regulatee); cf. *Taylor v. Sturgell*, 553 U.S. 880, 128 S. Ct. 2161, 2171-72 (2008) ("We have often repeated the general rule that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party....") (internal quotations and citation omitted); *Martin*, 490 U.S. at 762 ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

– Verizon and Qwest – made filings pointing out that that transaction conditions could not be designed to target the behavior of non-parties.<sup>29</sup> The Commission agreed, issuing a *sua sponte* Order on Reconsideration that cited the Verizon and Qwest filings, acknowledged “questions raised about the legality of the Reciprocity Limitation,” and modified the condition to eliminate that limitation.<sup>30</sup> The Bureaus should act similarly here to remove the conditions on reconsideration.

**B. The Conditions Do Not Address Transaction-Specific Harms.**

Adoption of the conditions also constitutes an unwarranted departure from the Commission’s long-standing policy that conditions imposed in connection with a transaction must remedy transaction-specific harms. As the Commission has stated, “[O]ur public interest authority enables us, where appropriate, to impose and enforce *narrowly tailored, transaction-specific conditions* that ensure that the public interest is served by the transaction.”<sup>31</sup> To this end,

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<sup>29</sup> See Letter from Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Dec. 29, 2006) (“Verizon Dec. 29, 2006 Letter”); Letter from Robert Connelly, Vice President – Deputy General Counsel, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74 (filed Jan. 4, 2007) (“Qwest Jan. 4, 2007 Letter”).

<sup>30</sup> See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Order on Reconsideration*, 22 FCC Rcd 6285, 6286-88 ¶¶ 3-5 (2007) (“*AT&T-BellSouth Recon. Order*”).

<sup>31</sup> See, e.g., *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17462 ¶ 29 (2008) (“*VZ-Alltel Order*”) (emphasis added); see also *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12366 ¶ 33 (2008); *Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463, 12480-81 ¶ 30 (2008) (“*Verizon Wireless-RCC Order*”); *AT&T Inc. and Dobson Communications Corp., Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20305 ¶ 14 (2007) (“*AT&T-Dobson Order*”); *AT&T Inc. and BellSouth Corp., Memorandum Opinion and Order*, 22 FCC Rcd 5662, 5674 ¶ 22 (2007) (“*AT&T-BellSouth Order*”); *Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., Memorandum Opinion and Order*, 21 FCC Rcd 11526, 11538 ¶ 20 (2006) (“*ALLTEL-Midwest Wireless Order*”); *Nextel Communications, Inc. and Sprint* (continued on next page)

“the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms).”<sup>32</sup> Applying this principle, the Commission regularly refuses to impose conditions that are not transaction-specific.<sup>33</sup> The Chairman recently reaffirmed this approach to Congress.<sup>34</sup>

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*Corporation, Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13978 ¶ 23 (2005) (“*Sprint-Nextel Order*”).

<sup>32</sup> *VZ-Alltel Order*, 23 FCC Rcd at 17462 ¶ 29; *see also Verizon Wireless-RCC Order*, 23 FCC Rcd at 12480-81 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11539 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>33</sup> *See, e.g., VZ-Alltel Order*, 23 FCC Rcd at 17525 ¶ 180 (declining to impose additional proposed roaming conditions on the merged entity); *id.* at 17527-28 ¶ 185 (declining to impose conditions related to exclusive handset contracts on the merged entity); *id.* at 17528-29 ¶ 188 (declining to require merged entity to extend its “open development initiative” to all its systems); *id.* at 17536 ¶ 208 (declining to impose additional RF exposure regulations on merged entity as a transaction condition); *News Corp. and the DirecTV Group, Inc.*, 23 FCC Rcd 3265, 3304-05 ¶ 85-86, n.254 (2008) (rejecting condition which would have required merged entity to engage in arbitration with regard to access to its national programming, in order to address alleged flaws in the Commission’s program access rules); *AT&T-Dobson Order*, 22 FCC Rcd at 20336-38 ¶¶ 87-94 (rejecting various spectrum-divestment conditions as not designed to remedy transaction-specific harms); *AT&T-BellSouth Order*, 22 FCC Rcd at 5692 n.154, 5696-97 ¶ 61 (declining to impose numerous proposed special access-related conditions on the merged entity); *id.* at 5721-22 ¶ 110 (declining to impose conditions related to infrastructure investment and consumer welfare); *id.* at 5753-54 ¶ 186 (declining to impose conditions related to “vague speculation” about future anticompetitive behavior of the merged entity); *Verizon Communications Inc. and America Movil*, 22 FCC Rcd 6195, 6208 ¶ 29 n.81 (2007) (declining to adopt conditions to alleviate a non-transaction-specific alleged low penetration rates of local exchange service).

<sup>34</sup> Consumers, Competition, and Consolidation in the Video and Broadband Market: Hearing Before the Sen. Comm. on Commerce and Transportation, 111th Cong. (Mar. 11, 2010) (oral testimony of Chairman Genachowski in response to question from Senator Kay Bailey Hutchison) (“[A]ny decisions that we make in any transaction need to be tied to the issues that arise in that transaction, and that is our focus. We have rulemaking processes to deal with broad issues of general applicability, we also have very serious obligations to consider all the issues that arise. Any actions that the FCC would take . . . will be tied to issues raised in the transaction that are appropriate for decision and action in the transaction.”) (emphasis added).

For these reasons, the conditions must be rescinded, as they are not in any way related to transaction-specific issues. The Order fails to draw *any* connection showing how the conditions are transaction-related or relevant to any concern or harm raised by the Bureaus or the record. The transaction does nothing to aggregate Verizon Wireless’s spectrum holdings, yet Condition 1 imposes restrictions on Verizon Wireless’s access to spectrum. It does nothing to increase Verizon Wireless’s market share, yet Condition 3 restricts the company’s ability to meet customer traffic demands.

Inexplicably, the Order suggests that the conditions will advance the transaction’s “promised benefits” – deployment of a 4G broadband network. Yet, to the extent the conditions restrict potential SkyTerra terrestrial partners and options for revenues, they could limit SkyTerra’s ability to complete that 4G network. Further, the Order offers no explanation why, if the conditions advance the public interest, they are limited to Verizon Wireless and AT&T rather than all similarly-situated providers. Thus, there is no explanation of why these conditions are in any way relevant, let alone designed to remedy a transaction-specific harm – nor, given the absence of any record on these matters, could any such explanation be developed. The Bureaus should rescind the conditions as they are clearly unrelated to any transaction-specific harm.

**C. The Conditions Arbitrarily and Capriciously Affect Verizon Wireless.**

By impacting Verizon Wireless without explanation, the Order separately violates the APA.<sup>35</sup> It fails to “articulate a satisfactory explanation for its action,”<sup>36</sup> including a “rational

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<sup>35</sup> See 5 U.S.C. § 706(2)(A) (courts shall set aside agency action that is “arbitrary, capricious ... or otherwise not in accordance with law”).

<sup>36</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

connection between the facts found and the choice made,”<sup>37</sup> or support its findings “by substantial evidence.”<sup>38</sup> The conditions make no sense given the only competitive concern discussed in the Order – that Harbinger’s multiple ownership interests in MSS providers could incent it to engage in anticompetitive conduct.<sup>39</sup> The Bureaus in the end found that the benefits of the transaction outweighed those concerns. Yet they then “accepted” unrelated spectrum conditions, despite the fact that the Bureaus never identified any spectrum-related harms and the conditions had nothing to do with the anticompetitive concerns they did articulate. This disconnect between the “facts found” and the “choice made” invalidates the conditions.

The Order fails to provide any analysis explaining why the conditions, and their specific terms, were appropriate in the first place. For example, the Order fails to explain:

- How the conditions will ensure that SkyTerra will move forward with plans to build a 4G network, a key benefit of the transaction as cited in the Order.<sup>40</sup>
- Why the conditions should apply *only* to the top two wireless providers and not any other provider.<sup>41</sup>

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<sup>37</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962).

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g.*, Order at ¶¶ 6-7, 29, 31, 41, 49, 52.

<sup>40</sup> *See* Order at ¶¶ 71-72 (stating that the conditions “give us greater confidence that the promised benefits will occur,” but not explaining why this is the case). Indeed, the conditions – by limiting SkyTerra’s flexibility in the marketplace – seem to *undercut* the Commission’s stated deployment goals. Nor is there any harm that might appropriately be addressed by the conditions. For example, if the Bureaus’ concern is spectrum aggregation and they wanted to ensure that the Commission maintained a spectrum review role, it makes no sense to single out only AT&T and Verizon Wireless and not other carriers with significant spectrum holdings, like Clearwire, T-Mobile and Sprint. Conversely, if the concern is market share, it makes no sense to address that concern by restricting access to spectrum.

<sup>41</sup> Despite its recognition that Harbinger’s competitors would include “AT&T, Verizon Wireless, Sprint, T-Mobile, Clearwire, and others,” the order arbitrarily singles out only Verizon Wireless and AT&T for special treatment. Order at ¶ 59. *See Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (stating that an agency must “provide adequate explanation before it treats similarly situated parties differently.”).

- Why, despite Harbinger’s ownership interests in Sprint and Leap,<sup>42</sup> the Order does not consider extending the conditions to those two companies – particularly given that the one competitive concern it identified was that Harbinger’s cross-ownership interests could discourage competition.<sup>43</sup>
- How the Bureaus arrived at the 25 percent combined traffic threshold, and why it is appropriate to link the subjected providers’ traffic level to SkyTerra’s overall level of traffic.
- Why the public interest is served by imposing barriers to commercial arrangements that would permit customers of the two wireless providers to gain expanded service capability or coverage on SkyTerra’s spectrum.<sup>44</sup>

Moreover, the conditions are themselves hopelessly arbitrary and otherwise unlawful.

For example:

- The Order provides absolutely no standards to govern an application seeking to allow Verizon Wireless to access the SkyTerra spectrum or exceed the 25 percent combined traffic limit. In analogous situations, courts have warned agencies that standards of conduct must be set forth with “ascertainable certainty,”<sup>45</sup> and not left to a vague “we-know-it-when-we-see-it” standard.<sup>46</sup> Where “they are opaque” – or as here nonexistent – “the danger of arbitrariness (or worse) is increased.”<sup>47</sup>

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<sup>42</sup> Order at ¶ 7.

<sup>43</sup> Order ¶ 29 (noting that Harbinger’s “overlapping interests raise some competitive concerns, both for customers of current mobile satellite services and for potential customers of future services that might use the MSS bands.”).

<sup>44</sup> See, e.g., *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 764 (6th Cir 1995) (finding that the FCC must provide a “reasoned basis” before restricting access to spectrum, because doing so can have a “profound effect on the ability of businesses to compete”).

<sup>45</sup> *Trinity*, 211 F.3d at 631 (requiring standards to be “in[] [the regulation] itself, or at least [be] referenced ... in [the regulation]”) (quoting *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998)).

<sup>46</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990) (discussing the need for criteria used to make waiver determinations) (subsequent history omitted). As in the waiver context, in which a waiver proponent must rebut a presumption that the rule should be applied, Verizon Wireless and AT&T are being required to rebut a presumption that any arrangement with SkyTerra concerning use of its spectrum is somehow problematic.

<sup>47</sup> *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008); see generally *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (explaining that a legal obligation “fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public

(continued on next page)

- Condition 1 prohibits arrangements allowing Verizon Wireless customers to roam on SkyTerra's spectrum absent FCC approval, but not agreements allowing *SkyTerra's* customers to roam on the networks of Verizon Wireless or AT&T.<sup>48</sup>
- Condition 3 places Verizon Wireless and AT&T in the position of *guessing* the total traffic volumes on SkyTerra's terrestrial network in each of nearly 200 Economic Areas, as well as the proportion of that traffic handled by the other and its affiliates, in order to determine how much traffic it might handle without falling afoul of the 25 percent threshold. This condition would create significant business uncertainty and place both companies at serious risk of violating the condition accidentally and/or unknowingly.
- Condition 3 also regulates Verizon Wireless business arrangements by subjecting the amount of Verizon Wireless traffic carried on the SkyTerra network to factors beyond the company's control that are in fact dependent on AT&T's arrangements with SkyTerra. For example, Verizon Wireless may provide only 1 percent of SkyTerra's traffic in an EA, yet be forbidden from providing additional traffic if AT&T's usage equaled 24 percent. Moreover, if AT&T's usage were to increase (or if SkyTerra's total volumes were to decrease), SkyTerra could fall into violation of the Condition's terms.

#### **D. The Conditions Violate Section 202(a) of the Act.**

The AT&T/BellSouth transaction precedent cited above also stands for the proposition that transaction conditions that enshrine unreasonable discrimination by a common carrier in its provision of services to certain non-parties must be eliminated as contrary to Section 202(a) of the Act. Section 202(a) makes it unlawful for a common carrier to unreasonably discriminate, directly or indirectly, in the services it makes available to others, or to subject any entity to

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uncertain as to the conduct it prohibits or leaves judges and jurors free to [render decisions] without any legally fixed standards”).

<sup>48</sup> See *Defenders of Wildlife v. United States EPA*, 420 F.3d 946, 959 (9th Cir. 2005) (“EPA’s approval of Arizona’s transfer application cannot survive arbitrary and capricious review because the EPA relied during the administrative proceedings on legally contradictory positions .... Its reasoning was therefore ‘internally inconsistent and inadequately explained.’”) (quoting *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action “arbitrary and capricious” because it was “internally inconsistent and inadequately explained”)).

unreasonable prejudice or disadvantage.<sup>49</sup> In the AT&T/BellSouth case, Verizon and Qwest challenged the legality of the last-minute Reciprocity Limitation condition under Section 202(a) because the condition effectively obligated AT&T/BellSouth to treat similarly situated carriers differently in the provision of special access services.<sup>50</sup> As discussed above, the *sua sponte* Order on Reconsideration modified the condition to eliminate that limitation, citing “questions raised about the legality of the Reciprocity Limitation.”<sup>51</sup>

The Bureaus must follow the same course here. SkyTerra is “a common carrier radio licensee,”<sup>52</sup> and following consummation of its transaction with Harbinger, it intends to “provide voice and data mobile wireless services ... on a wholesale basis to retail distribution customers such as mobile service providers, and other retailer distribution customers....”<sup>53</sup> Its provision of mobile wireless services on a wholesale basis to other mobile wireless service providers, however, is now subject to a critical caveat: it may not enter any arrangement with Verizon Wireless or AT&T that would make spectrum available, or exceed the combined 25 percent traffic threshold, without seeking FCC approval pursuant to unknown standards and an uncertain outcome. No other carrier is required to go through this process. In fact, the conditions create a perverse incentive to keep Verizon Wireless customers off the SkyTerra network, therefore discriminating against them and potentially undermining their 4G experience. Such a condition is discriminatory on its face, harms consumers, and uniquely subjects only two carriers to a

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<sup>49</sup> 47 U.S.C. § 202(a).

<sup>50</sup> See Verizon Dec. 29, 2006 Letter at 1; Qwest Jan. 4, 2007 Letter at 2-3.

<sup>51</sup> *AT&T-BellSouth Recon. Order*, 22 FCC Rcd at 6287 ¶ 4.

<sup>52</sup> Order at ¶ 16.

<sup>53</sup> *Id.* at ¶ 55.

competitive disadvantage without any reasoned or articulated basis. As such, it is unlawfully discriminatory.<sup>54</sup>

**E. The Bureaus Lacked Delegated Authority to Impose the Conditions.**

The Bureaus were without authority to make new rules based on the state of wireless competition or to make any determinations of the need for additional regulation. These are decisions that are to be made based on notice and comment and record evidence, by the full Commission. Further, the Order cites to no authority for the novel proposition that the Bureaus can promulgate new regulatory obligations that curtail the rights of two non-party companies in an adjudication. Because these issues “[p]resents new or novel arguments not previously considered by the Commission,”<sup>55</sup> the Bureaus were required to refer them to the full Commission.<sup>56</sup> If the conditions are not removed, the only conclusion that can be drawn is that the Bureaus have made these policy decisions. For this reason alone, the conditions should be

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<sup>54</sup> See 47 U.S.C. § 202(a) (prohibiting unreasonable discrimination in charges or services for like communication services directly or indirectly); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990) (invalidating order allowing a carrier to charge a tariffed, regulated rate to certain customers and not others), *superseded by statute*, Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044, *as recognized in* *Friedman’s Express, Inc. v. Reynolds Fastener, Inc.*, 184 B.R. 229 (Bankr. E.D. Penn. 1995). Indeed, the Bureaus cannot adopt a transaction condition that violates the Act. See 47 U.S.C. § 303(r) (authorizing the Commission to “prescribe such restrictions and conditions[] not inconsistent with law”).

<sup>55</sup> *E.g.*, 47 C.F.R. § 0.261(b)(i).

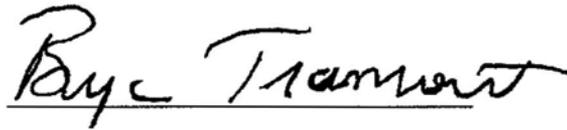
<sup>56</sup> See 47 C.F.R. § 0.241(a)(5) (OET lacks delegated authority to act on “[a]ny ... petition, pleading or request presenting new or novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines”); 47 C.F.R. § 0.261(b)(i) (International Bureau lacks delegated authority to act on “any application, petition, pleading, complaint, enforcement matter, or other request that ... [p]resents new or novel arguments not previously considered by the Commission”); 47 C.F.R. § 0.331(a)(2) (Wireless Telecommunications Bureau lacks delegated authority to act on “any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines”).

removed.<sup>57</sup> Should the Bureaus not do so immediately, this matter should be promptly referred to the full Commission for expedited review.

### CONCLUSION

For the reasons discussed above, the Bureaus should grant this Petition for Partial Reconsideration and remove Conditions 1 and 3 from the Order.

Respectfully submitted,



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<sup>57</sup> See, e.g., *Responsible Accounting Officer Letter 20, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 2957, 2961 ¶ 25 (1996) (rescinding order exceeding Bureau's delegated authority).

## CERTIFICATE OF SERVICE

I, Robert G. Morse, hereby certify that on this 1<sup>st</sup> day of April, 2010, I caused to be served a true copy of the foregoing "Petition for Partial Reconsideration" by first class mail, postage pre-paid, and by email where indicated (\*), upon the following:

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