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April 2, 2010

VIA ECFS

Marlene H. Dortch
Secretary
Federal Commiunications Commission
The Portals
445 12th Street, SW
Office of the Secretary, Room TW B204
Washington, D.C. 20554

Re: *SkyTerra Communications, Inc., Transfer, and Harbinger Capital Partners Funds, Transferee, Applications for Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184

Dear Ms. Dortch:

Attached please find a corrected copy of the Petition for Reconsideration filed by AT&T Inc. in the above-captioned matter. The original filing included no certificate of service.

Sincerely,

James P. Young

James P. Young
Attorney for AT&T Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 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
Applications for Consent to Transfer 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: Chiefs of the International Bureau, Wireless Telecommunications Bureau, and Office of Engineering and Technology

PETITION FOR RECONSIDERATION OF AT&T INC.

Pursuant to 47 C.F.R. § 1.106, AT&T Inc. ("AT&T") submits this petition for reconsideration of the order issued late Friday in this docket by the Chiefs of the International Bureau, Wireless Telecommunications Bureau and Office of Engineering and Technology, approving the transfer of control of SkyTerra Communications, Inc., a mobile satellite services ("MSS") provider that apparently aspires to construct a nationwide terrestrial 4G wireless network, to private investment fund Harbinger Capital Partners.[1] Specifically, AT&T requests that the Bureau Chiefs reconsider – and rescind – merger conditions 1 and 3, contained in Appendix B, Attachment 2 to the *Bureau Order*, which arbitrarily and unlawfully limit AT&T's ability to enter into certain agreements and arrangements with SkyTerra that would make its spectrum or terrestrial networks available to AT&T.

[1] *In the Matter of 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 (released March 26, 2010) ("*Bureau Order*").

INTRODUCTION AND SUMMARY

No one objected to the Harbinger-SkyTerra transaction. The *Bureau Order* specifically found anticompetitive harm to be both "unlikely" and "unlikely to be significant."[2] Notwithstanding these findings – and completely from out of the blue – the *Bureau Order* purports to condition the Commission's approval of the transaction on SkyTerra's "commitments" not to make spectrum available to or enter certain wholesale service arrangements with "the largest or second largest [terrestrial] wireless provider without receiving prior Commission approval."[3] With no prior warning, the Bureau Chiefs have adopted new regulatory restrictions *that apply only to AT&T and Verizon* and limit otherwise lawful secondary market spectrum and resale arrangements.

These new restrictions contain no sunset date, provide no standards or deadlines for the new approval process that would be at the Commission's "sole discretion," bear no relation to any issue raised in the proceeding or addressed in the *Bureau Order*, and directly conflict with established Commission policies and rules that recognize that secondary market transactions benefit consumers and are an essential component of the National Broadband Plan. As detailed below, these "merger conditions" – in truth, new regulations that selectively penalize non-parties to the proceeding – are unlawful in multiple respects. They should also be profoundly disturbing to a Commission that has called for open, data-driven regulatory processes and recently stressed

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[2] *Bureau Order* ¶¶ 65-66.

[3] *Bureau Order* ¶ 72. Given that no public filing in this proceeding suggested in any way that the Commission might use its order in the Harbinger-SkyTerra proceeding to impose new restrictions on AT&T, AT&T obviously had "good reason" not to participate earlier. *See* 47 C.F.R. § 1.106(b)(1). And given that these conditions single out AT&T (and Verizon) for special restrictions that do not apply to any other carrier, AT&T's interests plainly are "adversely affected by the action taken." *Id.*

in its National Broadband Plan the importance of spectrum flexibility and the need to *remove* – not erect – regulation that "impedes the free flow of spectrum to its most highly valued uses."[4]

The Bureau Chiefs should take immediate action to rescind these unlawful "conditions." Only by doing so can they reaffirm the Commission's commitments to "eliminate regulatory barriers that might hinder access to, and more efficient use of, valuable spectrum resources,"[5] and to employ non-arbitrary processes that establish nondiscriminatory spectrum policies through participatory proceedings that provide reasoned explanations and record support for any limitations on secondary market spectrum transactions. The *Bureau Order*'s alternative approach – naked favoritism transparently designed to handicap the ability of AT&T and Verizon to enter into commercial spectrum and resale arrangements that the Commission otherwise encourages as beneficial to consumers, without *any* showing that *any* such transaction could harm consumers – cannot stand.[6]

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[4] *National Broadband Plan* at 78.

[5] *Id.* at 83.

[6] The anti-AT&T/Verizon conditions (and a separate condition that establishes a deployment timetable for SkyTerra's terrestrial network) are contained in Appendix B, Attachment 2 to the *Bureau Order*. Condition 1 prohibits SkyTerra from "directly or indirectly, enter[ing] 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)." Condition 3 provides that "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)."

ARGUMENT

Although it is impossible to know what motivated the Commission's insistence on merger conditions penalizing AT&T and Verizon – since neither the *Bureau Order* nor any public filing in the proceeding even addresses the issue – there is no possible justification for these conditions. The Harbinger-SkyTerra transaction is not a horizontal merger; rather Harbinger merely applied to increase its voting interest in SkyTerra from slightly less than 50 percent to slightly more than 80 percent.[7] As such, other than foreign ownership concerns raised by Harbinger's foreign domicile and foreign investors, the transaction presented no obvious public interest concerns not previously raised when the Harbinger-SkyTerra relationship was established. As the parties explained in their applications, "[t]he proposed transaction does not adversely affect the competitive landscape or the broader goals of the Communications Act in any way. Instead, the proposed transfer of control will enable SkyTerra to conduct its operations more efficiently and effectively."[8]

The *Bureau Order* largely agreed, finding no transaction-specific harms in the MSS marketplace in which SkyTerra and several other satellite providers currently compete. The Bureau Chiefs found that any theoretical harm from the loss of potential competition in future MSS services (arising from Harbinger's minority stakes in other MSS providers) was "doubtful," "unlikely to be significant" and entirely "speculative" given the immaturity of the MSS marketplace.[9] Most pertinent here, the *Bureau Order* identifies *no* transaction-specific harms –

[7] *See* Public Notice, *SkyTerra Communications, Inc., Transferor, and Harbinger Capital Partners Fund, Transferee, Seek Consent to Transfer Control of SkyTerra Subsidiary, LLC*, 24 FCC Rcd. 5226 (2009); March 26, 2009 *ex parte* letter from counsel for Harbinger and SkyTerra to Marlene H. Dortch, attached "Narrative" at 6-7.

[8] *Id.* at 10.

[9] *Bureau Order* at ¶¶ 43-44, 53-54, 65-66.

real or theoretical – in the *terrestrial* mobile wireless marketplace, in which SkyTerra does not currently compete and has only limited authority to provide services ancillary to its satellite-based services. Indeed, as the *Bureau Order* recognizes, the SkyTerra restructuring could only add to the already intense competition that characterizes the most competitive terrestrial mobile wireless marketplace in the world by increasing the likelihood that SkyTerra would make use of its limited terrestrial authority.[10]

In this regard, the anti-AT&T/Verizon conditions affirmatively *undermine* wireless competition. Artificially limiting SkyTerra's commercial flexibility and potential customer base can only reduce the likelihood that SkyTerra will be able profitably to deploy and operate terrestrial facilities that have not progressed beyond the drawing board in the six years since SkyTerra's predecessor obtained MSS Ancillary Terrestrial Authority ("ATC"). Moreover, as the *Bureau Order* recognizes (¶ 60), the service that the licensees are contemplating could also provide significant public safety benefits during natural disasters or other emergencies. Those benefits too could be undermined by the limits the commitments needlessly place on SkyTerra's commercial flexibility and potential customer base. For these reasons alone, conditioning approval of the proposed transaction on new restrictions on terrestrial wireless arrangements is unlawful under established merger review standards stated in the *Bureau Order* that permit only "narrowly tailored, transaction-specific conditions."[11] It is simply not within the scope of this

[10] *Id.* at ¶ 62 ("We find that Harbinger's proposal to construct an integrated satellite/terrestrial 4G mobile broadband network, if realized, promises the possibility of providing several public interest benefits").

[11] *Bureau Order* at ¶ 13; *see also SBC-AT&T Merger Order*, 20 FCC Rcd. 18290 ¶ 19 (2005) (merger approvals may be conditioned "only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)").

proceeding for the Bureau Chiefs (or the Commission) to determine who AT&T and Verizon (or SkyTerra) may in the future contract with for terrestrial spectrum or services or on what terms.[12]

The anti-AT&T/Verizon merger conditions are also plainly arbitrary in violation of the Administrative Procedure Act, both because they are an unexplained departure from established Commission policies and rules supported by *no* evidence or reasoning, and because they represent new, substantive restrictions imposed on non-parties with no prior warning or opportunity to object.[13] As the Commission recently explained in its National Broadband Plan, the U.S. faces a spectrum crisis with soaring broadband demand rapidly outpacing the capacity of available spectrum and little new mobile wireless spectrum allocations in the regulatory pipeline.[14] As the Commission also recognized, its policies and rules that encourage secondary market leasing and resale arrangements that allow idle or underutilized spectrum to be used by carriers that need it provide a critical safety valve.[15] Thus, the Commission's rules generally provide very short timelines for Commission approval of long term spectrum leases, immediate

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[12] *See also Time Warner-America Online Merger Order*, 16 FCC Rcd. 6547, ¶ 6 (2001) ("It is important to emphasize that the Commission's review focuses on potential harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are merger-specific"); *Applications of Shareholders of AMFM Inc. and Clear Channel Communications, Inc. to the Transfer of Control of AFMF Texas Licenses Limited Partnership, et al.*, 15 FCC Rcd. 16062 (2000) (declining to condition merger on termination of transferor's contractual relationships with third party where party seeking conditions "failed to articulate any specific future anti-competitive business practices" of transferor and "bare allegation" that transferee might act in an anticompetitive manner in the future was "purely speculative").

[13] *See* 5 U.S.C. §§ 553(c), 554(c), 706(2); *Verizon Tel. Cos.* v. *FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) ("it is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past"); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored").

[14] *See National Broadband Plan* at 76-78.

[15] *Id.* at 83.

approval of short term leases and the implementation of wholesale or other arrangements without any prior Commission approval at all.[16] The National Broadband Plan issued just weeks ago credits these very policies and rules with fostering broadband innovation and investment and "provid[ing] a way for . . . network providers to obtain access to needed spectrum for broadband deployment," and it recommends that the Commission take a "second look" to determine how it can further reduce regulatory barriers to such beneficial secondary market transactions.[17] Yet, the *Bureau Order*, without *any* explanation, establishes entirely new, more restrictive Commission approval requirements, with no standards or approval timelines, for agreements that would make SkyTerra's spectrum or network available to AT&T or Verizon.

These restrictions are entirely arbitrary and cannot withstand review. The Commission properly repealed spectrum caps many years ago, and AT&T's spectrum holdings in most areas are below even the competitive spectrum screens the Commission has employed on a nondiscriminatory basis in prior merger proceedings to determine whether proposed spectrum aggregation warrants competitive analysis. There is thus no possible basis to assume that any future spectrum leasing, wholesale or other arrangements between SkyTerra and AT&T would

[16] *See, e.g.*, 47 C.F.R. § 1.9030 (long term leases) (Bureau generally must approve applications to lease spectrum within 21 days unless it provides public notice that an additional 90-day review period is needed); *id.* § 1.9035 (short term leases) (Commission consent to short term lease applications generally "will be reflected in the ULS on the next business day" after the application is electronically accepted); *Promoting Efficient Use of the Spectrum Through Elimination of Barriers to Deployment of Secondary Markets*, 18 FCC Rcd. 20604 (2003). Moreover, although the general terrestrial wireless leasing rules do not apply to MSS spectrum, the Commission has emphasized both that leasing is allowed (generally without prior Commission approval) and that the Commission "specifically contemplated" that SkyTerra and other MSS licensees would lease access to their MSS spectrum – *e.g.*, "to a third-party ATC provider." *Globalstar Licensee LLC; Application for Modification of License for Operation of Ancillary Terrestrial Component Facilities*, 23 FCC Rcd 15975, ¶ 25 (2008) (rejecting arguments that an MSS spectrum lease agreement entered without prior Commission approval was contrary to Commission policy and constituted an unauthorized transfer of control).

[17] *See National Broadband Plan* at 83.

raise any competitive issues. Accordingly, there is also no possible basis to create any new regulatory hurdles to such arrangements – much less across-the-board conditions that apply without regard to AT&T's spectrum holdings or spectrum needs in particular geographic areas.[18]

Indeed, any regulation that employs a "big is bad" revenue-based definition of secondary market transaction limits, as the *Bureau Order* does, is necessarily arbitrary. Larger carriers by definition serve more customers than smaller carriers and thus may approach spectrum exhaust more rapidly than smaller carriers, even though the larger carriers might hold more spectrum in absolute terms.[19] In this regard, the merger conditions single out AT&T and Verizon while arbitrarily exempting both Clearwire, which has *greater* existing spectrum holdings in many areas (and serves far fewer customers), and Sprint and Leap, in which Harbinger holds significant interests. In any context, these merger conditions could serve only to harm consumers, limit competition and promote a regulatory regime in which success is driven by regulatory favoritism rather than the ability to serve consumer wants and needs in the best manner possible. But the consumer harms of erecting indefinite and largely undefined barriers to

[18] *See, e.g., Serv. Rules for the 698-746, 747-762 & 777-792 MHz Bands*, 22 FCC Rcd. 15289, ¶¶ 256-59 (2007) (rejecting attempts to restrict incumbent wireless carriers' access to new spectrum resources as "reducing the likelihood that the party valuing the licenses the most will win the license and put it to use for the benefit of the public" and recognizing that "existing competition . . . limits any one party's incentives to attempt unilaterally to block new entrants from acquiring" or using spectrum. "Absent a monopoly on broadband service, an incumbent attempting to block new entrants would bear all of the costs of doing so, while other incumbents would capture much of the gain").

[19] *See, e.g., Verizon Tel. Cos.*, 570 F.3d at 301-04 (reversing Commission order retaining competitive restrictions because the Commission relied entirely on the size of the firm in the market); *SBC Communications Inc.* v. *FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors'"); *Competitive Telecomms. Ass'n* v. *FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996) (striking down "interim" rule designed to protect smaller IXCs at expense of AT&T); *Western Union Tel. Co* v. *FCC*, 665 F.2d 1112, 1133 (D.C. Cir. 1981); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *see also United States* v. *W. Elec.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (rejecting efforts to "aid the minnows against the trout").

beneficial commercial spectrum and resale arrangements are even more magnified in this context, which involves a hypothetical MSS ATC service premised on a terrestrial network that will require more than 36,000 terrestrial base stations that have not been built and business plans that have not been shown to be consistent with existing limitations on the MSS ATC spectrum that SkyTerra holds.[20] And even apart from these substantive deficiencies, the Bureaus imposed these constraints on *non*-parties with no reasonable opportunity for those parties to object.[21] In short, the *Bureau Order* violates the most basic APA requirements.[22]

In choosing to make new policy by arm-twisting license transfer applicants into "commitments" to restrict the rights of third parties to use entirely lawful means to meet the needs of their customers, the *Bureau Order* represents agency action at its worst. It denies interested parties – not least those who find themselves the immediate targets of the changed

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[20] *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band and the 1.6/2.4 GHz Bands*, 20 FCC Rcd. 4616, ¶¶ 10, 23 (2005) ("we reiterate and reaffirm that the terrestrial service is to be offered on an ancillary basis to the satellite service"; concluding that statutory competitive bidding requirements do not apply to ATC authority for MSS spectrum because terrestrial authority is limited and that "granting ATC authority under the conditions we prescribed would not unjustly enrich MSS operators, because MSS, even with ATC, is not a close substitute for terrestrial CMRS for most customers, and will not compete with CMRS directly").

[21] 5 U.S.C. §§ 553(c), 554(c), 706(2)(B) & (D); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

[22] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm,* 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including 'a rational connection between the facts found and the choice made'" (*quoting Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)); *Burlington N. & Santa Fe Ry. Co.* v. *Surface Transp. Bd.,* 403 F.3d 771, 777 (D.C. Cir. 2005) ("[w]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld"); *Siegel* v. *SEC*, 592 F.3d 147, 162 (D.C. Cir. 2010) ("[i]n failing to articulate a comprehensible principle," the agency's "decision borders on whimsical" and "clearly fails for want of reasoned decision-making").

policy – an opportunity to be heard. It allows the agency to avoid explaining and supporting its policy changes and new rules. And it substitutes selective regulation in the agency's "sole discretion" for rules of general applicability. If the Bureau Chiefs somehow believe that it would serve the public interest to dial back carriers' flexibility to engage in commercial secondary market transactions, to resurrect *de facto* spectrum caps in an environment of soaring broadband demands and needs, or to create special new secondary market restrictions for L-Band and other MSS spectrum that has been chronically underutilized, the proper place to address such industrywide issues is a rulemaking proceeding. But it is plainly improper to attempt to use Bureau-level merger conditions to make policy that the Commission is unable or unwilling to impose on the broader industry at large.

Indeed, the fact that the Bureau Chiefs' action here clearly displaces the Commission's established policies simply underscores that it exceeds their delegated authority. Under the relevant Commission rules, the Bureau Chiefs are not authorized to act on any requests "that present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines."[23] In other words, the Chiefs may only *apply* existing Commission rules and policies – they cannot make new policy or effectuate a "de facto rule amendment."[24] Here, however, the Bureau Chiefs' action effectively imposes new restrictions on L-Band spectrum that did not previously exist, and undermines the Commission's pervasive

[23] 47 C.F.R. §§ 0.241, 0.261 & 0.331.

[24] *Rockwell Collins, Inc. Request for Waiver of Section 87.173 of the Commission's Rules Governing Assignable Carrier Frequencies in the Aviation Services*, 13 FCC Rcd 2954 (1998) ("[s]uch a waiver would constitute a de facto rule amendment which would exceed our delegated authority"); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands*, 22 FCC Rcd 19833, ¶ 16 (2007) ("request for rule changes exceeds the Bureau's delegated authority").

policy in favor of secondary transactions – indeed, the Commission "has specifically contemplated" that MSS licensees like SkyTerra would be generally authorized to "leas[e] access to MSS spectrum to a third-party ATC provider."[25] The Bureau Chiefs have no authority to alter these Commission policies in orders issued on delegated authority.

CONCLUSION

For the foregoing reasons, the Chiefs of the International Bureau, Wireless Telecommunications Bureau and Office of Engineering and Technology should reconsider the *Bureau Order* and immediately issue an order on reconsideration eliminating Conditions 1 and 3 in Appendix B, Attachment 2 to the *Bureau Order*.[26]

Respectfully Submitted,

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[25] *Globalstar Licensee LLC; Application for Modification of License for Operation of Ancillary Terrestrial Component Facilities*, 23 FCC Rcd. 15975, ¶ 25 (2008).

[26] We note that when Verizon and Qwest complained of discriminatory treatment under merger conditions adopted in the *AT&T/BellSouth* merger order, the Commission reconsidered the challenged condition on its own motion and revised it to address "questions about the legality of" the original condition. Order on Reconsideration, *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, 22 FCC Rcd. 6285 (2007).

March 31, 2010

CERTIFICATE OF SERVICE

I, James P. Young, hereby certify that on this 2nd 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, upon the following:

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