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

OPPOSITION OF SPRINT NEXTEL CORPORATION TO
PETITION FOR PARTIAL RECONSIDERATION OF VERIZON WIRELESS

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TABLE OF CONTENTS

SUMMARY

The Bureaus should deny the Petition for Partial Reconsideration of the Bureaus' Order submitted by Verizon Wireless. First, Verizon Wireless lacks standing to petition the Bureaus' action. Second, the Order does not unfairly target or harm Verizon Wireless. To promote competition in the wireless sector, the Applicants made a series of voluntary commitments that the Bureaus accepted as conditions to the Order. The Bureaus adopted their Order pursuant to well-established Commission authority and consistent with precedent. The Bureaus' decision does not violate the due process rights of Verizon Wireless; it does not violate section 202 of the Communications Act of 1934; and it is not arbitrary and capricious. On the contrary, the Bureaus' conditions help fulfill the Commission's obligation to enhance competition and should be upheld.

The Applicants' conditions do not deprive Verizon Wireless of any due process rights because the conditions solely govern the Applicants' conduct. These conditions concern matters in which Verizon Wireless has no interests that would trigger due process protection. The conditions do not establish rules of general application. And the conditions essentially reaffirm existing obligations of the Applicants. Furthermore, Verizon Wireless' claim that the Commission lacks jurisdiction to adopt conditions that may affect a non-party to the transaction is contrary to both Commission precedent and previous arguments that Verizon Wireless itself has made in other Commission proceedings.

The Commission's statutory authority enables it to impose and enforce narrowly tailored, transaction-specific conditions based on voluntary commitments of the parties to ensure that the transaction at issue is in the public interest. The Commission routinely relies on this authority to impose conditions such as those challenged here by Verizon Wireless. Moreover, the Commission has long sought to ensure enhanced competition in the wireless sector through the imposition of pro-competitive measures such as those included here in the Order.

The conditions are not arbitrary or capricious because they merely require the Applicants to obtain Commission approval prior to providing spectrum to the first or second largest wireless provider in an industry where the two largest firms hold approximately two-thirds of the overall market share. By finding that these voluntarily assumed conditions increased the likelihood that the transaction would serve the public interest, the Bureaus were well within their authority to attach the conditions to the Order.

Verizon Wireless' allegation that the conditions represent unreasonable discrimination in violation of Section 202(a) of the Communications Act lacks merit because the spectrum leasing activities addressed in the conditions are not governed by this statutory provision, and because the conditions represent a lawful exercise of the Commission's forbearance authority. Finally, the Bureaus possess the authority to analyze this transaction and impose the conditions.

In short, the voluntarily assumed conditions to the Order in this proceeding apply by their terms solely to the Applicants and neither target Verizon Wireless nor constitute rules of general application. Even assuming Verizon Wireless possessed standing to challenge this Order, its

arguments have no merit. The Bureaus should therefore deny the Petition for Partial Reconsideration.

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OPPOSITION OF SPRINT NEXTEL CORPORATION TO PETITION FOR PARTIAL RECONSIDERATION OF VERIZON WIRELESS

Sprint Nextel Corporation ("Sprint Nextel"), pursuant to Section 1.106 of the Commission's rules,[1] hereby requests that the International Bureau, the Office of Engineering and Technology, and the Wireless Telecommunications Bureau (collectively, the "Bureaus") deny the Petition for Partial Reconsideration of Verizon Wireless filed on April 1, 2010 in the above-captioned docket ("Petition").

INTRODUCTION AND BACKGROUND

On March 26, 2010, the Bureaus issued an Order considering applications (the "Applications") and granting authority to transfer control of SkyTerra Subsidiary, LLC ("SkyTerra") and its respective licenses and authorizations from the shareholders of SkyTerra Communications, Inc. to Harbinger Capital Partners Funds ("Harbinger") (collectively, the

1 47 C.F.R. § 1.106.

"Applicants").[2] Applicants intend to "construct an integrated satellite/terrestrial 'fourth-generation' ('4G') mobile broadband network," providing broadband Internet services to hand-held consumer devices through a combination of their satellite coverage with a terrestrial network.[3] Applicants would construct the network using SkyTerra's Ancillary Terrestrial Component ("ATC") authority and SkyTerra's two next generation satellites, expected to launch in 2010 to 2011 pursuant to SkyTerra's mobile satellite services ("MSS") license in the L-band.[4]

In the Order, the Bureaus adopted three voluntary commitments made by Harbinger to the Commission as conditions to the Order's grant of authority.[5] Condition One requires the Applicants to obtain Commission approval prior to entering into any agreement to make its spectrum used by its terrestrial network in the L-band available to an entity that "is the largest or second largest wireless provider."[6] Condition Two requires the Applicants to "build a terrestrial network using Sky[T]erra's ATC authorizations."[7] Condition Three requires the Applicants to obtain Commission approval prior to carrying traffic of the largest and second largest wireless providers "account[ing] for more than 25 percent of SkyTerra's total traffic on its terrestrial network in any Economic Area."[8]

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2 *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, ¶ 1 (released Mar. 26, 2010) ("*Order*").

3 Order ¶¶ 46, 55.

4 *Id.* ¶ 55. The "L-band" includes spectrum allocated by the Commission for MSS downlinks and uplinks in the 1525-1559 MHz and 1626.5-1660.5 MHz bands, respectively.

5 *Id.* ¶¶ 72-73; *id.*, Appendix B, Attachment 2 ("Conditions").

6 Conditions ¶ 3. 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." *Id.*

7 Order ¶ 72.

8 *Id.*

Verizon Wireless and AT&T are currently the largest and second largest wireless providers, respectively, under the Bureaus' revenue-based definition of the term. Total nationwide wireless service revenues amounted to $152.6 billion in 2009,[9] while Verizon Wireless reported $53.5 billion of 2009 service revenue[10] and AT&T reported $48.5 billion of 2009 service revenue.[11] The revenue of the two largest wireless providers, Verizon Wireless and AT&T, therefore, accounts for approximately 67% of the entire industry (roughly 35% and 32%, respectively). By contrast, the third largest wireless provider, Sprint Nextel, reports $25.8 billion of 2009 service revenue (approximately 17% of industry revenue),[12] and the fourth largest wireless provider, T-Mobile, reports $18.9 billion of 2009 service revenue (approximately 12%).[13]

On April 1, 2010, Verizon Wireless filed its Petition, requesting that the Bureaus "reconsider and remove" Conditions One and Three.[14] Verizon Wireless alleges that the conditions are "unlawful" because (1) the conditions deprive Verizon Wireless of its due process rights, (2) the conditions do not address transaction-specific harms, (3) the conditions are arbitrary and capricious, (4) the conditions violate Section 202(a) of the Communications Act of 1934, as amended (the "Act" or the "Communications Act"), and (5) the Bureaus lacked

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9 CTIA, Wireless Quick Facts, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Apr. 9, 2010).

10 Verizon Communications Inc., Annual Report (Form 10-K), at Consolidated Results of Operations (Feb. 26, 2010).

11 AT&T Inc., Annual Report (Form 10-K), at Consolidated Statements of Income Report (Feb. 25, 2010).

12 Sprint Nextel Corp., Annual Report (Form 10-K), at 34 (Feb. 26, 2010).

13 T-Mobile USA, *T-Mobile USA Reports Fourth Quarter and Full Year 2009 Results* (Feb. 25, 2010), *available at* http://www.t-mobile.com/Company/InvestorRelations.aspx?tp=Abt_Tab_InvestorRelations&ViewArchive=Yes.

14 Petition at 1.

delegated authority to impose the conditions.[15] None of these arguments have any basis in law or fact.

ARGUMENT

A. Verizon Wireless Does Not Have Standing to Petition for Reconsideration of the Order.

As Verizon Wireless concedes, it is not a party to the subject proceeding. Pursuant to Section 1.106(b)(1) of the Commission's rules,[16] a person who is not a party to a proceeding must satisfy the Commission's two-part standing test: it shall (1) "state with particularity the manner in which the person's interests are adversely affected by the action taken," and (2) "show good reason why it was not possible for him to participate in the earlier stages of the proceeding." Verizon Wireless has not met either prong of this test.

First, Verizon Wireless fails to state a cognizable manner in which its interests were adversely affected by the action taken. As noted below, Verizon Wireless objects to two voluntary commitments made by the Applicants because it argues they constitute a rule applicable and harmful to it. The conditions to which Verizon Wireless objects do not identify Verizon Wireless by name and carry no possibility of an adverse enforcement action against Verizon Wireless should any of the conditions be breached. SkyTerra is the sole party that will face an adverse consequence if it fails to comply with the conditions in the Order. Verizon Wireless may not like the indirect effects of the Applicants' voluntary commitments. Verizon Wireless' displeasure at a competitor's actions, however, does not rise to the level of being "adversely affected" by the Order for purposes of the first prong of the standing test.

Second, Verizon Wireless failed to show good reason why it was not possible for it to participate in the earlier stages of the proceeding, as required by the second prong of the standing

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15 *Id.* at iv-v.

16 47 C.F.R. § 1.106(b)(1).

test. The closest it comes to such a showing is the repeated complaint that the Bureaus failed to provide notice and an opportunity to be heard.[17] Yet this complaint, as discussed further below, flows from a false premise that the Order singles out Verizon Wireless in a harmful manner. A false premise, without more, is no substitute for the Commission's two-pronged standing test.[18]

B. The Conditions Do Not Deprive Verizon Wireless of Any Due Process Rights.

Verizon Wireless contends that Conditions One and Three violate its due process rights because, as a non-party to the proceeding, it had a right to "notice and opportunity to be heard."[19] According to Verizon Wireless, the Bureaus, therefore, "ignored" its "fundamental right to notice and comment."[20] Verizon Wireless alleges that "these due process rights are embodied in . . . the [Communications] Act," but does not cite to a statutory provision applicable to the current proceeding.[21] Rather, Verizon Wireless cites to due process rights afforded to *licensees* in revocation and contested application hearings.[22] The rules governing various types of hearings have no relevance to a bureau action to approve the instant transfer of control applications.

As discussed above, Verizon Wireless does not have a cognizable interest in the proceeding, and thus does not have standing. Even if Verizon Wireless were to have standing, however, Verizon Wireless has failed to identify a basis for the procedures to which it claims it is entitled as a matter of due process. By the Order, the Applicants have agreed not to provide the

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17 Petition at 11.

18 We recognize that the Commission is often reluctant to reject petitions on procedural grounds such as standing, but in this case, Verizon Wireless' lack of standing is directly tied to a flaw in the overarching narrative of its Petition and its arguments: that is, the false premise that a voluntary commitment made by merger parties somehow constitutes a rule of general application that specifically targets and harms Verizon Wireless.

19 Petition at 11.

20 *Id.* at 12.

21 *See id.*

22 *See id.* at 12 n.22 (citing 47 U.S.C. §§ 309(e), 312, 316)).

first and second largest wireless providers, by revenue, with access to L-band licensed frequencies, or to provide them with more than a certain percentage of the Applicants' total bytes of data carried on its terrestrial network, without prior Commission approval. The Applicants did not have a preexisting duty to make L-band frequencies available to these entities, or to provide them with a certain guaranteed percentage of the Applicants' terrestrial network's total data traffic. Verizon Wireless has no right to deal with the Applicants and Verizon Wireless has no right to challenge the Applicants' commitment to seek Commission review before striking deals with the first and second largest providers, much less a property interest in any such challenge. Applicants have merely made decisions that are wholly within their authority to make.[23] Accordingly, the conditions do not implicate the due process rights of Verizon Wireless because they concern matters in which Verizon Wireless has no cognizable legal interest.[24]

Strikingly, moreover, no harm comes to Verizon Wireless under the Order even if Verizon Wireless were found to be at fault for the breach of a condition. The conditions apply by their terms only to the transfer that was the subject of the application and do not establish a rule of general application. The conditions only govern the conduct of the Applicants, the breach of which shall either subject the Applicants to a forfeiture or render null and void the Applicants' authorizations granted under the Order.[25]

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23 In addition, the conditions largely, if not entirely, reaffirm existing obligations of the Applicants to obtain prior Commission approval for any transfer, assignment or long-term lease of their spectrum.

24 Moreover, contrary to Verizon Wireless' contentions, the Commission's rules provide remedies that address Verizon Wireless' concerns, including the right to file a petition for reconsideration (a right Verizon Wireless has exercised in this proceeding) and to seek an application for review of the Order by the full Commission, *see* 47 C.F.R. §§ 1.104-1.120, through which "affected parties [may] challenge the basis of the [Order]." *Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989).

25 *See* Conditions ¶¶ 4, 12.

Verizon Wireless' related argument that the conditions are objectionable because they target the behavior of non-parties to the transfer[26] is contrary to years of Commission jurisprudence involving Commission actions that impact entities that are outside the Commission's jurisdiction, and has been rejected by both the Commission and the courts.[27] Most recently in a case where Verizon Communications Inc. was an intervenor urging precisely the opposite position that Verizon Wireless posits here, a 2007 Commission order banned exclusive contracts between cable companies and the owners of apartment buildings.[28] Apartment building owners argued that the exclusivity ban impermissibly regulates the real estate industry, which lies outside the Commission's jurisdiction.[29] The Commission disagreed, noting that "we merely prohibit the enforcement of existing exclusivity clauses and the execution

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[26] Petition at 13-14.

[27] *See, e.g.*, *International Settlement Rates*, 12 FCC Rcd 19806 (1997), *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 2007). There, the Commission mandated the maximum settlement rate U.S. carriers may pay foreign counterparts to terminate U.S-origin traffic. In rejecting a petition for review brought by foreign carriers and others, the court found that the rule regulates domestic U.S. carriers, rather than foreign carriers and foreign telecommunications services over which FCC has no jurisdiction. *Cable & Wireless P.L.C.*, 166 F.3d at 1230. This decision is analogous to the circumstances here where only the Applicants, rather than Verizon Wireless, would face enforcement for violation of the conditions, the court noted that the enforcement scheme adopted by the Commission, rather than targeting foreign carriers, authorizes enforcement measures to ensure what a *U.S. carrier pays* to a foreign carrier. *Id.* Moreover, while the practical effect of the order is to reduce settlement rates charged by foreign carriers, the court found that the Commission does not exceed its authority simply because a regulatory action has consequences outside its direct jurisdiction (in that case extraterritorially, *citing inter alia, R.C.A. Communications, Inc. v. United States*, 43 F. Supp. 851, 854-55 (S.D.N.Y. 1942); *In re Mackay Radio & Telegraph Co.*, 2 F.C.C. 592 598-99 (1936)); nor should the scope of agency action be viewed in terms of its practical or even foreseeable effects. *Id.* *See also In the Matter of Telecommunications Services Inside Wiring*, Report and Order, 18 FCC Rcd 1342 (2003) (prohibiting certain methods of wiring installation by cable operators in apartment buildings that impacted building owners).

[28] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order, 22 FCC Rcd 20235 (2007) ("*MDU Order*"), application for review denied, *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) ("*NCTA*").

[29] *See MDU Order*.

of new ones *by cable operators*."[30] On review of the Commission's order by the D.C. Circuit, Verizon argued that the order only applies to cable companies and "does not direct [an apartment building] owner to permit competitive cable operators to offer service within its [building] if the . . . owner does not wish to do so."[31] The D.C. Circuit agreed, finding that "no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effect."[32] Noting that "the alternative is untenable," the court recognized that "every agency action has relatively immediate effects for parties beyond those directly subject to regulation."[33]

The *NCTA* principle applies here, too. The subject conditions were not imposed on Verizon Wireless, they apply to the potential actions of the Applicants. The fact that the conditions may have an impact on Verizon Wireless, which was a non-party, is beside the point. As in the MDU exclusivity context, it is not Verizon Wireless' conduct that is being regulated, only that of the merging parties, and as such, the conditions are perfectly permissible.[34]

C. The Conditions Comply With the Commission's Statutory Authority and Precedent.

Under the Commission's long-familiar competitive analysis of communications mergers, the scope of which is broader than a traditional antitrust analysis, the Commission will consider

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30 *Id.* ¶ 37 (emphasis added).

31 *Brief of Intervenors AT&T, Verizon, et al.* in No. 08-1016 at 32 (D.C. Cir. filed Sept. 19, 2008).

32 *NCTA*, 567 F.3d at 666 (quoting *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999)).

33 *Id.*

34 For this reason, Verizon Wireless' reliance on the Commission's reconsideration of a condition adopted in the AT&T/BellSouth merger is misplaced. *See* Petition at 13-14. In that case, certain special access rate reductions made by the merging parties would only apply to non-parties if those parties themselves made comparable rate reductions. *Id.* There, the Commission actually required non-parties to take specific action (i.e., reduce their rates), and hence were directly regulating the non-parties, in contrast to the situation here. Thus, in the AT&T/BellSouth merger, the condition purported to impose consequences on the actions of third parties, whereas here that is not the case – it is only actions of the Applicants that are reached.

whether the transaction will enhance, rather than merely preserve, existing competition, and takes a more expansive view of potential and future competition and its impact on the relevant market.[35] In performing this analysis, the Commission considers whether the transaction could result in any public interest harms, and then employs a balancing test weighing any potential public interest harms of the proposed transaction with any potential public interest benefits.[36] Here, the approval of the transfers was sought and granted in connection with the merger of the Applicants and this analysis is fully applicable.

The Commission's public interest authority (or that delegated to its bureaus) enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction under review.[37] As the Commission has noted:

> Unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.[38]

The Commission routinely, as in the instant matter, uses this broad authority to impose conditions on industry transactions based on voluntary commitments of the parties that are intended to ensure that, on balance, the transaction at issue is in the public interest.[39]

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35 *See* Order ¶ 12; *see also Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements,* Memorandum Opinion and Order, WT Docket No. 08-246, FCC 09-97, ¶ 29 (Nov. 5, 2009) ("*Centennial*"); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 28 (Nov. 10, 2008) ("*Alltel*").

36 *Centennial* ¶ 29; *Alltel* ¶ 26.

37 *Centennial* ¶ 30; *Alltel* ¶ 29; *see also* 47 U.S.C. § 303(r) (Commission may "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

38 *Centennial* ¶ 30.

39 *See* Order ¶¶ 10-13.

Applying this familiar formula, the Bureaus here examined the potential adverse impact of the transaction on various markets for mobile satellite services, and balanced those against the potential public interest benefits that would flow from Harbinger's ability to launch an integrated satellite/terrestrial 4G mobile broadband network, particularly one that would be an important prospective new source of competition in the terrestrial wireless market.[40]

The Bureaus noted that "if Harbinger successfully deploys its terrestrial network using SkyTerra's terrestrial authority it would have a beneficial impact on competition through its role as an additional facilities-based provider, as well as a wholesale provider of these services for mobile resellers and others."[41] In particular, the Bureaus found that "Harbinger's plans to provide 4G mobile wireless broadband are a significant public interest benefit, because of the competition it will bring in mobile wireless broadband services."[42] The Bureaus thus concluded that, on balance, the transaction was in the public interest, assuming Harbinger "actually moved forward with its plan to use SkyTerra to provide 4G mobile wireless service, and *especially on Harbinger's plan to build a terrestrial network using SkyTerra's ATC authority*."[43]

In finding that the transaction, on balance, was in the public interest, the Bureaus found that the voluntary commitments adopted as conditions on the transaction were necessary "to ensure that the significant benefits promised by the transaction are achieved."[44] These commitments gave the Bureaus "greater confidence" that these public benefits will actually occur.[45] Accordingly, *with the conditions*, the Bureaus were assured that the potential public

40 *See id.* ¶¶ 63-73.
41 *Id.* ¶ 72.
42 *Id.* ¶ 70.
43 *Id.* ¶ 71 (emphasis added).
44 *Id.* ¶ 63.
45 *Id.* ¶ 72.

interest benefits of the acquisition outweigh any potential harms and concluded that under such circumstances approval of the transaction is in the public interest.

Here, the structure of the wireless market, an industry characterized by relatively high barriers to entry, is such that the two largest firms have market shares on the basis of 2009 reported revenue of 32% and 35%, respectively, for a two-firm concentration ratio of 67%.[46] The Federal Trade Commission ("FTC") has characterized a market with a two firm concentration ratio of 60% as an "advanced oligopoly."[47] Similarly, in blocking a merger that created a two-firm concentration ratio in excess of 60%, the FTC found that "[l]ower levels of concentration establish a rebuttable presumption of a violation" of the FTC Act, with higher concentration ratios establishing a prima facie case under the FTC Act.[48]

Given that over two-thirds of the mobile wireless market is controlled by the two largest providers, and given the Bureaus' interest in promoting competition in this market, the Bureaus acted completely reasonably by accepting two voluntary conditions that would promote additional competition in the wireless market. The first ensured that SkyTerra's terrestrial spectrum would only be leased to smaller competitors absent prior Commission approval, and the second ensured that significant portions of SkyTerra's capacity, which would otherwise be available to competitive resellers, is not tied up by the two largest firms in the market. Should

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46 *See supra* at 3.

47 *See, e.g.*, *In the Matter of the Echlin Mfg. Co.*, 105 F.T.C. 410 ¶ 199 (1985) (complaint dismissed on basis of no entry barriers in industry).

48 *In the Matter of Owens-Illinois, Inc.*, *et al.*, 115 F.T.C. 179, 269-70 (1992). In addition, the most recent CMRS Competition Report reported an average Herfindahl-Hirschman Index (HHI) as of 2007 for the mobile telephone market of 2674, which is characterized as "highly concentrated" under the Merger Guidelines used by the Department of Justice and the FTC to evaluate the effects of acquisitions on competition. *See* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 1.5 (1997 revision), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf; *see also Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54, ¶ 46 (Jan. 16, 2009).

there be circumstances where agreements with the two largest competitors would be in the public interest, Harbinger can request that the Commission grant such approval. Agreements or other strategic business relationships with the two largest wireless providers are not foreclosed, they are merely subject to review to ensure that, like the underlying transaction itself, they are consistent with the public interest.

The Commission has long sought to ensure enhanced competition in the wireless sector, and in telecommunications markets generally, through the imposition of pro-competitive measures similar to those imposed in the Order, and there is nothing new or novel about the conditions imposed in the Order. For example, in an effort to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . .,"[49] the Commission reserved licenses in broadband PCS spectrum auctions in "entrepreneurs' blocks" for "bidding by entities with annual gross revenues of less than $125 million and total assets of less than $500 million."[50] This PCS auction limitation ensured that smaller firms could compete for PCS licenses against larger companies, thereby enhancing competition and economic opportunity in the wireless sector.[51] Likewise, when the Commission rolled out new Local Multipoint Distribution Service ("LMDS") spectrum in the 28 GHz band, which could be used by new firms to provide local exchange services in competition with incumbent telephone companies and multichannel video services in competition with cable operators, the Commission adopted eligibility restrictions limiting the

[49] *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 ¶ 9 (July 15, 1994) (quoting 47 U.S.C. § 309(j)(4)(D)) ("*PCS R&O*").

[50] *Id.* ¶ 12.

[51] *Id.* ¶ 121.

ability of incumbent local exchange carriers and cable operators to hold LMDS licenses in their authorized or franchised service areas, in order to increase competition in these markets.[52]

Moreover, the conditions are narrowly tailored and transaction-specific. They apply directly to business arrangements made by Applicants in connection with the wireless broadband network that Applicants will construct as a result of the transaction.[53] The construction of that network and the competition it is expected to bring to the wireless market were important considerations to the Bureaus' public interest analysis. The Bureaus also expressly found that, in accordance with established Commission policy, the conditions ensure that the transaction will yield overall public interest benefits.[54] Moreover, as noted above, the conditions do not foreclose deals with Verizon Wireless, but only require that Commission review of such deals be sought, which is an additional reason why the conditions may be viewed as narrowly tailored.

Indeed, the Commission is not alone in such efforts. Other regulatory agencies with jurisdiction over industries that have been largely deregulated impose conditions on the private sector's usage of scarce resources in order to ensure vigorous competition and thereby protect the

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52 *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545 (1997). *See also Revision of Rules and Policies for the Direct Broadcast Satellite Service*, Report and Order, 11 FCC Rcd 9712 (1995) (adopting auction rule that sought to ensure that Direct Broadcast Satellite ("DBS") orbital slots covering the continental United States would be controlled by different entities to maximize direct competition among DBS providers, and limiting the ability of incumbent licensees to acquire additional DBS spectrum at auction without divesting existing spectrum).

53 *See* Conditions at 1-4.

54 *See* Order ¶ 72; *see also* Order ¶ 13 (citing *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order, 23 FCC Rcd 12348, 12363 ¶ 30 (2008); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276 ¶ 22 (2008); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485 ¶ 18 (2004)).

public interest.[55] Like these efforts, the Bureaus' conditions simply ensure the Commission has the opportunity to review any potentially undue consolidation of ownership or dominant use of the anticipated new competitive broadband facilities authorized by the Bureaus' approval of the subject transaction. As such, the conditions are well within the Commission's and the Bureaus' authority.

D. The Conditions Are Not Arbitrary or Capricious.

Verizon Wireless alleges that the Order "arbitrarily and capriciously affect[s] Verizon Wireless," and therefore violates the Administrative Procedure Act ("APA") by failing to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, or support its findings by substantial evidence."[56] In support, Verizon Wireless asserts the Order contains a "disconnect between the 'facts found' and the 'choices made,'" thereby "invalidat[ing]" the conditions.[57] There is no merit to this contention.

As set out above, the Bureaus found that the proposed transaction, as conditioned, could be expected to benefit competition by assuring that SkyTerra constructs a new terrestrial network

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[55] For example, in the air transportation sector, the Department of Transportation ("DOT"), which is charged with, *inter alia*, promoting new entry and competition and avoiding industry concentration and market domination often takes action to ensure that competition is not thwarted by a few competitors' control of the resources that are necessary to compete. As recently as February 2010, when Delta Air Lines and US Airways entered into an agreement to exchange slot interests (i.e., designated landing and takeoff times) at two airports, DOT, mindful of its obligation to protect the public interest in competitive air travel, conditioned the transaction on the airlines' agreement to sell a number of their existing slots to other carriers with relatively low slot holdings at the respective airports. The purpose of the condition was "to permit eligible carriers to enter or add frequencies in markets with sufficient operations to effectively compete." Dep't of Transp., *Notice of a Petition for Waiver and Solicitation of Comments on Grant of Petition with Conditions*, 75 Fed. Reg. 7306, 7310, 7312 (2010). *See also* Final Rule, *Congestion and Delay Reduction Rule at Chicago O'Hare Int'l Airport*, 71 Fed. Reg. 51,382, 51,388-90 (2006) (relying on pro-competition policies in public interest determination to grant preferential treatment to new entrant and small incumbent airlines in assigning certain slots); 14 C.F.R. § 93.30(b), (h) (stating preference for new entrant and small incumbents in assigning certain slots).

[56] Petition at 16-17 (citations and quotations omitted).

[57] *Id.* at 17.

consistent with its business plan that can compete with the networks of existing providers. Requiring Commission approval before spectrum in the new terrestrial network is made available to the first or second largest existing provider, or that limits the amount of capacity from the first or second largest provider that may be carried on the network, bears a direct relationship to the competitive benefits the Commission concluded warrants approving the SkyTerra/Harbinger transaction. Allowing the two largest providers to add to their existing market shares by obtaining spectrum from or placing an inordinate amount of traffic on the newly constructed system without further Commission review would undermine the competitive benefits the Bureaus foresee from the transaction.

Verizon Wireless is in no way singled out arbitrarily in this regard. As noted above, it is not even mentioned in the Order. Market share is a perfectly appropriate consideration in assessing the competitive effects of a transaction; there is nothing arbitrary about it. For example, in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963), the Supreme Court found that a bank merger leading to a single bank controlling a 30% share of the market was properly found to threaten undue concentration. This transaction has the potential to enhance the competitiveness of smaller participants in a market in which the two largest providers currently have combined shares that exceed two-thirds of the industry. To ensure that the acquisition of spectrum or traffic utilization by the two largest providers does not restrict the competitiveness of other market participants, the Order requires prior review of transactions with the two largest competitors. Far from arbitrary and capricious, accepting this type of competitive safeguard is exactly what the Commission should do to ensure that the promised public benefits are achieved.

The remainder of Verizon Wireless' assertions of supposed arbitrariness consists mostly of complaints that the Commission is not addressing other aspects of the transaction that Verizon Wireless asserts also raise competitive issues. But it is well established that it is not arbitrary to address one issue simply because others are left unaddressed.[58] Verizon Wireless also complains that the Commission may be arbitrary in considering any future application to deal with the first or second largest provider because the Order sets out no standards for that determination; this concern is at best premature. As established above, the Order uses sound reasoning to establish that the transaction is in the public interest if the conditions are imposed, thereby ensuring the potential public benefits of the transaction – namely, a healthy and competitive next-generation wireless marketplace.

The conditions also ensure that the Applicants will comply with the Commission's build-out requirements, the licensed spectrum will be utilized efficiently, competition will be promoted and the public will be provided with communications services. In this manner, the conditions are consistent with the Commission's long-standing practice of conditioning the grant of licenses on the prospective licensee's compliance with the Commission's rules and policies. Contrary to Verizon Wireless' contention, the conditions also serve the goals of the National Broadband Plan by promoting a robustly competitive marketplace for wireless broadband services.

If anything, the Commission should adopt additional conditions on this transaction to prevent competitive harm. For example, Sprint Nextel believes that the Bureaus should also condition the grant of authority on the Applicants and their affiliates TerreStar and TerreStar

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[58] *See, e.g.*, *Mainstream Mktg. Serv., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (regulation does not fail as underinclusive unless the failure to regulate "renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further"); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) (noting that legislation is not irrational merely because it addresses one problem and neglects others, and that there is leeway to approach a perceived problem incrementally).

Networks' satisfying their joint and several obligation to reimburse Sprint Nextel for Sprint's costs incurred in clearing TerreStar Networks' pro rata share of the MSS 2 GHz Band spectrum of Broadcast Auxiliary Service incumbents, pursuant to the Commission's Emerging Technologies relocation reimbursement policy[59] and its 800 MHz Reconfiguration Decision.[60] Sprint Nextel has demonstrated previously that fellow MSS entrant ICO Global is jointly and severally liable for its cost-sharing obligations, together with its subsidiary, New DBSD Satellite Services G.P., Debtor-In-Possession.[61] Upon approval of the Applications, Harbinger would own 49.32% in TerreStar Networks in addition to convertible and nonconvertible debt instruments. On a fully diluted basis, therefore, Harbinger may have *de jure* or *de facto* control of TerreStar Networks, in addition to significant interests in its parent, TerreStar. In light of the significant attributable interests and indicia of influence and control, the public interest would be served by adopting this condition to mitigate the risk of noncompliance with the Commission's long-standing *Emerging Technologies* policy. The condition is also consistent with the Commission's National Broadband Plan because protecting the integrity of the Commission's Emerging Technologies doctrine will be vital to the Commission's efforts to allocate, auction and assign new spectrum for wireless broadband services. In addition, if the Applicants, TerreStar and TerreStar Networks apply for the Commission's prior consent to the transfer of control of TerreStar Networks' licenses, the Commission should similarly condition the approval

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59 *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (Oct. 16, 1992); *Second Report and Order*, 8 FCC Rcd 6495 (Aug. 13, 1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (Aug. 13, 1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (Mar. 31, 1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (Dec. 2, 1994); *aff'd Ass'n of Pub. Safety Commc'n Officials-Int'l, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

60 *In the Matter of Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, Report and Order, 19 FCC Rcd 14969 (Aug. 6, 2004).

61 *See Reply Comments of Sprint*, WT Docket 02-55, filed July 24, 2009, at 2-3.

of such applications on the Applicants, TerreStar and TerreStar Networks' joint and several obligation to reimburse their pro rata share of Sprint Nextel's costs of clearing the 2 GHz MSS band.

E. The Conditions Do Not Violate Section 202(a) of the Communications Act.

Verizon Wireless claims that the conditions also violate Section 202(a) of the Act,[62] which makes it unlawful for a common carrier to engage in unreasonable discrimination, or subject an entity to unreasonable prejudice or disadvantage.[63] Specifically, Verizon Wireless alleges that the conditions prohibit SkyTerra, a radio common carrier, from making spectrum available to either of the two largest wireless carriers, or entering into a wholesale arrangement with them that exceeds the 25% traffic threshold, and are therefore discriminatory on their face in violation of Section 202(a).[64]

As a threshold matter, the conditions do not prohibit SkyTerra from conducting any business arrangements, they only require Commission review of deals with certain parties. Additionally, while SkyTerra may be a radio common carrier, its spectrum leasing activities are not common carrier activities or offerings, and hence Condition One is not subject to Section 202(a).[65] Moreover, as to the traffic threshold condition, the Bureaus have concluded that it will promote competition among providers of telecommunications service, and is in the public interest. As such, to the extent the condition even has the effect of requiring SkyTerra to engage in discriminatory conduct that might violate Section 202(a), the condition also represents a

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[62] 47 U.S.C. § 202(a).

[63] Petition at 19.

[64] *Id.* at 20.

[65] *See Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899 (5th Cir. 2002) (non-common carrier services are not subject to Title II of the Act, and a carrier's refusal to provide such services does not violate Section 202(a)); *see also Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1975) (a common carrier is such by virtue of its actual activities and one can be a common carrier with respect to some activities but not others).

lawful exercise of the Commission's forbearance authority under Section 10(b) of the Act, and consequently, does not violate the Act, as urged by Verizon Wireless.[66]

F. The Bureaus Have Delegated Authority to Impose the Conditions.

Verizon Wireless alleges that Conditions One and Three constitute "new rules based on the state of wireless competition" and "decisions that are to be made based on notice and comment and record evidence, by the full Commission."[67] As a result, Verizon Wireless urges the Bureaus to remove the conditions.[68] This argument is simply another variation of Verizon Wireless' central theme that the conditions were improperly adopted rules of general application.

As established above, however, Conditions One and Three do not constitute a rule of general applicability, nor do they present "new or novel arguments not previously considered by the Commission."[69] The Bureaus have the expressly delegated authority to analyze applications such as these on their merits[70] and "attach to the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.'"[71] In any event, even assuming the Bureaus exceeded their delegated authority, the Commission's rules provide a remedy that

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66 *See generally and compare Ass'n of Commc'ns Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). In that case, the D.C. Circuit remanded a merger condition adopted in the SBC/Ameritech merger which allowed the company to provide advanced services through a separate affiliate not subject to Section 251 resale obligations. The court held that the merger condition if viewed as an exercise of the Commission's forbearance authority, would have resulted in the forbearance from application of statutory provision, Section 251(c), that was excluded from Commission's forbearance authority except in very limited circumstances that had not been met. Section 202, in contrast, is not subject to a similar limitation, and is fully subject to the Commission's forbearance authority.

67 Petition at 21.

68 *Id.* at 21-22.

69 47 C.F.R. § 0.261(b)(i).

70 *See id.* §§ 0.31, 0.261(a), 0.331.

71 Order ¶ 13 (quoting 47 U.S.C. § 214(c)).

renders this issue moot: the right to file an application for review.[72] Indeed, the seriousness of Verizon Wireless' delegated authority challenge is belied by its failure to submit such a filing.

CONCLUSION

For the reasons discussed above, the Bureaus should deny the Petition for Partial Reconsideration of Verizon Wireless.

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April 12, 2010

[72] *See* 47 C.F.R. § 1.115.

CERTIFICATE OF SERVICE

I, Rachael L. Cotner, hereby certify that on this 12th day of April, 2010, I caused to be served a true copy of the foregoing "Opposition of Sprint Nextel Corporation to Petition for Partial Reconsideration of Verizon Wireless" by hand delivery where indicated (*), by FedEx where indicated (**), and by email where indicated (^), upon the following:

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