

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 of	)	SES-T/C 20080822-01089
Control of 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

**JOINT OPPOSITION TO PETITION FOR RECONSIDERATION OF AT&T INC. AND TO PETITION FOR PARTIAL RECONSIDERATION OF VERIZON WIRELESS**

Pursuant to Section 1.106(g) of the Commission’s rules, 47 C.F.R. § 1.106(g), Media Access Project hereby submits on behalf of the below-referenced Public Interest Spectrum Coalition (“PISC”) members this Joint Opposition (“Opposition”) to the Petition for Reconsideration of AT&T Inc. (“AT&T Petition”)<sup>1</sup> and the Petition for Partial Reconsideration of Verizon Wireless (“Verizon Petition”; together, “Petitions”)<sup>2</sup> in the above-captioned docket and files. For reasons set forth herein, PISC respectfully suggests that the Petitions be denied.

<sup>1</sup> Petition for Reconsideration of AT&T Inc., IB Docket No. 08-184, File Nos. ITC-T/C-20080822-00397, SAT-T/C-20080822-00157, SES-T/C 20080822-01089, SES-T/C-20080822-01088, 0003540644, 0021-EX-TU-2008, ISP-PDR-20080822-00016 (filed Mar. 31, 2010) (“AT&T Petition”).

<sup>2</sup> Petition for Partial Reconsideration, IB Docket No. 08-184, File Nos. ITC-T/C-20080822-00397, SAT-T/C-20080822-00157, SES-T/C 20080822-01089, SES-T/C-20080822-01088, 0003540644, 0021-EX-TU-2008, ISP-PDR-20080822-00016 (filed Apr. 1, 2010) (“Verizon Petition”).

For purposes of this Opposition, PISC includes the CUWiN Foundation (“CUWiN”), the International Association of Community Wireless Networks (“IACWN”), and Open Source Wireless Coalition (“OSWC”; together with CUWiN and IACWN, the “Potential Spectrum Users”), as well as Free Press, Media Access Project, New America Foundation, and Public Knowledge. The Potential Spectrum Users include or have as members parties that could make use of the spectrum assignments subject to the current proceeding, and would intend to do so. As a result, the Potential Spectrum Users would be aggrieved by any reconsideration of the decision challenged by the Petitions.

### **INTRODUCTION**

The Petitions seek partial reconsideration of a Memorandum Opinion and Order and Declaratory Ruling (the “Order”)<sup>3</sup> issued by the Commission’s International Bureau, Office of Engineering and Technology, and Wireless Telecommunications Bureau (together, the “Bureaus”). That Order granted approval to a series of applications (collectively referred to by the Order as the “Application”) for authority to transfer control of SkyTerra Subsidiary LLC (“SkyTerra”) from SkyTerra Communications, Inc. to Harbinger Capital Partners Funds (“Harbinger”; together with SkyTerra Communications, Inc., “Applicants”). The Bureaus granted the Application (and a related petition for declaratory ruling not implicated by the Petitions’ requested relief) subject to specified conditions that safeguard the public interest and promote facilities-based competition in the market for terrestrial mobile broadband services.

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<sup>3</sup> 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, File Nos. ITC-T/C-20080822-00397, SAT-T/C-20080822-00157, SES-T/C 20080822-01089, SES-T/C-20080822-01088, 0003540644, 0021-EX-TU-2008, ISP-PDR-20080822-00016, *Memorandum Opinion and Order*, DA 10-535 (IB, OET, WTB rel. Mar. 26, 2010) (“Order”).

As the Order explains, SkyTerra holds licenses for a Mobile Satellite Service (“MSS”) system in the L-Band, and “has authority to operate ancillary terrestrial component (‘ATC’) facilities in conjunction with these satellites.”<sup>4</sup> The Order notes that Harbinger has proposed to deploy “an additional, nationwide facilities-based mobile broadband network” using SkyTerra’s ATC authority.<sup>5</sup> The Bureaus found that “Harbinger’s plans to provide 4G mobile wireless broadband are a significant public interest benefit, both because of the competition it will bring in mobile wireless broadband services and because it will provide mobile wireless broadband service to traditionally underserved areas.”<sup>6</sup> Most importantly, the Bureaus also found that “SkyTerra is highly unlikely to provide this service if Harbinger does not acquire it,”<sup>7</sup> and therefore concluded that the “potential public benefits” of this new facilities-based mobile broadband services competitor “are dependent on Harbinger’s acquisition of SkyTerra.”<sup>8</sup>

To increase the chances for realization of this potential public benefit – namely, entry of a new, facilities-based mobile broadband competitor in presently underserved and unserved areas – the Order establishes three conditions to encourage “Harbinger’s actually moving forward with its plan to use SkyTerra to provide 4G mobile wireless service, and...to build a terrestrial network using SkyTerra’s ATC authority to facilitate broadband service to most of the U.S. population.”<sup>9</sup> Thus, the Order requires that “if the Applicants seek to make spectrum available to

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<sup>4</sup> *Id.* ¶ 3.

<sup>5</sup> *See id.* ¶ 68 (“Harbinger plans on building a terrestrial network...able to provide service at 4G speeds to over 90 percent of the U.S. population. Service from SkyTerra’s new satellite will be able to provide broadband service to the United States, including those rural areas that have little or no broadband service available today.”).

<sup>6</sup> *Id.* ¶ 70.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶ 72.

either of the two largest terrestrial providers of CMRS and broadband services, they must obtain Commission approval” therefor, and also “requires the Applicants to obtain Commission approval before traffic to these largest terrestrial providers accounts for more than 25 percent of SkyTerra’s total traffic on its terrestrial network in any Economic Area.”<sup>10</sup> The Petitions challenge only these two conditions summarized above, raising several procedural and substantive challenges confined to these two provisions in the Order. As discussed below, none of the arguments raised by AT&T and Verizon Wireless merit a grant of the Petitions’ request for partial reconsideration, nor any modification of the challenged conditions.

**I. PETITIONERS SUFFERED NO LOSS OF PROCEDURAL OR SUBSTANTIVE RIGHTS DUE TO LACK OF NOTICE REGARDING THE CONDITIONS.**

The Petitions assert that the Bureaus should reconsider the Order due to lack of prior notice regarding the challenged conditions. The Verizon Petition in particular sets forth a litany of arguments regarding notice of the challenged conditions provided to non-parties to the Application prior to the release of the Order. Tellingly, however, neither Petition cites any Commission decision or precedent directly on point to support its claims about the inadequacy of the announcement of merger conditions that, while they may impact the activities of third parties, certainly do not curtail any right or expectation interest that such third parties may reasonably expect to enjoy.

The Verizon Petition argues by way of analogy, referencing a host of statutes, court decisions, and Commission pronouncements that bear little or no relationship to the present proceeding. While the Petitions’ paean to due process undoubtedly has merit in the abstract, the recitation fails to demonstrate that the Order deprived either AT&T or Verizon Wireless of any procedural or substantive rights here. For instance, it may be edifying to include in the Petitions

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<sup>10</sup> *Id.*

citations to a lone Supreme Court Justice's opinion dissenting from denial of certiorari in a public records case involving allegations of child neglect,<sup>11</sup> but it is difficult to see the relevance of such opinions to the Order for which these parties presently seek reconsideration.

Somewhat more relevant citations to general notice provisions in both the Communications Act and the Administrative Procedures Act likewise do not aid the Petitions' cause. The provisions that Verizon Wireless cites in the Communications Act regarding notice and opportunity to be heard prior to license modification, license revocation, and contested application proceedings<sup>12</sup> assuredly provide salutary procedural protections to some parties appearing before the Commission. How those statutes' pronouncements might protect AT&T and Verizon Wireless in the instant proceeding, as parties who filed no contested applications and who hold no licenses subject to modification or revocation here, is less clear.

The point is not that AT&T and Verizon Wireless have no due process rights in the instant proceeding, but that their Petitions fail to demonstrate adequately how the Order and the Commission's process going forward denied any such rights. Ironically enough, Petitioners complain about a lack of due process in the very act of exercising the procedural rights reserved to them by Commission rules. The Petitioners, quite obviously, have a course to seek redress and reconsideration for any decision that may impact them, and they have taken full advantage of this option and opportunity to be heard by filing their petitions for reconsideration pursuant to Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b).

That rule subsection permits "any other person whose interests are adversely affected by any action taken...by the designated authority [ to] file a petition requesting reconsideration of

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<sup>11</sup> See Verizon Petition at 11 & n.20 (citing *Tarver v. Smith*, 402 U.S. 1000, 1003 (1971) (Douglas, J., dissenting)).

<sup>12</sup> See Verizon Petition at 11 & n.22.

the action taken,” and requires only that a petition filed by a non-party to the original proceeding “state with particularity the manner in which the person’s interests are adversely affected by the action taken, and [ ] show good reason why it was not possible for him to participate in the earlier stages of the proceeding.” The Petitions’ various claims regarding due process ignore the fact that the rules contemplate just such a situation, in which third parties allegedly aggrieved by a bureau-level decision in a proceeding that did not involve such third parties have a right to seek reconsideration of such decisions.

Finally, PISC notes that there are no “legal rights” to which AT&T and Verizon Wireless can lay claim with respect to the licenses held by SkyTerra, at least insofar as the challenged conditions in the Order may affect the Petitioners’ ability to contract for use of SkyTerra’s assigned spectrum. Use of spectrum always may be subject to the Commission’s prior approval, and in that respect the conditions imposed on the Applicants by the Order neither “modif[y] Commission rules to include prior approval procedures where none had existed”<sup>13</sup> nor “represent new, substantive restrictions imposed on non-parties.”<sup>14</sup>

In this vein, the Verizon Petition greatly overstates the breadth of the holding in the Commission’s decision regarding MSS/ATC spectrum leasing arrangements in the *Globalstar* case.<sup>15</sup> That decision did not conclude generally that prior Commission approval is not required for leasing of satellite or ATC spectrum, as the Verizon Petition suggests, but found – after a full review of the lease in question in that decision – that the lease was consistent with Commission

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<sup>13</sup> *Id.* at 6.

<sup>14</sup> AT&T Petition at 6.

<sup>15</sup> See Verizon Petition at 6 (citing Globalstar Licensee LLC, *Order and Authorization*, 23 FCC Rcd 15975, ¶¶ 24-27 (2008) (“*Globalstar*”).

policy.<sup>16</sup> The *Globalstar* order thereafter noted that the Commission previously had declined to make secondary markets provisions for terrestrial wireless spectrum applicable to satellite services, and conditioned an explicit “grant” of approval for the lease on fulfillment of the licensee’s general obligations and additional notice requirements.<sup>17</sup> The AT&T Petition concedes this point, albeit with an acknowledgement buried in the middle of a lengthy footnote, and argues only that leasing of MSS spectrum is generally – but, of course, not always – allowed without prior Commission approval.<sup>18</sup>

Thus, the Petitions fail to make a showing that the order deprived the Petitioners of any due process rights, and fail as well to show that the Order deprived the Petitioners of any supposed substantive rights to use of spectrum without obtaining Commission approval.

## **II. THE ORDER DOES NOT VIOLATE SECTION 202 OF THE COMMUNICATIONS ACT.**

The Verizon Petition also makes the claim that the challenged conditions would violate Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Of course, Section 202 regulates common carrier conduct, not Commission procedure. PISC notes that to the extent that the Verizon Petition argues that data roaming may constitute a common carrier service, that represents a stark departure from positions taken by Verizon Wireless in the Commission’s roaming proceeding.<sup>19</sup> Whatever common carrier services it governs, however, Section 202 of

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<sup>16</sup> See *Globalstar* ¶ 24.

<sup>17</sup> See *id.* ¶ 25.

<sup>18</sup> See AT&T Petition at 7 n.16.

<sup>19</sup> See Reply Comments of Verizon Wireless, WT Docket No. 05-265, at 2 (filed Nov. 28, 2007) (captioning a section of reply comments with the argument that “Internet Access Services and Other Non-Interconnected Services Are not Common Carrier Services and Thus Are Exempt from Title II Regulation”).

the statute does not limit the Commission’s authority – nor the Bureaus’ authority here – to promote facilities-based competition through the adoption of certain policies and conditions.

Once again, the Petitions overstate the meaning of an earlier Commission decision that may be arguably, but only tangentially, related to the objections raised against the Order challenged here. In the *AT&T-BellSouth Reconsideration Order* that the Verizon Petition cites,<sup>20</sup> the Commission did reconsider a condition agreed to by AT&T during that merger review process, with the Commission concluding that modification of the condition would reduce legal uncertainty. Nowhere did the *AT&T-BellSouth Reconsideration Order* explicitly hold that the condition at issue in that proceeding would constitute a violation of Section 202(a). It simply reported in a footnote that Verizon had argued the point.<sup>21</sup> Furthermore, the AT&T-BellSouth condition governed prices, terms, and conditions for common carrier special access services – not leasing or traffic requirements that speak to use and *de facto* control of licensed spectrum – and may be readily distinguished on these grounds from conditions established for Harbinger’s acquisition of control of SkyTerra.

### **III. THE ORDER DOES NOT TARGET PARTICULAR ENTITIES NOT PARTY TO THE APPLICATION.**

Despite the Petitions’ characterization of the challenged conditions as “anti-AT&T/Verizon merger conditions,”<sup>22</sup> the conditions for which reconsideration is sought do not name AT&T and Verizon Wireless. Rather, they apply to entities “that, at the time [any] agreement is entered into, [may be] the largest or second largest wireless provider...of

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<sup>20</sup> See Verizon Petition at 19-20 (discussing AT&T Inc. and BellSouth Corporation Application for Transfer of Control, *Order on Reconsideration*, 22 FCC Red 6285, ¶¶ 3-5 (2007) (“*AT&T-BellSouth Reconsideration Order*”).

<sup>21</sup> *AT&T-BellSouth Reconsideration Order* ¶ 4 n.11.

<sup>22</sup> See AT&T Petition at 6.

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."<sup>23</sup>

Considering incumbent carriers' oft-repeated claims about the hyper-competitive nature of the mobile voice and broadband markets,<sup>24</sup> they should have no reason to suspect that conditions applicable to the largest two providers by revenue shall apply forevermore to the same, closed class of two specific companies. Instead, as discussed briefly in the next and final section of this Opposition, the conditions that the Bureaus established in the Order rationally and reasonably attempt to promote facilities-based mobile voice and data competition by avoiding excessive concentration of licenses<sup>25</sup> and spectrum resources in the hands of the largest incumbent providers.

#### **IV. THE ORDER ESTABLISHES TRANSACTION-SPECIFIC CONDITIONS, AND DOES NOT ARBITRARILY OR CAPRICIOUSLY AFFECT THIRD PARTIES.**

Finally, the Order does not stray from establishing transaction-specific conditions, nor does it arbitrarily and capriciously impose conditions on the Applicants or any third-party. The Bureaus approved certain reasonable commitments designed to ensure that the Applicants would follow through on plans to build a new 4G mobile broadband network. These conditions promote entry of new facilities-based competitors rather than continued concentration of licenses, and of access to spectrum that is most useful for the provision of 3G and 4G wireless services, in the hands of a few gatekeepers. The conditions also promote deployment of new

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<sup>23</sup> Order at App. B, Attachment 2, ¶ 3.

<sup>24</sup> *See, e.g.*, AT&T Petition at 5.

<sup>25</sup> *See, e.g.*, 47 U.S.C. § 309(j)(3)(B).

service to currently unserved territories, including remote areas more easily reached and covered using MSS/ATC spectrum than using terrestrial-only assignments.

A recitation of all evidence showing the deleterious effects of concentration of spectrum licenses in the hands of a few powerful incumbents is beyond the scope of this Opposition.<sup>26</sup> PISC and others have submitted copious data and analyses on this point, but the Bureaus were not required in the Order to justify the adoption of the challenged conditions on the basis of industry-wide spectrum caps or similar measures. The AT&T Petition argues that the Commission “properly repealed spectrum caps many years ago,”<sup>27</sup> whereas several members of PISC have argued in other proceedings that the Commission should not hesitate to consider re-adoption of spectrum caps in light of developments since that repeal.<sup>28</sup> Whatever the proper determination may be with respect to spectrum caps more generally, PISC notes that with regard to the present Order, the Bureaus did not impose any spectrum cap or ultimate bar to use of the Applicants’ MSS spectrum by the largest incumbents.

The Order merely requires Commission approval for certain transactions and operations. As such, it establishes reasonable and routine prophylactic rules, and makes rational predictive judgments regarding the incentives for build-out in this emerging sector by a new facilities-based competitor using the licenses subject to the Application. Even if it were correct that competitive harm from the merger itself would be unlikely,<sup>29</sup> the harms that the merger conditions address

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<sup>26</sup> *See generally* Simon Wilkie, “Spectrum Auctions Are Not a Panacea,” Mar. 2007, at 20-31 (discussing evidence of warehousing by dominant carriers and incumbents that gain control of new spectrum).

<sup>27</sup> AT&T Petition at 7.

<sup>28</sup> *See, e.g., See, e.g.,* Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, the New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 25-26 (filed Sept. 30, 2009).

<sup>29</sup> *See* AT&T Petition at 2 (citing Order ¶¶ 65-66); *see also* AT&T Petition at 4-5.

would be quite possible and likely to arise if this spectrum were used not for the deployment of the promised new network, but instead only to increase the holdings of the largest two providers. The challenged conditions therefore properly address a harm clearly identified by the Bureaus, in a prudent and efficient fashion, because the conditions will only matter if SkyTerra fails to provide the necessary and desired competition by deploying its own systems.

### CONCLUSION

For the foregoing reasons, the members of the Public Interest Spectrum Coalition identified at the outset of this Joint Opposition respectfully request that the Bureaus deny the request for partial reconsideration in the Petitions filed by AT&T and Verizon Wireless.

Respectfully Submitted,



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April 12, 2010

## CERTIFICATE OF SERVICE

I, Matthew F. Wood, certify that on this 12th day of April, 2010, I caused to be served a true copy of the foregoing Joint Opposition by first class mail, postage pre-paid, and by electronic mail where indicated (\*), upon the following:

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