**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

**REPLY OF AT&T INC.**
**IN SUPPORT OF PETITION FOR RECONSIDERATION**

Pursuant to 47 C.F.R. § 1.106, AT&T Inc. ("AT&T") submits this reply in support of its petition for reconsideration of the *Bureau Order* in the above-captioned proceeding.[1]

The procedural and substantive failings of the Bureaus' adoption of conditions that arbitrarily penalize AT&T are so fundamental that the opponents of reconsideration – Sprint and the Public Interest Spectrum Coalition ("PISC") – do not attempt serious responses. Instead, they claim that, no matter how unlawful Conditions 1 and 3 may be, AT&T lacks standing to challenge them. According to Sprint and PISC, AT&T is not "adversely affected" by the order that singles it out, has no "right" to deal with SkyTerra, and cannot complain about Conditions that do not explicitly "name" AT&T. These arguments are frivolous: the *Bureau Order* places

[1] *In the Matter of SkyTerra Commc'ns, Inc., Transferor, and Harbinger Capital Partners Funds, Transferee*, IB Docket No. 08-184 (released Mar. 26, 2010) ("*Bureau Order*").

arbitrary limits on AT&T's ability to participate in secondary markets on equal footing, an adverse effect that courts have repeatedly held satisfies applicable standing requirements.

Given that the *Bureau Order* provides no explanation for the Conditions, and adduces no evidence to support them, Sprint and PISC also try to suggest what sort of order the Commission *could* have written. But the Conditions cannot be "saved" by "writing a better order." The assumptions underlying the Conditions, if they were to be articulated, would represent startling departures from longstanding Commission precedent. The oppositions make this quite clear in attempting to justify the Conditions on the basis that the wireless marketplace is an "oligopoly" and that larger carriers must, at all costs, be prevented from gaining access to more spectrum – findings that would represent a sea change in Commission policy. There is no possibility that the Commission could explain and support such findings in this transfer of control proceeding. Equally important, the conditions are incurably arbitrary because they place restrictions on AT&T and Verizon based on their nationwide revenues, a metric has no possible relevance to spectrum-related competition issues. Conditions 1 and 3 should be immediately rescinded.

## I. AT&T HAS STANDING TO CHALLENGE CONDITIONS 1 AND 3.

Sprint and PISC contend that AT&T is barred from complaining about conditions that – without notice, explanation or connection to this proceeding – raise new regulatory barriers to its secondary market participation. These arguments are baseless; many are so off the wall that they barely require an answer. For example, Sprint and PISC claim that AT&T has no standing because the conditions do not "identify AT&T by name."[2] If that were the law (and, of course, it is not), *all* agency action, short of formal bills of attainder, would be unreviewable. As Sprint and PISC concede, AT&T and Verizon *are* "currently the largest and second largest wireless

[2] Sprint at 4; *id.* at 15 (AT&T "is not even mentioned in the Order"); PISC at 8.

providers" under the *Bureau Order's* revenue-based definition and are thus the *only* terrestrial wireless carriers currently affected by the Conditions.[3]

Sprint's claim that AT&T does not meet the requirements of the Commission's reconsideration rule because it could have made its views known *before* the Bureaus acted – even though no public filing even hinted that the Bureaus might impose conditions affecting AT&T – is equally nonsensical.[4] Under Sprint's interpretation of Rule 1.106(b)(1), companies would either have to acquire powers of telepathy or participate in every Commission proceeding and raise every possible issue, whether related to the proceeding or not, just in case the proceeding took an unexpected turn – or otherwise lose their right to seek reconsideration.

Sprint and PISC fare no better in suggesting that AT&T does not satisfy the second prong of Rule 1.106(b)(1), because it is not "adversely affected by any action taken by" the Bureaus. This is so, they insist, because (i) AT&T has no "cognizable legal interest" or "property interest" in MSS spectrum or any future spectrum or wholesale arrangements with SkyTerra;[5] (ii) the Conditions do not absolutely prohibit such arrangements but "only" establish additional prior approval requirements;[6] (iii) "[t]he conditions only govern the conduct of the Applicants" and do not place AT&T at any risk of an enforcement action;[7] and (iv) the conditions are merely "voluntary" commitments by the Applicants, not agency "rules."[8] These arguments are trivial.

---

[3] Sprint at 3; PISC at 9.

[4] *See* Petition at 2 n.3 and 4.

[5] Sprint at 4-5; *see also id.* at 5 ("AT&T has no right to deal with the Applicants").

[6] Sprint at 11; PISC at 10-11.

[7] Sprint at 4, 6.

[8] Sprint at 14; PISC at 6.

The Rule 1.106 standard is less stringent than the Article III "injury" standard,[9] and the courts have repeatedly held that parties have a cognizable right to a "legally valid" spectrum procurement process and standing to challenge the lawfulness of agency action that denies it.[10] "The 'injury in fact' . . . is the denial of equal treatment from the imposition of the barrier, not the ultimate inability to obtain the benefit."[11] AT&T, no less than a disappointed bidder for a government contract, an unsuccessful bidder in a spectrum auction, or a company whose ability to grow internally may be impacted by ownership limits, has standing to challenge regulatory barriers to its participation in a category of transactions and need not "identif[y] any specific transaction it would have consummated but for" the challenged agency action.[12] The Conditions,

---

[9] Order on Reconsideration, *Airadigm Commc'ns, Inc.*, 21 FCC Rcd. 3893, ¶ 14 n.30 (2006) (Commission often "follows the principles of Article III standing"); Letter, *William B. Clay; Richard F. Swift, Esq.*, 23 FCC Rcd. 18034, 18036 n.21 (2008) ("Within the mandate of the Communications Act, the Commission may consider petitions from parties who might lack standing before a federal court"); Order on Reconsideration, *AT&T Corp.* v. *Business Telecom, Inc.*, 16 FCC Rcd. 21750, ¶ 7 (2001) (applying Article III test to resolve issue under Rule 1.106 and noting that to demonstrate standing under Article III, a party need only demonstrate: "(1) a personal injury 'in fact'; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, not merely speculative, that the requested relief will redress the injury").

[10] *See, e.g.*, *High Plains Wireless, L.P.* v. *FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002); *DIRECTV, Inc.* v. *FCC*, 110 F.3d 816, 829-30 (D.C. Cir. 1997) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit in order to establish standing"); *id.* at 829 ("DIRECTV's claim that the [] rule was an unlawful barrier to its participation in the auction . . . 'is obviously an injury both traceable to the alleged illegality in [the auction] and redressable by any remedy that eliminates the alleged illegality'") (quoting *Nat'l Maritime Union of Am., AFL-CIO* v. *Commander, Military Sealift Command*, 824 F.2d 1228, 1237-38 (D.C. Cir. 1987)).

[11] *Ne. Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993).

[12] *See, e.g.*, *Scheduled Airlines Traffic Offices, Inc.* v. *Dep't of Def.*, 87 F.3d 1356, 1358 (D.C Cir. 1996) ("[w]e have often found disappointed bidders for government contracts to have suffered sufficient injury for standing purposes . . . . [based upon] the injury to a bidder's 'right to a legally valid procurement process'"); *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1037 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537, 552 (D.C. Cir. 2002) (cable operator has standing to challenge ownership limit notwithstanding its failure to "identif[y] any specific

which subject AT&T to prior approval requirements in the Commission's "sole discretion" that apply to none of its competitors other than Verizon, plainly do erect new, special barriers to secondary market participation – indeed, that was the transparent intent of the Conditions.

Sprint nonetheless claims that AT&T is not adversely affected because the Conditions are nominally directed at the Applicants, and affect AT&T only "indirect[ly]."[13] Sprint is confused. The fact that the *Bureau Order* regulates AT&T only indirectly by aiming the enforcement sword at SkyTerra's throat does not change the fact that the Conditions adversely affect AT&T by making it more difficult for AT&T to consummate transactions with SkyTerra. Indeed, the threatened enforcement penalties are so severe (automatic termination of SkyTerra's authority) and the risk of unintended violations so high (how could SkyTerra predict whether wholesale arrangements with AT&T would cause it to run afoul of a 25 percent wholesale limit in any Economic Area when it cannot know in advance how much capacity its other customers (or AT&T) will use?), that SkyTerra is likely to be chilled from even attempting an arrangement with AT&T. It is no answer to suggest that those are "decisions wholly within [SkyTerra's] authority to make."[14] "[A]n agency does not have to be the direct actor in the injurious conduct;" rather, "indirect causation through [agency] authorization is sufficient to fulfill the causation requirement for Article III standing."[15] And decisions holding that the Commission does not exceed its *jurisdiction* when rules directed at carriers impact others over which it has no

---

transaction it would have consummated but for the . . . Rule"); *Comcast Corp.* v. *FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (allegation that rule "unduly restrict[s] its opportunity to grow internally and make economically efficient acquisitions" is sufficient to support standing to challenge rule).

[13] Sprint at 2-6.

[14] Sprint at 6.

[15] *Am. Cmty. Bankers* v. *FDIC*, 200 F.3d 822, 827 (D.C. Cir. 2000); *see also Consumer Fed'n of Am.* v. *FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) ("When an agency order permits a third-party to engage in conduct that allegedly injures a person, the person has satisfied the causation aspect of the standing analysis").

jurisdiction are wholly inapposite.[16] The issue is not whether the Commission has jurisdiction over AT&T, but whether the Conditions are arbitrary. In each of the decisions Sprint cites, the court recognized the standing of parties not subject to enforcement actions for violations of the rules at issue – but nonetheless adversely impacted – to raise APA challenges and required the Commission to justify its rules with record evidence and non-arbitrary reasoning.[17]

Sprint's argument that the conditions are merely "voluntary" commitments on the part of the Applicants and not "rules" adopted by the agency is particularly disingenuous. Even if one grants the fiction that Harbinger "voluntarily" sought out these restrictions on its ability to do business with AT&T and Verizon (and thus forever to forego potential customers and revenue), the *Bureau Order* adopts them as mandatory regulatory requirements,[18] the violation of which "shall render SkyTerra's authorizations null and void without any further action."[19]

## II. THE CONDITIONS ARE INCURABLY UNLAWFUL.

The *Bureau Order* cites no record evidence to support the Conditions, nor offers any explanation for its radical departures from Commission precedent. Sprint and PISC contend that the Commission can now salvage the order, but their suggestions dramatically confirm that the arbitrariness of the Conditions *cannot* be cured merely by writing "a better order."

---

[16] Sprint at 6-7 (citing *Int'l 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. 1999), and *Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Devs.*, 22 FCC Rcd. 20235 (2007), *application for review denied*, *Nat'l Cable & Telecomms. Ass'n* v. *FCC*, 567 F.3d 659 (D.C. Cir. 2009)).

[17] *See Cable & Wireless*, 166 F.3d at 1232 ("We next consider petitioners' claim that the Commission's settlement rate prescriptions violate the Administrative Procedure Act"); *Nat'l Cable & Telecomms. Ass'n*, 567 F.3d at 667.

[18] *See Bureau Order* ¶ 72 ("we are adopting Harbinger's commitments . . . as conditions to our approval"); *id.* ¶ 75 ("Ordering Clauses") (application for transfer of control is granted "as conditioned in this Memorandum Opinion and Order and Declaratory Ruling").

[19] *Id.* Appendix B, Attachment 2 at ¶¶ 8, 12.

Sprint suggests that the Commission could justify singling out AT&T and Verizon because the wireless marketplace is an "oligopoly" and the Conditions are necessary to prevent the "two largest competitors" from "restrict[ing] the competitiveness of other market participants."[20] Any such holding would represent a stark reversal of decades of precedent. The Commission has consistently held that the wireless marketplace is robustly competitive, and it has classified both AT&T and Verizon as nondominant carriers.[21] The Commission has also consistently rejected the sort of superficial "big is bad" arguments proffered by Sprint,[22] and has consistently held that competitiveness must be judged on the actual marketplace dynamics, all of which it has found to confirm that wireless is intensely competitive.[23] Decades of pro-competition policies cannot simply by thrown by the wayside; certainly, such a profound reversal of course would require a much more robust examination, record and explanation than the Commission could ever hope to create in this transfer of control proceeding.

It is also untenable to suggest that the Commission could justify the conditions on the theory that it is in the public interest to prevent AT&T from gaining access to additional spectrum, even through the mere use of *excess capacity* on SkyTerra's system. Any such holding, again, would contravene a decade of precedent. The Commission repealed spectrum caps years ago, and it has adopted policies to *encourage* secondary market transactions to maximize the spectrum use efficiency – reiterating these policies in the National Broadband

---

[20] Sprint at 10-11, 15-16.

[21] *See, e.g.*, Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, ¶¶ 1-2 (2009) ("*Thirteenth Report*"); Second Report, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, ¶¶ 16, 174 (1994).

[22] *See* Sprint at 10-11 & n.46.

[23] *See, e.g.*, *Thirteenth Report*, ¶¶ 5, 187 (2009).

Plan.[24] With the nation facing a spectrum crisis,[25] restrictions on SkyTerra's ability to use and profit from its MSS spectrum could only (1) increase the likelihood that SkyTerra's spectrum will continue to lie fallow, (2) create a disincentive to deploy the hypothesized terrestrial network in the first place, and (3) make it more difficult for AT&T and Verizon to relieve pressure on their own networks to meet the soaring demands of their wireless customers.

Sprint insists that the Commission has limited incumbents' access to spectrum in the past, but the orders it cites all involved rules of general applicability adopted in *rulemakings* more than a decade ago, in an era in which the Commission still maintained spectrum caps and wireless was less competitive.[26] To be sure, PISC has argued in other proceedings that the Commission should re-impose spectrum limitations, but, as PISC concedes, a "recitation of the evidence" on those issues is "beyond the scope of this Opposition"[27] – and hence beyond the scope of this transfer of control proceeding.

The Conditions are also incurably arbitrary because there is no connection between the nationwide revenues metric employed in the Conditions and *any* market-specific factors (such as relative spectrum holdings, market shares and concentration) in any given locality that might be relevant to any particular future spectrum-related arrangement between SkyTerra and any other carrier (whether AT&T or Sprint). Indeed, as of today, Clearwire (which has a substantial

---

[24] *National Broadband Plan* at 76-78 (emphasizing 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").

[25] Prepared Remarks of Chairman Julius Genachowski, America's Mobile Broadband Future, International CTIA Wireless I.T. & Entertainment, at 4 (Oct. 7, 2009) ("the biggest threat to the future of mobile America is the looming spectrum crisis"); Letter from David L. Lawson, AT&T, to Marlene H. Dortch, FCC, (April 14, 2010), Attachment (slides from a presentation by Ralph de la Vega, President of AT&T Mobility and the current Chairman of CTIA-The Wireless Association, documenting the soaring demand for mobile broadband services).

[26] Sprint at 11-12 & nn.47-50.

[27] PISC at 10.

arrangement with Sprint) actually holds more spectrum in many areas than either AT&T or Verizon. Focusing on AT&T and Verizon because of their national revenues is thus purely arbitrary,[28] and here again, the Commission has consistently rejected arguments that carriers should be singled out for restrictions on their ability to do business *solely* because they are "big."

Moreover, the conditions will inevitably (and arbitrarily) operate as an outright prohibition, not merely a mechanism for Commission review, because of the way in which they are constructed. Condition 3 prohibits combined AT&T and Verizon traffic from accounting for more than 25 percent of total bytes of data carried on SkyTerra's terrestrial network in any Economic Area.[29] Even apart from the administrative nightmare of tracking how many "bytes of data" each wholesale customer consumes, what if SkyTerra signs a wholesale deal with AT&T and then loses its largest customer – thus causing the AT&T/Verizon share in a single Economic Area to rise above 25 percent? The penalties are draconian: maximum forfeitures, followed by SkyTerra's authorizations being "rendered null and void without any further action required by the Commission."[30] SkyTerra could not rationally take the chance that a deal with AT&T or Verizon could lead to such severe penalties – even if it meant that its spectrum lay fallow. That is patently arbitrary and in direct conflict with the Commission's settled spectrum policies.

---

[28] *See, e.g.*, *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").

[29] The *Bureau Order* offers no explanation why an Economic Area would be a relevant geographic market for assessing wireless wholesale arrangements which the Commission generally does not review or approval at all.

[30] *See Bureau Order*, Appendix B, Attachment 2, ¶ 12; *see also id.* ("Each violation in an Economic Area shall be considered a separate act or failure to act and the forfeiture shall be calculated separately for each Economic Area").

The Commission should rescind Conditions 1 and 3 immediately. Any legitimate spectrum aggregation issues can be considered in an appropriate rulemaking proceeding on a full record and with careful consideration of the full implications of any policy changes. Persisting in trying to save the Conditions in this proceeding – and in the process, reversing years (and in some cases decades) of Commission policy through conditions that were originally adopted with no evidence, no due process, and no careful consideration or explanation – is a sure recipe for reversal and harm to the Commission's reputation.

## CONCLUSION

For the foregoing reasons, the Commission should immediately rescind Conditions 1 and 3 in Appendix B, Attachment 2 to the *Bureau Order*.

Respectfully Submitted,

/s/ D. Wayne Watts

D. Wayne Watts
Sr. Exec. Vice President & General Counsel
Paul K. Mancini
Gary L. Phillips
Michael P. Goggin
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-2055

*Its Attorneys*

April 19, 2010

## CERTIFICATE OF SERVICE

I, Brendan J. McMurrer, hereby certify that on this 19th day of April, 2010, I caused to be served a true copy of the foregoing Reply of AT&T Inc. In Support of Petition For Reconsideration upon the following by the method indicated:

Harbinger Capital Partners Funds
Attn: Jeffrey Kirshner
555 Madison Ave.
16th Floor
New York, NY 10022
*Via FedEx*

Kathryn Quinn
National Security Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
*Via FedEx*

Jeffrey S. Carlisle
(jeffrey.carlisle@skyterra.com)
SkyTerra Subsidiary, LLC
10802 Park Ridge Boulevard
Reston, VA 20191-4334
*Via FedEx and Email*

Henry Goldberg (general@gwg2.com)
Joseph A. Godles
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036-2413
*Via FedEx and Email*

Steven E. Zipperstein
(steve.zipperstein@verizonwireless.com)
John T. Scott
(john.scott@verizonwireless.com)
Verizon Wireless
1300 I Street, N.W., Suite 400 West
Washington, D.C. 20005
*Via FedEx and Email*

Bryan N. Tramont (btramont@wbklaw.com)
Adam D. Krinsky (akrinksky@wbklaw.com)
Russell P. Hanser (rhanswer@wbklaw.com)
Craig E. Gilmore (cgilmore@wbklaw.com)
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037
*Via FedEx and Email*

Bruce D. Jacobs
(bruce.jacobs@pillsburylaw.com)
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
*Via FedEx and Email*

Lawrence R. Krevor
Trey Hanbury
Sprint Nextel Corporation
900 7th Street, N.W.
Washington, DC 20001
*Via FedEx*

Matthew F. Wood (mwood@mediaaccess.org)
Media Access Project
1625 K Street, NW, Suite 1000
Washington, DC 20006
(202) 232-4300
*Via FedEx and Email*

/s/
Brendan J. McMurrer