Before the
Federal Communications Commission
Washington, DC 20554

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

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

REPLY TO OPPOSITIONS TO PETITION FOR PARTIAL RECONSIDERATION

Pursuant to Section 1.106(h) of the Commission's rules,[1] Verizon Wireless hereby replies to the oppositions of Sprint Nextel Corporation ("Sprint Nextel") and the Public Interest Spectrum Coalition ("PISC") (collectively, the "Opponents")[2] to Verizon Wireless's Petition for Partial Reconsideration of the Order in this proceeding.[3] The Oppositions fail to refute Verizon Wireless's showing that adoption of the conditions at issue – without any notice or comment, any record, or any reasoned basis – was both unlawful and contrary to open and transparent decisionmaking. Ultimately, these conditions irrationally discriminate among wireless

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[1] 47 C.F.R. § 1.106(h).

[2] *See* Opposition of Sprint Nextel Corporation to Petition for Partial Reconsideration of Verizon Wireless, IB Docket No. 08-184 *et al.* (Apr. 12, 2010) ("Sprint Nextel Opp."); Joint Opposition to Petition for Reconsideration of AT&T Inc. and to Petition for Partial Reconsideration of Verizon Wireless, IB Docket No. 08-184 *et al.* (Apr. 12, 2010) ("PISC Opp.") (collectively, the "Oppositions").

[3] *See* Verizon Wireless, Petition for Partial Reconsideration, IB Docket No. 08-184 *et al.* (Apr. 1, 2010) ("Petition"); *SkyTerra Communications, Inc. and Harbinger Capital Partners Funds*, IB Docket No. 08-184 *et al.*, DA 10-535 (rel. Mar. 26, 2010) ("Order").

competitors – including Sprint Nextel, which has access to more spectrum than either Verizon Wireless or AT&T and is partly owned by Harbinger. The Petition should be granted and the conditions rescinded.

DISCUSSION

I. THE CONDITIONS HARM VERIZON WIRELESS

Despite claims to the contrary, the conditions directly restrict the ability of Verizon Wireless and AT&T – but no other wireless service providers – to freely lease, resell, roam on or otherwise obtain access to SkyTerra spectrum without FCC approval. Just days after the National Broadband Plan sought to advance more expansive secondary markets and called for an additional 500 MHz of spectrum of wireless broadband spectrum, including 40 MHz of L-Band MSS spectrum,[4] the conditions limited Verizon Wireless' access to this spectrum – without any recognition that they directly conflict with the stated goals of that Plan.

By effectively binding Verizon Wireless to a time-consuming, standardless and uncertain approval process in its dealings with SkyTerra, the conditions place Verizon Wireless (and AT&T) at a competitive disadvantage vis-à-vis other wireless competitors. Prior to the Order, Verizon Wireless – like any other prospective business partner – could freely negotiate access to spectrum or carriage of traffic on SkyTerra's network without FCC approval, as long as the agreement did not result in a change in control of the spectrum. Sprint Nextel's claim that the conditions simply "reaffirm existing obligations"[5] is therefore wrong. Were that true, the conditions would be redundant, and Sprint Nextel should have no objection to their removal. In

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[4] *See* Connecting America: the National Broadband Plan at 83-84, 88 ("NBP"), *available at* http://www.broadband.gov/plan/.

[5] Sprint Nextel Opp. at 6 n.23.

fact, the conditions change the law in a way that is clearly adverse to Verizon Wireless.[6] It thus has standing to seek reconsideration, as PISC and ultimately Sprint Nextel appear to recognize.[7]

II. VERIZON WIRELESS'S DUE PROCESS RIGHTS WERE VIOLATED

Neither Sprint Nextel nor PISC repudiates the case law precedent cited in the Petition that a person cannot be deprived of legal rights in a proceeding to which he or she is not a party without notice and an opportunity to be heard.[8] Moreover, the Opponents fail to address or dispute case law holding that the Commission cannot use its adjudicatory powers to conduct an end-run around the notice and comment requirements of the APA by adopting rules without a rulemaking.[9] Here, the Bureaus adopted *de facto* rules – "statement[s] of general or particular

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[6] Contrary to PISC's assertion, PISC Opp. at 6-7, the Commission did not require prior approval of the Globalstar-Open Range spectrum lease. Rather, Globalstar notified the Commission of its leasing agreement after-the-fact, and according to the order the Commission merely "reviewed the spectrum lease notification and the publicly-available terms of the agreement." *Globalstar Licensee LLC*, 23 FCC Rcd 15975, 15985 ¶ 24 (2008). Such leasing arrangements do not require prior approval provided they do not result in a transfer of control. *Id.* at 15986 ¶ 25 n.66.

[7] *See* PISC Opp. at 5 ("The Petitioners, quite obviously, have a course to seek redress and reconsideration for any decision that may impact them ...."); Sprint Nextel Opp. at 6 n.24 (noting "the right to file a petition for reconsideration"). Sprint Nextel frivolously contends that Verizon Wireless failed to show "good reason" for not participating earlier in the proceeding. *See id.* at 4-5. The record of course lacked any discussion that would alert the company to the possibility that conditions affecting its rights as a non-party were under consideration until after they had already been adopted. *See* Petition at 4-5, 9. *Cf. Midwest Bell Communications*, 15 FCC Rcd 11005, 11008 ¶ 10 (2000); *Corban Telecommunications Inc.*, 17 FCC Rcd 23639, 23642 ¶ 7 (2002). The only alternative would be for Verizon Wireless to participate in every third-party transaction on the chance that a condition adversely affecting it might be adopted.

[8] Indeed, PISC concedes that Verizon Wireless holds due process rights here. *See* PISC Opp. at 5 ("The point is not that AT&T and Verizon Wireless have no due process rights in the instant proceeding ....").

[9] *See* Petition at 12-13. The Supreme Court has stated that "[t]he rule-making provisions of [the APA] ... were designed to assure fairness and mature consideration of rules of general application," and "*may not be avoided by the process of making rules in the course of adjudicatory proceedings*." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion) (emphasis added).

applicability and future effect designed to implement, interpret, or prescribe law or policy"[10] – without providing notice or an opportunity to comment to parties whose interests are affected.[11] Indeed, even PISC concedes that the Order "establishes reasonable and routine prophylactic *rules*."[12] These rules must therefore be rescinded.[13]

Further, Sprint Nextel's reliance on the *International Settlements* and *MDU Exclusivity* cases is misplaced.[14] Verizon Wireless's argument is not that the Commission is barred from actions that indirectly affect third parties, or that it somehow lacks jurisdiction over the company in specific matters, but rather that the agency may not take actions impinging on an entity's rights without affording it notice of the actions under consideration and an opportunity to be heard. The cases Sprint Nextel cites were both industry-wide rulemakings in which all potentially interested parties received constructive and/or actual notice.[15] In contrast, Verizon Wireless had no way to know its interests were at stake here until the Order was adopted. Moreover, Opponents' fallback contention that any due process concerns are ameliorated by the fact that Verizon Wireless can (and did) seek reconsideration in this case cannot save the conditions.[16]

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[10] 5 U.S.C. § 551(4).

[11] 47 U.S.C. § 553(b).

[12] PISC Opp. at 10 (emphasis added).

[13] *See, e.g., SBC v. FCC*, 414 F.3d 486, 495 (3d Cir. 2005) (a rule subject to the APA's procedural requirements, but adopted without them, is invalid and must be vacated).

[14] *See* Sprint Nextel Opp. at 7-8.

[15] *See International Settlement Rates, Notice of Proposed Rulemaking*, 12 FCC Rcd 6184 (1996); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units, Notice of Proposed Rulemaking*, 22 FCC Rcd 5935 (2007).

[16] *See, e.g., Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) ("That EPA allowed petitions for reconsideration is not an adequate substitute for an opportunity for notice and comment prior to promulgation.").

Finally, the Opponents do not make any attempt to reconcile the Bureaus' actions with the open and transparent decision-making that this Commission has emphasized and that is a hallmark of due process. Worse, PISC's support for the Bureaus' approach is flatly at odds with statements by its members and counsel repeatedly decrying the type of opaque dealings that led to the conditions here. For example, one week after the Order was issued, PISC member Free Press and PISC's counsel, the Media Access Project ("MAP"), submitted a letter to the Chairman observing that "[t]his Commission has repeatedly expressed its commitment to greater transparency and public outreach" and stating that "[w]e expect this same commitment to apply to the Commission's review of specific transactions ...."[17] These views are simply incompatible with PISC's support for the instant Order which resulted from negotiations that were inapposite to "greater transparency and public outreach."

III. OPPONENTS' COMPETITION POLICY ARGUMENTS ARE IRRELEVANT AND WRONG ON THE MERITS

In an attempt to justify the Order, Sprint Nextel and PISC advance a number of competition policy-related theories in support of the conditions. None of their *post-hoc* rationalizations appears in the Order or the record; as such, they cannot sustain the Order.[18]

Opponents' theories are also wrong. As the record in the *Mobile Wireless Competition Report* proceeding amply demonstrates, the industry is characterized by multi-dimensional and

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[17] *Ex Parte* Letter from Free Press *et al.*, MB Docket No. 10-56, at 2 (filed Apr. 7, 2010). Likewise, PISC member Public Knowledge has sharply criticized the Commission's "reli[ance] on *ex parte filings* (sometimes with little or no time for discussion) in developing its rulings." Gigi B. Sohn and Michael Weinberg, "An FCC for the Internet Age: Recommendations for Reforming the Federal Communications Commission" at 5 (Mar. 5, 2010), *available at* http://fcc-reform.org/f/fccref/fcc-reform-report-card-details-03052010_0.pdf.

[18] *See Federal Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) ("[A]n agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself.") (internal quotations and citations removed).

significant competition, and there is no reasoned basis on which to single out Verizon Wireless and AT&T for added regulatory burdens.[19] Sprint Nextel's reliance on decades-old decisions in the automotive carburetor kit and glass container markets to justify the conditions ignores current economic thought with regard to wireless services and other markets characterized by high fixed costs.[20] It simplistically asserts that the combined 67% share of wireless market revenues held by the two largest wireless firms reflects an "advanced oligopoly" that justifies the conditions.[21] However, "as any economist knows, a 'market share' is a relatively meaningless number unless accompanied by information concerning the cross-elasticities of demand and supply that the firms in the resulting market face."[22] The courts agree,[23] and the FCC "has long held that market share is not the be-all, end-all of competition."[24]

Exclusive focus on market share is especially inappropriate in markets with high fixed costs, such as those at issue here – as the Department of Justice recently reconfirmed.[25] Put simply, in such markets, "the best indicators of competition" are "prices, quantities, quality, customer experience, and new services," not "measures of the business success of particular

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[19] *See e.g.*, Comments of Verizon Wireless, WT Docket No. 09-66 at 17-93, Exh. A (filed Sept. 30, 2009); Reply Comments of Verizon Wireless, WT Docket No. 09-66 at iv, 2-8 (filed Oct. 22, 2009).

[20] *See* Sprint Nextel Opp. at 11 (*citing Echlin Mfg. Co.*, 105 F.T.C. 410 ¶ 199 (1985); *Owens-Illinois, Inc., et al.*, 115 F.T.C. 179, 269-70 (1992)).

[21] *Id.*

[22] 4 PHILIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION at 92 ¶ 914 (3d ed. 2009).

[23] *See, e.g.*, *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) (what matters is "not only [a provider's] share of the market, but also … the elasticities of supply and demand, which in turn are determined by the *availability* of competition") (emphasis in original).

[24] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001).

[25] *See, e.g.*, *Ex Parte* Submission of the United States Department of Justice, GN Docket No. 09-51 at 7 (filed Jan. 4, 2010) (noting that in the broadband market, "with differentiated products subject to large economies of scale (relative to the size of the market), [DOJ] does not expect to see a large number of suppliers").

competitors."[26] As Sprint Nextel has itself recently argued, these factors demonstrate a competitive wireless market: "[N]ot only have American consumers continued to realize additional price reductions (which, in turn, has further increased their demand for service), but they have also enjoyed new applications that were unimaginable only a few years ago."[27] To the extent the conditions extend only to Verizon Wireless and AT&T in response to a particular view of the wireless market, they are meritless.

The Bureaus' decision, and Sprint Nextel's effort to defend it, are particularly questionable given that Sprint Nextel – not Verizon Wireless, not AT&T – already has access to the largest amount of spectrum holdings of any mobile wireless service provider.[28] Sprint Nextel even asserts that it offers "the first and only 4G service from a national carrier in the United States," which makes its spectrum advantage even more pronounced.[29] Under these conditions, even if company-specific spectrum limitations could be justified – and they cannot be – such

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[26] DECLARATION OF MICHAEL D. TOPPER, ASSESSING THE COMPETITIVENESS OF MOBILE WIRELESS: AN ECONOMIC ANALYSIS 4 (Sept. 30, 2009), attached as Exhibit A to Comments of Verizon Wireless, WT Docket No. 09-66 at 5-6 (filed Sept. 30, 2009).

[27] Comments of Sprint Nextel, WT Docket No. 09-66 at 3 (filed Sept. 30, 2009).

[28] According to Sprint Nextel CEO Dan Hesse, Sprint Nextel's partnership with Clearwire "gives us the largest spectrum position of any company in America." Richard Martin, *Sprint Wins In WiMax Deal, But Risks Still Loom*, InformationWeek, May 7, 2008, *available at* http://www.informationweek.com/news/mobility/wifiwimax/showArticle.jhtml?articleID=207600572; *see also* Yankee Group 2009 Data, *cited in* Tricia Duryee, *Wireless Carriers Bicker Over Size of Spectrum Holdings*, mocoNews, Mar. 19, 2010 ("Other than Clearwire, Sprint is likely in the best position of all. It has partnered with Clearwire to roll-out its 4G network, meaning that in addition to its 69 MHz of holdings, it can tap into Clearwire's 150 MHz."), *available at* http://moconews.net/article/419-wireless-carriers-bicker-over-size-of-spectrum-holdings/.

[29] Sprint Nextel, News Release, *Ever Wonder "What Can You Do With 4G?"Find Out in New Marketing Campaign From Sprint*, Feb. 25, 2010, *available at* http://newsreleases.sprint.com/. Indeed, the Sprint Nextel-Clearwire transaction "was all about Sprint and the cablecos using Clearwire to more effectively compete with Verizon and AT&T, getting to 4G first, and doing so with partners that are already well established in all the key areas necessary for success for this new venture." Berge Ayvazian and Brian Dolan, *The New Clearwire: Renewed Relationship Between Clearwire, Sprint Xohm Brings Fresh Opportunities for WiMAX Buildout in U.S.* in WiMAX BUSINESS & TECHNOLOGY STRATEGIES at S3 (Aug. 4, 2008).

limits should, if anything, apply to Sprint Nextel itself. The Bureaus' action is particularly irrational given Harbinger is acquiring control of SkyTerra and already holds an interest in Sprint Nextel, since the only potential competitive harm the Order identified flowed from SkyTerra's cross-ownership interests with other entities.[30]

Sprint Nextel relies on two cases for the proposition that the FCC has followed the same course before, but each of those cases involved the adoption of competition and spectrum policies as part of notice and comment rulemakings.[31] PISC asserts that competition policy questions are "beyond the scope of this Opposition," but nonetheless attempts to defend the "predictive judgments" the Bureaus made on spectrum policy.[32]

Ultimately, as both Opponents unwittingly make clear, the instant debate – conducted via Oppositions to a Petition for Partial Reconsideration of a transaction and a Reply thereto – demonstrates precisely why the FCC should have proceeded, if at all, via rulemaking. As the Commission has previously found, "a rulemaking proceeding is generally, a better, fairer and more effective method of implementing a new industry-wide policy than is the ad hoc and potentially uneven application of conditions in isolated[] proceedings affecting or favoring a single party…."[33]

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[30] Order at ¶ 29 (noting Harbinger's "overlapping interests raise some competitive concerns").
[31] *See* Sprint Nextel Opp. at 12-13 (citing the PCS and LMDS rulemakings).
[32] PISC Opp. at 10-11.
[33] *Operation of NGSO FSS Systems*, 17 FCC Rcd 9614, 9699 ¶ 218 (2002); *see also National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 681-683 (D.C. Cir. 1973) (rulemaking approach is accorded judicial preference when an agency develops new policies) (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

IV. THE CONDITIONS ARE OTHERWISE UNLAWFUL

The Opponents cannot overcome the arbitrariness and capriciousness of the conditions,[34] or explain how they comport with Section 303(r)'s demand that conditions be "not inconsistent with law."[35] In fact, they cite to no justification in the Order or any record basis to explain how these conditions will assist in achieving the purported goals of the transaction – enhancing competition in mobile wireless broadband services, adding a new facilities-based broadband provider and expanding broadband coverage to underserved areas by ensuring that SkyTerra builds a terrestrial network and provides 4G mobile wireless broadband services.[36] Nor do they explain why the conditions restrict dealings with only the two largest terrestrial carriers. For these and additional reasons set forth in the Petition, the conditions are arbitrary and capricious, and therefore subject to reversal under the APA, and must be removed.

Likewise, to the extent SkyTerra – "a common carrier radio licensee"[37] – makes available a common carrier offering, the conditions impose unreasonably discriminatory requirements on its dealings with two potential customers, in violation of Section 202(a). Indeed, Sprint Nextel concedes the possibility that the conditions may have "the effect of requiring SkyTerra to engage in discriminatory conduct that might violate Section 202(a)."[38]

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[34] *See generally* Petition at 16-19.

[35] 47 U.S.C. § 303(r).

[36] *See* Order at ¶¶ 60-62, 70, 72.

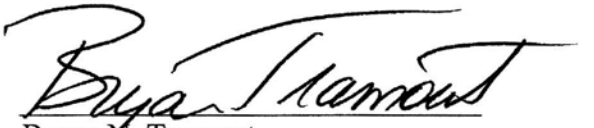
[37] Order at ¶ 16.

[38] *See* Sprint Nextel Opp. at 18. Contrary to Sprint Nextel's claims, the conditions cannot be an implicit exercise of forbearance authority under Section 10(a) of the Act, as the Act requires the Commission to make several *express* findings in support of any forbearance. *See* 47 U.S.C. § 160(a). Further, despite PISC's suggestion, PISC Opp. at 7, data roaming is an information service, not a telecommunications service, and thus is not subject to Title II regulation. *See, e.g.*, Reply Comments of Verizon Wireless, WT Docket No. 05-265 at 2-7 (filed Nov. 28, 2007).

CONCLUSION

Ultimately, the Bureaus' adoption of *de facto* rules via adjudication, impacting two non-parties who lacked notice and an opportunity to be heard, was unprecedented and unlawful, and should be rescinded. Should the Bureaus not do so immediately, Verizon Wireless reiterates that this matter should promptly be referred to the full Commission for expedited review.[39]

Respectfully submitted,



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April 19, 2010

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[39] *See* Petition at 21 (citing 47 C.F.R. §§ 0.241(a)(5), 0.261(b)(i), 0.331(a)(2)). Contrary to Sprint Nextel's contention, Verizon Wireless could not have filed an application for review. *See* Sprint Nextel Opp. at 19-20. The FCC's rules preclude the filing of an application for review where, as here, "it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c).

CERTIFICATE OF SERVICE

I, Robert G. Morse, hereby certify that on this 19th day of April, 2010, I caused to be served a true copy of the foregoing "Reply to Oppositions to Petition for Partial Reconsideration" by first class mail, postage pre-paid, and by email where indicated (*), upon the following:

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