

July 6, 2010

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Harbinger Capital Partners Funds/SkyTerra Communications, Inc.  
IB Docket No. 08-184; Written *Ex Parte* Presentation

Dear Ms. Dortch:

Verizon Wireless, by its counsel, submits this letter to (1) reiterate that the Commission should rescind the unlawful spectrum leasing and use conditions imposed in the *SkyTerra-Harbinger Order*<sup>1</sup> – an action that is now even more clearly justified given the Commission’s plan to consider new leasing and use rules for the Mobile Satellite Service (MSS)<sup>2</sup>; and (2) respond to Sprint Nextel’s latest effort to defend the *Order*’s imposition of spectrum leasing and use limits affecting only two wireless carriers – each of which has access to *less* spectrum than Sprint Nextel.

More than three months ago, Verizon Wireless filed a petition for partial reconsideration to rescind the two conditions in the *SkyTerra-Harbinger Order* that prohibit dealings between SkyTerra and Verizon Wireless (and AT&T) absent prior Commission approval.<sup>3</sup> The Commission should rescind the conditions for all the reasons expressed in our reconsideration petition. The Commission now has another reason to take that action – its plan to commence a proceeding to examine its rules governing SkyTerra and other MSS licensees. That proceeding – not the *SkyTerra-Harbinger Order* – is the proper place to take up policy issues related to the leasing and use of MSS spectrum. In light of the *MSS Spectrum Flexibility NPRM and NOI* to be

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<sup>1</sup> See *SkyTerra Communications, Inc. and Harbinger Capital Partners Funds*, IB Docket No. 08-184 *et al.*, DA 10-535 (IB/OET rel. Mar. 26, 2010) (“*SkyTerra-Harbinger Order*” or “*Order*”).

<sup>2</sup> See Comm Daily Notebook, Communications Daily, Jun. 28, 2010 (“The agenda for the July 15 FCC meeting includes ... a notice of inquiry and NPRM that moves the FCC further toward leasing 90 MHz of mobile satellite service (MSS) spectrum.... ‘The NPRM and NOI would [also] address whether or not some rules should be changed to allow terrestrial use.’ ... [and] ‘how to use spectrum to develop the deployment of mobile broadband ....’”).

<sup>3</sup> See *Verizon Wireless, Petition for Partial Reconsideration*, IB Docket No. 08-184 *et al.* at 6-7 (Apr. 1, 2010) (“Pet. for Recon.”).

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considered at the July 15, 2010 open meeting,<sup>4</sup> the Commission should remove the conditions and instead consider in this new proceeding whether to extend its terrestrial spectrum leasing rules to MSS providers or adopt use rules.<sup>5</sup>

Rescinding the conditions and contemporaneously seeking comment on leasing or use rules best serves the public interest. Foremost, it would eliminate unlawful conditions imposed without notice on two parties singled out for discriminatory treatment without legal or factual basis. It would also correct a decision at odds with this Commission's commitment to open and transparent decisionmaking. A rulemaking would produce a record to determine Commission policy going forward – a record that is nonexistent in the *SkyTerra-Harbinger* proceeding. Further, if the terrestrial leasing model were extended to MSS leases for terrestrial use, the FCC would either receive prior notice or provide prior approval of all such lease arrangements – including those between SkyTerra and third parties.<sup>6</sup> This would allow the FCC to examine MSS leasing industry-wide rather than following the arbitrary and capricious approach of restricting dealings with only two companies.

Given that the Commission will begin this rulemaking next week, there is no reason to maintain the unlawful conditions. They should be removed either as a separate order in the *SkyTerra-Harbinger* proceeding, or in conjunction with the *MSS Spectrum Flexibility NPRM and NOI*.

To the extent the Commission nonetheless believes that conditions on the transaction are still warranted, Verizon Wireless previously suggested an industry-wide approach – a proposal that Sprint Nextel vehemently opposes.<sup>7</sup> As an initial matter, the irony should not be lost that

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<sup>4</sup> See *News Release*, “FCC Announces Tentative Agenda for the July 15<sup>th</sup> Open Meeting” (rel. June 24, 2010).

<sup>5</sup> The terrestrial wireless spectrum leasing rules currently do not apply to MSS. See *Globalstar Licensee LLC*, 23 FCC Rcd 15975, 15986 ¶ 25 (2008) (acknowledging that “the Commission declined to make the specific spectrum leasing rules adopted for wireless terrestrial services ... applicable to satellite services”).

<sup>6</sup> The FCC's terrestrial spectrum lease rules require that parties to a spectrum manager lease notify the FCC at least 21 days in advance of commencing operations under a long-term lease or 10 days before commencing operations on a short-term lease of one year or less. 47 C.F.R. § 1.9020(e)(1)(ii). Leases that result in a *de facto* transfer of control require prior FCC approval. 47 C.F.R. §§ 1.9030(e), 1.9035(e). Verizon Wireless notes that longstanding Commission precedent provides for satellite capacity leasing that is distinct from the terrestrial wireless spectrum lease rules and those rules' review and/or approval process. See *Globalstar Licensee LLC*, 23 FCC Rcd at 15986 ¶ 25.

<sup>7</sup> See Letter to FCC from Sprint Nextel Corporation, IB Docket No. 08-184 (Jun. 8, 2010) (“Sprint June 8<sup>th</sup> Letter”); see also Letter to FCC from Sprint Nextel Corporation, IB Docket No. 08-184 (May 6, 2010) (“Sprint May 6<sup>th</sup> Letter”). Sprint Nextel claims a recent Verizon Wireless *ex parte* presentation advocated, for the first time, that to the extent the FCC believes that any conditions are warranted, they should apply industry-wide. See Sprint June 8<sup>th</sup> Letter at 1 (referencing Letter to FCC from Verizon Wireless, IB Docket No. 08-184 (May 17, 2010)). In fact, Verizon Wireless has always maintained that spectrum access conditions have not been justified, but if anything, they should apply to carriers like Sprint Nextel. See *Verizon Wireless, Reply to Oppositions to Petition for Partial Reconsideration*, IB Docket No. 08-184 *et al.* at 7-8 (Apr. 19, 2010) (“Reply”) (“[E]ven if company-specific

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Sprint Nextel earlier argued that Verizon Wireless lacks standing to challenge the conditions in question, but now seems to have no such concern when it comes to its own opposition to general conditions that might affect Sprint Nextel.<sup>8</sup> Further, Sprint Nextel now uses Verizon Wireless's very reasoning which it earlier opposed – that the conditions violate due process and are arbitrary and capricious – to argue that industry-wide conditions would make the *SkyTerra-Harbinger Order* even more vulnerable to legal challenge. In fact, an industry-wide condition would at a minimum address the arbitrary and discriminatory nature of the current conditions imposed only on two parties.<sup>9</sup>

Sprint Nextel's latest missive continues to use this reconsideration proceeding for competitive advantage by conjuring the existence of a competition-based rationale for the conditions when in fact the *SkyTerra-Harbinger Order* includes no such analysis. Rather, as Verizon Wireless has previously documented, it contains only a conclusory, unsupported statement that conditions restricting SkyTerra dealings with either of the two largest wireless carriers by revenue give the Bureaus "greater confidence" that SkyTerra will make good on its plans to build a 4G network and enhance competition in the mobile wireless broadband services.<sup>10</sup> There is no justification in the *Order*, nor any record basis, to explain how the conditions will assist in achieving these purported goals.<sup>11</sup> Nor does the *Order* explain why the conditions restrict dealings with only the two largest terrestrial carriers defined by revenue.

Tellingly, although Sprint Nextel implores the FCC to sustain the "competition-based rationale" rather than an industry-wide approach, it fails to identify what that justification is.<sup>12</sup> And, of course, there was no such rationale either in the *SkyTerra-Harbinger Order* or contained anywhere in the record of that proceeding. The Commission cannot cure this defect on reconsideration.<sup>13</sup>

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spectrum limitations could be justified – and they cannot be – such limits should, if anything, apply to Sprint Nextel itself."); *see also* Pet. for Recon. at 17 & n.40 ("[I]f the Bureaus' concern is spectrum aggregation and they wanted to ensure that the Commission maintained a spectrum review role, it makes no sense to single out only AT&T and Verizon Wireless and not other carriers with significant spectrum holdings, like Clearwire, T-Mobile and Sprint.").

<sup>8</sup> *See* Opposition of Sprint Nextel Corporation to Petition for Partial Reconsideration of Verizon Wireless, IB Docket No. 08-184 *et al.* at iii, 6 (Apr. 12, 2010) (asserting that "Verizon Wireless lacks standing to petition the Bureaus' action" and "no harm comes to Verizon Wireless under the Order," because "[t]he conditions only govern the conduct of [SkyTerra and Harbinger]").

<sup>9</sup> In an attempt to justify the conditions, Sprint Nextel has cited to the *XM-Sirius Order*. *See* Sprint May 6<sup>th</sup> Letter at 2-3 (citing *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.*, 23 FCC Rcd 12348, 12394-417 (2008) ("*XM-Sirius Order*"). That case is inapposite, however, because the conditions adopted in *XM-Sirius* did not, as here, arbitrarily target two non-parties to the proceeding without notice and an opportunity to comment.

<sup>10</sup> *SkyTerra-Harbinger Order* at ¶¶ 70-73.

<sup>11</sup> *See, e.g.*, Reply at 9.

<sup>12</sup> *See* Sprint June 8<sup>th</sup> Letter.

<sup>13</sup> *See, e.g., Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982); Reply at 4.

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Indeed, each filing Sprint Nextel makes only further underscores the illogic of the *SkyTerra-Harbinger Order*. The conditions restrict additional spectrum access or wholesale use by Verizon Wireless and AT&T, despite Sprint Nextel's own repeated public statements that it has access to *more* spectrum than any other wireless carrier, including Verizon Wireless and AT&T. According to Sprint Nextel CEO Dan Hesse, Sprint Nextel's partnership with Clearwire (in which Sprint Nextel is the majority shareholder) "gives us the largest spectrum position of any company in America."<sup>14</sup>

Sprint Nextel has emphasized its claimed spectrum advantage specifically with regard to 4G broadband wireless service which was, of course, the Bureau's focus in the *SkyTerra-Harbinger Order*. In a Sprint Nextel presentation on WiMAX, its chosen technology for 4G, the company argued that what mattered was not the particular frequency spectrum carriers had, but how much they held – asserting that its spectrum advantage is a significant competitive edge:

As WiMAX and LTE use very similar radio technologies, the bandwidth efficiency should be roughly equal and, in the end . . . , having more spectrum available is a far greater advantage than the frequency band it occupies. Initial LTE services are planned for the 700 MHz spectrum the FCC auctioned in 2008. In each major market, the 700 MHz A- and B-Blocks provide a total of 24 MHz and the C-Block (Open Device block) has a total of 22 MHz. *Sprint/Clearwire have an average of 120 MHz of 2.5 GHz BRS spectrum in most major markets.*<sup>15</sup>

These statements touting Sprint Nextel's "spectrum advantage" to investors and others directly contradict its own statements to this Commission defending the *SkyTerra-Harbinger Order*. Sprint Nextel argues here that restricting two of its competitors' access to spectrum promotes competition. If limiting access to spectrum is an appropriate tool to promote competition, then by definition Sprint Nextel's own "spectrum advantage" should trigger limits on its own spectrum holdings. Put another way, if Sprint's argument that conditions on spectrum access are valid pro-competitive restrictions, then the most obvious target for limiting access to spectrum should be Sprint Nextel itself.

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<sup>14</sup> 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 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/>.

<sup>15</sup> "Mobile WiMAX: The 4G Revolution Has Begun," Version 1.0 at 12 (emphasis in original), available at [http://www4.sprint.com/servlet/whitepapers/dbdownload/Mobile\\_WiMAX\\_The\\_4G\\_Revolution\\_Has\\_Begun\\_Jan2010.pdf?table=whp\\_item\\_file&blob=item\\_file&keyname=item\\_id&keyvalue=%274v994ya%27](http://www4.sprint.com/servlet/whitepapers/dbdownload/Mobile_WiMAX_The_4G_Revolution_Has_Begun_Jan2010.pdf?table=whp_item_file&blob=item_file&keyname=item_id&keyvalue=%274v994ya%27). A copy of this presentation is attached.

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The arbitrariness of limiting spectrum access to two Sprint Nextel competitors that have access to far *less* spectrum than Sprint Nextel is exacerbated by the fact that Sprint Nextel is also part owned by Harbinger. The cross-ownership of Harbinger with other market competitors was the one competitive concern the *SkyTerra-Harbinger Order* identified,<sup>16</sup> yet when it came to imposing conditions, Sprint Nextel was excused. Under these circumstances, it clearly was unlawful to impose the conditions only on Verizon Wireless and AT&T while excluding Sprint Nextel and others.<sup>17</sup>

While Verizon continues to oppose any conditions, at a minimum applying them in an even-handed manner industry-wide would be an improvement over conditions that discriminate against only two parties. The Commission could do so by adopting a condition akin to the terrestrial spectrum manager leasing rules. Such action – applied to all potential spectrum partners rather than just two – would ameliorate the arbitrary and capricious decisionmaking that characterized the imposition of the conditions in the first instance.<sup>18</sup> Of course, the better choice to address any spectrum-related issues is not via conditions in an adjudicatory proceeding (or the reconsideration phase thereof) but, as noted above, by considering leasing and use rules in the *MSS Spectrum Flexibility NPRM and NOI* proceeding.

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Accordingly, Verizon Wireless reiterates that the FCC should rescind the conditions and consider instead leasing or use rules in the *MSS Spectrum Flexibility NPRM and NOI* proceeding. At a minimum, however, if the Commission continues to believe that any spectrum access conditions on the transaction are warranted, the conditions should apply industry-wide in the manner discussed above.

Pursuant to Section 1.1206 of the Commission's rules, this *ex parte* presentation is being filed electronically in this proceeding. Should you have questions regarding this filing, please contact the undersigned.

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<sup>16</sup> *SkyTerra-Harbinger Order* at ¶ 29.

<sup>17</sup> Pet. for Recon. at 17-18.

<sup>18</sup> See Pet. for Recon. at 17-18; Reply at 1-2.

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Respectfully submitted,

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