

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554**

In the Matter of )  
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Fixed and Mobile Services in the Mobile )  
Satellite Service Bands at 1525-1559 MHz ) ET Docket No. 10-142  
and 1626.5-1660.5 MHz, 1610-1626.5 MHz )  
and 2483.5-2500 MHz, and 2000-2020 MHz )  
and 2180-2200 MHz )

**COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC**

Granite Telecommunications, LLC (“Granite”) respectfully submits these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry released on July 15, 2010, in the above-captioned docket. In this proceeding, the Commission seeks input on measures that will make additional spectrum available for new investment in mobile broadband services “while ensuring that the United States maintains robust mobile satellite service capabilities.” As described in more detail below, to achieve these laudable public interest goals, Granite urges the Commission to develop pro-competitive rules and policies for the Mobile Satellite Services (“MSS”) , including the provision of services using Ancillary Terrestrial Services spectrum, to ensure that dominant providers, particularly AT&T, cannot exploit their market power to undermine competition in the wireless, including MSS, market and is not able to use MSS spectrum as another means of undermining competition in the wireline market.

I. **MSS/ATC Rules Must Deter Anticompetitive Conduct by AT&T**

The overall goal of this proceeding is to promote additional investment in mobile broadband, "... one of America's most dynamic innovation and economic platforms,"<sup>1</sup> while retaining sufficient market-wide MSS capability. The Commission invites comment on ways to remove regulatory barriers to terrestrial use and to promote investments such as those recently made in SkyTerra Communications by Harbinger Capital Partners.<sup>2</sup> The NPRM/NOI specifically proposes to apply the secondary market rules applicable to all terrestrial wireless services to MSS.<sup>3</sup> With respect to 2 GHz spectrum, the NPRM/NOI proposes that if any MSS license is cancelled, the spectrum should be made available for terrestrial broadband use and not for use by an existing or new MSS entrant under the satellite rules.<sup>4</sup> The NOI also seeks comment on any other measures that should be adopted to increase the "value, utilization, innovation and investment" in MSS.<sup>5</sup>

These proposals are a part of the Commission's effort to re-examine our nation's spectrum policies and the terms under which such scarce resources may be used in order to promote nationwide broadband deployment, create incentives for greater innovation, ensure sound and reliable public safety communications, and achieve other priority public interest

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<sup>1</sup> In the Matter of Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz, and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, ET Docket No. 10-142, *Notice of Proposed Rulemaking and Notice of Inquiry*, FCC 10-126 at ¶ 1 (rel. Jul. 15, 2010) ("*NPRM/NOI*").

<sup>2</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, *Memorandum Opinion and Order and Declaratory Ruling*, 25 FCC Rcd 3059 (rel. Mar. 26, 2010) ("*Order*"), recon. pending.

<sup>3</sup> Granite is not commenting on the Commission's additional proposal to add co-primary fixed and mobile allocations to the 2 GHz band. See *NPRM/NOI* at ¶ 2.

<sup>4</sup> *NPRM/NOI* at ¶¶ 9, 14.

<sup>5</sup> *NPRM/NOI* at ¶ 31.

objectives.<sup>6</sup> Indeed, other than the TV spectrum, the 90 megahertz of spectrum allocated to MSS is the largest single source of spectrum in the Commission's plan to facilitate broadband deployment by designating 300 megahertz in the near term.<sup>7</sup> In that effort, the Commission has recognized that the complex and changing U. S. market for telecommunications services is now marked by an increasingly integrated wireline and wireless market for voice, broadband, and video services, and that the Commission's policies must reflect the entwined and overlapping nature of these markets and services.<sup>8</sup>

In this proceeding, the Commission has an important opportunity to facilitate a robust competitive mobile broadband market in the MSS bands while ensuring that MSS spectrum is not misused as a means of undermining competition in the wireline and wireless markets. The Commission can achieve this by setting appropriate pro-competitive ground rules for the use of these scarce spectrum resources. To these ends, the rules developed in this proceeding must reflect the fact that AT&T wields market power that has led to a long history of anticompetitive practices in the wireline market and which, as discussed in Section II below, continues to thwart a fully competitive wireline market.<sup>9</sup> To be clear, AT&T's market power today extends to wireline and wireless services. First, the Commission's recent annual examination of the state of the commercial mobile radio services ("CMRS") market reported that market concentration in the provision of mobile services over the past five years has led to AT&T and Verizon

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<sup>6</sup> See generally *Connecting America: The National Broadband Plan*, Chapter 5: Spectrum (2010) ("*National Broadband Plan*"); Statement of Chairman Genachowski Regarding FCC Proceeding to Spur Mobile Broadband Investment in MSS Bands (rel. July 15, 2010).

<sup>7</sup> See *National Broadband Plan*, Recommendation 5.8, p. 84.

<sup>8</sup> See, e.g., *National Broadband Plan*, Recommendation 5.16, p. 97.

<sup>9</sup> Although Verizon is the other dominant carrier that wields market power in the wireline and wireless services markets, Granite limits its comments herein to the need for regulatory limits that will curb AT&T's incentive and opportunity to engage in anticompetitive practices in the wireline market.

controlling 60 percent of both wireless subscribers and revenue (as of 2009).<sup>10</sup> Further, AT&T and Verizon possess the most 700 MHz, cellular, broadband PCS, and AWS spectrum,<sup>11</sup> affording them an array of frequencies with which to meet a wide variety of service needs.<sup>12</sup> Second, AT&T markets to businesses by bundling wireless services with DSL.<sup>13</sup> AT&T's ability to bundle these services with its wireline offering puts competitors at a distinct disadvantage. Because AT&T may provide DSL and wireless services free of the regulatory restrictions of Sections 251, 252 and 271<sup>14</sup> that apply to its voice services, it may offer these products at discounted rates which makes it impossible for competitive wireline carriers to compete with the total offering.

AT&T is currently using its bundled service offerings to disadvantage competitors in the wireline market, as discussed below in Section II. AT&T would also have an incentive and opportunity to exploit any MSS spectrum made available to it to leverage its total bundled offering making it even harder for competitive wireline carriers to compete. Granite urges the Commission to establish pro-competitive rules for the MSS market that will take into account AT&T's relentless efforts to undermine competition in the related wireline market and AT&T's unique market position in the wireless services market. If the Commission is to achieve its public interest objectives of promoting additional investment in mobile broadband and its overall goal of promoting competition in the wireline and wireless markets, and the attendant consumer benefits, the MSS rules developed in this proceeding must be carefully crafted to deter AT&T

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<sup>10</sup> Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 09-66, *Fourteenth Report*, FCC 10-81 at ¶¶ 4, 30 (rel. May 20, 2010) ("*CMRS Report*"). Further, the trend toward concentration is increasing. *Id.*

<sup>11</sup> *Id.* at ¶ 267.

<sup>12</sup> *Id.* at ¶ 283.

<sup>13</sup> For example, the following link reflects AT&T's offering of bundles of wireless, DSL, and voice services to small businesses in the former BellSouth region: [http://smallbusiness.bellsouth.com/bundles\\_services.html](http://smallbusiness.bellsouth.com/bundles_services.html). AT&T makes similar bundled offers to residential and small business customers throughout AT&T's 22-state wireline territory.

<sup>14</sup> 47 U.S.C. §§ 251, 252 and 271 (2010).

from using this spectrum as a means to undermine competition in the wireline and wireless markets.

## II. AT&T Continues to Undermine Competition in the Wireline Sector

AT&T has engaged in numerous anticompetitive practices when dealing with Granite and other carriers in the wireline market. Such practices are reflected in the Section 252 interconnection agreements that Granite recently negotiated with AT&T (the “ICAs”), and similar agreements that AT&T has negotiated with other carriers.<sup>15</sup> We provide a few examples below.

### A. AT&T’s refusal to allow competitive LECs to serve customers over fiber loops

AT&T has asserted that it is willing to allow competitive LECs to continue to serve customers via a wholesale arrangement, notwithstanding the Commission’s elimination of UNE-P service in the Triennial Review Order. As Edward Whitacre, former AT&T CEO, stated when the first wholesale agreement with a CLEC was announced, “the real winners are the customers of both companies, who will continue to benefit from choice in local service provider.”<sup>16</sup>

Unfortunately, a continued benefit from choice in local provider is no longer available for the ever-growing number of customers that AT&T serves over fiber loops, which pursuant to 47 C.F.R. § 51.318(a)(3)-(4). In the *Triennial Review Order* and subsequent reconsideration orders (collectively, the “*Triennial Review proceeding*”), the Commission held that on national basis ILECs are relieved from unbundling these network elements and providing them at TELRIC

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<sup>15</sup> For example, AT&T filed its California ICA agreement with Granite on July 14, 2010, and has filed numerous other ICA’s with Granite over the past 18 months.

<sup>16</sup> *SBC, Sage Telecom Reach Wholesale Telecom Services Agreement*, AT&T Press Release, available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21080> (last accessed Sep. 1, 2010).

rates.<sup>17</sup> These elements include fiber-to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements).<sup>18</sup> Despite extensive efforts by Granite to obtain the right to serve customers using fiber loops at rates higher than TELRIC rates, AT&T has adamantly refused to provide Granite with access to these customers on any terms. Because the service is not available where customers are served by facilities that are exclusively fiber and packet-based, business customers served by such facilities do not have competitive options that would otherwise be available to them if services were provisioned to them over analog facilities.

In cases where business customers have many locations, AT&T is able to impede competitors from serving such customers across an entire region by not offering a service to CLECs that is provisioned over fiber and is digital-based, *i.e.*, non-analog-based facilities. Many businesses have a strong preference to deal with a single provider within a region and thus, a carrier's inability to serve *all* of the business's location in the region may prevent it from selling *any* service to the business in the region. For example, if a business has 1,000 locations in AT&T's territory and AT&T serves 50 of those locations over fiber, a competitive carrier cannot offer service to those 50 locations. AT&T's practice combined with the customer's preference to have a single supplier for all 1,000 locations may, therefore, effectively preclude a competitive

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<sup>17</sup> While it is not Granite's intent to dispute the wisdom of the FCC's decision to end unbundling of fiber loops, some very cogent arguments for unbundling of fiber loops have been made in WC Docket 09-223.

<sup>18</sup>These elements are defined in the Commission's *Triennial Review Order*, *Triennial Review MDU Reconsideration Order*, and *Triennial Review FTTC Reconsideration Order*. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, *aff'd in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*); Order on Reconsideration, FCC 04-191 (rel. Aug. 9, 2004) (*Triennial Review MDU Reconsideration Order*); Order on Reconsideration, FCC 04-248 (rel. Oct. 18, 2004) (*Triennial Review FTTC Reconsideration Order*). The Commission has also forbore from enforcing the requirements that Bell Operating Companies (BOCs) provide access to these network elements pursuant to 47 U.S.C. § 271.

carrier from serving not only the 50 locations served by fiber, but also the 950 locations served by copper.

B. AT&T's Refusal to Offer DSL Service

AT&T has also adamantly refused to offer DSL service to end users receiving voice service from Granite using the same cable pair under a wholesale agreement by allowing Granite to resell the DSL service to the end user.<sup>19</sup> AT&T exerts an unfair competitive advantage in that it can offer retail customers combined voice and data service using a single line, but does not make such a service available to competitive carriers. By bundling the DSL service with voice services, AT&T has improperly enhanced its substantial market power in the voice market and has significantly impeded Granite's ability to sell voice service to business customers. Many businesses need a broadband connection for processing credit card transactions or to transmit data among the business's multiple locations and look for the cost savings that that is made possible by a combined voice and DSL product using a single line (referred to herein as "line split DSL"). AT&T's refusal to make its line split DSL offering available via a wholesale agreement not only stifles competition in the wireline voice market, but is also incompatible with the Commission's goal of promoting widespread availability of broadband at affordable prices.

Since AT&T voluntarily sells line split DSL service to its voice customers, it is fair to infer that AT&T earns a profit selling line split DSL service. It could earn that same profit by selling the same line split DSL service to end users that are served by Granite or another CLEC using a single AT&T loop. Further support for the inference that selling line split DSL is

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<sup>19</sup> AT&T does offer a wholesale stand alone dry loop product. This dry loop product requires a separate cable pair and new installation. Because the CLEC must purchase two lines, one for voice and one for data, this product often makes the combined offering (voice and broadband) uncompetitive from a price perspective when compared to AT&T's bundled voice and DSL offering, using a single line.

profitable is found in the fact that AT&T is the only RBOC to refuse to sell broadband service without voice service.<sup>20</sup>

The fact that it is foregoing this short-term profit from DSL suggests that AT&T expects to recoup this lost short term profit over the long run by driving competitors like Granite out of the voice business. The U.S. Court of Appeals for the District of Columbia Circuit recognized in *Covad Communications Co. v. Bell Atlantic Corp.* that allegations that an ILEC's refusal to sell DSL to end users who had orders pending with a CLEC stated a cause of action for monopolization under the antitrust laws.<sup>21</sup> To prevail, the CLEC must show that the ILEC's refusal to deal is "irrational" in the sense that the defendant sacrificed the opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival.<sup>22</sup> This is precisely the case here. The profits that AT&T makes in selling DSL to end users that purchase voice service from AT&T would not disappear simply because the end user purchases voice service from Granite. It is inescapable that AT&T's refusal to sell line split DSL sacrifices AT&T's short-term profits "because of the adverse impact the refusal would have on a rival": Granite. The Commission should not countenance these anticompetitive tactics that are designed to impede competition in the market for voice services, particularly voice services to business customers.

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<sup>20</sup> Indeed, Verizon offers DSL service to Granite and other wholesale customers to resell on a "White Label" basis. See <http://www.prnewswire.com/news-releases/verizon-global-wholesale-expands-high-speed-internet-portfolio-with-white-label-options-98921929.html>. Qwest and Embarq (now CenturyLink) similarly offer CLECs a combined voice and DSL product over a single line. <http://embarq.centurylink.com/Business/BundledServices/BusinessBundle>.

<sup>21</sup> *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 675 (D.C. Cir. 2005). Courts have recognized that an extensive FCC regulatory framework exists that itself provides oversight functions and remedies for anticompetitive behavior on the part of entities, such as AT&T, subject to FCC jurisdiction. See, e.g., *Verizon v. Trinko*, 540 U.S. 398, 412-413 (2004) (noting that "in certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm," as FCC enforcement powers include "an order that the deficiency be corrected, the imposition of penalties, or the suspension or revocation" of operating authority); *Broadcom v. Qualcomm*, 501 F.3d 297, 316-317 (3rd Cir. 2007). Thus, antitrust courts defer to the Commission in important respects in ensuring that consumers receive the benefits of competition that are contemplated by both the antitrust laws and the Communications Act.

<sup>22</sup> *Covad Communications*, 398 F.3d at 675 (quoting AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 773, at 199 (Supp. 2004)).

### III. AT&T Should Not Be Permitted to Participate in the MSS Market if It is Engaged in Anticompetitive Practices in the Wireline or Other Markets

The Commission has already recognized that certain conditions on the participation of AT&T in the MSS market are appropriate. In the order granting authority for the transfer of control of SkyTerra Subsidiary, LLC (“SkyTerra”) to Harbinger Capital Partners Fund,<sup>23</sup> the Commission adopted certain voluntary commitments as conditions to the Order’s grant of authority.<sup>24</sup> In particular, the Order requires AT&T to obtain Commission approval prior to entering into any agreement to make SkyTerra’s spectrum used by its terrestrial network available to an entity “that is the largest or second largest wireless provider.”<sup>25</sup> In addition, the applicants must 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.” In that case, the Commission’s Order reflected that AT&T and Verizon control nearly two-thirds of the mobile wireless market and that Commission scrutiny of the potential impact on competition -- at a minimum -- is warranted before these dominant carriers may control or significantly use SkyTerra’s terrestrial spectrum.

In light of AT&T’s ongoing practice of manipulating various service offerings and bundling to stymie competition and the continued incentive and ability of AT&T to undermine competition in the wireline and wireless markets, those narrow conditions, issued in the context of a specific transaction with particular parties, should be broadened as follows:

A. Commission review and approval should be required prior to entering into any agreement to make any terrestrial MSS spectrum available to AT&T through terrestrial spectrum

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<sup>23</sup> Order, note 2 *supra*.

<sup>24</sup> These conditions also pertain to Verizon.

<sup>25</sup> The “largest or second largest wireless provider” means the “largest or second largest provider of commercial mobile radio service (“CMRS”) and wireless broadband services (including the provider’s Affiliates) measured by aggregate nationwide revenue of the provider and its Affiliates for such services.” *Id.* According to this definition, only AT&T and Verizon are affected by this condition.

lease, traffic arrangements or otherwise. In this review, the Commission should provide an opportunity for public comment specifically on whether and to what extent the carrier's participation in the MSS market raises the risk of anticompetitive practices in the wireline market, taking into account current and recent practices in the wireline market, and/or the wireless market. The Commission should publish the terms of the proposed participation and give interested parties an opportunity to comment on the proposed participation and concerns regarding competition..

In reviewing such requests, the Commission should have broad discretion to investigate allegations of anticompetitive conduct in the wireline and wireless market, assess the likely risk that the use of the terrestrial MSS spectrum will lead to further anticompetitive conduct in those markets, and fashion conditions designed to curb the incentive and opportunity for the dominant carrier to undermine competition in those markets.

B. For the same competitive and public interest reasons, Granite urges the Commission to limit the eligibility of AT&T or any affiliate to acquire by lease or purchase *any* spectrum that may become available for terrestrial broadband use as a result of the cancellation, surrender or other disposition of MSS licenses.

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/s/  
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