

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Harbinger Capital Master Fund I, Ltd. and)	
Harbinger Capital Partners Special Situations)	File No. ISP-PDR-20080129-00002 and
Fund, L.P.)	ISP-AMD-20090417-00002
)	
Petition for Declaratory Ruling under)	
Section 310(b) of the Communications Act)	
of 1934, as Amended)	

ORDER AND DECLARATORY RULING

Adopted: August 24, 2009

Released: August 24, 2009

By the Acting Chief, International Bureau:

I. INTRODUCTION

1. In this *Order and Declaratory Ruling*, we consider a petition for declaratory ruling (“Petition”) filed by Harbinger Capital Partners Master Fund I, Ltd. (“Master Fund”) and Harbinger Capital Partners Special Situations Fund, L.P. (“Special Situations Fund”) (collectively, “Harbinger” or “Petitioners”) pursuant to section 310(b)(4) of the Communications Act of 1934, as amended (the “Communications Act”).¹ The Petitioners are shareholders of SkyTerra Communications, Inc. (“SkyTerra Communications”), the ultimate U.S. parent company of SkyTerra Subsidiary LLC (“SkyTerra”),² a Commission licensee. Petitioners request a declaratory ruling that would authorize their levels of indirect foreign ownership of SkyTerra in excess of the 25 percent benchmark under section

¹ 47 U.S.C. § 310(b)(4). SkyTerra Subsidiary LLC, Petition for Declaratory Ruling Pursuant to Section 310(b) of the Communications Act of 1934, as Amended, File No. ISP-PDR-20080129-00002 (dated Jan. 29, 2008) (“Petition”); Letter from Henry Goldberg and Joseph A. Godles, Attorneys for the Harbinger Funds, to Marlene H. Dortch, Secretary, FCC (dated Mar. 31, 2008); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated June 30, 2008) (“June 30, 2008 Letter”); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Aug. 7, 2008); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Nov. 7, 2008); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Jan. 5, 2009); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Mar. 4, 2009) (“March 4, 2009 Letter”); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Mar. 10, 2009) (“March 10, 2009 Escrow Letter”); Letter from Joseph A. Godles, Counsel to Harbinger, to Marlene H. Dortch, Secretary, FCC (dated Mar. 31, 2009) (“March 31, 2009 Letter”); Harbinger Capital Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P., Petition for Declaratory Ruling under Section 310(b) of the Communications Act of 1934, as Amended, File No. ISP-AMD-20090417-00002 (dated Apr. 16, 2009) (“April 2009 Amendment”).

² SkyTerra was formerly known as Mobile Satellite Ventures Subsidiary LLC. See Letter from Jennifer Manner, Vice President, Regulatory Affairs, SkyTerra, to Marlene H. Dortch, Secretary, FCC (dated Dec. 9, 2008); Letter from Jennifer Manner, Vice President, Regulatory Affairs, SkyTerra, to Marlene H. Dortch, Secretary, FCC (dated Dec. 15, 2008) (noting that Mobile Satellite Ventures LP and Mobile Satellite Ventures GP Inc. are now called SkyTerra LP and SkyTerra GP Inc., respectively). To avoid confusion, we use the current corporate names of the SkyTerra entities in this *Order and Declaratory Ruling*.

310(b)(4) of the Communications Act on a permanent basis³ (up to 62% equity and 49.99% voting interests in SkyTerra Communications (and indirectly in SkyTerra)).⁴ Petitioners also request that the declaratory ruling permit SkyTerra to have an additional 25 percent allowance for indirect equity and voting interests from foreign individuals and entities without seeking further Commission approval under section 310(b)(4) of the Communications Act subject to standard conditions.⁵

2. As discussed below, we find that the public interest would not be served by denying Harbinger's request for permanent authority to acquire up to 62 percent equity and 49.99 percent voting interests in SkyTerra Communications (and indirectly in SkyTerra). We decline to grant the request for an additional 25 percent allowance for SkyTerra because the Commission previously issued SkyTerra such an allowance in the *2008 MSV Order*.⁶ We therefore grant the Petition, subject to the limitations contained in this *Order and Declaratory Ruling*.

II. BACKGROUND

3. *SkyTerra*. SkyTerra is a Delaware limited liability company that holds Commission licenses and authorizations.⁷ It is a wholly-owned subsidiary of SkyTerra LP, a Delaware limited partnership. SkyTerra LP's general partner, SkyTerra GP Inc., a Delaware corporation, holds all of the voting interests and no equity interests in SkyTerra LP. SkyTerra Communications holds 100 percent of the equity interests in SkyTerra LP.⁸ Shares of SkyTerra Communications, a publicly-traded Delaware corporation, are held as follows: (1) Master Fund (18.51% equity and 29.87% voting); (2) Special Situations Fund (16.40% equity and 16.09% voting); (3) Harbinger Capital Partners Fund I, L.P. ("Partners Fund") (14.18% equity and 2.08%); (4) Other Shareholders (41.73% equity and 47.70% voting); (5) Apollo Funds shares held in escrow with Akin Gump Strauss Hauer & Feld LLP ("Akin

³ The precise levels of foreign ownership in SkyTerra Communications for which Petitioners seek approval are specified in the Petition, as amended by the April 2009 Amendment. See *supra* n.1. As noted in ¶ 9, *infra*, on August 22, 2008, Petitioners filed applications to transfer control of SkyTerra from SkyTerra Communications to Harbinger ("SkyTerra Transfer of Control Application") and applications to transfer control of Inmarsat Hawaii Inc. and Inmarsat, Inc. from the shareholders of Inmarsat plc to Harbinger. On March 27, 2009, Harbinger and SkyTerra Communications submitted a revised narrative pleading for these applications that contains the most current ownership information for Harbinger. See SkyTerra Communications, Inc. Transferor, Harbinger Capital Partners Funds, Transferee, Applications for Authority to Transfer Control of SkyTerra Subsidiary LLC, Narrative (dated Mar. 27, 2009) ("SkyTerra Narrative"). Our analysis in this *Order and Declaratory Ruling* is based on the ownership information contained in the Petition, the letters supplementing the Petition, the April 2009 Amendment, and the SkyTerra Narrative, as supplemented on August 7, 2009. These filings may be retrieved in IBFS under File Nos. ISP-PDR-20080129-00002, ISP-AMD-20090417-00002, and ISP-PDR-20080822-00016. All citations in this *Order and Declaratory Ruling* to the SkyTerra Narrative, Attachment B at Annexes 1-3 and 7 refer to the updated Annexes filed on August 7, 2009.

⁴ On March 7, 2008, the Commission granted the Petitioners authority to hold on an interim basis up to 49.99% equity and voting interests in SkyTerra Communications pending Commission action on the instant Petition. See *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications, Inc., Petition for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended*, File No. ISP-PDR-20070314-00004, Declaratory Ruling, FCC 08-77, 23 FCC Rcd 4436, 4444, ¶ 18 (2008) ("*2008 MSV Order*"); see *infra* n.28.

⁵ See Petition at 2.

⁶ See *infra* ¶ 21. See also *2008 MSV Order*, 23 FCC Rcd at 4443, ¶ 16.

⁷ See SkyTerra Narrative at 4 and Attachment A (List of Licenses).

⁸ See SkyTerra Narrative, Attachment B at Annex 6.

Gump”) as escrow agent⁹ (0.41% equity and 0.91% voting); and (6) Other shares held in escrow with Wells Fargo Bank, N.A. (“Wells Fargo”), as escrow agent¹⁰ (8.77% equity and 3.35% voting). According to Petitioners, and as described below, Philip A. Falcone, a U.S. citizen, has ultimate control of Harbinger.¹¹

4. *The Harbinger Master Fund.* The Master Fund is a Cayman Islands exempted company. The majority of the Master Fund’s shares (approximately 84.03% of its equity and voting interests) are held by Harbinger Capital Partners Offshore Fund I, Ltd. (the “Offshore Feeder Fund”) and Cayman Islands entities co-owned by the Offshore Feeder Fund and certain “Redeemed Investors.”¹² The Master Fund and the Offshore Feeder Fund have delegated broad investment management authority to Harbinger Capital Partners, LLC (the “Offshore Manager”), a Delaware limited liability company that is ultimately controlled by Philip A. Falcone (“Mr. Falcone”), a U.S. citizen.¹³ Most of the remaining shares of the Master Fund (approximately 15.68% of its equity and voting interests) are held by the Partners Fund, a Delaware limited partnership that is controlled by Mr. Falcone,¹⁴ and Delaware entities co-owned by the Partners Fund and certain “Redeemed Investors.”¹⁵ An additional 0.28 percent equity and voting interest is held, as of May 31, 2009, by one of two funds created to facilitate new investment in the Master Fund.¹⁶ According to Petitioners, all of the direct and indirect equity and voting interests in the Master Fund are held by citizens of, or entities that have their principal places of business in, the United States and other World Trade Organization (“WTO”) signatories, except for: (1) seven investment funds from

⁹ See March 4, 2009 Letter (identifying the equity and voting interests associated with shares held in escrow pending Commission action on the SkyTerra Transfer of Control Application). At the request of Commission staff, Harbinger submitted on March 10, 2009, the escrow agreements executed in connection with escrowed shares described above. See March 10, 2009 Escrow Letter (attaching the Akin Gump Escrow Agreement (dated April 9, 2008) and the Wells Fargo Escrow Agreement (dated November 7, 2008), as amended by Amendment No. 1 (dated January 27, 2009)); see also April 2009 Amendment (attaching Amendment No. 2 to the Wells Fargo Agreement (dated April 15, 2009)).

¹⁰ *Id.*

¹¹ SkyTerra Narrative, Attachment B at 6. See also Appendices A and B of this *Order and Declaratory Ruling* (depicting the ownership structure of the Master Fund and the Special Situations Fund as set forth in Annex 3 of Attachment B of the SkyTerra Narrative.).

¹² The Cayman Islands entities are Harbinger Class L Holdings (Cayman), Ltd. and Harbinger Class PE Holdings (Cayman), Ltd. See SkyTerra Narrative, Attachment B, Annex 3 at 1.

¹³ SkyTerra Narrative, Attachment B at 6. Mr. Falcone holds a 50% voting interest in the Offshore Manager and is the sole member of Harbinger Holdings, LLC, a Delaware limited liability company which holds the remaining 50% voting interest in Offshore Manager. See *id.*, Annex 3 at 1.

¹⁴ SkyTerra Narrative, Attachment B, Annex 3 at 1. The Partners Fund’s general partner is Harbinger Capital Partners GP, LLC, a Delaware limited liability company. The Managing Member of Harbinger Capital Partners GP, LLC is Harbinger Holdings LLC, whose sole member is Mr. Falcone. Harbinger Holdings, LLC and Mr. Falcone each holds a 50% voting interest in Harbinger Capital Partners GP, LLC. *Id.* As detailed in paragraph 6 *infra*, the Partners Fund also holds shares of SkyTerra Communications directly (14.18% equity and 2.08% voting interests).

¹⁵ The Delaware entities are Harbinger Class L Holdings (U.S.), LLC and Harbinger Class PE Holdings (U.S.), Trust. See SkyTerra Narrative, Attachment B, Annex 3 at 1.

¹⁶ The two funds established to hold new investment in the Master Fund are Harbinger Capital Partners Offshore Fund II, Ltd. (which holds the 0.28% interest in the Master Fund through its wholly-owned subsidiary, Harbinger Capital Partners Intermediate Fund II, Ltd., both of which are Cayman Islands entities) and Harbinger Capital Partners Fund II, L.P. (a Delaware limited partnership). See SkyTerra Narrative, Attachment B, Annex 3 at 1 & 3 n.9.

the Bahamas that hold in the aggregate a 0.50 percent interest in the Offshore Feeder Fund; and (2) five investment funds from the Bahamas that collectively have a 0.22 percent interest in a Cayman entity that is co-owned by the Offshore Feeder Fund and certain “Redeemed Investors” and a 0.18 percent interest in a Delaware entity that is co-owned by the Partners Fund and certain “Redeemed Investors.”¹⁷

5. *The Harbinger Special Situations Fund.* The Special Situations Fund is a Delaware limited partnership whose general partner, Harbinger Capital Partners Special Situations GP, LLC (“Special Fund GP”), is a Delaware limited liability company. Special Fund GP holds a 9.3 percent equity interest in, and has management control over, the Special Situations Fund, which is ultimately controlled by Mr. Falcone.¹⁸ The majority of the limited partnership interests in the Special Situations Fund (62.26%) are held by Harbinger Capital Partners Special Situations Offshore Fund, L.P. (“Special Offshore Fund”), a Cayman Islands limited partnership.¹⁹ Harbinger Capital Partners SSF CFF, Ltd. (“Harbinger Capital SSF”), a Cayman Islands Exempted Company, holds a 1.62 percent limited partnership interest in the Special Situations Fund.²⁰ According to information provided by the Petitioners, all of the equity investors in the Special Offshore Fund²¹ and in Harbinger Capital SSF²² are

¹⁷ SkyTerra Narrative, Attachment B at 5; *see also id.*, Annex 3 at 1 & 2 n.5. According to Petitioners, the Offshore Feeder Fund’s investors consist of: (1) individuals that are citizens of the United States (0.08%); (2) individuals that are citizens of Canada, China, Cayman Islands, Liechtenstein, and Switzerland (0.97%); (3) banks/insurance companies/pension plans and foundations/endowments organized in the United States and controlled by U.S. citizens (6.73%); (4) banks/insurance companies/pension plans and foundations/endowments controlled by citizens of, or organized in, Bermuda, Canada, Cayman Islands, Channel Islands, France, Luxembourg, Norway, Sweden, Switzerland, The Netherlands and the United Kingdom (15.51%); (5) other investors that are organized in the United States and have their principal place of business in the United States (4.45%); and (6) other investors that are organized in a foreign country or have their principal place of business in a foreign country (72.26%) (United Arab Emirates, Australia, Bahrain, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, Channel Islands, Chile, France, Italy, Ireland, Japan, Luxembourg, Netherlands Antilles, Norway, Panama, Singapore, Spain, Switzerland, The Bahamas, The Netherlands, and the United Kingdom). *See id.*, Annex 1 at 2. The Petition classifies the Partners Fund investors as consisting of: (1) individuals that are citizens of the United States (10.40%); (2) banks/insurance companies/pension plans and foundations/endowments that are organized in the United States and controlled by U.S. citizens (11.70%); and (3) other investors that are organized in the United States and have their principal place of business in the United States (77.90%). *See id.*, Annex 1 at 1. In addition, as of May 31, 2009, investment funds from France, Ireland, and Switzerland held a collective interest of 0.28% in the Master Fund through Harbinger Capital Partners Offshore Fund II, Ltd. *See id.*, Annex 1 at 11, Annex 3 at 1, & Annex 7.

¹⁸ SkyTerra Narrative, Attachment B at 5. Special Fund GP is controlled by two of its members, each of which has 50% voting interest: Phillip A. Falcone and Harbinger Holdings, LLC, a Delaware limited liability company that is ultimately controlled by Mr. Falcone. *Id.*, Annex 3 at 4. Petitioners state that Special Fund GP’s equity investors are all U.S. citizens. *Id.*

¹⁹ The Special Offshore Fund is ultimately controlled by Phillip A. Falcone through Harbinger Holdings, LLC, a Delaware limited liability company. SkyTerra Narrative, Attachment B, Annex 3 at 4.

²⁰ SkyTerra Narrative, Attachment B, at 6; *see id.*, Annex 3 at 4.

²¹ SkyTerra Narrative, Attachment B at 6. The Special Offshore Fund’s investors consist of: (1) individuals that are citizens of the United States (0.13%); (2) banks, insurance companies, pension plans and foundations/endowments organized in the United States and controlled by U.S. citizens (9.38%); (3) banks, insurance companies, pension plans and foundations/endowments controlled by foreign citizens or organized in foreign countries (22.07%) (Bermuda, British Virgin Islands, Cayman Islands, Finland, Luxembourg, Switzerland, and The Netherlands); (4) other investors that are organized in the United States and have their principal place of business in the United States (2.21%); and (5) other investors that are organized in a foreign country or have their principal place of business in a foreign country (66.20%) (British Virgin Islands, Channel Islands, Canada, Cayman Islands, Germany, Guernsey, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands Antilles, Norway, Panama, Switzerland, and The Netherlands). *See id.*, Annex 1 at 4.

citizens of, or entities that have their principal places of business in, the United States and other WTO Member countries. The Petitioners represent that the remaining limited partnership interests in the Special Situations Fund (26.82%) are widely dispersed and properly ascribed to U.S. investors.²³

6. *The Harbinger Partners Fund.* The Partners Fund is a Delaware limited partnership whose general partner is Harbinger Capital Partners GP, LLC, a Delaware limited liability company that is controlled by Mr. Falcone.²⁴ The Partners Fund holds directly 14.18 percent and 2.08 percent of SkyTerra Communications' equity and voting interests, respectively,²⁵ and as noted above, it – along with the Delaware entities it co-owns with certain “Redeemed Investors” – holds approximately 15.68 percent of the Master Fund.²⁶ According to information provided by Petitioners, all of the equity investors in the Partners Fund are citizens of, or entities that have their principal places of business in, the United States.²⁷

7. *Harbinger's Petition.* In January 2008, Harbinger filed the instant Petition requesting permanent authority under section 310(b)(4) of the Communications Act to hold up to 49.99 percent equity and voting interests in SkyTerra Communications. This request for permanent authority was similar to Harbinger's earlier request for interim authority that the Commission granted Harbinger in the *2008 MSV Order* (up to 49.99% equity and voting interests in SkyTerra Communications).²⁸ Subsequently, on April 17, 2009, Harbinger amended its request to seek approval to hold up to 62 percent equity and 49.99 voting interests in SkyTerra Communications (“April 2009 Amendment”).²⁹ Harbinger also requests that the Commission allow SkyTerra to have up to and including an additional aggregate 25 percent indirect equity and/or voting interests from foreign individuals or entities without seeking further

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²² SkyTerra Narrative, Attachment B, Annex 1 at 5. Harbinger Capital SSF's investors consists of: (1) banks, insurance companies, pension plans and foundations/endowments controlled by foreign citizens or organized in foreign countries (21.36%) (Cayman Islands); (2) other investors that are organized in the United States and have their principal place of business in the United States (34.82%); and (3) other investors that are organized in a foreign country or have their principal place of business in a foreign country (43.83%) (Cayman Islands). *See id.*, Annex 1 at 5.

²³ SkyTerra Narrative, Attachment B, Annex 3 at 4.

²⁴ *See supra* n.14.

²⁵ *See supra* ¶ 3.

²⁶ *See supra* ¶ 4.

²⁷ The Petition classifies the Partners Fund investors as consisting of: (1) individuals that are citizens of the United States (10.40%); (2) banks/insurance companies/pension plans and foundations/endowments that are organized in the United States and controlled by U.S. citizens (11.70%); and (3) other investors that are organized in the United States and have their principal place of business in the United States (77.90%). *See* SkyTerra Narrative, Attachment B, Annex 1 at 1.

²⁸ *See* Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P., Amended Petition for Expedited Action for Declaratory Ruling under Section 310(b) of the Communications Act, as amended, File No. ISP-PDR-20080111-00001 (filed Jan. 11, 2008 and amended Jan. 17, 2008) (“Interim Petition”) (requesting interim authority to hold no more than 49.99 equity and voting interests of SkyTerra Communications). *See* Interim Petition at 7. In 2008, the Commission granted Harbinger's Interim Petition under section 310(b)(4) of the Communications Act to increase its indirect ownership in SkyTerra through additional purchases of SkyTerra Communications shares, not to exceed a non-controlling (*de jure* or *de facto*) 49.99% equity interest and 49.99% voting interest, subject to and without prejudice to any action the Commission may take on this Petition (*i.e.*, interim until the Commission acts on the instant Petition). *See 2008 MSV Order*, 23 FCC Rcd at 4444, ¶ 18.

²⁹ *See* April 2009 Amendment at 2-8.

Commission approval under section 310(b)(4), subject to standard conditions.³⁰ In support of its request, Harbinger notes that the Commission has adopted an open entry standard for investors from WTO Member countries.³¹ In addition, Harbinger states that because the Master Fund is formed in the Cayman Islands and because almost all of Harbinger's foreign investors are from WTO Member countries, grant of the subject Petition and approval of the indirect foreign ownership of SkyTerra by Harbinger should not raise competitive concerns.³²

8. The International Bureau placed the Petition and the April 2009 Amendment on public notice on March 4, 2008 and May 4, 2009, respectively. No oppositions or comments on either the Petition or the April 2009 Amendment were received.³³

9. *Related Matters.* On August 22, 2008, Harbinger and SkyTerra Communications filed a group of applications seeking Commission approval for the transfer of control of (1) SkyTerra from SkyTerra Communications to Harbinger ("SkyTerra Transfer of Control Application") and (2) Inmarsat Hawaii Inc. and Inmarsat, Inc. from the shareholders of Inmarsat plc to Harbinger ("Inmarsat Transfer of Control Application").³⁴ In connection with the SkyTerra Transfer of Control Application, Harbinger and SkyTerra Communications also request a foreign ownership ruling under section 310(b)(4) of the Communications Act that would allow Harbinger and any commonly controlled funds to own, directly or indirectly, up to 100 percent of the issued and outstanding stock of SkyTerra.³⁵ We note that grant of the instant Petition is without prejudice to any action the Commission may take on the SkyTerra Transfer of Control Application and the Inmarsat Transfer of Control Application.

III. DISCUSSION

10. After reviewing the Harbinger Petition pursuant to our policies under section 310(b)(4) of the Communications Act and based on the record before us, we conclude that it would not serve the public interest to deny the Petition based upon the foreign equity and voting interests held indirectly in SkyTerra by and through Harbinger. We therefore grant the Petition and authorize Harbinger to hold on a permanent basis up to 62 percent equity and 49.99 percent voting interests in SkyTerra Communications (and indirectly in SkyTerra), subject to the limitations contained in this *Order and Declaratory Ruling*.

A. Legal Standard for Foreign Ownership of Radio Licensees

11. We review the foreign ownership of Harbinger under section 310(b)(4) of the Communications Act and the Commission's foreign ownership policies established in the *Foreign*

³⁰ See Petition at 2.

³¹ Petition at 11.

³² *Id.*

³³ See *Non-Streamlined International Applications/Petitions Accepted for Filing*, Public Notice, Report No. TEL-01240NS (rel. March 4, 2008); *Non-Streamlined International Applications/Petitions Accepted for Filing*, Public Notice, Report No. TEL-01358NS (rel. May 4, 2009).

³⁴ See *SkyTerra Communications, Inc., Transferor, and Harbinger Capital Partners Funds, Transferee, Seek FCC Consent to Transfer Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184, Public Notice, DA 09-996, 24 FCC Rcd 5226 (2009). Currently, transfer of control applications for Inmarsat authorizations are on file for SES-STA-20080822-01085 and 0022-EX-TU-2008.

³⁵ See ISP-PDR-20080822-00016; SkyTerra Narrative, Attachment B at 1.

Participation Order.³⁶ As part of that analysis, we consider any national security, law enforcement, foreign policy or trade policy concerns raised by the proposed transfer of control or assignment of licenses.³⁷ Relying on Commission precedent, we find that the foreign investment in SkyTerra Communications, the ultimate U.S. parent of SkyTerra, by and through Harbinger does not raise any issues under section 310(a) or 310(b)(1)-(3) of the Communications Act.³⁸ Our analysis focuses on issues raised under section 310(b)(4).

12. Section 310(b)(4) of the Communications Act establishes a 25 percent benchmark for investment by foreign individuals, corporations and governments in U.S.-organized entities that control U.S. common carrier radio licensees. This section also grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.³⁹ The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark.⁴⁰ Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the

³⁶ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, IB Docket Nos. 97-142 and 95-22, 12 FCC Rcd 23891 (1997) (“*Foreign Participation Order*”), Order on Reconsideration, 15 FCC Rcd 18158 (2000).

³⁷ The Commission considers national security, law enforcement, foreign policy, and trade policy concerns when analyzing foreign investment pursuant to sections 310(b)(4) and 310(d). *Foreign Participation Order*, 12 FCC Rcd at 23918-21 ¶¶ 59-66.

³⁸ Section 310(a) of the Communications Act prohibits any radio license from being “granted to or held by” a foreign government or its representative. 47 U.S.C. § 310(a). In this case, no foreign government or its representative holds or will hold any of SkyTerra's radio licenses. Section 310(b)(1)-(2) of the Communications Act prohibits common carrier, broadcast and aeronautical fixed or aeronautical en route radio licenses from being “granted to or held by” aliens, or their representatives, or foreign corporations. 47 U.S.C. § 310(b)(1)-(2). We find that no alien, representative, or foreign corporation holds or will hold any of SkyTerra's common carrier radio licenses in this case. Accordingly, we find that grant of Harbinger's Petition is not inconsistent with the foreign ownership provisions of section 310(a) or 310(b)(1)-(2) of the Communications Act. See *Applications of VoiceStream Wireless Corp., Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9804-9809 ¶¶ 38-48. Additionally, because the foreign investment in SkyTerra is held through its controlling U.S. parent companies, SkyTerra LP and SkyTerra Communications, grant of Harbinger's Petition does not trigger section 310(b)(3) of the Communications Act, which places a 20% limit on alien, foreign corporate or foreign government ownership of entities that themselves hold common carrier, broadcast and aeronautical fixed or aeronautical en route Title III licenses. Compare 47 U.S.C. § 310(b)(3) with § 310(b)(4). See *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, Declaratory Ruling, 103 F.C.C. 2d 511 (1985) (“*Wilner & Scheiner P*”), recon. in part, 1 FCC Rcd 12 (1986).

³⁹ See 47 U.S.C. § 310(b)(4) (providing that “No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by ... any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government, or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest would be served by the refusal or revocation of such license.”).

⁴⁰ The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's direct or indirect parent. See *BBC License Subsidiary L.P.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973 ¶ 22 (1995). The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests. *Id.* at 10972 ¶ 20, 10973-74 ¶¶ 22-25.

“public interest will be served by the refusal or revocation of such license.”⁴¹

13. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals or entities from WTO Member countries in U.S. common carrier and aeronautical fixed and aeronautical en route radio licensees.⁴² Therefore, with respect to indirect foreign investment from WTO Members, the Commission adopted a rebuttable presumption that such investment generally raises no competitive concerns.⁴³

B. Attribution of Escrowed Shares of SkyTerra Communications

14. In calculating foreign equity and voting interests under section 310(b) of the Act, the Commission considers the many alternative means by which equity or voting interests are held in corporate and noncorporate business entities⁴⁴ to ascertain, among other things, the beneficial owners of the shares. In this case, because Harbinger has the right to acquire additional shares out of certain escrow accounts in the event the Commission approves the SkyTerra Transfer of Control Application,⁴⁵ we must ascertain whether Harbinger is properly viewed as the beneficial owner of the escrowed shares of SkyTerra Communications, and whether it has the right to vote the shares, for purposes of attributing the escrowed shares under section 310(b) of the Act.⁴⁶

15. According to the Petitioners, shares of SkyTerra Communications held in escrow consist of: (1) voting shares amounting to 0.91 percent of its voting stock and 0.41 percent of its total capital stock placed in escrow (“Akin Gump Escrow Agreement”) in connection with an April 2008 transaction in which Harbinger acquired shares of SkyTerra Communications from various Apollo funds⁴⁷ (the “Apollo Funds Transaction”); (2) non-voting shares amounting to 7.27 percent of SkyTerra’s total capital stock that were transferred to, and placed in escrow with, Well Fargo Bank, National Association (“Wells Fargo Escrow Agreement”) in connection with a September 2008 transaction in which Harbinger

⁴¹ 47 U.S.C. § 310(b)(4).

⁴² *Foreign Participation Order*, 12 FCC Rcd at 23896 ¶ 9, 23913 ¶ 50, 23940 ¶¶ 111-112. In evaluating an applicant’s request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a “principal place of business” test to determine the nationality or “home market” of foreign investors. See *Foreign Participation Order*, 12 FCC Rcd at 23941 ¶ 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3951 ¶ 207 (1995)).

⁴³ *Foreign Participation Order*, 12 FCC Rcd at 23913 ¶ 50, 23940 ¶¶ 111-112. The Commission stated, in the *Foreign Participation Order*, that it will deny an application if it finds that more than 25% of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding. See *id.* at 23946 ¶ 131.

⁴⁴ See, e.g., *Kansas City Broadcasting Co.*, 5 Rad. Reg. 1057 (1952) (members of a church); *Chicagoland TV Co.*, 4 Rad. Reg. 2d 747,752 (1965) (union members).

⁴⁵ SkyTerra Narrative at 6-7. See *SkyTerra Communications, Inc., Transferor, and Harbinger Capital Partners Funds, Transferee, Seek Consent to Transfer Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184, Public Notice, DA 09-996, 24 FCC Rcd 5226 (2009).

⁴⁶ Not accounting for the shares held in escrow, Harbinger holds 49.09% equity interest and 48.04% voting interests in SkyTerra Communications as well as warrants for additional voting shares of SkyTerra Communications. See ¶ 9, *supra*; see also SkyTerra Narrative at 7; April 2009 Amendment at 5, 7.

⁴⁷ These companies are Apollo Investment Fund IV, L.P., Apollo Overseas Partners IV, L.P., AIF IV/RRRR LLC, AP/RM Acquisition LLC, and ST/RRRR LLC. Akin Gump Escrow Agreement at 1.

acquired shares of SkyTerra Communications from TerreStar Corporation⁴⁸ (the “TerreStar Transaction”); and (3) voting shares amounting to 3.35 percent of SkyTerra Communications’ voting stock and 1.50 percent of its total capital stock placed in escrow with Wells Fargo in January and February 2009 (“2009 Transactions”).⁴⁹ As a result, the Petitioners have amended the Petition to seek approval for up to 62 percent equity interests in order to take into account shares of SkyTerra Communications that are held in the two escrow accounts.

16. We examine first the provisions in the Wells Fargo Agreement relevant to the beneficial (*i.e.*, equitable) ownership of the escrowed shares.⁵⁰ We find, for purposes of our section 310(b) analysis, that Harbinger is properly viewed as the beneficial owner of the SkyTerra Communications shares held in escrow under the Wells Fargo Agreement.⁵¹ We base our finding on the provisions in the Wells Fargo Agreement that govern the treatment of cash distributions made by SkyTerra Communications with respect to the escrowed shares. Under the Wells Fargo Agreement, shares of SkyTerra Communications purchased by or at the direction of Harbinger are delivered to Wells Fargo as escrow agent.⁵² The escrow agent holds title to the shares pending Commission action on the SkyTerra Transfer of Control Application.⁵³ The escrow agent is authorized and directed by the agreement to deposit, transfer, hold and invest the cash distributions and any investment income generated on those distributions.⁵⁴ The Harbinger funds, nevertheless, retain the power to direct investments by the escrow agent, and all cash distributions and investment earnings and income ultimately will be distributed to Harbinger.⁵⁵ If Harbinger fails to receive the required Commission approval or determines not to seek required approval, the escrow agent will sell the escrowed property (other than the cash distributions and income) and remit the sale proceeds *and* cash/income to Harbinger.⁵⁶ Harbinger thus retains and is entitled to the economic risks and potential rewards of owning the escrowed shares while they are held by the escrow agent.⁵⁷

⁴⁸ TerreStar previously held ownership interests in SkyTerra Communications at the time the Petition was filed. *See* Petition at 3; *see also* TerreStar Sells Remaining Interest in SkyTerra for \$123 M (dated September 16, 2008), available at <http://www.terrestar.com/news/press/20080916.html>.

⁴⁹ We note that none of the transactions discussed above, where escrow agreements have been used, were submitted to the Commission for prior approval.

⁵⁰ We address the treatment of voting rights under the Wells Fargo Agreement in paragraph 18, *infra*.

⁵¹ The Petitioners submitted the Wells Fargo and Akin Gump escrow agreements for the record on March 10, 2009. *See* March 10, 2009 Escrow Letter (attaching, *inter alia*, the Wells Fargo Agreement and Amendment No. 1 to that agreement). Petitioners subsequently amended the Wells Fargo Agreement and submitted that amendment as part of the April 2009 Amendment to the Petition. *See* April 2009 Amendment (attaching Amendment No. 2 to the Wells Fargo Agreement).

⁵² Wells Fargo Agreement at Article 1, Section 1.1 (Escrow Property) (as amended by Amendment No. 1).

⁵³ *Id.* at Article 1, Section 1.2 (Title, Voting Rights; Distributions and Investments) (as amended by Amendment No. 2). The escrow agent also holds title to any non-cash distributions that SkyTerra Communications makes with respect to the escrowed shares, such as additional securities of the company. Any such additional securities become part of the escrowed property. *Id.*; *see also id.* at Article 1, Section 1.1(e) (Company Distributions) (as amended by Amendment No. 1).

⁵⁴ *Id.* at Article 1, Section 1.2 (Title, Voting Rights; Distributions and Investments) (as amended by Amendment No. 2).

⁵⁵ *Id.* at Article 1, Section 1.3 (Disbursements).

⁵⁶ *Id.*

⁵⁷ The normal indicia of the beneficial ownership of a corporation include “voting rights *and* distributions of dividends, and generally reflects the amount of shareholder capital contributed to the corporation.” *See Applications* (continued....)

Under these circumstances, we find for purposes of our section 310(b) analysis that Harbinger is the beneficial owner of the shares of SkyTerra Communications held in escrow under the Wells Fargo Agreement.⁵⁸ In light of our finding with regard to the Wells Fargo Agreement, we attribute to Harbinger an additional 8.77 percent equity (total capital stock) interest in SkyTerra Communications that is held in escrow under the Wells Fargo Agreement. As discussed above, these escrowed shares consist of non-voting shares acquired in the TerreStar Transaction, which amount to 7.27 percent of SkyTerra Communications' equity (total capital stock), and voting shares acquired in the 2009 Transactions, which amount to 1.50 percent of its equity (total capital stock) (7.27% + 1.50% = 8.77%).⁵⁹ Adding the 8.77 percent equity interest associated with the shares held in escrow to the 49.09 percent equity interest held outright by Harbinger, we find that Harbinger currently holds at least 57.86 percent of the equity interests in SkyTerra Communications, in excess of the 49.99 percent equity interest permitted by the interim ruling the Commission previously issued in the *2008 MSV Order*.⁶⁰

17. The Akin Gump Agreement provides that the original owners of the escrowed shares, *i.e.*, the Apollo Funds, retain title to the shares *and* the right to receive cash dividends declared or paid with respect to the shares.⁶¹ If Harbinger fails to receive the required Commission approval or determines not to seek required approval, the escrow agent will sell the escrowed property (consisting of shares initially placed in escrow and any subsequent non-cash distributions) and remit the sale proceeds to Harbinger. Thus, in contrast to the treatment of cash distributions under the Wells Fargo Agreement, all cash distributions made with respect to shares held in escrow under the Akin Gump Agreement will have been paid to the Apollo Funds and will not be distributed to Harbinger. We nonetheless need not make a final determination as to whether the Akin Gump Agreement confers upon Harbinger a beneficial ownership

(Continued from previous page) _____
of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses, Memorandum Opinion and Order, DA 97-328, 12 FCC Rcd 2030, 2046, ¶ 36 (citing *Application of Fox Television Stations, Inc.*, Memorandum Opinion and Order, FCC 95-188, 10 FCC Rcd 8452, 8472-73, ¶¶ 46-47 (“*Fox I*”)) (emphasis added).

⁵⁸ The Commission has previously held, “in the absence of any express indication that Congress intended to constrain our authority, we conclude that Congress intended for us to construe the [section 310(b)] benchmark standard in a manner that allows for a meaningful assessment of alien ownership interests in corporate licensees and parent companies.” *Fox I*, 10 FCC Rcd at 8470-71, ¶ 41. See also *Application of Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719, ¶ 14 (1995) (“*Fox II*”) (emphasizing that the Commission examines the economic realities and substance of the transactions under review and not simply the labels that the parties attach to their corporate incidents). Cf. *PrimeMedia Broadcasting, Inc., et al.*, Memorandum Opinion and Order, FCC 88-218, 3 FCC Rcd 4293, 4295, ¶¶ 8-11 (1988) (stating that neither the legislative history nor statutory language of the Communications Act provide a clearly expressed legislative intent to exclude capital stock held in trust for the benefit of an alien owner from the limitations prescribed in [s]ection 310(b)).

⁵⁹ See *supra* ¶ 15.

⁶⁰ See *2008 MSV Order*, 23 FCC Rcd at 4444, ¶ 18 (“In no event shall the equity or voting interest held by Harbinger, when aggregated with interests held by any commonly-controlled funds, exceed 49.99 percent.”). See *infra* ¶ 21 (noting that the ruling issued in this *Order and Declaratory Ruling* is without prejudice to any enforcement action by the Commission for non-compliance with the Communications Act, as amended, the Commission's rules, or the interim authority granted in the *2008 MSV Order*).

⁶¹ Akin Gump Escrow Agreement at Section 3.1 (Title, Voting Rights and Cash Dividends). The Apollo Funds also retain title to any non-cash distributions that SkyTerra Communications makes with respect to the escrowed shares, such as additional securities of the company, which become part of the escrowed property. *Id.* at Section 2 (Deposit of Escrowed Property), Section 3.1 (Title, Voting Rights and Cash Dividends), Section 4 (Disbursement of the Escrowed Property). The Apollo Funds also retain the right to vote the shares while they remain in escrow. *Id.* at Section 3.1 (Title, Voting Rights and Cash Dividends). We discuss in paragraph 18, *infra*, the attribution of voting rights associated with the shares of SkyTerra Communications held in both the Wells Fargo and the Akin Gump escrow accounts.

interest in the escrowed shares. Even assuming that is the case, Harbinger in its April 2009 Amendment requests specific authority to hold up to 62 percent of the equity of SkyTerra Communications in order to take into account the 0.41 percent equity (total capital stock) interest held in the Akin Gump escrow account, as well as the 8.77 percent equity (total capital stock) interest held in the Wells Fargo escrow account and the 49.09 percent equity (total capital stock) interest held outright by Harbinger.⁶² As discussed in Section III.C. below, we find that the public interest would not be served by denying Harbinger's request to hold a total 62 percent non-controlling equity interest in SkyTerra Communications.

18. We do not attribute to Harbinger the voting interests associated with the shares of SkyTerra Communications that are held in escrow pursuant to either the Akin Gump Agreement or the Wells Fargo Agreement. Petitioners state that, under the Akin Gump Escrow, the Apollo Funds continue to have title to the shares and continue to have the right to vote the shares while the shares are in escrow. According to the Petitioners, Harbinger has not communicated and pledges not to communicate with either the Apollo Funds or the escrow agent concerning how the shares should be voted.⁶³ With regard to the voting shares held in escrow under the Wells Fargo Agreement, Petitioners have executed an amendment to that agreement that prohibits the escrow agent from exercising any voting rights associated with the escrowed shares.⁶⁴ Based on this amendment to the Wells Fargo Agreement, and Petitioners' representation that Harbinger will not exercise *de facto* control of SkyTerra unless the SkyTerra Transfer Application is granted,⁶⁵ we do not attribute the voting interests associated with these escrowed shares to Harbinger at this time.⁶⁶ We caution Harbinger that, in making this finding, we rely on the continuing veracity of its representation and note that a myriad of factors are relevant to determining whether, in a particular case, there has been an unauthorized transfer of *de facto* control.⁶⁷

C. Section 310(b)(4) Public Interest Analysis

19. We now consider the public interest merits of the Petition, as amended, pursuant to section 310(b)(4) of the Communications Act and the Commission's foreign ownership policies

⁶² See April 2009 Amendment at 6-7. We also note that the 0.41% equity (total capital stock) interest held in the Akin Gump escrow account, when added to the 49.09% equity interest held outright by Harbinger, does not in any event exceed the 49.99% equity interest permitted under the interim ruling issued in the 2008 *MSV Order*.

⁶³ April 2009 Amendment at 4; Akin Gump Escrow Agreement at Section 3.1(b) (Title, Voting Rights and Cash Dividends).

⁶⁴ See April 2009 Amendment, Amendment No. 2 to the Wells Fargo Escrow Agreement at Section 1.2 (Title, Voting Rights; Distributions and Investments).

⁶⁵ April 2009 Amendment at 5.

⁶⁶ The terms of the escrow agreement, as amended, appear to satisfy the requirements and limitations the Commission has established for use of voting trusts in similar circumstances. See *e.g.*, *Tender Offers and Proxy Contests, Policy Statement*, 59 Rad. Reg. 2d 1536, 1577-1583, ¶¶ 59-71 (P & F) (1986) (*Tender Offers Policy Statement*); *Stratos Global Corporation, Transferor, Robert M. Franklin, Transferee, Consolidated Application for Consent to Transfer of Control*, Memorandum Opinion and Order and Declaratory Ruling, FCC 07-213, 22 FCC Rcd 21328, 21343-50 ¶¶ 38-49 (2007).

⁶⁷ Thus, while Harbinger has committed not to elect a majority of SkyTerra Communications' board of directors unless its transfer application is granted (see April 2009 Amendment at 5), the fact that a party does not elect a majority of the board (or hold a majority of a company's voting shares) is relevant to, but not dispositive of, the Commission's inquiry. See *Rochester Telephone Corporation v. United States*, 23 F. Supp. 634 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125, 145 (1939) ("Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case.") (Footnote omitted).

established in the *Foreign Participation Order*.⁶⁸ After reviewing the record in this matter, we believe that, on balance, the public interest would not be served by denying the Petition, as amended. The Commission previously found in the *2008 MSV Order* that the Harbinger funds have their principal places of business in the United States or the Cayman Islands and all but a *de minimis* portion of their equity investment is properly ascribed to the United States and other WTO Member countries.⁶⁹ Based on the record before us, we find that the vast majority of the equity and voting interests in Harbinger continues to be properly ascribed to individuals or entities that are citizens of, or that principally conduct business in, WTO Member countries for purposes of our public interest analysis under section 310(b)(4) of the Communications Act and the policies adopted in the *Foreign Participation Order*.⁷⁰ Notwithstanding some changes in ownership and control of Harbinger since grant of the Interim Petition in the *2008 MSV Order*,⁷¹ we find no appreciable increase in ownership by non-WTO investors. Applying the Commission's attribution principles for calculating foreign ownership under section 310(b), we find that investors who are from non-WTO Member countries hold indirectly an aggregate 0.07 percent equity interest and 0.18 percent voting interest in SkyTerra Communications (and SkyTerra) through Harbinger.⁷² While these percentages are higher than the 0.02 percent equity interest and 0.06 percent voting interest that the Commission calculated in the *2008 MSV Order*,⁷³ they are still well below the 25 percent allowance authorized in the *2008 MSV Order* for additional, indirect foreign equity and voting interests in SkyTerra.⁷⁴ We believe that authorizing Harbinger to acquire a 62 percent equity interest and

⁶⁸ See *supra* ¶¶ 11-13.

⁶⁹ See *2008 MSV Order*, 23 FCC Rcd at 4444, ¶ 18, Appendix B at 4454-57, ¶¶ 9-14.

⁷⁰ See *supra* ¶¶ 4-6, 12-13.

⁷¹ Since grant of the Interim Petition, Philip A. Falcone, a U.S. citizen, has acquired ultimate control of Harbinger. See SkyTerra Narrative at 5; see also *id.*, Attachment B at 6-7 and Annex 3. He previously shared a controlling interest in Harbinger with Raymond J. Harbert, also a U.S. citizen. See June 30, 2008 Letter, Attachments 2 & 3. The Master Fund has also added seven intervening holding companies (four of which are foreign-organized), and the Special Situations Fund has added one intervening holding company (which is foreign-organized) to their vertical chains of ownership. Compare SkyTerra Narrative, Attachment B at Annex 3 with the Interim Petition at Attachment 3. We find, however, that the new foreign-organized holding companies have their principal places of business in the United States or the Cayman Islands, a WTO Member country. See SkyTerra Narrative, Attachment B at Annex 2. The record indicates there have been other changes in foreign ownership of the Master Fund and the Special Situations Fund. Compare *id.* at Annex 1 with the Interim Petition at Attachment 1. We find on the basis of the record, however, that the vast majority of the equity and voting interests in Harbinger continue to be properly ascribed to the United States and other WTO Member countries. See *supra* ¶¶ 4-6; see also *infra* n.72 and accompanying text.

⁷² See *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22627-22632 (IB 2004), *erratum*, 21 FCC Rcd 6484 (IB 2006), *petition for recon. pending* ("Foreign Ownership Guidelines"). The 0.07% equity interest and 0.18% voting interest is comprised of ownership interests held indirectly in the Master Fund by investors from the Bahamas, a non-WTO Member country. See SkyTerra Narrative, Attachment B, Annex 3 at 1 & 2 n.5. See also *supra* ¶ 4.

⁷³ See *2008 MSV Order*, 23 FCC Rcd at 4457-58 (Appendix B, ¶ 13).

⁷⁴ See *2008 MSV Order*, 23 FCC Rcd at 4443, ¶ 16. The foreign ownership ruling that the Commission issued to SkyTerra in the *2008 MSV Order* approved specific, indirect foreign equity and/or voting interests held by investors from WTO Member countries; and provided an allowance for an additional, aggregate 25% amount of foreign equity and/or voting interests to account for fluctuations in SkyTerra's indirect ownership, including ownership by investors from non-WTO Member countries. The ruling is subject to certain limitations to ensure that no individual investor obtains an interest that exceeds 25% without prior Commission approval and that non-WTO Member investment does not exceed the 25% amount. See *id.*; see also *Foreign Ownership Guidelines*, 19 FCC Rcd at 22638.

a non-controlling 49.99 percent voting interest in SkyTerra Communications serves to facilitate the customary operations of the capital markets within the statutory framework of section 310(b)(4) of the Communications Act.⁷⁵ We also find that grant of the Petition fosters the Commission's open entry policy articulated in the *Foreign Participation Order*.⁷⁶

20. Based on these findings, we conclude that Harbinger is entitled to a rebuttable presumption that its acquisition of 62 percent equity and 49.99 percent voting interest in SkyTerra Communications does not pose a risk to competition in the U.S. market, and we find no credible evidence in the record to rebut this presumption. In addition, we have received no opposition to or comment on the Petition or the April 2009 Amendment from the Executive Branch.⁷⁷ Therefore, pursuant to section 310(b)(4) and the policies adopted in the *Foreign Participation Order*, we grant Harbinger's Petition, as amended, subject to the limitations specified in the ruling below.

21. Specifically, this ruling permits Harbinger to hold – on a permanent basis – aggregate indirect ownership interests in SkyTerra through purchases of SkyTerra Communications shares, not to exceed 62 percent equity interest and a non-controlling 49.99 percent voting interest.⁷⁸ In no event shall the equity or voting interests held by Harbinger, when aggregated with interests held by any commonly-controlled funds, exceed these amounts.⁷⁹ This ruling authorizes only the foreign ownership interests identified in the Petition, as amended by the SkyTerra Narrative.⁸⁰ This ruling does not authorize the aggregate 0.07 percent indirect equity interest and 0.18 percent indirect voting interest ascribed in this *Order and Declaratory Ruling* to non-WTO Member investment in the Master Fund and, in turn, in SkyTerra Communications (and SkyTerra).⁸¹ Further, this ruling shall not be construed to permit any foreign individual or entity that is not named in the Petition, as amended by the SkyTerra Narrative, to acquire control of SkyTerra or to acquire an indirect equity or voting interest in SkyTerra that exceeds 25

⁷⁵ See *2008 MSV Order*, 23 FCC Rcd at 4444, ¶ 18.

⁷⁶ In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals and entities from WTO Member countries in U.S. common carrier and aeronautical radio licensees. 12 FCC Rcd at 23896, ¶ 9, 23913, ¶ 50, 23940, ¶¶ 111-112.

⁷⁷ SkyTerra is subject to the Executive Branch Agreement, dated November 14, 2001, which is attached to the Commission's decision in *Motient Corporation and Subsidiaries, Transferors, and SkyTerra Communications, Inc., Transferee, Application for Authority to Transfer Control of Mobile Satellite Ventures Subsidiary LLC*, WC Docket No. 06-106, Memorandum Opinion and Order and Declaratory Ruling, DA 06-1872, 21 FCC Rcd 10198 (WTB, OET, IB 2006). See also *2008 MSV Order*, 23 FCC Rcd at 4440, ¶ 10 n.24.

⁷⁸ See *2008 MSV Order*, 23 FCC Rcd at 4444, ¶ 18 (allowing Harbinger to increase, on an interim basis, its aggregate indirect ownership in SkyTerra through additional purchases of SkyTerra Communications' stock, "not to exceed a non-controlling (*de jure* or *de facto*) 49.99% equity and 49.99% voting interest"). Our approval of Harbinger's 62% equity interest in SkyTerra Communications is limited to the shares held in the Wells Fargo and Akin Gump escrow accounts as of the date of the April 2009 Amendment as well as an additional 3% equity interest to cover unanticipated exigencies and market fluctuations.

⁷⁹ We caution the Petitioners that they are required to seek and obtain prior Commission approval before Harbinger, and any common-controlled funds, obtain any level of shareholdings or other rights in SkyTerra Communications sufficient to confer on them, as a group, *de jure* or *de facto* control of SkyTerra Communications and SkyTerra.

⁸⁰ The Petition, the letters amending the Petition (listed *supra* n.1), the April 2009 Amendment, and the SkyTerra Narrative, as supplemented on August 7, 2009, may be retrieved in IBFS under File Nos. ISP-PDR-20080129-00002, ISP-AMD-20090417-00002, and ISP-PDR-20080822-00016.

⁸¹ These amounts must be counted against – that is, fall within – the 25% allowance granted to SkyTerra in the *2008 MSV Order* for additional, indirect foreign ownership interests. See *2008 MSV Order*, 23 FCC Rcd at 4443, ¶ 16.

percent without obtaining additional approval from the Commission.⁸² We note that it is not necessary for us to address Harbinger's request that we include in this ruling a provision that allows SkyTerra to have up to and including an additional aggregate 25 percent indirect foreign equity and/or voting interest without seeking further Commission approval.⁸³ Since the filing of Harbinger's Petition, we have granted SkyTerra a foreign ownership ruling that includes the standard 25 percent allowance for additional, indirect foreign ownership interests.⁸⁴ We emphasize that Harbinger has an affirmative duty to monitor its foreign equity and voting interests to ensure compliance with this ruling and to calculate its foreign ownership interests consistent with the Commission's attribution principles.⁸⁵ This ruling is without prejudice to any enforcement action by the Commission for non-compliance with the Communications Act, as amended, the Commission's rules, or the interim authority granted in the *2008 MSV Order*.

IV. CONCLUSION

22. For the reasons set forth above, we find that the public interest would not be served by denying the Petition. Accordingly, we authorize Harbinger to hold no more than 62 percent equity and 49.99 percent voting interests in SkyTerra Communications, subject to the limitations set forth in this *Order and Declaratory Ruling*.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j) and 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 310(b)(4), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling, as amended, filed by Harbinger IS GRANTED to the extent specified in this *Order and Declaratory Ruling*.

24. IT IS FURTHER ORDERED that the Interim Authority granted in the *2008 MSV Order* is superseded by the ruling issued in this *Order and Declaratory Ruling*.

Federal Communications Commission

John V. Giusti
Acting Chief
International Bureau

⁸² See June 30 Letter (clarifying that Harbinger does not seek authority that would permit any foreign individual or entity that is not named in the Petition to acquire control of SkyTerra or to acquire an indirect equity and/or voting interest in SkyTerra that exceeds 25% without obtaining additional approval from the Commission).

⁸³ See Petition at 2 (noting that Harbinger's request is the same as and not duplicative with SkyTerra's requested 25% allowance in its then-pending petition for declaratory ruling filed in the *2008 MSV* proceeding).

⁸⁴ *2008 MSV Order*, 23 FCC Rcd at 4443, ¶ 16.

⁸⁵ Cf. *2008 MSV Order*, 23 FCC Rcd at 4443, ¶ 16 (citing *Verizon Communications, Inc., Transferor and America Móvil, S.A. DE C.V., Transferee, Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc. (TELPR)*, WT Docket No. 06-113, Memorandum Opinion and Order and Declaratory Ruling, FCC 07-43, 22 FCC Rcd 6195, 6225, ¶ 68 (2007)).

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6. Harbinger Capital Partners LLC is also the Investment Manager for (but holds no equity in): Harbinger Class PE Holdings (Cayman), Ltd. (Cayman Islands Exempted Company); and Harbinger Capital Partners Fund II, L.P. (DE Limited Partnership); and is the Administrator, which is comparable to an Investment Manager, for Harbinger Class PE Holdings (U.S.) Trust.

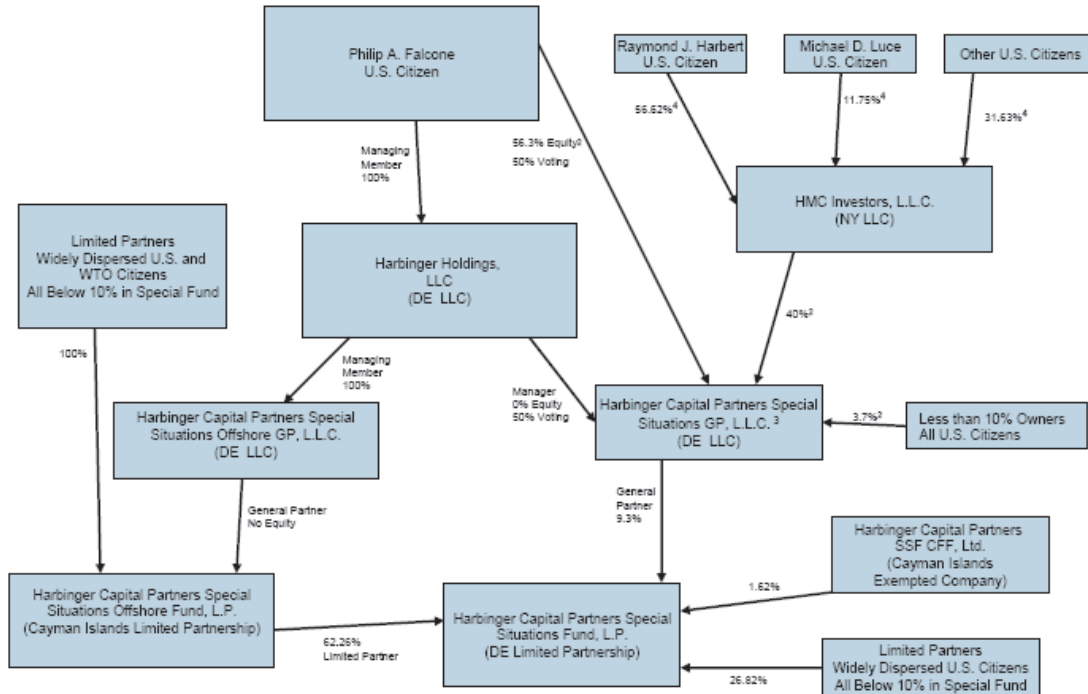
7. Harbinger Class L Holdings (U.S.), LLC and Harbinger Class L Holdings (Cayman), Ltd. are subsidiaries of HCP Onshore Fund I and HCP Offshore Fund I, respectively (each of these subsidiary entities as referred to herein, "Class L Holdings"), that were established in September 2008 to hold each such fund's pro rata portion of the Class LU Shares of the Master Fund. The Class LU Shares represent an undivided interest in the ultimate net value of certain assets of the Master Fund with exposure to bankrupt Lehman Brothers entities. Originally, HCP Onshore Fund I and HCP Offshore Fund I held 100% of their respective Class L Holdings subsidiary, but as investors in each fund have redeemed their shares after the formation of the Class L Holdings subsidiary, the redeeming investors have received, in addition to cash proceeds, partial in-kind proceeds representing a pro rata portion of such shareholder's or limited partner's proportional interest in Class L Holdings subsidiary. The interests in Class L Holdings (although an interest in the Master Fund) will have no interest in the SkyTerra shares obtained by the Master Fund by virtue of this transaction. The boxes denoted with "RI" represent redeemed investors; to the extent that these investors have made complete redemptions, their only remaining indirect interest in the Master Fund is in the portion of the assets attributable to the Class LU Shares. It is expected similar in kind distributions will be made to redeeming investors until the assets attributable to the Class LU Shares are liquidated.

8. Harbinger Class PE Holdings (U.S.) Trust and Harbinger Class PE Holdings (Cayman), Ltd. are subsidiaries of HCP Onshore Fund I and HCP Offshore Fund I, respectively (each of these subsidiary entities as referred to herein, "Class PE Holdings"), that were established in December 2008 to hold each such fund's pro rata portion of the Class PE Shares of the Master Fund. The Class PE Shares represent an undivided interest in the Master Fund's private equity and certain other illiquid investments. Originally, HCP Onshore Fund I and HCP Offshore Fund I held 100% of their respective Class PE Holdings subsidiary, but as investors in each fund have redeemed their shares after the formation of the Class PE Holdings, the redeeming investors have received, in addition to cash proceeds, partial in-kind proceeds representing a pro rata portion of such shareholder's or limited partner's proportional interest in Class PE Holdings subsidiary. The interests in Class PE Holdings (although an interest in the Master Fund) will have no interest in the SkyTerra shares obtained by the Master Fund by virtue of this transaction. The boxes denoted with "RI" represent redeemed investors; to the extent that these investors have made complete redemptions, their only remaining indirect interest in the Master Fund is in the portion of the assets attributable to the Class PE Shares. It is expected similar in kind distributions will be made to redeeming investors until the assets attributable to the Class PE Shares are liquidated.

9. Harbinger Capital Partners Fund II, L.P., a Delaware limited partnership, ("*HCP Onshore Fund II*") and Harbinger Capital Partners Offshore Fund II, Ltd. ("*HCP Offshore Fund II*"), a Cayman Island exempted company, have been created to facilitate new investment in the Master Fund without those investors taking a proportionate interest in either the Class LU Shares or the Class PE Shares. Harbinger Capital Partners LLC is the Investment Manager for HCP Offshore Fund II, as well as for Harbinger Capital Partners Intermediate Fund II, Ltd., a Cayman Island exempted company through which HCP Offshore Fund II has invested in the Master Fund. As of May 31, 2009, there were no limited partners in HCP Onshore Fund II. HCP Onshore Fund II accepted its first limited partner on June 1. As of July 1, 2009, it had two limited partners, both of which are U.S. persons. (The general partner of HCP Onshore Fund II is Harbinger Capital Partners GP, L.L.C.)

10. The percentages shown here are for the class of interests of HMC Investors, L.L.C. - known as Series 2 Units - relevant to the Master Fund, which is different from the class of interests of HMC Investors, L.L.C. relevant to the Special Situations Fund.

Appendix B: Ownership Structure of the Special Situations Fund¹



1. All equity percentages are calculated as of May 31, 2009.

2. In 2009 and 2010, as the asset value and performance returns of the Special Situations Fund increase, Philip A. Falcone’s equity percentage in Harbinger Capital Partners Special Situations GP, L.L.C. (“Special Situations GP”) increases and HMC Investors, L.L.C.’s equity percentage decreases. In 2011, Philip A. Falcone’s equity percentage will be 76.3% and HMC Investors, L.L.C.’s equity percentage will be 20%. In 2012, Philip A. Falcone’s equity percentage will be 81.3% and HMC Investors, L.L.C.’s equity percentage will be 15%. Thereafter, Philip A. Falcone’s equity percentage will be 96.3% and HMC Investors, L.L.C.’s equity percentage will be 0%. Other U.S. citizens, each of whom is one of the “less than 10% owners,” collectively will own the remaining 3.7%.

3. Until such time as the investors in the Special Situations Fund have had the opportunity to redeem their interests, the consent of HMC-New York, Inc., which was formerly the Managing Member of, and had a 50% voting interest in, Special Situations GP, will be required to take certain actions with respect to Special Situations GP.

4. The percentages shown here are for the class of interests of HMC Investors, L.L.C. - known as Series 5 Units - relevant to the Special Situations Fund, which is different from the class of interests of HMC Investors, L.L.C. relevant to the Master Fund.