

United States Senate  
WASHINGTON, DC 20510

April 21, 2010

**0662**

The Honorable Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Chairman Genachowski:

On March 26, 2010, the Commission released an order approving a transfer of control of licenses from SkyTerra Communications to Harbinger Capital Partners. This order includes binding conditions affecting Harbinger as well as other wireless communications providers that were not party to the SkyTerra transaction. We have several concerns about Conditions 1 and 3 contained in Appendix B of the order that require Harbinger to seek approval from the Commission before entering into certain commercial transactions with particular wireless communications providers.

In the order, the Commission appears to have accepted a “commitment” from an applicant that will implicate the rights of third parties that were not participants in the proceeding. It does not appear that these third parties were given notice prior to the issuance of the order or an opportunity to be heard with respect to the conditions that will impact their business opportunities. It is also unclear what process or standard of review the Commission intends to use to evaluate any request by Harbinger to enter transactions with these providers. As a practical matter, we fear this regulatory uncertainty will likely lead Harbinger to avoid entering into transactions with these providers, ultimately resulting in a competitive disadvantage for those companies as they consider opportunities to innovate, to grow, and to improve the wireless services they offer.

The Commission’s decision to impose these conditions appears to reflect a judgment that the market for mobile broadband services requires intervention by the Commission to ensure it is competitive, and we find that judgment to be questionable. The order does not provide support for such a determination; instead, it notes that any competitive concerns associated with the transaction are minor. Indeed, the wireless communications market is extremely competitive and dynamic, and it should be noted that Congress has not directed the Commission to establish policies limiting spectrum access or use for a subset of wireless providers in order to promote competition.

In order to help us better understand the need for Conditions 1 and 3 and how the two conditions came to be included in the order approving the SkyTerra-Harbinger transaction, please answer the following questions by May 5, 2010.

1. The Commission imposed conditions on the transfer of control of licenses from Skyterra to Harbinger, however, the conditions relate to business dealings with third parties that were neither party to the transaction nor participants in the proceeding.
  - a. What legal authority does the Commission believe grants it the ability to impose a condition that is binding on the business arrangements of third party entities not participating directly in a transaction or proceeding under Commission review? Specifically, explain whether the Commission believes that Sec. 214 and Sec. 310 of the Communications Act, which grant authority for the Commission to consider conditions on a transaction under review, confers authority to extend those conditions to prospective business arrangements an applicant will have in the future with specific companies?
  - b. Has the Commission ever previously imposed binding conditions on non-party entities in a similar manner during the transaction review process? If so, when?
2. In announcing that it will require affirmative approval from the Commission before Harbinger may enter a business arrangement with only two of the industry's wireless companies while allowing the rest free access to the spectrum of Harbinger, the Commission appears to suggest that the market for mobile broadband services requires regulatory intervention to ensure it remains competitive. What market analysis did the Commission rely upon that suggests the largest wireless communications providers must undergo new and additional regulatory scrutiny before entering into non-merger arrangements as set forth in Conditions 1 and 3?
3. What legal authority did the Commission use to justify creating a new regulatory process to scrutinize secondary transactions that do not involve the transfer of control of licenses?
4. The order notes that there are several companies providing terrestrial wireless services and that at least two companies plan to deploy fourth generation (4G) wireless broadband services this year, one of which is not among the two largest wireless communications providers. How did the Commission determine that Conditions 1 and 3 should apply only to the two largest wireless providers? What market analysis did the Commission rely upon to justify that number? Why did the Commission decide to use revenue to determine the size of a carrier for the purposes of Conditions 1 and 3 rather than total spectrum holdings?
5. Conditions 1 and 3 of the order seem to materially impact the opportunities of certain wireless providers to access particular spectrum markets or enter into other permissible arrangements.
  - a. Did the Commission seek or receive comment from any wireless communications providers about Conditions 1 or 3 before issuing the order?
  - b. If not, why did the Commission not solicit such input?
  - c. If not, has the Commission violated the Administrative Procedure Act and its own rules by not providing affected entities adequate notice and opportunity for comment before imposing Conditions 1 and 3 as part of the order?
6. We understand that it is common for unopposed and routine license transfers to be considered at the bureau level on delegated authority. This order, however, does not appear to be routine as it

seems to significantly change the Commission's wireless policy while also imposing binding conditions on third parties.

- a. How and why did you determine that this transaction should be handled at the bureau level?
  - b. Before the order was issued by the bureau chiefs, were you aware that Conditions 1 and 3 would create new regulatory authority for the Commission and would apply to entities not party to the proceeding?
  - c. If so, why did you decide to keep the order at the bureau level rather than elevating it to the full Commission for open consideration?
7. Conditions 1 and 3 of the order require the Commission to approve certain business arrangements between Harbinger and some wireless providers. Is it your intention that the Commission will establish an approval process before Harbinger or another party seek such approval, or will the Commission wait until it is petitioned to do so? Will the process include clear guidance on the standard of review the Commission will use in reviewing or approving the potential transactions?

We are also concerned that this order—which directly impacts the rights of licensees and represents a clear shift in Commission policy—was not debated and voted on by the full Commission. Instead, this expansion of Commission authority and change in wireless policy was included in a bureau level decision in an uncontested proceeding. Discussion and debate among all of the Commissioners is critical when taking actions that significantly impact evolving communications markets. We understand that parties impacted by this order have filed for reconsideration, and we urge your prompt attention to this matter.

Thank you for your consideration. We look forward to your responses to our questions.

Sincerely,

  
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