

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

December 7, 2011

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Genachowski:

Your recent decision to release a staff analysis pertaining to the withdrawn AT&T / T-Mobile filing and apparently to revise the FCC's "spectrum screen" in that document touches upon FCC process issues the Committee on Energy and Commerce has been focusing on this year. Throughout the 112th Congress, the Subcommittee on Communications and Technology has taken a hard look at the processes of the Federal Communications Commission (FCC) to ensure that the Commission maintains the highest standard of transparency and predictability in the exercise of its duties. We therefore request additional information on how you decide whether to release staff analyses or other materials surrounding withdrawn items and how the FCC uses the "spectrum screen" process in reviewing the spectrum holdings of FCC licensees.

Prior to 2003, the FCC imposed a spectrum cap that precluded a wireless carrier from holding more than 55 MHz of spectrum in any geographic area of the United States. The FCC adopted this spectrum cap through its rulemaking process, and eliminated the cap in the same manner.

Beginning in 2003, the FCC replaced the spectrum cap with the so-called spectrum screen. The FCC has used the spectrum screen on a case-by-case basis to identify markets in which there is no potential for competitive harm presented by the transfer of control of licenses for mobile services. For markets in which the screen is exceeded, the FCC then conducts a more granular review to determine whether a transaction would, in fact, impose any such harm. During the past nine years, the FCC has increased the amount of spectrum available to provide mobile services, both through auction of additional spectrum as well as through more flexible use of existing commercial spectrum. However, because the spectrum screen is applied on a case-by-case basis during transactions, it is not entirely clear whether and how the FCC conducts an analysis of the marketplace to establish the spectrum screen, nor precisely how it uses that

screen in review of a transaction. The FCC has never adopted formal rules or process to govern the setting and use of the spectrum screen, which has resulted in uncertainty as to the FCC's process, reasoning, and rationale.

The FCC apparently changed its spectrum screen in the recently released staff analysis on the AT&T / T-Mobile transaction, a document that was not adopted by the FCC. Moreover, questions remain as to how the Commission uses the spectrum screen. Traditionally, the use of the screen has mirrored the way in which the Department of Justice looks at the Herfindahl-Hirschman Index (HHI): a high or increased HHI is not itself an indication of lack of competition, rather it is used to identify those markets that require additional scrutiny. Recent FCC actions seem to indicate that the Commission intends to use the spectrum screen as an indication of *de facto* lack of competition.

We therefore ask that you provide answers to the following questions:

1. Why did you decide to release the staff analysis? What process did you follow in making that decision? Is such a decision solely within the discretion of the Chairman or does it require consent of the other Commissioners? Did you consult with them? Or was this decision made by the staff?
2. Has the FCC ever previously released underlying materials related to a withdrawn license transaction or other pending item, such as a Section 271 application or forbearance petition? If so, what were the circumstances?
3. Has the FCC ever previously released underlying materials related to a withdrawn item that discusses another item still pending before the Commission or staff?
4. Has the FCC ever previously chosen not to release underlying materials related to a withdrawn license transaction or other pending item, such as a Section 271 application or forbearance petition? If so, what were the circumstances?
5. What factors does the FCC consider when deciding whether to release materials relating to a withdrawn item? Does the FCC have formalized rules regarding such a decision to release materials?
6. How much advance notice of changes to the spectrum screen is the public provided so that they may factor it into their analysis of proposed or potential transactions?
7. Are *ad hoc* changes to the spectrum screen customary? If so, why are such changes appropriate both as a matter of law and as a matter of good policy without a full notice and comment rulemaking providing the public and interested parties an opportunity to provide input?
8. Has the FCC sought notice and comment on the spectrum screen process?
9. What factors does the FCC include when formulating a spectrum screen?

10. Does the spectrum screen treat all spectrum the same? If not, how and why does it treat some spectrum differently?
11. How does the FCC account for the evolution of the spectrum screen as market conditions change?
12. How does the FCC use the spectrum screen: as an indication that further competitive analysis is needed or as the basis for a finding that competitive harm exists in that market?

Please provide your responses by December 19, 2011. If you have any questions please contact Neil Fried or David Redl of Committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman



Greg Walden
Chairman
Subcommittee on Communications
and Technology

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Anna G. Eshoo, Ranking Member
Subcommittee on Communications and Technology