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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

September 8, 2011

Mr. Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

I was extremely disappointed to read that the FCC refuses requests for information from any of the 533 Senators and Members of Congress who do not chair either the House or Senate Commerce Committee. Unilaterally deciding that 99.6 percent of the elected representatives in the legislative branch have no legitimate interest in requesting and receiving information from the FCC is a misguided and unsupportable claim. However, you cite no actual legal authority to support it. Instead, you merely reference a general statement from a Congressional Research Service (CRS) report regarding the role of Congressional Committees. Specifically, the line from the CRS report is, “[t]he most common and effective method of conducting oversight is through the committee structure.” However, there are also less common methods of oversight that are no less legitimate. In fact, in a different section of the report that you cited, the report states “investigations and related activities may be conducted by . . . individual members.”¹

The FCC also cites the portion of the CRS report stating, “[i]ndividual members have no authority to issue compulsory process.” The phrase “compulsory process” refers to a Congressional subpoena. However, subpoenas are generally a last resort only after voluntary requests have been refused. Most of the information Congress receives does not require creating a legal obligation on the part of the agency to comply. Agencies should generally provide documents voluntarily to Members of Congress, especially if they would be required to produce the documents under the Freedom of Information Act anyway if requested by the general public.²

¹ Frederick M. Kaiser et al., Congressional Research Service, Congressional Oversight Manual, RL30240 (2011), at 20, [hereinafter CRS Report] available at <http://www.fas.org/sgp/ers/misc/RL30240.pdf>.

² Please note that the CRS Report which you have quoted says the following regarding Congressional document requests:

In more recent years, congressional committees have seemingly relied more heavily on staff level communication and contacts as well as other “informal” attempts at gathering information – document requests, informal briefings, etc. – before initiating the necessary formalistic procedures

It is unprofessional, unreasonable, and downright odd for the FCC to demand compulsory process before providing what it would be obligated to produce under FOIA and what it should produce for the sake of transparency and accountability. When Members raise legitimate questions, the focus should be on providing answers to ensure public confidence in the Commission, not looking for ways to dodge the issue. Before demanding a subpoena, the FCC should explain why it seeks to withhold or hide the information. Merely asserting that it has not yet been compelled does nothing to dispel the concerns that prompted the questions in the first place.

The Supreme Court has also long recognized the penetrating and far-reaching scope of the power of Congressional inquiry.³ This power of inquiry has its roots in the framing of the Constitution⁴ and is considered “co-extensive with the power to legislate.”⁵ In *Watkins v. United States*,⁶ the Supreme Court said:

[The] power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes . . . it comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.⁷

Moreover, it is for the Senate and its committees and subcommittees, and not for the Executive Branch or others, to determine whether there should be any restrictions on Members ability to request and receive information in connection with their legislative duties:

It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress. Each of them participates in the law-making process; each has a voice and a vote in that process; and *each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator.*⁸

Taken together, these precedents support the ability for Congress, including individual members, to conduct oversight investigations of Executive agencies – including the FCC.

In addition to these arguments for executive openness and transparency, there are also more direct concerns related explicitly to the FCC’s actions. In the past two months, the FCC

such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in open, public hearings.

³ See, e.g., *Eastland v. United States Servicemen’s Fund*, 421, U.S. 491, 504, n.15 (1975).

⁴ See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁵ *Queen v. United States*, 349 U.S. 155, 160 (1955).

⁶ 354 U.S. 178 (1957).

⁷ *Id.* at 187.

⁸ *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979) (emphasis added).

has faced a great deal of criticism for its decision from a wide range of sources including The Economist magazine, the Federal Aviation Administration (FAA), the Department of Defense (DoD), and the Department of Transportation (DOT).

On August 4th, *The Economist* wrote that the story behind the FCC's actions is a "sorry tale of greed, haste and incompetence."⁹ Three weeks prior, on July 12th, the FAA submitted a report which found that LightSquared's initial plans would have caused close to 800 deaths over a ten year period.¹⁰ On March 25th, the DoD and DOT wrote to the FCC criticizing the handling of LightSquared's application. In a joint letter, the Deputy Secretaries of Transportation and Defense wrote that they "were not sufficiently included in the development of the LightSquared initial work plan and its key milestones."¹¹ And that, "[t]he new LightSquared business plan and the new FCC rules significantly expand the terrestrial transmission environment, increasing the potential for interference to GPS receivers."¹²

While these statements in and of themselves are not direct proof of malfeasance, they do raise serious questions regarding the FCC's actions related to LightSquared. Given these continuing concerns regarding national security, public safety, and general good government, please provide the documents I requested in my letter to you on April 27, 2011.

In addition to my previous request, please answer to the following questions as well:

1. What consultation, if any, did the FCC have with other government agencies concerning LightSquared's waiver request prior to January 26, 2011?
2. What consultation, if any, did the FCC have with other government agencies concerning the March 26, 2010 FCC order regarding SkyTerra Communications and Harbinger Capital?
3. The FCC has publicly stated in the *Washington Post* that the "international bureau, wireless bureau, and engineering department jointly drafted [LightSquared's] waiver."¹³ What are the names of the specific FCC employees who worked on the FCC's January 26, 2011 waiver regarding LightSquared and what portions of the waiver did they write?
 - a. Did any FCC employees either perform or supervise any GPS interference testing prior to approving this waiver?
 - i. If so, what were the results of those tests?

⁹ The Economist, N.V., August 4, 2011; The Difference Engine: Off the radar.

¹⁰ LightSquared has claimed that these calculations do not reflect their current plan, but LightSquared has not denied that their initial plans, which they presented to the FCC, would have led to 794 fatalities.

¹¹ Letter from Department of Transportation Deputy Secretary John Porcari and Department of Defense Deputy Secretary William Lynn III to Federal Communications Commission Chairman Julius Genachowski, received March 25, 2011.

¹² *Id.*

¹³ Washington Post, Cecilia Kang, July 29, 2011; Analyst says key FCC staff excluded in LightSquared decision; Agency denies claim.

- ii. If not, why not?
- b. Did any FCC employees receive any data regarding GPS interference prior to approving this waiver?
 - i. If so, what were the results of those tests?

Thank you for your cooperation and attention in this matter. I would appreciate a response by September 22, 2011. If you have any questions, please do not hesitate to contact Chris Lucas for the Committee on the Judiciary at (202) 224-5225.

Sincerely,



Charles E. Grassley
Ranking Member