

# National Legal and Policy Center

*"promoting ethics in public life"*



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**Founded 1991**

February 2, 2011

The Honorable Darrell Issa  
The Honorable Edolphus Towns  
House Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Issa and Congressman Towns:

As chairman and ranking member of the Committee on Oversight and Government Reform, your committee has a special responsibility to oversee ethics matters with federal policy implications. There are few issues more important today than reinforcing Americans' faith in government at all levels and particularly the high ethics standards the Obama Administration set forth two years ago.

Unfortunately, those ethics standards may have been called into question recently regarding federal wireless communications policy. This letter brings to your attention a series of odd procedural decisions at an independent regulatory agency – the Federal Communications Commission (FCC) – that appear to have been undertaken solely for the financial benefit of one individual. As outlined in further detail below, these process decisions, series of contacts, apparent appearances of impropriety, and potential conflicts of interest seem to reveal improper influence peddling before the Executive Branch, Office of Science and Technology Policy (OSTP), and the Federal Communications Commission.

## ***Background***

As you may know, the National Legal and Policy Center was among the first to disclose revelations that Andrew McLaughlin, the former White House Policy Advisor at OSTP, was secretly communicating by email with his former employees at Google about public policy issues affecting the company.

In the course of our research, we conducted a thorough review of visits to OSTP by industry leaders. As a consequence of our analysis of White House visitor records and meetings with OSTP officials, we have found another potentially troubling ethics issue concerning Phil Falcone, Harbinger Capital Partners, and Mr. Falcone's wireless venture, LightSquared.

Phil Falcone, the founder of a hedge fund known as Harbinger Capital Partners is currently under criminal and civil investigations by the Securities and Exchange Commission and U.S.

Attorney's Office in Manhattan for allegedly failing to disclose \$113 million in personal loans he took from his hedge fund to pay personal taxes. *The Wall Street Journal* has also reported that investigators are looking into allegations that Mr. Falcone allowed some clients to redeem funds from his hedge fund during the financial crisis of 2008, while preventing others from doing so.<sup>1</sup>

According to the *Wall Street Journal*, Mr. Falcone and Harbinger scored big gains for investors in 2007, but his fund has since shrunk from \$26.5 billion to about \$9 billion from losses and client withdrawals. Harbinger's fund was off 15% for the year as of last November, and investors like Goldman Sachs and Blackstone Group had put in requests to withdraw funds.

As importantly, investors have expressed increased anxiety over Mr. Falcone's plans to launch a global wireless satellite network known as *LightSquared*. The majority of Harbinger's declining assets have been pledged to the venture, but many believe the initiative is risky and underfunded. Experts believe that building a wireless network can require as much as \$40 billion in investment. Interestingly, a May 31, 2010 story from *The Register* reported that "Harbinger reckons with a suitably flexible FCC... it can get the network operable for something in the region of \$6 billion."<sup>2</sup>

### ***Mr. Falcone's Wireless Plans***

Mr. Falcone's wireless plans appear to focus on taking advantage of an FCC wireless loophole that would allow the circumvention of the billions of dollars in investment required to purchase wireless spectrum by taking over a distressed satellite company (SkyTerra, now LightSquared) and entering the wireless phone and Internet market at a fraction of the cost of competitors.

Mr. Falcone then plans to lease or sell a part of that spectrum for wireless phone or Internet service to a consumer wireless company (or companies) that could share in the costs of building and operating the network – all without the need to operate the satellite network, or sell satellite service.<sup>3</sup>

The plan centered around first securing FCC approval for Harbinger's acquisition of SkyTerra, then getting the FCC to "fast-track" approval for Harbinger to take advantage of a little-known spectrum loophole for satellite licenses.

### ***The Loophole***

FCC policy regarding satellite license holders allows the holders to "supplement" satellite spectrum with *free* terrestrial (land-based) spectrum. The policy was implemented because satellites have limited transmission power, and the opaque nature of rooftops and buildings limits effective coverage. Satellite operators are thus permitted to run base stations on the ground, at the same frequency and use *free* terrestrial spectrum to "fill in the gaps." The land-based

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<sup>1</sup> Authorities Probe a Top Hedge Fund," *Wall Street Journal*, 11/13/10.

<sup>2</sup> "Satellite firm offers 4G network on back of 2G business model", *The Register*, 5/31/10.

<sup>3</sup> See *SkyTerra Proxy Statement*, 2/26/10, p. F-5.

spectrum is known as Ancillary Terrestrial Component (ATC), and is free to use for companies possessing a satellite license.<sup>4</sup>

Thus, the loophole Harbinger was seeking allowed LightSquared to essentially build out its national 4G state-of-the-art wireless and broadband network using the *free terrestrial spectrum* it is permitted to use as part of its satellite license, avoiding the requirements to immediately invest upfront capital to launch expensive satellites. The terrestrial spectrum can then be leased to wireless providers.

It is important to note that other companies that want to compete in the U.S. wireless phone and Internet market have to pay billions of dollars at auction to use the public airwaves (spectrum), and those billions accrue to the benefit of taxpayers. By contrast, Falcone's bold plan would build out a national wireless network taking advantage of *free* spectrum – i.e., at taxpayer expense. Clearwire, for instance, already has invested substantial sums to secure spectrum and build out its wireless network.

### ***Falcone's Plans Required Unprecedented FCC Intervention on his behalf***

None of Mr. Falcone's plans would be successful, however, unless he was successful in persuading the Administration and the FCC to intervene on his behalf. And over the course of the past year, a series of odd decisions, questionable meetings and procedural anomalies at the Federal Communications Commission and White House highlight Mr. Falcone's growing influence in the hallways of government.

Mr. Falcone's plans required the investment of the majority of Harbinger's assets into a little-known satellite company (SkyTerra) despite substantial investor opposition. The merger between Harbinger and SkyTerra was conditioned on FCC approval, and accordingly, in October of 2009, the parties sought such approval for majority control of SkyTerra and a transfer of their satellite license in a proposed merger transaction.<sup>5</sup>

The transaction moved through the FCC at an accelerated pace and was approved within five months of filing its restructured takeover request in October 2009. For comparison sake, given the slow speed in which the agency acts, the FCC typically decides merger transactions in 180 days. Since many merger transactions go well beyond that period, the FCC has an informal 180-day "shot clock" as a method of keeping transactions moving inside of the agency. Falcone's approval arrived a month before the FCC's shot clock period.

On February 26, 2010 during the FCC's public comment period on the proposed transaction, Harbinger filed a confidential business plan document that included certain conditions the company agreed to in order to obtain FCC approval of the license transfer. These conditions included an unprecedented agreement that without prior approval from the FCC, Harbinger

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<sup>4</sup> See 47 CFR § 25.149(B)(4)(i) .

<sup>5</sup> "Authorities Probe a Top Hedge Fund," *Wall Street Journal*, 11/13/10).  
*SkyTerra Proxy Statement*, 2/26/10, p. 76.  
*SkyTerra Proxy Statement*, 2/26/10, p. 8.

would not be allowed to provide spectrum to the two largest wireless carriers, and similarly would not be allowed to carry more than a limited amount of traffic for either.<sup>6</sup>

During FCC merger proceedings, parties typically file confidential materials that are protected from the public. Under FCC rules, however, the public must be notified within 24 hours that a filing of confidential material was submitted into the record. In this case, the FCC withheld Harbinger's letter and the merger conditions from public disclosure for more than a month. The letter was made public only on March 31, 2010, five days after the FCC approved the license transfer, and nine days after the Harbinger/SkyTerra merger was approved by SkyTerra shareholders.<sup>7</sup>

The FCC also violated its own precedent by failing to place in the record and publicly disclose the merger conditions (non-confidential data) before the deal was finalized so that interested parties would have an opportunity to comment on the proposed conditions.

The FCC's electronic filing system also reveals additional anomalies with respect to Falcone's transaction – a confidential document filed on February 12 also appeared on the electronic docket on March 12—the document has yet to be made final. In fact, no public notice of the filing appeared in the electronic docket for any of the confidential filings made in late 2009 and early 2010 until weeks or months later.

On April 21, 2010 Senators Hutchinson, DeMint, Vitter and Brownback sent FCC Chairman Genachowski a joint letter with numerous inquiries regarding the Falcone transaction.<sup>8</sup> On May 10, Genachowski replied with a non-responsive letter. These correspondences were not posted electronically for weeks after they were filed. In addition to violating FCC procedure and precedent, the FCC's actions in withholding these documents from public view directly contradicts Chairman Genachowski's promise to maintain an open and transparent process at the FCC.

On November 19, 2010, Mr. Falcone implemented the final stage of his plan, applying for a waiver of FCC's rules to allow SkyTerra (now re-named LightSquared) to begin selling wireless phone and Internet services utilizing *free* terrestrial spectrum (ATC) to wholesale customers without having to operate its satellite system. In an unprecedented move for the agency, the FCC placed Mr. Falcone's waiver request on a "fast track" approval schedule with a truncated 10-day comment period over the Thanksgiving holiday. On the Friday after Thanksgiving, the FCC granted a three-day extension of the comment period, still well short of the standard 30-day period for public comment.<sup>9</sup>

### ***How Phil Falcone ensured a "suitably flexible FCC"***

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<sup>6</sup> Letter from Harbinger to Federal Communications Commission, 2/26/10.

<sup>7</sup> SkyTerra Press Release, "SkyTerra Communications, Inc. Stockholders Approve Merger with Harbinger," 3/22/10.

<sup>8</sup> Letter from Senators Hutchinson, DeMint, Vitter, and Brownback to Chairman Genachowski, 4/21/10.

<sup>9</sup> FCC Public Notice of LightSquared Application for ATC Waiver, 11/19/10; FCC Notice of Extension, 11/26/10.

Sensing an opportunity to exploit FCC satellite license “loopholes” while playing into the Administration’s agenda to find another facilities-based wireless and broadband provider, it now appears that Mr. Falcone worked throughout 2009 to secure special consideration and tilt the playing field to get his wireless venture off the ground.

According to White House visitor access logs, on September 22, 2009, Mr. Falcone and LightSquared CEO Sanjiv Ahuja personally visited the White House and met with the Chief of Staff at the Office of Science and Technology Policy (OSTP).<sup>10</sup> One day later, the Harbinger/SkyTerra merger agreement was signed.<sup>11</sup>

On September 30, 2009, one week after his September 2009 White House visit, Mr. Falcone contributed \$30,400 to the DSCC -- the maximum legal individual contribution limit to a party committee. His wife, Lisa Falcone, contributed an additional \$30,400 to the DSCC on the same day. (LightSquared’s new CEO Sanjiv Ahuja also contributed \$30,400 to the DNC in September of 2010).<sup>12</sup>

Mr. Falcone’s contributions to the DSCC were anomalous he long has been a much larger donor to the Republican Party. In fact, just prior to the \$60,800 in contributions to the Democrats, the most Mr. Falcone and his spouse previously contributed during that political cycle was \$2,400. As for Sanjiv Ahuja, his \$30,400 contribution to the DNC was his first political contribution in eight years, and prior to that he contributed only to Republicans between 1998-2002.

On January 21, 2010, Mr. Falcone visited the White House again, this time for an appointment with John Holdren, the Director of the Office of Science and Technology Policy.

### ***Falcone Hired Husband of Senior FCC Staffer to Lobby the FCC on Mobile Satellite Services***

In addition to well-timed political contributions to the DSCC at the height of merger review discussions, Mr. Falcone’s Harbinger also secured the assistance of a lobbying firm, the Palmetto Group, via Harbinger’s legal counsel Goldberg, Godles, Wiener and Wright to lobby Congress and the FCC on mobile satellite services.<sup>13</sup> Mr. Steve Glaze, a lobbyist with the Palmetto Group, was registered to lobby the FCC directly on mobile satellite services and is married to Terri Glaze, a senior staffer at the FCC.<sup>14</sup>

### ***Governmental and Private GPS Authorities Object to ATC License Due to Interference***

On January 12, 2011, the National Telecommunications and Information Authority (an authority housed within the Department of Commerce responsible for working with other Executive Branch agencies to develop and present the Administration's position on telecom issues) sent a letter to Chairman Genachowski objecting to the ATC waiver for SkyTerra and stating that the “[g]rant of the LightSquared waiver would create a new interference environment and it is

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<sup>10</sup> [White House Visitor Access Logs](#).

<sup>11</sup> [SkyTerra Proxy Statement](#), 2/26/10, p. 32.

<sup>12</sup> See [www.opensecrets.org](http://www.opensecrets.org)

<sup>13</sup> Palmetto Group [Lobbying Disclosure Forms](#) for 2008 & 2009.

<sup>14</sup> “Terri Glaze Named Director of FCC's Legislative Affairs Office,” [Broadcasting and Cable](#), 7/22/09

incumbent on the FCC to deal with the resulting interference issues before any interference occurs.” (emphasis in original)<sup>15</sup>

Attached to Assistant Secretary Strickling’s letter was a letter from Danny Price, Director of Spectrum and Communication Policy at the Department of Defense to Strickling, stating that “DoD is concerned with the [order and authorization] being conducted without the proper analysis required to make a well informed decision. Given the potential negative impacts to GPS, Inmarsat, and AMT operations, request NTIA advocate to the FCC to defer action on the waiver request and place this application under a Notice of Proposed Rule-Making . . . .”<sup>16</sup>

The United States GPS Industry Council (USGPSIC) has also raised concerns in a letter to the NTIA: “the potential for interference to existing terrestrial and adjacent mobile space services from the introduction of a primary terrestrial voice and data broadband service . . . is orders of magnitude more significant than under the original MSS ATC mode of operation.”

The USGPSIC letter continues, “none of these changes can be fully and fairly vetted without an open rulemaking proceeding, as the current application process initiated by the FCC is insufficient for the proposed changes. Indeed, the FCC governing statute and its rules and regulations require an Administrative Procedure Act (APA)-sanctioned rulemaking in order to implement this transformation . . . .”<sup>17</sup>

Notably, the letter raises serious concerns about interference with E911 and law enforcement GPS applications.

### ***Summary***

Last Tuesday, the FCC, on delegated authority, officially granted the request by LightSquared to drop the FCC’s long-standing requirement that its new 4G service be a satellite service. In granting the waiver, the FCC chose to issue a license modification for LightSquared because of what they term “unique” circumstances, instead of modifying its rules to apply to all providers--essentially guaranteeing that Mr. Falcone, and only Mr. Falcone, receives this special treatment.

One can speculate whether or not those “unique” circumstances are related to Mr. Falcone’s September 30, 2009 meeting with the White House, and subsequent political contributions to the DSCC (in fact, the maximum contributions allowed by law), but the outcome of the FCC’s decision means other similarly situated satellite companies will not be able to take advantage of the same loophole, as the license modification is only valid for LightSquared.

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<sup>15</sup> Letter from Lawrence Strickling, Assistant Secretary of Commerce for Communications and Information, to FCC Chairman Julius Genachowski, 1/12/11).

<sup>16</sup> Letter from Danny Price, Director of Spectrum and Communication Policy at the Department of Defense to Assistant Secretary Strickling, 12/28/10).

<sup>17</sup> Letter from USGPSIC to NTIA, 12/13/10.

The ramifications of the FCC's favoritism are enormous. Consider for instance other competitive nationwide mobile providers like Clearwire, which have purchased terrestrial spectrum at auction for substantial sums and have invested millions more -- in Clearwire's case -- to build out its 4G network. For them, the message couldn't be more clear: Companies who play by the rules, create jobs, and invest in building out competing networks, are now at great risk of seeing their plans entirely upended by the FCC's arbitrary "unique" circumstances that give a Clearwire competitor the same terrestrial spectrum *for free*, and essentially exempt them from requirements to invest and build out a competing network by using a wholesale model where free satellite spectrum can be leased and "laundered" to other terrestrial mobile providers.

Based on this evidence and the record outlined above, it would appear that Mr. Falcone, a hedge fund trader currently under federal civil and criminal investigation, purchased a distressed satellite company to obtain a federal government bailout worth billions of dollars by shrewdly taking advantage of existing loopholes and preferential treatment by the FCC.

Mr. Falcone, who previously was almost exclusively a supporter of GOP causes and candidates gained access and influence to the Obama Administration and Democrats through well-timed White House visits and contributions to the DSCC -- weeks before filing his merger application at the FCC. Since then, at virtually every step of the way, Mr. Falcone has received favorable treatment and expedited consideration of his plans to offer wireless satellite services utilizing *free* terrestrial spectrum that would cost billions in the marketplace.

The FCC for its part, has fast tracked the merger, granting approval with lightning speed in March of 2010. During the entire process, the FCC has cut procedural corners, failed to publicly disclose ex parte contacts between Mr. Falcone, his representatives and the FCC, failed to consider the legitimate concerns of governmental authorities and GPS stakeholders about the ATC license waiver, and as announced last week, ultimately granted the crucial final waiver necessary for LightSquared (and only LightSquared) to begin offering wireless services using *free* terrestrial spectrum.

Given the above, and given the special responsibility of federal agencies to not only avoid conflicts of interest, but to avoid even the appearance of conflicts, the above record is troubling. No fair-minded person could look at the record so far and not believe that further investigation is warranted. These actions call out for your committee to conduct a thorough investigation so that citizens will have the benefit of the full record.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Boehm". The signature is fluid and cursive, with the first name "Ken" and last name "Boehm" clearly distinguishable.

Ken Boehm  
Chairman, National Legal and Policy Center