

Globalstar TLPS: With 2-3 Vote a Possibility at FCC, Wheeler Most Likely to Pull Order, But May Not Reintroduce

Update on FCC Vote

TLPS order hangs in the balance with an uncertain last vote. On June 3, Democratic FCC Commissioner Jessica Rosenworcel reportedly voted no on an order that would allow Globalstar to proceed with its Terrestrial Low Power Service (TLPS). Her vote deprived the order of a Democratic yes vote that would likely be necessary to clinch approval of the order. Votes are not made public because the order is likely being considered on circulation, but the current tally appears to be at 2-2 with Democrats Tom Wheeler and Mignon Clyburn voting in favor of the order and Republicans Jessica Rosenworcel and Ajit Pai voting against it.

Stakeholders should note the vote was likely unexpected. When an FCC chairman chooses to have an order considered on circulation, he will generally have canvassed the other commissioners to ensure enough yes votes on the item before circulating it. In this case, it is very likely that Rosenworcel's office received new information or policy arguments between the time the decision was made to circulate the order and the time her no vote was made. Wheeler's office may have also made unsuccessful attempts to negotiate a change to the order with Rosenworcel's office in order to receive a yes vote from her.

One source explained that Wheeler's best strategic option is to pull the order from circulation before the fifth vote. Pulling the order before the final vote saves the chairman from having the loss on his record, and in the unlikely event he wants to bring the order back, it leaves him at less of a disadvantage to negotiate changes. However, sources indicate he is unlikely to be invested enough to do the necessary work to pull and refile an order that would be more likely to pass.

In this article, we examine Chairman Wheeler's likely considerations in deciding whether to move the order forward.

A Closer Look at Wheeler's Considerations

Most likely action for Wheeler is to pull the order. At the time of publication, the order has a 2-2 vote on circulation, with Republican Commissioner Michael O'Rielly yet to vote. As a former FCC attorney explained, "It's pretty easy for the Commission to make changes as a procedural matter, and circulate a revised version of the order... the challenge is really more substantive." However, in the event that O'Rielly is a third no vote, "It would suggest that there are deep concerns that just couldn't have been ameliorated through edits."

Given this balance, Chairman Wheeler is most likely to pull the order from circulation very soon before it could garner a possible third no vote. A source familiar with the matter explained that in introducing the order, Wheeler had been willing to work out a deal, but would not see it as a great loss if a deal was not made. The source also added that this line of thinking may not be enough motivation to keep the order going after the current vote tally.

In the less likely event that Wheeler seeks to eventually have the order approved, pulling the order would make strategic and procedural sense. According to a former FCC staffer, this approach is preferable to Wheeler because orchestrating the right reforms becomes much more difficult once the chairman is in the minority position. With

the chairman in dissent, it moves the power to the three no-voting commissioners to set out how they want the order to move forward. (News of a third no would also likely leak to the press, which would make it harder to make the requisite changes.)

Possible rationales for commissioner votes: Commissioner O’Rielly is still in play. A source familiar with the proceeding explained that O’Rielly’s staff has been meeting with involved parties and has received calls from members of Congress in favor of Globalstar, but has kept close counsel on where he stands on the proceeding. The source reflected that O’Rielly likely is more receptive to letting unlicensed spectrum flourish and may have little to gain from voting with the Chairman in the proceeding. This uncertainty around O’Rielly’s vote indicates the best strategic choice for Wheeler may be to pull the order.

Rosenworcel’s concerns about the order are the easiest to ascertain. She has been very clear that unlicensed frequency and sharing of spectrum are critical spectrum policy concerns. So, the issues that motivated her no vote may track closely with those of Google and other members of the tech community that use unlicensed spectrum.

Commissioner Pai has tended to be much more ambivalent about unlicensed spectrum. However, his statement that the Globalstar order would “give a particular company special rights” suggests that he may also have been influenced by arguments that the company would unfairly gain a windfall on a resource that other entities normally have to compete for, which was an influential argument in the stalled Lightsquared proceeding.

We spoke to a source familiar with the decision making process of the commissioners, who said it is very rare for Republicans to not vote the same way given their ideological similarities, with Pai being somewhat more conservative and slightly more consistent with the consensus Republican, pro-big-business position.