

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Request of FiberTower, Inc. for	)	DA 05-114
Waiver of Sections 101.103 and 101.115	)	
of the Commission's Rules to Permit the	)	
Use of 0.61 Meter Antennas in the	)	
10.7-11.7 GHz Band	)	

**PETITION TO DENY OF THE SATELLITE INDUSTRY ASSOCIATION**

The Satellite Industry Association ("SIA") hereby petitions to deny the above-captioned waiver request filed by FiberTower, Inc. ("FiberTower").<sup>1</sup> SIA opposes FiberTower's waiver request because: (1) granting the request would constitute a *de facto* rule change that should not be made without a thorough examination of the policies that underlie the rule; and (2) FiberTower has presented no special circumstances that would warrant a deviation from the rule.

SIA's interest in this matter arises from the fact that FiberTower's waiver request implicates a band that is shared between terrestrial and satellite services. SIA serves as an advocate for the commercial satellite industry on regulatory and policy issues common to its members. With its member companies providing a broad range of

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<sup>1</sup> The Wireless Telecommunications Bureau placed the waiver request on public notice on January 19, 2005. See Public Notice, DA 05-114.

manufactured products and services, SIA represents the unified voice of the commercial satellite industry.<sup>2</sup>

## **DISCUSSION**

### **I. INTRODUCTION**

The 10.7-11.7 GHz band is shared between the Fixed Service (“FS”) and the Fixed Satellite Service (“FSS”), both of which have primary allocations in the band. FiberTower has requested a waiver of Sections 101.103 and 101.115 of the Commission’s rules, which require that microwave antennas operating in the 10.7-11.7 GHz band have a minimum diameter of four feet. FiberTower seeks authority to install antennas that are only two feet in diameter.

FiberTower’s waiver request mirrors a petition for rulemaking that FiberTower filed last July. In that petition, which SIA opposed, FiberTower asked that the Commission initiate a rulemaking petition to revise the rules that FiberTower now is asking the Commission to waive. Although no action has been taken on its earlier petition, FiberTower now seeks the authority to install up to 500 non-conforming microwave antennas per year.

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<sup>2</sup> SIA includes Executive Members The Boeing Company; Globalstar, L.P.; Hughes Network Systems, Inc.; ICO Global Communications; Intelsat; Iridium; Lockheed Martin Corp.; Loral Space & Communications Ltd.; Mobile Satellite Ventures; Northrop Grumman Corporation; PanAmSat Corporation and SES Americom, Inc. and Associate Members Eutelsat, Inmarsat, New Skies Satellites Inc., Stratos Global Corporation, and The DIRECTV Group.

## II. GRANTING FIBERTOWER'S WAIVER REQUEST WOULD CONSTITUTE A *DE FACTO* RULE CHANGE.

The Commission has rules in place that have the effect of limiting the deployment of FS and FSS stations in the 10.7-11.7 GHz band. In the case of FSS stations, those rules take the form of a footnote, NG 104, to the Commission's Table of Allocations. This footnote limits use of the band for FSS purposes to "international systems."<sup>3</sup> The Commission has made clear that the focus of this rule is on restricting deployment, stating that its purpose is "to limit the number of FSS earth stations with which the terrestrial fixed service would be required to coordinate."<sup>4</sup>

The Commission on occasion has waived the "international-only" requirement of NG 104. It has done so, however, only in circumstances that also limited deployment of FSS stations in the band. For example, it has granted waivers involving a small number of gateway FSS earth stations or earth stations used for telemetry, tracking, and command.<sup>5</sup> It also has granted waivers conditioned on FSS earth stations accepting harmful interference from present or future FS stations, thereby as a practical

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<sup>3</sup> See 47 C.F.R. § 2.106, Footnote NG 104 ("The use of the bands 10.7-11.7 GHz (space-to-Earth) and 12.75-13.25 GHz (Earth-to-space) by the fixed-satellite service in the geostationary-satellite orbit shall be limited to international systems, *i.e.*, other than domestic systems.")

<sup>4</sup> See, *e.g.*, *GE American Communications, Inc.*, 15 FCC Rcd 3385 at ¶ 10 (Sat. & Radiocomm. Div. 1999) (footnote omitted).

<sup>5</sup> See, *e.g.*, Order and Authorization, *Mobile Satellite Ventures Subsidiary LLC*, DA 05-50 (Jan. 10, 2005) at ¶ 28.

matter limiting the uses to which the FSS stations could be put and the places they could be located.<sup>6</sup>

The FS rules also have the effect of limiting station deployment. FiberTower has acknowledged that, for reasons such as space limitations, cost, and aesthetics, many more FS antennas would be deployed under a rule permitting FS microwave antennas having a diameter as small as two feet than will be deployed under the present rule requiring a diameter of at least four feet.<sup>7</sup>

By effectively limiting the deployment of FS stations and FSS stations in the 10.7-11.7 GHz band, the current rules prevent either service from proliferating in the band to the exclusion of the other service. SIA believes that the current rules already are more favorable to the FS service than to the FSS service, and should be revised to establish a more equitable relationship. Whether one agrees with this proposition or not, however, it would be inappropriate even to consider taking action that would alter the relative balance between the two services that is established under the current rules without conducting a comprehensive review, in a rulemaking, of the policy implications of such a change.<sup>8</sup>

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<sup>6</sup> See Order and Authorization, *Echostar KuX Corporation*, DA 04-3162 (Sept. 30, 2004) at ¶¶ 9-13; Order and Authorization, *Echostar Satellite LLC*, DA 04-3163 (Sept. 30, 2004) at ¶¶ 9-13; Order and Authorization, *Echostar KuX Corporation*, DA 04-3164 (Sept. 30, 2004) at ¶¶ 9-13.

<sup>7</sup> See, e.g., FiberTower waiver request at 3, 6-7.

<sup>8</sup> For the reasons stated in SIA's opposition to the petition for rulemaking filed by FiberTower, SIA believes that FiberTower has not justified a change in the current rules.

Granting FiberTower's waiver request would make *de facto* changes to the rules limiting deployment in the FS without the benefit of a rulemaking. If the waiver request is granted, FiberTower will be in a position to deploy thousands of two-foot microwave antennas by the time the Commission has considered FiberTower's petition for rulemaking, issued a notice of proposed rulemaking (assuming the Commission determines that a rulemaking is warranted), received comments and reply comments, and prepared and released a Report and Order.

Those thousands of two-foot microwave antennas, moreover, are just the beginning. If FiberTower's waiver request is granted, it is a virtual certainty that FiberTower's competitors will seek waivers of their own, and there is no apparent basis for denying them comparable treatment. The reality, then, is that tens of thousands of two-foot microwave antennas could well be installed before the Commission has an opportunity to evaluate whether there are grounds for a rulemaking and, if so, whether tilting the 10.7-11.7 GHz playing field further in the direction of the fixed service is contrary to the public interest.

Conditioning waiver grants on compliance with the outcome of any rulemaking is no answer. Such conditions would not negate the fact that, during the years it would take for the Commission to complete a rulemaking petition proceeding and, if deemed justifiable, a rulemaking proceeding, fixed service operators will be deploying large numbers of two-foot microwave antennas that will limit the ability of FSS licensees to deploy earth stations. These developments will be occurring at

precisely the time that new services such as high definition and local-into-local television are spurring demand for Ku-band frequencies, forcing satellite service providers to look to the “extended” Ku-band at 10.7-11.7 GHz band as overflow capacity for the “conventional” Ku-band, which is highly congested.

It is unrealistic to think, moreover, that the large installed base of two-foot microwave antennas will be removed if the Commission ultimately decides to retain the four-foot diameter minimum. FiberTower has acknowledged that, for a variety of reasons, two-foot antennas are feasible at many sites where four-foot antennas cannot be installed. If the Commission adheres to the requirement of a four-foot minimum at the conclusion of a rulemaking, therefore, the choice will be between keeping in place the two-foot antennas that have been installed and removing the two-foot antennas and discontinuing service. It is inevitable in these circumstances that the operators of the two-foot antennas would seek special temporary authority or a waiver to continue operating. To avoid painting itself into this corner, the Commission should deny FiberTower’s waiver request and, assuming FiberTower’s rulemaking petition is granted, use a rulemaking as the vehicle for conducting a thorough examination of the rules relating to the deployment of FS and FSS stations in the 10.7-11.7 GHz band.

### III. FIBERTOWER DID NOT PRESENT SPECIAL CIRCUMSTANCES.

It is well established that a rulemaking proceeding, rather than a waiver proceeding, is the appropriate vehicle for evaluating a challenge to the underlying premises of a rule. Waiver proceedings are reserved for cases in which there are “special circumstances” that warrant a departure from the rule.<sup>9</sup>

FiberTower’s waiver request fails this basic test. Although FiberTower claims that there are locations where use of four-foot antennas would be “impractical,”<sup>10</sup> it has not shown any nexus between this claim and the 500 antennas that FiberTower proposes to install annually. FiberTower has not identified where it intends to install its antennas, and has presented no facts concerning the conditions that are present at the sites. FiberTower’s filing, therefore, lacks the essential details that are needed to support a waiver request.

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<sup>9</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>10</sup> FiberTower waiver request at 1.

## CONCLUSION

For the reasons stated herein, FiberTower's waiver request should be denied.

Respectfully submitted,

SATELLITE INDUSTRY ASSOCIATION

A handwritten signature in black ink, appearing to read "David Cavossa". The signature is fluid and cursive, with a large loop at the end.

David Cavossa, Executive Director  
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February 3, 2005

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Deny of the Satellite Industry Association was served by first class mail this 3rd day of February, 2005, on the following:

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/s/Deborah Wiggins  
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