

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

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WASHINGTON, D.C. 20554

WT Docket No. 98-5

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In the Matter of)
)
Streamlining the Commission's)
Antenna Structure Clearance)
Procedure)
)
and)
)
Revision of Part 17 of the)
Commission's Rules Concerning)
Construction, Marking, and)
Lighting of Antenna Structures)

To: The Commission

COMMENTS OF VERNON TELEPHONE COOPERATIVE, INC.

Vernon Telephone Cooperative, Inc. ("VTC"), through its counsel and pursuant to Section 1.415(a) of the FCC's Rules, submits the following comments in the above-captioned Notice of Proposed Rule Making (NPRM).

I. Statement Of Interest.

VTC is a common carrier providing local exchange telephone service and improved mobile telephone service (IMTS) to the public in the Westby, Wisconsin area. VTC is the owner of an antenna tower near Westby, Wisconsin, on which it has located its own Business Radio Service, and Paging and Radiotelephone Service transmitters. VTC is also in the process of negotiating tower lease agreements with other site owners in order to obtain site availability for future transmitter sites. As an owner of an antenna tower that is required by the Commission to be obstruction marked and lighted, as well as a future tenant licensee on other antenna towers that could also require obstruction marking and lighting, VTC will be directly affected

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by the Commission's proposals to (a) require site owners to register antenna structures, (b) hold antenna structure owners primarily responsible for maintenance of obstruction marking and lighting requirements, and (c) continue holding tenant licensees responsible for compliance with the obstruction marking and lighting requirements in the event the tower owner defaults in meeting its Commission obligations. Moreover, VTC believes that its views can be viewed as unbiased, given its dual role as owner/lessor and lessee.

II. The Commission Should Hold Antenna Structure Owners Responsible For Any Fines Associated With Obstruction Marking And Lighting Compliance, And Should Strictly Limit A Tenant Licensee's Responsibilities.

A. Tower Owners Are The Responsible Party.

VTC adamantly supports the Commission's proposal to make antenna tower owners responsible (financially and otherwise) for registering antenna structures, for ensuring that antenna structures are properly obstruction marked and lighted (in accordance with Part 17 of the Commission's Rules), and for bearing financial responsibility in the event of a violation of the Commission's obstruction marking and lighting rules.¹

Placing regulatory responsibility for compliance with the Commission's obstruction marking and lighting requirements on the structure owners, as opposed to the tenant licensees, is appropriate: Most tower owners, like their brethren for other

¹ Proposed Rule Sections 17.29 and 17.31 will mandate that the structure owner, and not their tenant licensees, are responsible for daily inspections of antenna obstruction lighting and for notifying the FAA in the event of a light outage.

rental properties (e.g., apartment buildings, commercial office buildings, retail shopping centers, etc.), are engaged in the business of leasing antenna space to their tenants for profit. The remaining tower owners who lease antenna space do so as a means of defraying their overhead expenses associated with the construction and maintenance of the tower. Thus, tower owners receive a financial benefit from their tenants in the form of a periodic rental fee², in exchange for providing antenna space on a properly maintained antenna tower. And like owners of other rental properties, tower owners should be responsible for ensuring that the antenna tower conforms to all applicable federal, state and local governmental requirements. Where violations of other governmental regulations are found, the owner of the rental property, as opposed to the tenant, is typically cited and ordered to make necessary repairs. It is this standard that VTC urges the Commission to adopt as a means of ensuring compliance with its obstruction marking and lighting rules. As a tower owner, VTC is prepared to shoulder this responsibility.

B. Tenant Licensees Generally Are Not In A Position To Force Owner Compliance With The FCC's Rules And Must Not Be Responsible In The Event Of A Default.

VTC must oppose the Commission's proposal to the extent that tenant licensees would be held "secondarily" liable for compliance with the Commission's obstruction marking and lighting

² The typical monthly rental for antenna sites can range from a few hundred dollars per month to over one-thousand dollars per month.

rules.³ VTC is concerned that this proposal will result in tower users being forced to undertake activities that, under the terms of the lease agreement, are in the sole provence of the tower owner and its leasing agent. Most antenna space lease agreements prohibit tenant licensees from performing any repairs or maintenance to the antenna structure, whether it be for general maintenance or maintenance related to the tower's obstruction marking and lighting system. This prohibition is the result of owner concerns for insurance liability should the tenant licensee or its agent have an accident while making a repair. Also, allowing tenants to perform such work on the tower could subject the owner to higher maintenance costs (if reimbursement is expected), and liability for any damage to the operations of other tenants that may occur. Thus, antenna tower owners generally mandate in the lease that only they may access the tower for maintenance (or any other purpose, including upkeep of the tower's obstruction marking and lighting). Therefore, proposed Rule Section 17.6 places tenant licensees in a legal quandary: If they do not take steps to repair the defaulting owner's tower, they face Commission fines and penalties. If they step in and repair the tower, they face removal from the tower for breach of contract, as well as loss of their repair costs and perhaps litigation expenses and other liability claims by the

³ Proposed Rule Section 17.6 provides that "[i]n the event of a default by the antenna structure owner, each licensee or permittee authorized on an antenna structure shall be responsible for ensuring that the structure complies with the requirements of this part.

owner. By virtue of the terms of these lease agreements, tenant licensees have been forced into a situation where they have no choice but to (i) allow the owner to maintain the antenna structure in all respects, risking the adverse legal consequences discussed above, or (ii) go through the considerable expense of erecting and maintaining an individual antenna tower, which could amount to several tens of thousands of dollars (and is financially impractical, especially for small businesses). In many parts of the country, geographic zoning and other limitations make constructing your own tower infeasible.

Further, VTC opposes any attempt by the Commission to assess a monetary forfeiture against any tenant licensee for a tower violation, even if such responsibility is placed on tenant licensees only as a result of the tower owner's default of its obligations. As discussed above, most tower lease agreements prohibit tenants from taking action for liability reasons. Therefore, the duties imposed on a tenant licensee should be limited to those within its control, namely (1) if a tenant licensee becomes aware of a light outage or faded paint, it will promptly notify the tower owner; (2) if the tenant licensee receives a notice from the Commission that the tower is in violation and the owner is non-responsive, the tenant licensee will attempt to contact the tower owner to secure compliance, will immediately notify the Federal Aviation Administration (FAA) of the non-compliant condition, and will take steps to vacate the tower at the earliest opportunity if the tower owner continues in

its violation; and (3) the tenant licensee will not take any actions which would place the tower in noncompliance during the term of the lease (such as disconnecting tower lights when mounting an antenna).

In this way, when licensees are performing maintenance on their transmitter equipment, the tower owner will have "a second set of eyes" inspecting the antenna tower for any obstruction marking and lighting irregularities; and if a tower owner ignores Commission instructions to remedy a violation, the tenant licensee will do what it can, within its control, to remedy the situation.

VTC respectfully submits that the responsibility for correcting any deficiencies or irregularities with the tower must rest solely on the shoulders of the owner, and not the tenant licensees. If the Commission's stands by its "secondary liability" approach, fairness dictates that the Commission affirmatively establish that tenant licensees are entitled to full reimbursement of costs incurred in maintaining the tower due to the owner's inaction, and is free of any civil liability arising from an accident occurring due to the owner's violations.

III. The Commission Should Adopt Streamlined Procedures To Allow Licensees To Relocate In The Event Of An Uncorrected Violation

VTC is aware of instances where tenant licensees have had difficulties in forcing tower owners to correct deficiencies in obstruction markings and lighting. Because tenant licensees are rarely in a strong enough position to require tower owners to

take corrective action, they should not be responsible for guaranteeing that the tower is ultimately marked and lighted in accordance with the Commission's requirements. VTC urges, in circumstances where the tower owner fails to take necessary corrective action and refuses to allow the tenant licensees to take such action (at the expense of the tower owner), that the Commission to adopt a streamlined procedure under which tenant licensees could promptly immediately relocate to another antenna tower, in the event that the tower owner continues to default in meeting its responsibilities. VTC suggests that such streamlined procedures should encompass the liberal granting of verbal special temporary authority to allow the tenant licensee to relocate, if another tower is available. If a new site is not be immediately available, the Commission should liberally grant a waiver of the Commission's permanent discontinuance rules. In this way, tenant licensees would have some flexibility in avoiding civil liability while restoring station operations as promptly as possible from a nearby site, without having to risk an inadvertent cancellation of their operating authority while locating (or building) the new tower site.

IV. The Commission Should Clarify The Scope Of A Licensee's Duties, And Ensure That Tenant Licensees Will Not Be Liable For Fines Related To Acts Or Omissions By The Tower Owner.

While the Commission's NPRM states that tower owners will be held primarily responsible for compliance with the Commission's obstruction marking and lighting rules, and tenant licensees will remain secondarily responsible, the NPRM is not clear as to the

extent that tenant licensees would be held liable for any enforcement action arising from the tower owner's breach of its responsibilities. VTC wishes to clarify several points.

First, VTC requests that the Commission clarify that it does not propose to require tenant licensees to monitor the tower on a daily basis in order to ensure that the tower is properly lighted during nighttime hours and report any outages to the nearest FAA Flight Service Center (other than the initial report to the FAA upon receipt of a Commission notice that the tower owner has defaulted). As noted above, proposed Rule Sections 17.29 and 17.31 impose these duties solely on the tower owner, to the exclusion of the tenant licensee. VTC also wishes to verify that under the Commission's current proposal, tenant licensees would not be required to take any action (e.g. daily monitoring and repairs) with respect to the antenna tower until the Commission has first made an affirmative determination that the tower owner is in default of its obligations to ensure that the tower was properly obstruction marked and lighted at all times, and second, successfully made contact with an appropriate representative of the licensee.⁴ More importantly, once such a determination is made, any enforcement action should only be directed against the

⁴ VTC submits that contacting any employee of a licensee is insufficient to place the licensee on notice that the Commission is now looking to the tenant licensee to ensure that the tower is brought into compliance with the Commission's Rules, and that such compliance is continually maintained. VTC is concerned that if the Commission makes contact with an employee who is unfamiliar with the FCC's requirements, that the employee will not understand the significance and urgency of the FCC's contact.

tower owner, and not against any tenant licensee(s) who might be asked to step in and make necessary repairs to the tower. Third, following a determination that the tower owner had defaulted on its obligations, VTC wishes to clarify that tenant licensees would not be subject to any enforcement action as a result of the tower owner's violation of the Commission's obstruction marking and lighting rules.

V. Conclusion.

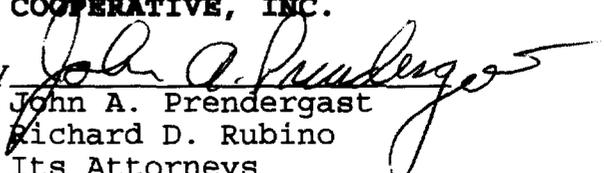
The Commission should hold only antenna structure owners, and not the tenant licensees, responsible for compliance with the Commission's obstruction marking and lighting requirements. Should the Commission determine that it will hold tenant licensees secondarily responsible for ensuring that the tower is properly marked and lighted, such responsibility should only be triggered by a formal determination that the tower owner is in default of its responsibilities, and that actual notice has been given to an appropriate representative of the tenant licensee. Upon receipt of such notice, licensees should be responsible only for those specific duties discussed above. In any event, tenant licensees should not be financially responsible for any violations committed by the tower owner, and the expense for any repairs or monitoring services performed by the tenant licensees, pursuant to Commission order, should be borne by the tower owner. Where a tower owner has defaulted on its responsibilities, a streamlined procedure must be in place so that tenant licensees can immediately relocate their transmitters to another tower, in

order to avoid potential liability associated with a air hazard. Finally, the Commission should clarify its proposed rules to ensure that tenant licensees will not be fined for any acts or omissions by the tower owner.

Respectfully submitted,

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