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Via Electronic Filing

Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: EX PARTE SUBMISSION
WT Docket 07-54: In the Matter of Amendment of Part 101 of the
Commission's Rules to Modify Antenna Requirements for the 10.7-11.7 GHz
Band

Dear Ms. Dortch:

I am writing in response to the August 29, 2007 *ex parte* filed on behalf of FiberTower Corporation and to present a proposal in the above-referenced proceeding. The purposes of this letter are to present a compromise approach, correct certain misunderstandings that FiberTower appears to have, and address further the legal issue of whether the Commission has provided adequate notice to adopt limits on new microwave applicants in the band to prevent aggregate interference to a handful of Mobile Satellite Service gateway sites that are expected to operate in the band.

MSV initially proposed certain rule changes to Part 101 to establish specific protection limits for MSS gateways and procedures for applying those limits. Reply Comments of MSV (June 21, 2007). While MSV continues to believe rule changes are warranted, MSV believes that adequate protection could be afforded to its operations if the FCC makes a finding that aggregate interference to MSS gateways is a legitimate concern and that it requires all applicants for new or modified Fixed Service facilities in the band to carefully coordinate their operations with any licensed gateway operations so as to avoid such interference. Statement of these principles should be sufficient to limit or prevent future disputes and prevent potential interference to incumbent licensees by new operators, without having a significant adverse effect on the deployment of new microwave facilities. MSS gateways will operate in the band in no more than 3-5 markets and will never use more than half the frequencies in the 10.7-11.7 GHz band.

FiberTower's recent letter suggested that MSV is attempting to put a gateway in Houston and seeking rules that would displace existing microwave operations. Neither is the case. MSV used the Houston case only to illustrate that its concern with potential aggregate interference is not entirely speculative, since when it investigated locating one

of its gateways at a Houston teleport it found a large number of co-channel microwave paths in existence already, each of which would have contributed significantly to aggregate interference into an MSV gateway. Partly as a result, MSV narrowed its search to teleports where existing microwave operations are not problematic and natural or other shielding provides additional protection. To be clear, MSV is proposing that any new obligations regarding aggregate interference apply only to new microwave applicants and only those in the vicinity of MSS gateways in a very few markets.

MSV also disputes FiberTower's contention that the Commission has not provided adequate notice to permit it to take action here. On its face, FiberTower's claim is unreasonable: the Commission appropriately raised the issue of aggregate interference in its Notice of Proposed Rulemaking and several parties (including FiberTower) have addressed the issue. For the Commission, as it changes the rules to invite a significant expansion of microwave facilities in the band, to take action requiring new microwave applicants to be accountable for their impact on the aggregate interference into a handful of earth stations, is not only legally permitted but practically the only reasonable course.

More specifically, the NPRM expressly raised the issue of aggregate interference, seeking comments and proposals for solving the problem:

In particular, we seek comment on the risk that aggregate interference poses to earth stations. Commenting parties may suggest ways to avoid or mitigate instances of aggregate interference. Parties should also discuss the sufficiency of existing industry practices, coordination requirements, and interference criteria to address instances of aggregate interference.

NPRM at ¶23. At least two parties addressed this issue in their initial comments in response to the NPRM. See Comments of Comsearch and Intelsat. FiberTower itself addressed the issue in its reply comments. In its reply comments, MSV expressed concern with the potential for aggregate interference and asked the Commission to take certain specific actions.

Pursuant to the Administrative Procedures Act and the parallel FCC rule, each agency must give adequate notice of any proposed rule and “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c); 47 C.F.R. § 1.415(b). The courts have interpreted this requirement as met if an agency's final rule is a “logical outgrowth” of the agency's notice. *Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951-52 (U.S. App. D.C. 2004). An action is considered a logical outgrowth if interested parties should have anticipated that the change was possible. *Id.* See also *In the Matter of Amendment to Parts 2, 15, and 97 of the Commission's Rules To Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, 13 FCC Rcd 16947, 16968 (July 29, 1998) (finding that “notice is sufficient where the description of the ‘subjects and issues involved’ affords interested parties a reasonable opportunity to participate in the rulemaking”).

FiberTower cites *Home Box Office, Inc. v. FCC* for the proposition that notice must provide sufficient information to permit “adversarial critique.” 567 F.2d 9, 55 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). However, the reasoning of the requirement in *HBO* was that an agency’s receipt of *ex parte* information was itself a violation of law, a decision has since been sharply limited. See *Elcon Enterprises, Inc. v. Washington Metropolitan Area Transit Authority*, 977 F.2d 1472, 1481 (D.C. Cir. 1992); *Sierra Club v. Costle*, 657 F.2d 298, 401-02 (D.C. Cir. 1981). Presently, only “[i]f *ex parte* material were to lead to an unanticipatable change in the final rule... would [the situation] be, of course, objectionable.” *Air Transport Ass’n of America v. FAA*, 169 F.3d 1, 18 n.5 (D.C. Cir. 1999). The actions MSV advocates are hardly “unanticipatable” in light of the NPRM and the subsequent comments.

FiberTower also relies on *American Medical Ass’n v. Reno*, a case which rests on the failure of an agency (the Drug Enforcement Administration) to articulate the basis for its decision more than the adequacy of the notice provided. There is no requirement that the FCC outline a specific proposal in an NPRM prior to adoption of a final rule. As the Commission stated just last year:

Agencies are free — indeed, they are encouraged — to modify proposed rules as a result of the comments they receive. If they were not free to do so, agencies ‘could learn from the comments on [their] proposals only at the peril of subjecting [themselves] to rulemaking without end.’ As long as parties could have anticipated that the rule ultimately adopted was ‘possible,’ it is considered a ‘logical outgrowth’ of the original proposal, and there is no violation of the APA’s notice requirements.

In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, 21 FCC Rcd 6703, 6710 (June 2, 2006).

Accordingly, MSV strongly believes that the FCC has the authority to act on the specific proposals that MSV has raised in this proceeding.

Marlene H. Dortch

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Please contact the undersigned with any questions.

Very truly yours,

/s/

Jennifer A. Manner

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