

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
Request of Mobilitie, LLC
for Waiver of 47 C.F.R. § 17.47(b)
and
Flash Technology Request for Waiver of
47 C.F.R. § 17.47

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 2009

Released: September 29, 2009

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the requests of Mobilitie, LLC ("Mobilitie") and Flash Technology ("Flash") for waiver of Section 17.47(b) of the Commission's Rules, 47 C.F.R. § 17.47(b). Section 17.47(b) provides that the owner of any antenna structure that is registered with the Commission and has been assigned lighting specifications pursuant to Part 17 "[s]hall inspect at intervals not to exceed 3 months all automatic or mechanical control devices, indicators, and alarm systems associated with the antenna structure lighting to insure that such apparatus is functioning properly."

2. Both Mobilitie and Flash argue that the quarterly inspections of antenna monitoring systems mandated by Section 17.47(b) of the Rules have been rendered unnecessary because of technological advancements associated with Flash's Eagle Monitoring System. Mobilitie asks the Commission to waive the rule and instead permit annual inspections of all its antenna structures monitored with this system. Similarly, Flash asks the Commission to waive the rule for all of its customers upon the customer's certification that its towers are equipped with the Eagle Monitoring System technology and are continuously monitored by Flash's technicians. For the reasons set forth below, we grant Mobilitie its request for relief. In addition, while we do not grant Flash a waiver on

1 47 C.F.R. § 17.47(b).

2 In the Matter of Request of Mobilitie, LLC for Waiver of 47 C.F.R. § 17.47(b), Request for Waiver, filed March 11, 2009 (Mobilitie Waiver Request) at 3.

3 In the Matter of Flash Technology Request for Waiver of 47 C.F.R. § 17.47, Request for Waiver, filed June 22, 2009 (Flash Waiver Request).

behalf of its clients,⁴ we establish an expedited process by which other tower owners using Flash's Eagle Monitoring System may request and obtain waivers of their obligation to perform quarterly inspections under Section 17.47(b).

II. BACKGROUND

3. On May 15, 2007, the Commission granted to the American Tower Corporation ("ATC") and to Global Signal, Inc. ("GSI") waivers of Section 17.47(b) of the Rules to allow annual, rather than quarterly, inspection of towers monitored by specified, technologically advanced monitoring systems.⁵ On October 15, 2007, the Wireless Telecommunications Bureau ("Bureau") granted to Optasite Towers L.L.C. ("Optasite") a similar waiver of Section 17.47(b) for its towers that are monitored using the same technology (the Eagle Monitoring System) as ATC.⁶ Subsequently, similar relief was granted to Crown Castle USA Inc. ("Crown Castle") and Global Tower LLC ("Global Tower") based on their use of technologies that compare favorably with the Eagle Monitoring System.⁷ Most recently, Diamond Communications LLC and Diamond Towers LLC ("Diamond") were granted a waiver based on their use of the TowerSentry Monitoring Systems.⁸ While Diamond's joint petitioner TowerSentry LLC ("TowerSentry") was not specifically granted a waiver, relief was extended to TowerSentry's customers through an expedited waiver process.⁹

4. Mobilitie filed its instant waiver request on March 11, 2009, and Flash filed its instant waiver request on June 23, 2009. Mobilitie, and Flash on behalf of its clients, seek the same relief granted to ATC, GSI, Optasite, Crown Castle, Global Tower, and Diamond. Both Mobilitie and Flash assert in their petitions that the monitoring technology the Eagle Monitoring System employs is exactly the same technology -- and in some instances the same system -- that has previously supported waiver grants.¹⁰ Mobilitie further supports its petition through its May 18, 2009 response to a request for additional information by the Wireless Telecommunications Bureau.¹¹ We will consider both the Mobilitie and Flash waiver requests jointly in this Order.

⁴ Flash is not subject to 47 C.F.R. § 17.47(b). See para. 5, *infra*.

⁵ In the Matter of Requests of American Tower Corporation and Global Signal, Inc., to Waive Section 17.47(b) of the Commission's Rules, WT Docket No. 05-326, *Memorandum Opinion and Order*, 22 FCC Rcd 9743 (2007) (*ATC/GSI Waiver Order*).

⁶ Petition of Optasite Towers L.L.C. for Waiver of Section 17.47(b) of the Commission's Rules, *Memorandum Opinion and Order*, 22 FCC Rcd 18456 (WTB 2007) (*Optasite Waiver Order*).

⁷ In the Matter of Crown Castle USA Inc. Request for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 22 FCC Rcd 21881 (WTB 2007) (*Crown Castle Waiver Order*); In the Matter of Request of Global Tower LLC for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, 23 FCC Rcd 16531 (WTB 2008) (*Global Tower Waiver Order*).

⁸ In the matter of TowerSentry LLC Request for Waiver of 47 C.F.R. § 17.47(b) and Joint Petition of Diamond Communications LLC and Diamond Towers LLC for Waiver of 47 C.F.R. § 17.47(b), *Memorandum Opinion and Order*, DA 09-1763, released August 7, 2009 (WTB 2009) (*TowerSentry/Diamond Waiver Order*).

⁹ *Id* at 6.

¹⁰ *Mobilitie Waiver Request* at 1; *Flash Waiver Request* at 1.

¹¹ See E-mail from John Dodge, Davis Wright Tremaine LLP to John Borkowski, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau (May 18, 2009) (*Mobilitie Supplement*). This additional information was provided in response to a request by the Wireless Telecommunications Bureau's Spectrum and Competition Policy Division. See E-mail from John Borkowski, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau to Chanelle Perry, Davis Wright Tremaine LLP (May 13, 2009).

III. DISCUSSION

5. Section 1.925 of the Commission's Rules provides that, with respect to wireless telecommunications services, the Commission may grant a request for waiver if it is shown that: "(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."¹² As discussed below, we grant a waiver to Mobilitie because we find that application of the quarterly inspection requirements of Section 17.47(b) to the towers in question is not necessary to serve the underlying purposes of the rule, and grant of the waiver is in the public interest. Based on the evidence presented, strict application of the rule to Mobilitie would be unduly burdensome and contrary to the public interest. Because Flash is an independent tower light monitoring company, and not an "owner of any antenna structure," it is not subject to Section 17.47(b) of the Commission's Rules. We do not find that it would serve the public interest to grant to Flash a waiver of that rule on behalf of its unspecified current and future customers. Instead, we extend relief to Flash's customers by means of an expedited waiver process that is functionally similar to the certification process requested by Flash, as described below.

6. Mobilitie and Flash's other customers employ the same Eagle Monitoring System used by parties that were previously granted waivers.¹³ In these orders, the Eagle Monitoring System was found to have self-diagnostic functions, including alarm notification, 24-hour polling, and manual contact, that are sufficiently robust so as to make quarterly inspection unnecessary to ensure that the control devices, indicators, and alarm systems on the towers are operating properly, thereby warranting a waiver of the rule. Significantly, the Eagle Monitoring System employs a National Operations Center ("NOC") that Flash staffs with trained personnel capable of responding to alarms 24 hours per day, 365 days per year,¹⁴ as well as a backup NOC that, in the event of a catastrophic failure at the primary NOC, has specific procedures to follow to transfer the monitoring duties of the system.¹⁵

7. Mobilitie and Flash both state that, particularly for towers in remote locations, quarterly inspection imposes a substantial and unnecessary resource burden. Mobilitie states that it spent approximately \$475,000 in 2008 conducting 700 quarterly inspections.¹⁶ Flash estimates that tower owners that have retained Flash to monitor their towers utilizing the Eagle Monitoring System, and that have not already obtained waivers of Section 17.47(b), spend an estimated \$800,000 annually on quarterly inspections.¹⁷ Further, Mobilitie asserts that during 1400 on-site quarterly inspections of its towers monitored using the Eagle Monitoring System since January 1, 2007, inspectors have not discovered a single event requiring a Notice to Airmen.¹⁸

8. For the reasons cited by the Commission in the *ATC/GSI Waiver Order*, and by the Bureau in subsequent orders, we conclude, based upon the uncontested evidence submitted in the record by Mobilitie and Flash, that the *Mobilitie Waiver Request* and the *Flash Waiver Request* establish that

¹² 47 C.F.R. § 1.925(b)(3).

¹³ *Mobilitie Waiver Request* at 2. See also *ATC/GSI Waiver Order* and *Optasite Waiver Order*.

¹⁴ *Mobilitie Waiver Request* at 4; *Flash Waiver Request* at 4.

¹⁵ *Mobilitie Supplement* at 1-3; *Flash Waiver Request* at 6. Mobilitie refers to the primary and backup NOCs as Alarm Response Centers, but they are apparently the same facilities.

¹⁶ *Mobilitie Waiver Request* at 3.

¹⁷ *Flash Waiver Request* at 8.

¹⁸ *Mobilitie Waiver Request* at 4.

quarterly inspections are unnecessary for those towers monitored by the Eagle Monitoring System.¹⁹ The Airspace and Rules Group of the Federal Aviation Administration has stated that it is not opposed to waivers of Section 17.47(b) “provided the applicant can demonstrate a safe and reliable automatic monitoring system with tracking mechanisms to evaluate the remote monitoring technology.”²⁰ We conclude that the Eagle Monitoring System is a safe and reliable monitoring system with tracking mechanisms to evaluate the remote monitoring technology, and that features of this system provide sufficiently robust monitoring of the control devices, indicators and alarm systems so as to render quarterly inspections unnecessary. Indeed, such advanced technology provides the benefits of more rapid response where there has been a lighting failure, and thus the public interest is served with respect to aircraft safety. In addition, granting waivers to tower owners using the Eagle Monitoring System will save them hundreds of thousands of dollars annually that are unnecessarily spent on quarterly inspections where they have deployed this advanced technology.

9. We therefore grant Mobilitie’s waiver request. For other tower owners using the Eagle Monitoring System, we will grant, in an expedited manner, waivers upon submission and review of a streamlined petition containing certifications similar to those proposed by Flash in its petition. Specifically, any waiver applicant shall submit a certification that: (1) its towers are monitored by Flash using the Eagle Monitoring System under the process described in this order; and (2) it maintains a facility to receive notifications of failures from the Eagle Monitoring System, which will enable the tower owner to carry out its responsibilities under Part 17 of the Commission’s rules.²¹ Although it was not proposed by Flash, we find the latter certification necessary to ensure that tower owners receiving waivers remain equipped to comply with the Commission’s regulations. The certification shall be signed, under penalty of perjury, by a company officer (or partner, sole proprietor or similar person able to act on behalf of the tower owner) with knowledge of the underlying facts. To ensure timely processing, waiver requests should also be e-mailed to part17@fcc.gov.²²

IV. CONCLUSION

10. For the reasons discussed above, we waive Section 17.47(b) to allow Mobilitie to conduct inspections required by that section, for its antenna structures monitored by the Eagle Monitoring System, on an annual rather than a quarterly basis. We further establish an expedited process for Flash’s other customers to obtain similar waivers. The Eagle Monitoring System reliably diagnoses problems, including any failures of control devices, indicators and alarm systems, within real time, and therefore renders strict application of the rule unnecessary to serve its underlying purpose. Moreover, our action will relieve both Mobilitie and potentially Flash’s other clients of the burden of performing unnecessary quarterly inspections. In addition, granting Mobilitie’s waiver, as well as implementing an expedited waiver process for other tower owners that employ the Eagle Monitoring System, will further encourage tower owners to invest in state-of-the-art technologies so that they too will become capable of continuous monitoring of both their lighting systems and control devices.

¹⁹ *ATC/GSI Waiver Order*, 22 FCC Rcd at 9747, 9748, ¶¶ 11, 17; *Optasite Waiver Order*, 22 FCC Rcd at 18456, ¶ 8; *Crown Castle Waiver Order*, 22 FCC Rcd at 21884, ¶ 9; *Global Tower Waiver Order*, 23 FCC Rcd at 16531, ¶ 9; *TowerSentry/Diamond Waiver Order*, DA 09-1763, at ¶ 10.

²⁰ Brief Comment of Office of Airspace and Rules, FAA, WT Docket No. 05-326, filed December 4, 2006.

²¹ See *TowerSentry/Diamond Waiver Order* at 6.

²² In its petition, Flash also offers to provide the Commission with a continually updated list of all towers, and associated tower owners, that its Eagle Monitoring System is monitoring (other than those already encompassed by an existing waiver). *Flash Waiver Request* at 2. We find that possession of such a list is unnecessary to implement the terms of this Order, and accordingly we decline to impose this burden on Flash. We expect, however, that Flash will remain willing and able to confirm whether particular towers are monitored using the Eagle Monitoring System upon request.

11. We note that PCIA has filed a Petition for Rulemaking in which it requests, among other things, to amend Section 17.47(b) of the rules so as to exempt systems using NOC-based monitoring technology from the quarterly inspection requirement.²³ PCIA's Petition for Rulemaking was placed on Public Notice to allow interested persons to file statements opposing or supporting it.²⁴ This petition is currently pending before the Commission, and the waiver that we grant today, as well as any future waivers granted under the expedited process, are subject to any rule changes that the Commission may promulgate in that proceeding.

V. ORDERING CLAUSES

12. IT IS THEREFORE ORDERED, pursuant to Sections 4(i), 303(q), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(q), 303(r), and pursuant to Sections 0.131, 0.331, and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, that the Request for Waiver filed by Mobilitie IS GRANTED.

13. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 303(q), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(q), 303(r), and pursuant to Sections 0.131, 0.331, and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, that the Request for Waiver filed by Flash IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman
Chief, Wireless Telecommunications Bureau

²³ Petition for Rulemaking, RM-11349, In the Matter of Amendments to Modernize and Clarify Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures, filed by PCIA – The Wireless Infrastructure Association on September 12, 2006.

²⁴ Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed, *Public Notice*, Report No. 2794 (rel. October 30, 2006). Comments were due on November 29, 2006.