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

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| In the Matter of | ) | |
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| Hiber, Inc. | ) | IBFS File No.: SAT-PDR-20180910-00069 |
| | ) | Call Sign S3038 |
| Request for Waiver or Reduction of Surety Bond Default Payment | ) | |
| | ) | |

## MEMORANDUM OPINION AND ORDER

**Adopted: June 2, 2022** **Released: June 2, 2022**

By the Chief, International Bureau:

## I. INTRODUCTION

1. By this Order, we deny the request of Hiber, Inc. to waive or reduce the surety bond associated with its grant of U.S. market access to provide non-voice, non-geostationary (NVNG) mobile satellite services (MSS). On September 24, 2021, Hiber surrendered its grant of U.S. market access which, under the Commission's rules and as conditioned in the grant, results in the forfeiture of Hiber's surety bond. We find that Hiber has failed to demonstrate that a waiver or reduction of the bond would not undermine the purpose of the rule or that a waiver would serve the public interest. Consequently, the outstanding balance on the bond is due and payable to the U.S. Treasury upon written notice from the Commission's Office of Managing Director.[1]

## II. BACKGROUND

2. On May 6, 2020, the International Bureau granted Hiber's petition to access the U.S. market to provide NVNG MSS using a constellation of up to 24 low-Earth orbit satellites authorized by the Netherlands.[2] Hiber's petition was included as part of a processing round for NVNG MSS systems in the 399.9-400.05 MHz and 400.15-401 MHz bands.[3] As a condition to its grant, Hiber was required to meet launch and operation milestones, specifically, launch and operate 50 percent (12) of its proposed space stations, no later than May 6, 2026, and launch and operate the remaining space stations by May 6, 2029.[4] Hiber was also required to post a surety bond, and maintain the surety bond in accordance with section 25.165 of the Commission's rules to assure payment in the event of failure to meet its milestone

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[1] *International Bureau Updates Procedures For Filing and Maintaining Surety Bonds Pursuant to Revised Milestone and Escalating Bond Requirements*, Public Notice 31 FCC Rcd 11054 (Int'l Bur. 2016).

[2] *Hiber, Inc. Petition for Declaratory Ruling to Access U.S. Market Using the Hiberband Low-Earth Orbit System*, Order and Declaratory Ruling, 35 FCC Rcd 4619 (IB 2020) (Hiber Order).

[3] *Satellite Policy Branch Information, Myriota Pty. Ltd. Petition accepted for filing, IBFS File No. SAT-PDR-20190328-00020 Cut-Off Established for Additional NVNG MSS Applications or Petitions for Operations in the 399.9-400.05 MHz and 400.15-401 MHz Bands*, Public Notice, 34 FCC Rcd 7185 (Int'l Bur. 2019).

[4] Hiber Order at para. 29 (b).

obligation to launch 50 percent of its proposed space stations.[5] Hiber's grant was conditioned accordingly.[6]

3. Hiber submitted its initial bond for $1.67 million on May 29, 2020, and filed a rider to the bond increasing the amount to $2,336,980 on April 6, 2021.[7] On September 24, 2021, Hiber surrendered its grant of U.S. market access.[8] In its surrender letter, Hiber explains that it was no longer developing its system, and no longer seeks to provide services to the United States through this system. Hiber acknowledged that its surety bond "will be used to pay the default payment specified in 47 C.F.R. § 25.165(c)."[9] However, in its surrender letter Hiber requested a waiver or reduction of the surety bond default payment.

4. Hiber asserts there is good cause to grant a waiver or reduce the amount of the bond based on its good faith in taking tangible steps to deploy its system.[10] Hiber states it was committed to building its network and did not engage in spectrum warehousing. In support, Hiber notes that it launched four of its 24 satellites, constructed two ground stations, and coordinated frequencies with a number of operators.[11] The costs associated with developing its system, Hiber reports, including construction, launch, coordination, and other associated expenses totaled $33 million over approximately six years.[12]

5. Hiber further explains that two of the four satellites it launched are non-operational, and that technical issues with the other two satellites prevent it from providing commercial service. As a result of these issues, it has not been able to generate sufficient revenue to complete its system. Hiber also states that the Covid-19 pandemic prevented its representatives from traveling to the United States to meet with potential stakeholders, further constraining its ability to obtain investments to support construction of its constellation.[13]

6. In the alternative to a complete waiver of the bond amount, Hiber requests a reduction in the amount due under the bond. Because Hiber was able to construct and launch four of the 12 satellites required at the initial milestone, it seeks to reduce the amount due by 33 percent.[14] Hiber concludes its letter by stating that the "special circumstances" it has presented warrant a deviation from the bond requirement and a waiver or reduction of the bond due would serve the public interest better than strict adherence to the rule.

[5] 47 CFR § 25.165(d).

[6] Hiber Order at para. 29 (c).

[7] Letters from Tony Lin, Counsel to Hiber, to Marlene H. Dortch, Secretary, FCC, (May 29, 2020 and April 6, 2021).

[8] Letter from Bruce Henock, General Counsel, Hiber, Inc, to Marlene H. Dortch, Secretary, FCC (Sept. 24, 2021) (Hiber Surrender Letter). In this letter, Hiber states that it is also surrendering its blanket license to operate 10,000 mobile earth terminals with its system, IBFS File No. SES-LIC-20191217-01739. This information was placed on Public Notice. No comments were filed in response to the notice. Satellite Policy Branch, Actions Taken, DA 21-1238 (Oct. 1, 2021).

[9] Hiber Surrender Letter at 1.

[10] *Id*. at 2.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*. at 3.

## III. DISCUSSION

7. Prior to the initiation of the surety bond rule, the Commission required a financial qualification showing to determine whether an applicant had the financial resources needed to launch and operate a satellite for one year.[15] Under this process, entities could apply for and obtain a satellite license, and later abandon it based on economic changes in the marketplace without accountability. The Commission found that changes in a licensee's plan and delays in the provision of service precluded other interested parties from moving forward with satellite systems in a more timely manner. In 2003, the Commission replaced the financial qualification showing with a bond requirement which, the Commission stated, required satellite licensees to make a financial commitment to construct and launch their satellites.[16] The bond requirement, as implemented, was a market-driven rather than regulatory determination, and the Commission reasoned that requiring satellite licensees to make a financial commitment to construct and launch their satellites would help deter speculative applications.[17] Thus, the Commission concluded, the bond requirement would prevent valuable spectrum resources from lying fallow when another party could put the resources into use.[18] Regardless of intent, the Commission noted that a licensee that obtains a license and surrenders it later has the same effect as a licensee that warehouses scarce orbit and spectrum resources.[19]

8. In 2015, the Commission adopted a revised methodology to achieve its public interest goal respecting the timely and expeditious construction and deployment of new spacecraft.[20] The new "incentive" regulation eliminated interim milestones and modified the performance bond to increase liability over time.[21] Although the requirement was revised, the purpose of the bond remains the same--to encourage satellite operators to construct and launch spacecraft expeditiously or surrender their authorization early if business plans changed, thereby deterring warehousing of spectrum and orbital resources.[22] The escalating bond requirement, the Commission noted, also permits licensees greater flexibility and reduces regulation. As currently enacted, section 25.165 requires licensees, within 30 days of grant of a license or U.S. market access, to post and have on file with the Commission a surety bond of a specified penal amount payable through the Commission to the United States Treasury.[23] As a

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[15] *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 12674, 10766 at para. 6 (2003) (*First Report and Order*).

[16] *Id*. at 10824, para. 166.

[17] *Id*.

[18] *Id*.

[19] *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Order on Reconsideration and Fifth Report and Order, 19 FCC Rcd 12637, 12652 at para. 37 (2004) (*First Order on Reconsideration*).

[20] *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, Second Report and Order, 30 FCC Rcd 14713, 14734 at paras. 50-51 (2015) (*Second Report and Order*).

[21] The Commission eliminated all of the space station construction milestones except the requirement to bring the space station(s) into operation at a specified period of time. *Id*. at para. 59. In 2017, the Commission modified the milestone for NGSO systems to require the launch and operation of 50 percent of the authorized system within six years of grant, and complete their systems within 9 years of grant. *Update to Parts 2 and 25 Concerning Non-Geostationary, Fixed-Satellite Service Systems and Related Matters*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 7809, 7831 at para. 67 (2017).

[22] Under the escalating bond requirement, liability increases from $1 million to $3 million for geostationary satellites, and $1 million to $5 million for NGSO systems. The total potential liability of $3 million for GSO satellites and $5 million for NGSO systems did not change under the new rule. *Second Report and Order*, 30 FCC Rcd 14741 at para. 70.

[23] 47 CFR § 25.165.

condition of its license or grant of U.S. market access, each licensee or market access grantee must maintain the bond pursuant to the formula set forth in the rule or the license or grant is null and void.[24]

9. *Waiver Analysis.* A waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.[25] Generally, the Commission may waive any rule if there is good cause to do so and, in making this determination, may take into account considerations such as hardship, equity, or more effective implementation of overall policy on an individual basis.[26] Hiber asserts there is good cause to waive its bond obligation. We disagree. Rather, the reasons presented by Hiber--technical and financing issues--do not constitute special circumstances warranting a waiver. Taking "good faith" tangible steps toward implementation, including in this case constructing and launching four satellites and spending $33 million over the course of seven years, is the expected course of action for operators benefitting from market access grants and not a basis to waive the bond requirement.[27] Hiber also claims the global pandemic was devastating to its ability to obtain additional investments to support construction of its system.[28] While licensees are not required to have committed funds at the beginning of its satellite manufacturing project, they are not excused from the consequences of proceeding without having secured sufficient funding, including consequences "exacerbated by difficult economic conditions or an unfavorable business climate."[29] The Commission has clearly stated that where satellite entrepreneurs freely apply for and obtain licenses, and later abandon them due to changes in the marketplace, such practices are inconsistent with the public interest by precluding some other interested company from making use of valuable spectrum and orbital

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[24] The surety bond payment liability in the event of default is calculated pursuant to the formulas in section 25.165 47 CFR § 25.165 (a)(1), (2). For an NGSO licensee or holder of a grant of U.S. market access, the amount of the surety bond must require payment in the event of a default in an amount, at a minimum, according to the following formula, with the resulting dollar amount rounded to the nearest $10,000: A=$1,000,000+$4,000,000 * D/2192, where A is the amount to be paid and D is the lesser of 2192 or the number of days that elapsed from the date of the license grant until the date when the license was surrendered.

[25] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)).

[26] 47 CFR § 1.3. *See Northeast Cellular*, 897 F.2d at 1166 ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.").

[27] Hiber Order, at para. 29 (b); Hiber Surrender Letter at 2. *See AtContact Communications, LLC*, Order, 25 FCC Rcd 7567, 7585 at para. 53 (2010) (*AtContact Order*) (reliance on an applicant's "good faith efforts" to succeed will tend to undermine the bond requirement, which was designed to obviate subjective assessments of the licensee's motives).

[28] We note that two other licensees surrendered space station authorizations within six months of Hiber during the ongoing global pandemic, and no bond waivers were requested. *See* Directv Enterprises, LLC, IBFS File No. SAT-LOA-20130205-00016, Letter from Jennifer D. Hindin, Counsel to Directv, to Marlene H. Dortch, Secretary FCC (May 28, 2021), and Karousel Satellite LLC, IBFS File No. SAT-LOA-20161115-00113, Letter from Monish Kundra, Karousel, to Marlene H, Dortch, Secretary FCC (Aug. 13, 2021).

[29] *Globalstar Licensee LLC*, Order, 25 FCC Rcd 13114, 13125, ¶ 25 (IB, OET, WTB, 2010); *see also Constellation Communications Holdings, Inc.*, 18 FCC Rcd 18822, 18825 at para. 7 (2003) ("failure to attract investors, an uncertain business situation, or an unfavorable business climate in general does not justify an extension of a licensee's construction timetable"); *NetSat 28 Company LLC*, Memorandum Opinion and Order, 19 FCC Rcd 17722, 17728 at para. 14 (IB, 2004) (failure to attract investors or an unfavorable business climate does not warrant an extension of a licensee's milestones).

resources in a more timely fashion.[30] The Commission explained that a bond requirement "create[s] incentives for companies to consider their business risks before applying for a license."[31] In sum, "[a]llowing entities to file applications, with the knowledge that they may well be able to obtain a waiver of the bond if they are unable to proceed with implementation, could eviscerate the Commission's safeguards against speculation and warehousing."[32]

10. Similarly, we do not find good cause to reduce the amount of the bond due. Hiber seeks a reduction of the bond by 33 percent, representing the percentage of satellites it launched as required under the milestone.[33] Hiber cannot reliably assert it met any portion of the milestone, which required Hiber to launch 50 percent of the maximum number of proposed space stations (that is, 12 out of 24 satellites) and "place them in the assigned orbits, and operate them in accordance with the grant" no later than May 6, 2026.[34] As Hiber notes, it launched only four of the 12 satellites, none of the four satellites launched were able to provide service, and Hiber has surrendered its authorization to provide service to the U.S. market.[35] In any event, even a partial waiver of the bond payment due would be "fundamentally inconsistent" with the underlying purpose of the bond requirement to deter warehousing of spectrum and orbital resources.[36]

## IV. CONCLUSION AND ORDERING CLAUSE

11. For the foregoing reasons, IT IS ORDERED, pursuant to sections 0.51, and 0.261 of the Commission's rules, 47 CFR §§ 0.51, 0.261, that Hiber, Inc.'s request for a waiver or reduction of the surety bond due to the United States Treasury for the surrender of its market access grant for a NVNG MSS system is DENIED.

12. IT IS FURTHER ORDERED that the full amount of Hiber, Inc.'s surety bond payment of $1,920,000 will be due and payable to the U.S. Treasury upon written notice from the Office of Managing Director.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Sullivan
Chief
International Bureau

[30] *First Order on Reconsideration*, 19 FCC Rcd at 12652, para. 37.

[31] *Id*.

[32] *AtContact Order*, 25 FCC Rcd at 7586, para. 55. *See also Kepler Communications Inc.,* Order and Declaratory Ruling, 33 FCC Rcd 11453, 11460 at para. 18 (2018) (rejecting Kepler's assertion that a preemptive waiver of the surety bond requirement will minimize operational risk for the launch of its system and accommodate replacement satellites because these reasons do not rise to the level of special circumstances warranting a waiver of the rule).

[33] Hiber Surrender Letter at 3.

[34] Hiber Order at 29 (b).

[35] Hiber Surrender Letter at 3.

[36] *AtContact Order*, 25 FCC Rcd at 7581, para. 40.