Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of

Petition for Declaratory Ruling Regarding )

Treatment of Rulemakings and Waivers )

Related to New Equipment and Services ) RM Number \_\_\_\_\_\_\_\_\_\_\_\_

at Frequencies Greater Than 95 GHz )

**PETITION FOR DECLARATORY RULING**

**OF**

**IEEE-USA**

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***DATED FILED***

# SUMMARY

IEEE-USA requests a declaratory ruling from the Commission that petitions or applications related to technologies and services in the frequency spectrum above 95 GHz be classified as “a new technology or service” in accordance with the terms of Section 7 of the Communications Act of 1934, as amended.[[1]](#footnote-1) Under Section 7, such new technologies or services are entitled to a Commission review shot clock of 12 months and the burden is placed on opponents to show that the new technologies or services are not in the public interest.

 At present there are no FCC service rules that address *any* applications or services which utilize frequency spectrum above 95 GHz. The regulatory consequence of this current limitation is that the only use permitted is with experimental licenses for this portion of the spectrum. Such limitation creates major uncertainties which act as a barrier to entry for innovation by precluding private sector capital investment necessary for development of long term commercial opportunities, thus precluding the accrual of public and private benefits to society.

 Clearly, the implication of Section 7 is to eliminate the regulatory uncertainties associated with Commission decisions for new technologies such as those above 95GHz (e.g., misclassification, time delays). Eliminating or reducing the consequent barrier to market entry as requested by IEEE-USA will stimulate the innovation and capital investment for research and development necessary for eventual introduction to the commercial marketplace. This, in turn will expedite numerous applications using this relatively unused portion of the spectrum and further the goals of Section 1 of the Communications Act of 1934, as amended.

# I. BACKGROUND

 A. IEEE-USA

IEEE-USA is a unit of the Institute of Electrical and Electronics Engineers, Inc. It was created in 1973 to support the public policy interests of IEEE's and professional advancement of U.S. members and is primarily supported by annual assessments of its members.[[2]](#footnote-2)

IEEE-USA's mission as outlined in the IEEE Bylaws is to recommend policies and implement programs specifically intended to serve and benefit the members, the profession, and the public in the United States in appropriate professional areas of economic, ethical, legislative, social and technology policy concern. Its vision is to serve the IEEE U.S. member as the best resource for achieving professional success and support as well as providing an effective voice on policies that promote U.S. prosperity.

B. Need for accelerated remedial regulatory action

In the past, U.S. industry was leading in the expansion of wireless services into ever higher frequency bands, enabled by timely prerequisite domestic regulatory progress. While the U.S. continues to lead in technological development, recently, a foreign manufacturer has taken the product development and service deployment lead in the next higher frequency band for which FCC has not yet adopted the prerequisite regulatory rules. Accelerated remedial regulatory action is therefore needed to enable the U.S. industry to compete in accordance with its leadership potential.

C. Above 95 MHz Perspectives

 1. Present Situation

At present the Commission’s Table of Allocations extends up to 275 GHz and generally parallels the provisions of the International Telecommunications Union (ITU) above 95 GHz. In almost all bands above 95 GHz Federal Government allocations and Non-Federal Government allocations under FCC jurisdiction are coprimary. However, the Commission’s radio service rules end at 95.0 GHz, an upper limit reached on October 16, 2003 in the Report and Order of Docket 02-146.[[3]](#footnote-3) While the Commission provides for experimental radio uses under Part 5 of its rules on any radio frequency, such an experimental authorization limits the scope and ability to access markets for innovative radio products and services due to the requirements of Sections 5.51, 5.111, and 5.113 that limit Part 5 licenses to valid experiments and prevent normal marketing.[[4]](#footnote-4)

IEEE-USA believes that this lack of service rules inhibits market entry for new and innovative technology and applications above 95 GHz; it inhibits the acquisition of private sector funds for the research/development/testing necessary to move technology from technical journals and into the commercial marketplace. This was affirmed by FCC Commissioner Pai when he stated:

(D)elays at the Commission have substantial real-world consequences: new technologies remain on the shelves; capital lies fallow; and entrepreneurs stop hiring or, even worse, reduce their workforce as they wait for regulatory uncertainty to work itself out. The FCC has long had a reputation in Washington as an agency that moves too slowly.[[5]](#footnote-5)

It should be noted that previous FCC actions to lessen barriers to innovative technology have been commercially successful and resulted in numerous products and services related to, for example, Wi-Fi and Bluetooth technologies in the 60 GHz band, and technology in the 70/80 GHz band.[[6]](#footnote-6)

 2. Above 95 MHz Technology Applications & Progress

The lack of commercial development of technology above 95 GHz is demonstrated by the majority of any progress being skewed in favor of the substantial military-government sources of financing that are less sensitive to the inherent regulatory uncertainties. The consequence, of course, is that applications are inhibited in their non-governmental development despite being ripe for commercial exploitation. This was demonstrated, for example, on December 19, 2011 when IEEE-USA presented a public seminar at the FCC entitled “Terahertz Technology: The Next Frontier for Radio”. The seminar explored the feasibility of new technology above 100 GHz[[7]](#footnote-7) and included speakers from Sandia National Laboratories, CalTech Jet Propulsion Laboratory and AT&T Bell Labs. Another unit of the IEEE, the Microwave Theory and Techniques Group, has been publishing a regular journal on terahertz technology,*IEEE Transactions on Terahertz Science and Technology[[8]](#footnote-8)*, for over a year**.**

Most importantly, a review of the FCC’s experimental licensing database shows 13 current licenses above 95 GHz[[9]](#footnote-9). Almost all of these licensees appear to be military contractors whose funding and applications differ from commercial developers, especially in the short run. Nevertheless, practical trial applications of above 95 GHz technology are beginning to appear in the commercial marketplace outside the U.S. demonstrating the interest in such new technologies. For example, in a demonstration at the 2008 Beijing Olympics a Japanese-developed 120 GHz system collected HDTV video feeds to a central location.[[10]](#footnote-10)

More recently, a Singapore government-financed research laboratory announced a novel 135 GHz antenna technology that “can support wireless speed of 20 Gbps – more than 200 times faster than present day Wi-Fi”.[[11]](#footnote-11) We note, however, a lack of field trials and prototype equipment in the U.S. and believe the evidence supports that inhibition of private capital investment issues related to FCC regulation are a major contributing factor.

 3. Available Regulatory-Administrative Incentives

Section 7 of the Act creates a one year (or less) path from proposal to adoption of new technologies and services. By making a declaratory ruling that proposals to the Commission for new technologies and services above 95 GHz will be treated as new technologies and services under Section 7, the Commission will encourage commercial development and innovation by greatly decreasing regulatory uncertainty. Presently, the only certainty is that an experimental use of above-95 GHz technology is eligible for experimental licensing. There is no path to post-experimental use.

Section 7 was added on December 8, 1983[[12]](#footnote-12) but has rarely, if ever, been used by the Commission. Its terms provide:

**§ 157. New technologies and services**

(a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

(b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

Favorable consideration of this Declaratory Ruling Request will demonstrate the Commission is a willing to move quickly on new service proposals above 95 GHz and consider them on their merits in a timely way.[[13]](#footnote-13)

 Consistent with this position, Commissioner Pai has stated:

“The Commission should make the deployment of new technologies and new services a priority, resolving any concerns about them within a year.”[[14]](#footnote-14)

In his address at Carnegie-Melon University, Commission Pai also pointed out the underlying problem of “regulatory uncertainty” in communications technology

“After all, just think about how uncertainty affects you in your life. If you were looking for land on which to build a new house, for example, would you purchase a plot if the zoning board refused to tell you whether you could build the house? Probably not. As someone put it to me recently, “Regulatory uncertainty is business uncertainty.” And when businesses are uncertain, they, like you or I, are hesitant to invest. It’s therefore no surprise that billions of dollars of capital are staying on the sidelines in the communications industry.”[[15]](#footnote-15)

Apparently, the only other statement available from a commissioner on the issue of Section 7 is from Commissioner Ness in 1999 where she said,

“Section 7 of the Communications Act of 1996(*sic*) sets the development of new

 technologies as national policy. And, as stewards of the spectrum, the

 Commission has an obligation to the American public to ensure that the process

 yields the essential information needed to make good spectrum management

 decisions in a reasonable timeframe.”[[16]](#footnote-16)

4. IEEE-USA and Section 7

IEEE-USA previously contacted the Commission to request more active use of Section 7 to facilitate the development of innovative technology in the US. In its April 18, 2011 letter to FCC, it made several suggestions on how the Commission could expedite the deliberation of new technologies.[[17]](#footnote-17)

5. Federal Government Frequency Sharing Issues

At present there may be some coprimary federal government use of this spectrum under the auspices of the National Telecommunications and Information Administration (NTIA) pursuant to its authority under Sections 305 and 902 of the Act[[18]](#footnote-18) since all spectrum allocations above 95 GHz are shared between federal and nonfederal users.[[19]](#footnote-19) However, the very nature of these frequencies greatly facilitates much easier sharing than at lower frequencies due to high path loss resulting from atmospheric absorption as well has the small very directional antennas made possible by very small wavelengths.[[20]](#footnote-20) As a result of these factors, interference is much less likely at lower frequencies and NTIA has previously used this observation to introduce an unprecedented direct coordination system to speed coordination of nongovernment licenses in its Web Based Frequency Coordination for the lower adjacent 70/80/90 GHz bands.[[21]](#footnote-21) It should be noted that the language of Section 7(a) appears to apply to both NTIA and FCC. In view of NTIA’s interest in the use of commercial off-the-shelf (COTS) technology for federal wireless systems and the Commercial Department’s mission to promote “job creation, economic growth, sustainable development and improved standards of living for all Americans”[[22]](#footnote-22) it is expected that NTIA should be supportive to facilitating the introduction of new technology for nongovernment users in the bands above 95 GHz as they have been in lower bands.

# II. DECLATORY RULING REQUEST

Pursuant to Section 303(r) of the Act[[23]](#footnote-23) and Section 1.2 of the Commission's rules,[[24]](#footnote-24) IEEE-USA respectfully petitions the Commission to issue a Declaratory Ruling on a narrow issue with significant implications: that requests for rulemaking or waivers dealing with frequencies above 95 GHz be presumed to be “a new technology or service” within the context of Section 7 of the Communications Act of 1934, as amended.

There are no present FCC service rules above 95 GHz and therefore no licenses other than experimental licenses subject to the terms of Part 5 of the Commission’s Rules. Consequently, technology for bands above 95 GHz face regulatory uncertainty and an expected regulatory delay that is difficult to quantify. These issues are real disincentives for the capital formation that is necessary for technology development above 95 GHz. The result is creation of barriers to commercial market entry which deprives the public and private sectors of the benefits of new and innovative technologies. This Request is supported by the information presented above.

Implementing Section 7 is not a perfect solution nor is this section a perfect piece of legislation. For example, Section 7(a) is relatively clear although it is not clear what activities are required within the one year deadline of Section 7(b). However, Section 7 remains and integral part of the Communications Act of 1934, as amended, and the intent of Congress is clear.

It has been nearly 30 years since section 7 was adopted. While many of the technological advances in that period may have raised questions of whether they qualified as ‘new technology” and many wireless innovations may have raised difficult conflicts with incumbent licensees, the case now for technology at frequencies greater than 95 GHz is quite clear: There is not, and cannot be, commercial production technology subject to FCC jurisdiction above 95 GHz while the lack of service rules above 95 GHz imposes real regulatory barriers to such technologies’ implementation in a free market system. Further there are no FCC incumbents in this spectrum. The case of federal incumbents and coprimary federal government allocations is much simpler than at lower bands as has been shown in NTIA’s agreement with the Commission for “licensing light” rules for 71-76, 81-86, and 92-95 GHz[[25]](#footnote-25) and simplified online coordination of applicants.[[26]](#footnote-26)

1. Specific Request for Content of Ruling

IEEE-USA requests that the Commission make a declaratory ruling that technology above 95 GHz qualifies as a “new technology” under Section 7 and that the burden test of Section 7(a)[[27]](#footnote-27) applies in the deliberations on that technology although the Commission should consider comments on the issue of whether the “new technology” determination is valid on a case by case basis.

IEEE-USA also proposes that the Commission make a Declaratory Ruling that it will interpret the requirement of Section 7(b) as follows: After receipt of a petition for rulemaking, or the issuance of an NOI or NPRM on its own motion, the Commission must within one year determine promptly whether the subject matter is a new technology or service subject to Sec. 7 and if it finds in the affirmative, the Commission must, within the one year, adopt rules that enable provision of the new technology or service.

Should the Commission not agree with this interpretation of Section 7(b) we ask that it clarify what its interpretation of this long-standing statute is. Such clarification of this statute, intended by Congress to facilitate technological innovation, will remove uncertainty that presently impedes capital formation for innovative technology and deployment of such technology in the regulated spectrum.

# III. CONCLUSION

Section 7 is a provision of the Communications Act that has been overlooked for almost 30 years. Technology and services for frequencies greater than 95 GHz are on the verge of commercial practicality. IEEE-USA urges the Commission to make a Declaratory Ruling that such technology and services qualify as “new” under Section 7 and are entitled to the provisions of both Sections 7(a) and 7(b).

1. 47 U.S.C. § 157 [↑](#footnote-ref-1)
2. http://ieeeusa.org/about/ [↑](#footnote-ref-2)
3. *Ibid.* 47 C.F.R. §97.301 permits Amateur Radio Service use at 122.25-123, 134-141, 241-250, and above 275 GHz. 47 C.F.R. §18.301 permits Industrial, Scientific, and Medical (ISM) use, *e.g.* microwave ovens, at 122.5 and 245 GHz. But neither of these provisions allow the sale of and use of communications equipment to/by nonamateur licensees or unlicensed users. [↑](#footnote-ref-3)
4. 47 C.F.R. §§5.51, 111, 113 [↑](#footnote-ref-4)
5. Remarks of Commissioner Ajit Pai, “Unlocking Investment and Innovation in the Digital Age: The Path to a 21st-Century FCC”, Carnegie Mellon University, Pittsburgh, PA, July 18, 2012 (http://hraunfoss.fcc.gov/edocs\_public/attachmatch/DOC-315268A1.pdf) [↑](#footnote-ref-5)
6. FCC Dockets 81-413, 94-124, and 02-146 [↑](#footnote-ref-6)
7. Parts of this seminar are archived at [http://techchannel.att.com/play-video.cfm/2012/1/19/Conference-TV-Terahertz-Technology:-Terahertz-Wireless-Communication1](http://techchannel.att.com/play-video.cfm/2012/1/19/Conference-TV-Terahertz-Technology%3A-Terahertz-Wireless-Communication1) [↑](#footnote-ref-7)
8. http://mtt.org/terahertz.html (1 terahertz = 1000 GHz) [↑](#footnote-ref-8)
9. A few, perhaps 3, of these may be data entry errors of experiments that are actually at lower frequencies. [↑](#footnote-ref-9)
10. Akihiko Hirata, *et.al.,* Transmission Trial of TelevisionBroadcast Materials Using 120-GHz-band Wireless Link, *NTT Technical Review*, Vol. *7* No. 3 (Mar. 2009), p. 1-5 (https://www.ntt-review.jp/archive/ntttechnical.php?contents=ntr200903sf3.pdf&mode=show\_pdf%3Cbr%20/%3E) [↑](#footnote-ref-10)
11. A\*STAR’s Institute of Microelectronics (Singapore), “A\*STAR’s IME DEVELOPS SMALLEST ANTENNA THAT CAN INCREASE WIFI SPEED BY 200 TIMES” (28 August 2012)( https://www.ime.a-star.edu.sg/files/news/Final%20mmWave%20Antenna%20Technology\_IME%20technical%20release\_28Aug2012.pdf) [↑](#footnote-ref-11)
12. Pub. L. 98–214, § 12, Dec. 8, 1983, 97 Stat. 1471; [↑](#footnote-ref-12)
13. The Commission has acknowledged the general terms of Section 7 on a few occasions. For example in Docket 98-94, which ultimately adopted a policy statement to facilitate experiments with technologies subject to regulation under Title II of the Act, the Commission acknowledged in both the *NOI* and the *Policy Statement* the statutory language that "the policy of the United States to encourage the provision of new technologies and services to the public." In the ultrawideband NPRM it stated “We note that Section 7 of the Communications Act of 1934, as amended, requires the Commission ‘to encourage the provision of new technologies and services to the public.’ Accordingly, we conclude that the Commission should develop reasonable regulations that will foster the development of UWB technology while continuing to protect radio services against interference.” *NPRM*, Docket 98-153, May 10, 2000, at para. 8 (http://transition.fcc.gov/Bureaus/Engineering\_Technology/Notices/2000/fcc00163.txt) [↑](#footnote-ref-13)
14. Commissioner Pai, *op cit.,* at p. 5 [↑](#footnote-ref-14)
15. Commissioner Pai, *op cit.* at p. 4 [↑](#footnote-ref-15)
16. Commissioner Susan Ness, Remarks Before the 1999 International Ultra-Wideband Conference, September 29, 1999 (http://hraunfoss.fcc.gov/edocs\_public/attachmatch/DA-12-154A1.pdf) [↑](#footnote-ref-16)
17. Letter from IEEE-USA to FCC Chairman Genachowski, April 18, 2011 (<http://www.ieeeusa.org/policy/policy/2011/041811.pdf>) [↑](#footnote-ref-17)
18. 47 U.S.C. §§305,902 (Specific frequency assignments for federal government users are rarely made public by NTIA although the allocations contained in the FCC Allocation Table. Therefore it can not be said with certainty whether such assignments exist above 95 GHz based on publicly available information.) [↑](#footnote-ref-18)
19. 47 C.F.R. §2.106 [↑](#footnote-ref-19)
20. FCC/Office of Engineering and Technology, Millimeter Wave Propagation: Spectrum Management Implications, OET Bulletin No. 70 (July 1997) (<http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet70/oet70a.pdf>) At such frequencies gases in the atmospheric actually absorb power from radio transmissions much as water in a microwave oven absorbs radio power. This absorption is in addition to the path loss mechanisms at lower frequencies resulting in much higher total path losses than at lower frequencies - although the details depend on specific frequencies since they are related to resonances of molecules in the atmosphere.) [↑](#footnote-ref-20)
21. http://freqcoord.ntia.doc.gov/index.aspx [↑](#footnote-ref-21)
22. Department of Commerce Mission Statement (http://www.commerce.gov/about-department-commerce) [↑](#footnote-ref-22)
23. 47 U.S.C. §303(r) [↑](#footnote-ref-23)
24. 47 C.F.R. §1.2 [↑](#footnote-ref-24)
25. 47 C.F.R. 101.1501,1513 [↑](#footnote-ref-25)
26. 47 C.F.R. 101.1523 [↑](#footnote-ref-26)
27. “Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.” 47 U.S.C. 7(a) [↑](#footnote-ref-27)