

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

In re Matter of)
ART LICENSING CORPORATION)
Requests for Waiver, Extension of Time to Meet)
Coverage Requirements, and Extension of License)
Period)
211 Applications for Renewal of License of)
Common Carrier Point-to-Point Microwave)
Stations)
158 Notifications of Completion of Construction)
of Common Carrier Point-to-Point Microwave)
Stations)
352 Applications for Extension of Time of)
Construct 39 GHz Economic Area Licenses)

ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: October 1, 2008

Released: October 2, 2008

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 2, 2007, FiberTower Corporation (FiberTower) filed, on behalf of its wholly owned subsidiary, ART Licensing Corporation (ART Licensing), a petition for reconsideration of the action taken by the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) on January 31, 2007, on requests for relief regarding 214 Fixed Service (FS) rectangular service area licenses in the 38.6–40.0 GHz band (39 GHz band) held by ART Licensing. FiberTower also filed substantial service showings for all 214 of the subject licenses. In addition, on August 8, 2008,

1 FiberTower Corporation, Petition for Reconsideration and Request for Clarification (filed Mar. 2, 2007) (Petition).
2 Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, FCC, to Philip L. Verveer, Esq., Wilkie Farr and Gallagher, LLP, dated January 31, 2007 (Division Letter).
3 The 214 applications at issue are hereinafter collectively referred to as "Extension Applications."
4 The attached Appendices to this Order on Reconsideration and Memorandum Opinion and Order list the licenses in question and the renewal applications and/or construction notifications pending for those stations.

FiberTower filed applications to extend the deadline for demonstrating substantial service for each of its 352 39 GHz Economic Area (EA) licenses to June 1, 2012.⁵

2. For the reasons discussed below, we find that FiberTower is providing substantial service in the areas covered by 31 of the subject rectangular service area licenses.⁶ We dismiss the Petition as moot with respect to those licenses and direct processing of pending applications relating to those licenses. With respect to the remaining 183 rectangular service area licenses, we conclude that FiberTower has not demonstrated substantial service but conclude that an extension of time to demonstrate substantial service until June 1, 2012 is warranted.⁷ We therefore grant the Petition in part with respect to those licenses, reinstate the extension applications associated with those licenses, reject the requests for determination of substantial service without prejudice to FiberTower refile prior to the extension date of June 1, 2012, and direct processing of the renewal applications associated with those licenses. In addition, for the reasons stated below, we conclude that it is in the public interest to extend the deadline for FiberTower to demonstrate substantial service for the 352 subject EA licenses to June 1, 2012, and we authorize the Broadband Division to process those EA Extension Applications.

II. BACKGROUND

3. *39 GHz Licensing Generally.* Licensees in the 39 GHz Service are subject to Part 101 of the Commission's Rules.⁸ Originally, channels in the 39 GHz Service were licensed on a licensee-defined rectangular service area basis.⁹ In 1997, the Commission amended the rules for the 39 GHz Service to provide for licensing on a Basic Trading Area (BTA) basis, as well as for the use of competitive bidding.¹⁰ Subsequently, the Commission revised the rules to use Economic Area (EA) licensing areas,¹¹ and auctioned 39 GHz overlay licenses on an EA basis in 2000.¹² Pursuant to the Commission's Rules, 39 GHz licenses – both rectangular service areas and EAs – are issued for a period not to exceed ten years.¹³ With respect to renewal expectancy and performance requirements, 39 GHz rectangular service area and EA licensees must demonstrate “substantial service” in their license areas in connection with applications for license renewal.¹⁴

⁵ The applications and call signs at issue are listed in Appendix C. The applications will be collectively referred to as the EA Extension Applications.

⁶ The licenses in question, as well as the associated renewal applications and construction notifications, are listed in Appendix A.

⁷ The licenses in question, as well as the associated renewal applications and extension applications, are listed in Appendix B.

⁸ 47 C.F.R. Part 101.

⁹ See 47 C.F.R. § 101.147(u). Rectangular service area licenses in the 39 GHz Service are also referred to as incumbent licenses.

¹⁰ Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600 (1997) (*39 GHz R&O*).

¹¹ Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12,452-12,453 ¶ 46 (1999) (*39 GHz MO&O*).

¹² See 39 GHz Band Auction Closes, *Public Notice*, 15 FCC Rcd 13648 (WTB 2000).

¹³ 47 C.F.R. § 101.67.

¹⁴ See *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49. See also 47 C.F.R. § 101.17.

4. *ART Licensing's Rectangular Service Area Licenses.* The subject rectangular service area licenses were originally issued to Advanced Radio Telecom Corp. (ART) between August 1, 1996 and September 24, 1997. ART, which was founded in 1993,¹⁵ began to sell a variety of Internet services to end users in Seattle, Washington, Portland, Oregon, and Phoenix, Arizona in 1998.¹⁶ In April 2001, ART and certain related companies filed for bankruptcy,¹⁷ subsequently emerging from bankruptcy, pursuant to Commission approval, with new ownership under the control of First Avenue Networks, Inc. (FAN).¹⁸ On May 14, 2006, FAN and FiberTower announced an agreement to merge.¹⁹ The companies reported that they operated networks to provide backhaul – transport from cell site to switch – in twelve geographic areas with more than 1,000 sites.²⁰ On August 30, 2006, pursuant to Commission approval, the merger was consummated.²¹ The merged company was renamed FiberTower Corporation (FiberTower).²² FiberTower uses a combination of radio links, fiber-optic rings, and fiber exchange points to provide its services.²³ FiberTower contends that, on a company-wide basis, it had built 1,768 sites and had more than 1,300 customer billing locations by the end of the third quarter of 2006.²⁴ According to FiberTower, it had master service agreements at that time with five of the seven largest domestic wireless carriers.²⁵

5. On October 6, 2006, ART Licensing, which is the licensee of record and a wholly-owned subsidiary of FiberTower, filed 214 applications seeking waivers of Sections 1.949(b) and 101.67 of the Commission's Rules²⁶ to extend the license periods for 214 39 GHz licenses to October 18, 2010.²⁷ FiberTower also therein requested waivers of and extensions of time to comply with the substantial service requirements set forth in Section 101.17(a) of the Commission's Rules²⁸ for those 214 licenses.²⁹

¹⁵ Waiver Request at 4.

¹⁶ Petition at 7-8.

¹⁷ See File No. 0000623492, Description of Transaction, Qualifications of Transferee & Public Interest at 1.

¹⁸ See File No. 0000720210 (filed Jan. 3, 2002, accepted Jan. 4, 2002).

¹⁹ See File No. 0002619531, Amended Description of the Proposed Transactions and Public Interest Statement (filed June 21, 2006) at 3.

²⁰ *Id.*

²¹ See File No. 0002731976 (filed Aug. 31, 2006, accepted Sep. 1, 2006).

²² See File No. 0002619531, Amended Description of the Proposed Transactions and Public Interest Statement (filed June 21, 2006) at 2.

²³ Petition at 10.

²⁴ *Id.* Unless noted in the substantial service showings discussed below, FiberTower does not claim that any of the referenced sites were constructed for the operation of the subject licenses,

²⁵ See *Id.* (estimating the expected contract value at \$300 million).

²⁶ 47 C.F.R. §§ 1.949(b), 101.67.

²⁷ See Extension Applications, Request for Waiver, Extension of Time to Meet Coverage Requirements, and Extension of License Period (filed Oct. 6, 2006) (Waiver Request). Although ART Licensing is the licensee of record for the subject stations, FiberTower filed the Waiver Request and the instant Petition on behalf of ART Licensing. Because the Waiver Request and the instant Petition generally discuss the actions of FiberTower to support the requested relief, we herein also generally refer to FiberTower except in those instances where the Waiver Request or the instant Petition specifically reference ART Licensing.

²⁸ 47 C.F.R. § 101.17(a).

²⁹ Extension Applications, Waiver Request.

FiberTower argued that extending the licenses to October 18, 2010 would serve the public interest because that is the date by which FiberTower must renew the licenses for 352 Economic Area (EA) licenses in the 39 GHz band.³⁰ FiberTower contended that the requested extension would permit FiberTower to develop the majority of its 39 GHz licenses simultaneously, and would also allow the Commission to consider the substantial service showings for its rectangular service area licenses at the same time that it evaluates FiberTower's showings for its 352 EA licenses in the 39 GHz band.³¹ In the Waiver Request, FiberTower maintained that, while it has made efforts to make productive use of the licenses, it has faced insurmountable obstacles largely out of its control.³² While FiberTower conceded that "earlier efforts to provide substantial service were negatively influenced by avoidable errors,"³³ it expressed optimism that new demand and equipment availability would make productive use of the 39 GHz band feasible.³⁴ FiberTower claimed that it needed a stable and defined date from which it may plan to meet substantial service obligations for the subject licenses.³⁵

6. *Division Letter.* On January 31, 2007, the Division found that FiberTower's arguments failed to justify an extension of time to demonstrate substantial service.³⁶ Although the Division found that FiberTower had failed to demonstrate that the requested waiver was warranted, on its own motion, the Division granted FiberTower a limited waiver of Section 1.946 of the Commission's Rules to extend, until August 1, 2007, the deadline by which it was required to demonstrate that it is providing substantial service for 162 licenses with deadlines prior to that date.³⁷ Specifically, the Division found that such a limited waiver would further the public interest "by preventing the disruption of any service that FiberTower may currently be providing while giving FiberTower a last opportunity to put these licenses to use."³⁸ The Division also authorized processing of renewal applications for those 162 licenses, subject to the condition that such licenses will automatically terminate if FiberTower fails to demonstrate substantial service for each license by August 1, 2007. However, the Division did not find that the public interest warranted extending waiver relief to the 52 licenses with substantial service deadlines beyond August 1, 2007.³⁹ Rather, pursuant to the *Division Letter*, FiberTower was required to file a renewal application and demonstrate substantial service for each of the 52 licenses by the deadline set forth in the license terms.⁴⁰

7. *FiberTower's Petition.* On March 2, 2007, FiberTower filed the instant Petition. FiberTower argues that it and its predecessors were diligent in attempting to put the spectrum to use.⁴¹ FiberTower

³⁰ See Waiver Request at 2.

³¹ See *Id.* at 2, 7.

³² *Id.* at 9.

³³ *Id.* at 3-4.

³⁴ *Id.* at 4-6.

³⁵ *Id.* at 7.

³⁶ See *Division Letter* at 3.

³⁷ See *Division Letter* at 4; Appendix B (listing the 162 licenses for which FiberTower was granted extensions of time). According to the Commission's records, new authorizations were printed for each of the subject licenses on February 1, 2007.

³⁸ *Id.* at 4-5.

³⁹ *Id.* at 5; Appendix C (listing the 52 licenses for which no extension of time was granted).

⁴⁰ *Id.*

⁴¹ Petition at 6-12.

claims that it has attempted to develop the licenses by making a “massive systemic investment” towards “(1) the construction of multiple network operational control centers; (2) equipment purchases on a national scale; (3) the creation of a nationwide warehouse and equipment distribution system; (4) efforts by the national engineering team to continuously pursue updated multipoint and enhanced performance point-to-point equipment; (4) efforts by the national systems team to develop multiple software systems; (5) the creation of national scope operations, sales, and marketing teams; [and] (6) investment in legal, regulatory and finance infrastructure.”⁴² FiberTower contends that it and other licensees have faced technical issues and equipment problems that have thwarted the use of these licenses.⁴³ FiberTower also argues that granting an extension only until August 1, 2007 is not in the public interest because it promotes defensive construction of spectrum solely to preserve licenses.⁴⁴ In addition, FiberTower notes that it filed substantial service showings for three licenses that were the subject of the *Division Letter* and requests that the condition requiring that these stations demonstrate substantial service by August 1, 2007 be deleted from these licenses.⁴⁵

8. On June 29, 2007, FiberTower filed a supplement to the instant Petition.⁴⁶ FiberTower presents additional information in the Supplement concerning its efforts to develop “viable” equipment for the provision of service with the subject 39 GHz licenses.⁴⁷ FiberTower also requests confidential treatment for the Supplement and for the information and exhibits attached to the Supplement.⁴⁸

9. In addition, FiberTower has now filed substantial service showings for all 214 of the subject licenses. With respect to the licenses with renewal dates prior to August 1, 2007,⁴⁹ FiberTower filed substantial service showings for Stations WPNE715, WPND676, WPND776, and WPNA623 as an exhibit to the renewal application of each station.⁵⁰ On July 21, 2007 and August 1, 2007, FiberTower filed notifications of construction completion with substantial service showings for the remaining 158

⁴² *Id.* at 9-10.

⁴³ *Id.* at 12-16.

⁴⁴ *Id.* at 16-18.

⁴⁵ *Id.* at 22.

⁴⁶ FiberTower Corporation, Information Regarding Petition for Reconsideration and Request for Clarification (filed June 29, 2007) (June Supplement).

⁴⁷ FiberTower also requests that, to the extent that information presented in the Supplement had not previously been presented to the Commission, the Commission consider the information pursuant to 47 C.F.R. §§ 1.106(c)(1), (c)(2).

⁴⁸ See June Supplement.

⁴⁹ Pursuant to the *Division Letter*, FiberTower filed 159 renewal-only applications for those licenses for which the substantial service deadline had been extended to August 1, 2007. FiberTower had previously filed renewal applications for three 39 GHz licenses that were due to expire on November 15, 2006. See File Nos. 0002819591 (WPNA435); 0002819589 (WPNA437); 0002819003 (WPNA522). Pursuant to the *Division Letter*, the three applications were granted and new licenses were issued subject to the condition that the licensee demonstrate substantial service in each license area by August 1, 2007, and that failure to demonstrate substantial service by August 1, 2007 shall result in automatic cancellation of the licenses. Since August 1, 2007, FiberTower has also filed renewal-only applications for those 52 licenses for which no relief was granted by the *Division Letter*. Accordingly, there are currently 211 renewal-only applications pending. We list these 211 renewal-only applications in the Appendices.

⁵⁰ See File Nos. 0002973788 (WPNE715); 0002931158 (WPND676); 0002931157 (WPND776); 0002931204 (WPNA623). In each of these substantial service showings, FiberTower states that it meets the “safe harbor standard” of four links per million population in the respective licensed areas.

licenses with renewal dates prior to August 1, 2007.⁵¹ Since August 1, 2007, FiberTower has submitted substantial service showings for the 52 subject licenses with expiration dates beyond August 1, 2007 as an exhibit to the renewal application of each station.

10. With respect to 22 of the licenses, FiberTower contends that it falls within the “safe harbor”⁵² because it has constructed four links per million population in each licensed area.⁵³ In addition, FiberTower stated in the substantial service showings for eight other licenses that it would meet the safe harbor standard in those licensed areas by a specific date and has since amended those eight applications to indicate that it has.⁵⁴ Moreover, on November 16, 2007, FiberTower amended the substantial service showing for Station WPNH555 to state that it has now met the safe harbor standard in that licensed area.⁵⁵ However, with respect to the remaining 183 licenses, FiberTower concedes that it has not constructed an average of four links per million population in the licensed areas and therefore does not fall within the safe harbor.⁵⁶ Rather, FiberTower renews arguments that it has satisfied the Commission’s substantial service standard because it has invested “significant time, energy, and capital to put in place the systems, infrastructure, services and personnel required to support large-scale regional or national deployments.”⁵⁷ Specifically, FiberTower contends that its overall capital investment in its wireless network and additional antecedent planning, such as entering into contracts with vendors, serves the Commission’s goal of, “promot[ing] investment in and rapid deployment of new technology and services.”⁵⁸

11. *ART Licensing’s 39 GHz EA licenses.* On August 8, 2008, FiberTower, on behalf of ART Licensing, filed Applications to extend the substantial service deadline for its 39 GHz EA licenses from October 18, 2010 to June 1, 2012. FiberTower cites extensive efforts to develop its networks during the

⁵¹ See, e.g., File No. 0003127025, Exhibit - Substantial Service Showing Demonstration for Renewal of Call Sign WPNG313 (filed Aug. 1, 2007) (“Substantial Service Showing”). We list the 158 pending notification applications in the Appendices. Except as otherwise noted, specific references to “Substantial Service Showing” pertain to File No. 0003127025.

⁵² The Commission elaborated on what may constitute “substantial service” for the 39 GHz band by offering some specific examples, which are sometimes referred to as “safe harbors,” to provide 39 GHz band licensees with a degree of certainty as to how to comply with the substantial service requirement by the end of the initial license term. *39 GHz R&O*, 12 FCC Rcd at 18626, ¶ 46. The Commission explained that a 39 GHz licensee may fall within a “safe harbor” by constructing four permanent links per one million people in its licensed area. *Id.*

⁵³ See File Nos. 0002973788 (WPNE715); 0002931158 (WPND676); 0002931157 (WPND776); 0002931204 (WPNA623); 0003127959 (WPNA435); 0003127961 (WPNA437); 0003127965 (WPNA522); 0003127963 (WPNA679); 0003127967 (WPND652); 0003127968 (WPND674); 0003127974 (WPND836); 0003127972 (WPNE255); 0003127977 (WPNE369); 0003127978 (WPNE372); 0003127980 (WPNE708); 0003127981 (WPNE710); 0003128011 (WPNE711); 0003127982 (WPNE713); 0003127983 (WPNE938); 0003127984 (WPNG295); 0003127986 (WPNG297); 0003137414 (WPNG953).

⁵⁴ See File Nos. 0003128014 (WPND649); 0003128015 (WPNE239); 003128013 (WPNE253); 0003128017 (WPNE936); 0003128012 (WPNG308); 0003136163 (WPNH527); 0003138481 (WPNH841); 0003138487 (WPNH846).

⁵⁵ See File No. 0003180937 (WPNH555) (filed Sep. 24, 2007; amended Nov. 16, 2007).

⁵⁶ See Appendix.

⁵⁷ Substantial Service Showing at 9.

⁵⁸ *Id.*

EA license terms.⁵⁹ It also relies on a recent decision by the Bureau to extend the substantial service deadline for Local Multipoint Distribution Service (LMDS) licensees to June 1, 2012 and claims that FiberTower is similarly situated to the LMDS licensees that received an extension.⁶⁰ FiberTower also cites as support a recent decision to extend the substantial service deadline to June 1, 2012 for 39 GHz EA licenses held by IDT Spectrum, LLC.⁶¹

III. DISCUSSION

A. Substantial Service Notifications

12. Because the Petition would be moot with respect to any license for which FiberTower has demonstrated substantial service before the applicable deadline, we first examine the substantial service showings that FiberTower has made for each of its licenses. Pursuant to the Commission's Rules, 39 GHz licenses are issued for a period not to exceed ten years.⁶² At the end of the ten-year period, a licensee is required to submit an acceptable showing to the Commission demonstrating that it "is providing service which rises to the level of 'substantial'" in each area for which it holds a license.⁶³ Licensees failing to demonstrate that they are providing substantial service will not have their licenses renewed.⁶⁴ For the reasons explained herein, we find that FiberTower has demonstrated that it is providing substantial service in 31 licensed areas. However, with respect to the remaining 183 licenses, we find that FiberTower has failed to demonstrate that it is providing substantial service in the licensed areas.

13. FiberTower contends that it falls within the Commission's safe harbor because it has constructed four links per million population in 31 licensed areas. We agree with FiberTower that it falls within the safe harbor for 22 of the subject licenses areas because it timely constructed four links per million population in each licensed area.⁶⁵ In another 9 licensed areas, FiberTower amended its

⁵⁹ Request for Extension of Time or, in the Alternative, Limited Waiver of Substantial Service Requirement (filed Aug. 8, 2008) (EA Extension Exhibit) at 2-3. While the exhibits filed for each application are essentially identical, the specific cites here are to the exhibit filed under File No. 0003540677.

⁶⁰ *Id.* at 2-3, 6-7, 12, *citing* Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd 5894 (WTB 2008) (*LMDS Order*).

⁶¹ EA Extension Exhibit at 1, 6, *citing* IDT Spectrum, LLC, *Memorandum Opinion and Order and Order on Reconsideration*, DA 08-1878 (WTB rel. Aug. 8, 2008) (*IDT Spectrum Order*).

⁶² 47 C.F.R. § 101.67.

⁶³ 47 C.F.R. § 101.17(a). A licensee's substantial service showing should include, but not be limited to, the following information for each license area: (1) a description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage; (2) a description of the 38.6–40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term; and (3) a description of the 38.6–40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required). *See* 47 C.F.R. § 101.17(a)(1)-(3).

⁶⁴ *See* 47 C.F.R. § 101.17(b).

⁶⁵ *See* File Nos. 0002973788 (WPNE715); 0002931158 (WPND676); 0002931204 (WPND776); 0002931204 (WPNA623); 0003127959 (WPNA435); 0003127961 (WPNA437); 0003127965 (WPNA522); 0003127963 (WPNA679); 0003127967 (WPND652); 0003127968 (WPND674); 0003127974 (WPND836); 0003127972 (WPNE255); 0003127977 (WPNE369); 0003127978 (WPNE372); 0003127980 (WPNE708); 0003127981 (WPNE710); 0003128011 (WPNE711); 0003127982 (WPNE713); 0003127983 (WPNE938); 0003127984 (WPNG295); 0003127986 (WPNG297); 0003137414 (WPNG953).

applications to demonstrate that it had met the safe harbor within 60 days of the applicable construction deadline.⁶⁶ With respect to these nine licenses, we find that FiberTower's diligence in moving forward to complete construction justifies granting a short extension of the construction deadline to allow consideration of the substantial service showings for these licenses. Accordingly, on our own motion, we will grant FiberTower a 60-day extension of time to meet the construction deadlines in each of those licensed areas.⁶⁷ With respect to the extended deadline, we conclude that FiberTower has met the four-links per million safe harbor and has therefore demonstrated substantial service. We therefore direct acceptance of the construction notifications and processing of the associated renewal applications for those 31 stations.⁶⁸ We dismiss the Petition as moot with respect to those 31 licenses because FiberTower has complied with its substantial service deadlines for those licenses.

14. With respect to the remaining 183 licenses, FiberTower has failed to demonstrate that it "is providing service which rises to the level of 'substantial.'"⁶⁹ Indeed, FiberTower concedes that it has not constructed "any 39 GHz links physically operating in" these 183 licensed areas.⁷⁰ Rather, FiberTower asks the Commission to find that it is providing substantial service in each of these licensed areas based on non-license-specific references to the "significant time, energy, and capital to put in place the systems, infrastructure, services and personnel required to support large-scale regional or national deployments."⁷¹ Specifically, FiberTower relies on the following activities: (1) establishing network operations centers; (2) establishing back office systems to support national operations; (3) establishing billing systems; (4) hiring engineers and developing engineering systems; (5) developing a customized software system for design management, customer contract registration, opportunity analysis and network forecasting; and (6) establishing relationships with contractors, tower operators, and mobile carriers.⁷² We conclude that these activities cannot support a finding of substantial service in the absence of any actual operation of the stations.

15. Although FiberTower is correct that the Commission adopted the substantial service requirement as the performance standard for 39 GHz licensees to accord licensees flexibility in designing their systems and offering a variety of services to the public, FiberTower ignores the Commission's counterbalancing purpose of providing "a clear and expeditious accounting of spectrum use by licensees

⁶⁶ Specifically, FiberTower amended File Nos. 0003138481 (WPNH841) and 0003138487 (WPNH846) within 30 days of the construction deadlines for those licensed areas stating that it had now met its substantial service obligations in each of those areas. With respect to six other licensed areas, FiberTower filed similar amendments within 60 days of the applicable construction deadlines for those areas. See File Nos. 0003128014 (WPND649) (amended Sept. 4, 2007); 0003128015 (WPNE239) (amended Sept. 4, 2007); 0003128017 (WPNE936) (amended Sept. 4, 2007); 0003128012 (WPNG308) (amended Sept. 4, 2007); 0003136163 (WPNH527) (amended Sept. 24, 2007) (the substantial service deadline for Station WPNH527 was August 13, 2007); 0003128013 (WPNE253) (amended Sept. 24, 2007) (the substantial service deadline for Station WPNE253 was August 1, 2007); 0003180937 (WPNH555) (amended Nov. 16, 2007) (the substantial service deadline for WPNH555 was September 24, 2007).

⁶⁷ See File Nos. 0003128014 (WPND649); 0003128015 (WPNE239); 0003128013 (WPNE253); 0003128017 (WPNE936); 0003128012 (WPNG308); 0003136163 (WPNH527); 0003138481 (WPNH841); 0003138487 (WPNH846); 0003180937 (WPNH555).

⁶⁸ See Appendix A for a full list of the licenses and applications in question.

⁶⁹ See 47 C.F.R. § 101.17(a).

⁷⁰ Substantial Service Showing at 9.

⁷¹ *Id.*

⁷² *Id.* at 10-15.

to ensure that service is indeed being provided to the public.” The record supports our finding that FiberTower is not providing any service in these 183 licensed areas.⁷³

16. We find that FiberTower’s reliance on *Microwave Renewals*, *Pacific Bell*, and *Winstar* is misplaced.⁷⁴ In *Microwave Renewals*, the former Public Safety and Private Wireless Division (PSPWD) of the Bureau considered the substantial service showings for 102 39 GHz licenses “in light of” the fact that the “licensees actually had less than one-third of a full ten-year license term to satisfy the substantial service requirement.”⁷⁵ PSPWD found that the licensees were using the spectrum to provide service to the public, either by operating at 50% or better of the Commission safe harbor or by demonstrating significant construction (*i.e.*, the construction of more than ten links in the service area).⁷⁶ Similarly, in *Pacific Bell*,⁷⁷ a licensee demonstrated the provision of substantial service by constructing five links in a licensed area that had a population of approximately 2 million in the 34 months that elapsed since the Commission adopted and applied the substantial service requirement to incumbent 39 GHz licensees. Finally, in *Winstar*,⁷⁸ PSPWD found that the licensee may adequately demonstrate “that it is providing substantial service” in each licensed area if it constructed at least one link because the “sliver areas in question have populations far less than a quarter million.” While each decision rested on specific facts, none involved a finding of substantial service where, in fact, no construction or operation was undertaken in the licensed area during the license term. We do not believe that a finding of substantial service can be made without a demonstration of actual construction or operation in the licensed area during the license term. As noted above, we find no such evidence in the record with respect to 183 of the subject rectangular service area licenses. We therefore turn to the Petition with respect to those 183 licenses.

B. Extension Requests

17. Section 1.946 of the Commission’s Rules provides that a request for extension of time to construct “may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”⁷⁹ The rule prohibits granting extensions based on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.⁸⁰ Section 1.925 of the Commission’s Rules⁸¹ provides that a waiver of the Commission’s Rules may be granted if it is shown that either (1) 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 (2) in view of the unique or unusual circumstances

⁷³ FiberTower notes the number of sites it has constructed “predominately on point-to-point licensed bands (11 GHz, 18 GHz, 23 GHz). . . .” Substantial Service Showing at 16-17.

⁷⁴ See Substantial Service Showing at 7-9.

⁷⁵ *Microwave Renewals*, 17 FCC Rcd at 4406 ¶ 8.

⁷⁶ See *id.* at 4406-4407 ¶¶ 8-11.

⁷⁷ *Pacific Bell Wireless LLC, Memorandum Opinion and Order*, 18 FCC Rcd 8150, 8153-8154 ¶¶ 10-13 (WTB PSPWD 2003).

⁷⁸ *Winstar Wireless Fiber Corp., Memorandum Opinion and Order*, 18 FCC Rcd 24673, 24683 ¶¶ 18-19 (WTB PSPWD 2003).

⁷⁹ 47 C.F.R. § 1.946(e)(1).

⁸⁰ 47 C.F.R. § 1.946(e)(2), (3). Pursuant to 47 C.F.R. § 1.946(e)(2), a presumption of diligence is established if a licensee orders equipment within 90 days of its initial license grant.

⁸¹ 47 C.F.R. § 1.925.

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.⁸²

18. Initially, we agree with the *Division Letter* that the “technological and business issues” that FiberTower claims have hindered the provision of substantial service within the 39 GHz band⁸³ are not those that warrant an extension of time or a waiver. In particular, the *Division Letter* correctly found that the record in this proceeding does not demonstrate that FiberTower faces the “regulatory uncertainty” or the extensive technical and equipment challenges faced by WCS licensees.⁸⁴ Moreover, Section 1.946(e)(2) of the Commission’s Rules⁸⁵ states that an extension will not be granted if the delays are caused by a failure to obtain financing. FiberTower and its predecessors exercised their own business judgment in acquiring their 39 GHz holdings. We agree with the Division that FiberTower’s realization that ART’s prior business plans were not commercially viable was not a factor outside of its control that would justify an extension of time to construct.⁸⁶

19. We also find that FiberTower’s reliance on the *WCS Extension Order*,⁸⁷ *FCI900*,⁸⁸ and the *220 MHz Extension Order*⁸⁹ is misplaced. In the *WCS Extension Order*, the Bureau found that, in the Wireless Communications Service (WCS), limited deployment attempts using available equipment had been marred by technical problems or proved to be economically infeasible.⁹⁰ Moreover, the Bureau was “persuaded . . . that relatively restrictive [out-of-band emission (OOBE)] limits may have impeded the development of WCS equipment and have contributed to the unique circumstances of the band.”⁹¹ The Bureau therefore concluded that “the WCS licensees have demonstrated that they face factors beyond their control that have limited their options in providing service. . . .”⁹² The *Division Letter* correctly found that the record in this proceeding does not demonstrate that FiberTower faces the “regulatory uncertainty” or the extensive technical and equipment challenges faced by WCS licensees.⁹³

20. We conclude, however, that it would be in the public interest to grant an extension of time to demonstrate substantial service until June 1, 2012 for the 183 rectangular service area licenses that

⁸² *Id.*; see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972).

⁸³ See, e.g., Petition at 14.

⁸⁴ See *Division Letter* at 4, n. 34.

⁸⁵ 47 C.F.R. § 1.946(e)(2).

⁸⁶ See *Division Letter* at 3 (citing *Eldorado Communications, LLC, Order*, 17 FCC Rcd 24613, 24616 (WTB CWD 2002) (*Eldorado Communications*)).

⁸⁷ Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006) (*WCS Extension Order*).

⁸⁸ FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001) (*FCI 900*).

⁸⁹ Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004) (*220 MHz Extension Order*).

⁹⁰ See *WCS Extension Order*, 21 FCC Rcd at 14139 ¶ 10.

⁹¹ See *Id.*

⁹² See *Id.* at 14139 ¶ 9 (citing 47 C.F.R. § 1.946(e)(1)).

⁹³ See *Division Letter* at 5, n. 44.

have not yet demonstrated substantial service, as well as the subject 352 EA licenses. As FiberTower notes, the 39 GHz band has the potential to serve as a backhaul solution for licensees in the 700 MHz Band,⁹⁴ the Advanced Wireless Services (AWS-1),⁹⁵ and the Broadband Radio Service/Educational Broadband Service (BRS/EBS).⁹⁶ We note that the Commission has issued licenses for the AWS-1 band in the past 18 months⁹⁷ and recently has completed an auction for the 700 MHz Band.⁹⁸ We anticipate that, in the next several years, services in these bands will develop robustly,⁹⁹ along with other mobile and fixed wireless broadband services. In the case of LMDS, the Bureau recently concluded that it would be in the public interest to give LMDS licensees additional time “in which to construct their licenses, to allow the equipment market to develop further and to give them the option to coordinate their buildout with licensees in the 700 MHz and AWS bands.”¹⁰⁰ FiberTower has demonstrated that its 39 GHz licenses are similarly enough situated to LMDS that it would be appropriate to grant similar relief for its 39 GHz licenses.

21. Under those circumstances, we determine that strict enforcement of Section 101.17 of the Commission’s Rules¹⁰¹ would not serve the rule’s underlying purpose, as it would tend to slow, rather than accelerate, service deployment. We believe the public interest would best be served by granting FiberTower until June 1, 2012 to demonstrate substantial service for its 183 rectangular service area licenses for which it has not yet demonstrated substantial service, as well as for its 352 EA licenses. Accordingly, we grant FiberTower’s petition for reconsideration in part, reinstate their applications for extension of time with respect to the 183 licenses listed in Appendix B, and direct the Division to extend the substantial service requirement under Section 101.17 of the Commission’s Rules¹⁰² for those licenses

⁹⁴ The 700 MHz Band licenses may be used for flexible fixed, mobile, and broadcast uses, including fixed and mobile wireless commercial services (including FDD-based and TDD-based services); fixed and mobile wireless uses for private, internal radio needs; and mobile and other digital new broadcast operations. These uses may include two-way interactive, cellular, and mobile television broadcasting services.

⁹⁵ Advanced Wireless Service (AWS) is a collective term for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. The services ultimately provided by AWS licensees are only limited by the fixed and mobile designation of the spectrum we allocate for AWS and the service rules we ultimately adopt for the bands.

⁹⁶ BRS provides integrated access to broadband technologies, including high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, ¶ 9 (2004).

⁹⁷ See, e.g., Wireless Telecommunications Bureau Grants Advanced Wireless Services Licenses, *Public Notice*, 22 FCC Rcd 7293 (WTB 2007).

⁹⁸ See Auction of 700 MHz Band Licenses Closes, *Public Notice*, DA 08-595 (WTB rel. Mar. 20, 2008).

⁹⁹ Licensees in the Lower 700 MHz A, B, and E Blocks and in the Upper 700 MHz C Block must meet their first buildout requirement by February 17, 2013 (assuming their licenses are granted before February 17, 2009). See 47 C.F.R. § 27.14(g), (h). In addition, we anticipate that AWS-1 service will be rolled out in a number of markets over the next several years as federal incumbents are relocated. For more information on the relocation, see <http://www.ntia.doc.gov/osmhome/reports/specrelo/index.htm>.

¹⁰⁰ *LMDS Order*, 23 FCC Rcd at 5906 ¶ 26.

¹⁰¹ 47 C.F.R. § 101.17.

¹⁰² *Id.*

listed in Appendix B until June 1, 2012. We direct the Division to reinstate the extension applications filed for those stations and process the extension applications and associated renewal applications. We also direct the Division to process the EA Extension Applications set forth in Appendix C.

IV. CONCLUSION AND ORDERING CLAUSES

22. We find that FiberTower has demonstrated substantial service for 31 of its licenses, dismiss the Petition as moot with respect to those licenses, and direct processing of the renewal applications and construction notifications associated with those 31 licenses. With respect to the remaining 183 licenses addressed by the *Division Letter*, we grant the Petition in part and extend the deadline for FiberTower to demonstrate substantial service to June 1, 2012. Finally, we find it is in the public interest to extend the substantial service deadline for FiberTower's 39 GHz EA licenses to June 1, 2012 and direct the Division to process those applications.

23. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration and Request for Clarification filed on March 2, 2007 by FiberTower Corporation, on behalf of its wholly owned subsidiary, ART Licensing Corporation, IS DISMISSED IN PART, GRANTED IN PART, and DENIED IN PART.

24. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f), the Information Regarding Petition for Reconsideration and Request for Clarification filed on June 29, 2007 by FiberTower Corporation IS DISMISSED.

25. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.946, 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau SHALL REINSTATE the applications for extension of time to demonstrate substantial service filed by FiberTower Corporation listed in Appendix B and SHALL PROCESS those applications in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 1.955(a)(2) of the Commission's Rules, 47 C.F.R. §§ 1.946, 1.955(a)(2), that the requests for findings of substantial service made by FiberTower Corporation ARE GRANTED with respect to those licenses listed in Appendix A and ARE DENIED with respect to the licenses listed in Appendix B.

27. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946(d) and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.946(d), 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau SHALL PROCESS the applications for notifications of completion of construction filed by FiberTower Corporation listed in Appendix A in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

28. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.949 and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.949(b), 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau SHALL PROCESS the applications for renewal of license filed by FiberTower Corporation listed in Appendices A and B in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

29. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946(d) and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.946(d), 101.17(b), that the applications for notifications of completion of construction filed by FiberTower Corporation listed in Appendix B ARE DENIED.

30. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.946, 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau shall process the applications for extension of time to demonstrate substantial service listed in Appendix C in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

31. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau