

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

In re Matter of	)	
	)	
FIBERTOWER SPECTRUM HOLDINGS LLC	)	
	)	
Requests for Waiver, Extension of Time, or in the	)	
alternative, Limited Waiver of Substantial Service	)	
Requirements	)	
	)	
94 Applications for Extension of Time to	)	File Nos. 0005207557 <i>et seq.</i>
Construct 24 GHz Digital Electronic Message	)	
Service (DEMS) Licenses	)	
	)	
345 Applications for Extension of Time to	)	File Nos. 0005207187 <i>et seq.</i>
Construct 39 GHz Economic Area Licenses	)	
	)	
250 Applications for Extension of Time to	)	File Nos. 0005207571 <i>et seq.</i>
Construct 39 GHz Rectangular Service Area	)	
(RSA) Licenses	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 7, 2012**

**Released: November 7, 2012**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we find that FiberTower Corporation has failed to demonstrate compliance with the substantial service requirements for 94 of its 24 GHz Digital Electronic Message Service (“DEMS”) licenses and 595 of its 39 GHz licenses. We also deny FiberTower’s requests for extension of time to demonstrate substantial service for these licenses, as well as its associated requests for waiver of the June 1, 2012 substantial service deadline. Based on these determinations, these licenses automatically terminated, by operation of Commission rule, as of June 1, 2012.

**II. BACKGROUND**

**A. The Services**

2. 24 GHz DEMS and 39 GHz licenses are both subject to Part 101 of the Commission’s Rules, which generally governs terrestrial microwave operations.<sup>1</sup> Originally, channels in the 39 GHz

<sup>1</sup> 47 C.F.R. Part 101.

service were licensed on a licensee-defined Rectangular Service Area (“RSA”) basis, but the Commission later revised its rules to provide for Economic Area (“EA”) license areas, and auctioned 39 GHz overlay licenses on an EA basis in 2000.<sup>2</sup> DEMS licenses were originally licensed in 1983 based on Standard Metropolitan Statistical Areas (“SMSAs”), and the service was transitioned from 18 GHz to 24 GHz in 1997.<sup>3</sup> Both 39 GHz licenses and 24 GHz DEMS licenses are licensed for ten-year terms and holders of both kinds of licenses must demonstrate “substantial service” at license renewal.<sup>4</sup> Through its wholly-owned subsidiary, FiberTower Spectrum Holdings LLC, FiberTower Corporation (collectively, “FiberTower,”) holds 352 39 GHz EA licenses, 283 39 GHz RSA licenses, and 102 24 GHz DEMS licenses. FiberTower has previously demonstrated substantial service for 32 39 GHz RSA licenses and 6 39 GHz EA licenses.<sup>5</sup> Also, FiberTower submitted construction notifications for eight DEMS licenses, one 39 GHz RSA license, and one 39 GHz EA license that demonstrated some level of actual construction as of the deadline.<sup>6</sup>

## B. 2008 Extension

3. With respect to its 39 GHz licenses, the Wireless Telecommunications Bureau (“Bureau”) has already granted FiberTower a significant extension of time in which to meet substantial service.<sup>7</sup> In October 2008, in response to separate requests for extension for its EA and RSA licenses, the Bureau granted FiberTower until June 1, 2012 to construct its 39 GHz licenses, resulting in a nearly four-year construction extension for the RSA licenses and a two-year construction extension for the EA licenses.<sup>8</sup> The Bureau found that FiberTower could potentially provide wireless backhaul services to licensees in the 700 MHz band, the Advanced Wireless Services-1 (“AWS-1”) band, and/or the Broadband Radio Service/Educational Radio Service (“BRS/EBS”) band, all of which at that time had recently been auctioned, licensed, or put into use.<sup>9</sup> The Bureau anticipated that these bands would develop robustly, along with other mobile and fixed wireless services, and that FiberTower could provide

<sup>2</sup> See ART Licensing Corporation, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 14116, ¶3 (“MO&O”).

<sup>3</sup> See Amendment of the Commission’s Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and To Allocate the 24 GHz Band for Fixed Services, ET Docket No. 97-99, *Order*, 12 FCC Rcd 3471 (1997) (reallocating DEMS from the 18 GHz band to the 24 GHz Band), *reconsideration denied*, *Memorandum Opinion and Order*, 13 FCC Rcd 15147 (1998); Amendment of the Commission’s Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and To Allocate the 24 GHz Band for Fixed Services, *Order*, 12 FCC Rcd 8266 (PSPWD 1997) (modifying DEMS-based licenses to change authorized band of operations from 18 GHz to 24 GHz). See also Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934, 16937 ¶ 3 (2000) (“24 GHz R&O”) (adopting competitive bidding and service rules for 24 GHz Band, including DEMS); 47 C.F.R. Part 101.

<sup>4</sup> See 47 C.F.R. §§ 101.17, 101.67, 101.526, and 101.527.

<sup>5</sup> Those 38 licenses are not included in this *Memorandum Opinion and Order*.

<sup>6</sup> See File Nos. 0005242324 (WPQV578), 0005242328 (WPNE373), 0005242330 (WPNG641), 0005242332 (WMT307), 0005242335 (WMF850), 0005242340 (WMT312), 0005242343 (WMT338), and 0005242347 (WPNH290), 0005244173 (WMT336), 0005244224 (WMT348) (filed May 31 and June 1, 2012). Those showings will be addressed separately.

<sup>7</sup> For a more detailed discussion of this background, see *MO&O*, 23 FCC Rcd at 14118-14122 ¶¶ 5-11.

<sup>8</sup> *Id.* at 14125-14126 ¶ 20.

<sup>9</sup> *Id.*

wireless backhaul service to these new services.<sup>10</sup> Moreover, the Bureau found that 39 GHz licensees were similarly situated to Local Multipoint Distribution Service (“LMDS”) licensees, which had received a construction extension from the Bureau to enable them to coordinate the buildout of their licenses with the buildout of the 700 MHz and AWS-1 bands.<sup>11</sup>

**C. 2010 Extension**

4. On August 26, 2010, FiberTower requested an extension of time to construct its 102 24 GHz DEMS licenses until June 1, 2012.<sup>12</sup> That request was granted on October 7, 2010.<sup>13</sup>

**D. 2012 Request for Extension of Time to Construct/Request for Waiver**

5. On May 14, 2012, FiberTower filed, under Section 1.946(e) of the Commission’s rules, 699 applications seeking a three-year extension of time until June 1, 2015, to construct 346 of its 39 GHz EA licenses, 251 of its 39 GHz RSA licenses, and all of its 24 GHz DEMS licenses.<sup>14</sup> In the alternative, FiberTower sought a “limited waiver” of Sections 101.17 and 101.527 of the Commission’s rules, as another means of extending the construction deadline applicable to the licenses until June 1 2015.<sup>15</sup> FiberTower argues that: (1) a lack of a national market for microwave backhaul and access service,<sup>16</sup> (2) an unforeseeable loss of traffic and future business opportunities,<sup>17</sup> and (3) a continuing lack of viable equipment,<sup>18</sup> all of which it characterizes as circumstances beyond its control, have prevented it from providing substantial service. In addition, FiberTower argues that building out these licenses would require it to build “links to nowhere” in areas of the country with little or no market for wireless backhaul and access service, thus wasting valuable resources.<sup>19</sup> Moreover, FiberTower argues, requiring it to forfeit its millimeter wave band licenses would risk material disruption to FiberTower, its customers, the swift deployment of LTE networks, and the country’s commercial, government and public safety ecosystem, and result in significant amounts of spectrum lying fallow during the height of LTE deployment.<sup>20</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See the Appendix for the file numbers of those extension applications.

<sup>13</sup> See Appendix.

<sup>14</sup> See Appendix for the file numbers of the extension applications. With each extension application, FiberTower filed a pleading. See Request for Extension of Time or, in the Alternative, Limited Waiver of Substantial Service Requirement (dated Apr. 30, 2012) (Extension Request).

<sup>15</sup> Extension Request at 1.

<sup>16</sup> *Id.* at 6-10.

<sup>17</sup> *Id.* at 11-13.

<sup>18</sup> *Id.* at 13-16.

<sup>19</sup> *Id.* at 16-19; see also ¶ 20, *infra*, setting forth the safe harbor standards for 24 GHz and 39 GHz licenses.

<sup>20</sup> *Id.* at 19-22.

**E. Substantial Service Notifications**

6. Two weeks after filing its extension and waiver requests, on June 1, 2012, FiberTower filed, in the alternative, construction notifications for 689 of its 24 GHz DEMS and 39 GHz licenses.<sup>21</sup> In these notifications, FiberTower argues that it has demonstrated substantial service by (1) designing and proposing network builds that meet or exceed similar demonstrations previously found by the Commission to satisfy the construction requirements for 39 GHz licenses;<sup>22</sup> (2) continuing to play a role as a fixed wireless provider for backhaul;<sup>23</sup> and (3) engaging in equipment development with equipment developers for the wide-area millimeter bands.<sup>24</sup> FiberTower argues, “In light of the significant time, energy, and capital that FiberTower has invested in developing its systems, infrastructure, and personnel required to provide market-leading service and support large-scale regional and national network deployments, the Commission should find that FiberTower has met its substantial service obligations.”<sup>25</sup>

**F. Bankruptcy**

7. On July 17, 2012, FiberTower Network Services Corp., FiberTower Corporation, FiberTower Licensing Corp., and FiberTower Spectrum Holdings LLC filed a petition for relief under Chapter 11 of the Bankruptcy Code.<sup>26</sup> On September 27, 2012, upon FiberTower’s request, the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, issued an order granting a preliminary injunction enjoining the Commission from granting, transferring, assigning, or selling FiberTower’s 24 GHz and 39 GHz licenses to any entity other than FiberTower or FiberTower’s designee.<sup>27</sup> The Bankruptcy Court also enjoined the Commission from taking any action “that would impair or otherwise adversely alter Debtors’ rights before the Commission on or on appeal of any decision of the Commission to contest (a) cancellation or termination of the FCC Licenses; or (b) a determination that the FCC Licenses were terminated or cancelled prior to entry of this Order.”<sup>28</sup> The *Preliminary Injunction Order* further provides that it nothing contained in it “shall stay or otherwise affect proceedings before the Commission, adjudicatory or otherwise, or stay or otherwise affect any appeal from any order of the Commission which proceedings or appeals precede the sale, assignment, or transfer of [FiberTower’s] FCC Licenses to an entity other than [FiberTower] or [its] assignee or designee.”<sup>29</sup>

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<sup>21</sup> See the Appendix for the file numbers of the construction notifications. With each notification, FiberTower filed an exhibit entitled “Attachment A: License Renewal Request and Substantial Service Showing” (“Substantial Service Exhibit”).

<sup>22</sup> Substantial Service Exhibit at 2.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 4-5.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex).

<sup>27</sup> FiberTower Network Services Corp., *et al.*, Debtors; FiberTower Network Services Corp., *et al.*, Debtors v. Federal Communications Commission, Adv. No. 12-4104, *Order Granting Preliminary Injunction* (Bankr. N.D. Tex., issued Sep. 27, 2012) (“*Preliminary Injunction Order*”).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3.

### G. Supplements and Comments

8. FiberTower has filed a series of supplements to its Extension Request. In the First Supplement, FiberTower reports that it has “(1) acquired a substantial amount of commercially viable network equipment for deployment in the 24 GHz and 39 GHz bands; (2) acquired and tested a wide range of network equipment and continues to test and evaluate equipment; (3) successfully worked with equipment providers to develop and deploy market-viable equipment in the 24 GHz and 39 GHz bands; (4) produced spectrum leases in the 24 GHz and 39 GHz bands using either its “Spectrum-in-a-Box” programs or its traditional spectrum leasing programs, resulting in built systems and contracts to build additional systems; and (5) received a commitment from its creditor committee to fund and build a substantial service compliant network using its 24 and 39 GHz licenses.”<sup>30</sup>

9. In the Second Supplement, FiberTower reports that its creditors have committed funding for FiberTower to build out and thereby meet the substantial service safe harbor standards for all of its licenses by the end of 2013.<sup>31</sup> Under its funding plan, FiberTower would build out 25 percent of its licenses in each quarter of 2013.<sup>32</sup>

10. In the Third Supplement, FiberTower elaborates that it is willing to commit to meeting “the FCC’s safe harbor standard” within the next 18 months.<sup>33</sup> It also expresses its willingness to build 25 percent of the necessary links within six months, and each additional 25 percent of the links in three month intervals thereafter.<sup>34</sup>

11. In the Fourth Supplement, FiberTower claims that if these licenses are cancelled, it has “no viable plan for reorganizing” and claims that the likely result would be the dismantling of its existing backhaul network, which currently provides backhaul services to several wireless telephone providers in markets across the United States.<sup>35</sup> FiberTower expresses concern that it “may not have the resources to continue operating its legacy network beyond 30 days” in certain markets.<sup>36</sup> FiberTower also argues that granting the Extension Request would facilitate a court-approved bankruptcy reorganization.<sup>37</sup> Finally, FiberTower offers additional argument based on prior cases granting other licensees extensions of time to build out, including an extension of time granted to 2 Lightspeed, LP.<sup>38</sup>

12. In the Fifth Supplement, FiberTower requests expedited action, argues that the *Preliminary Injunction Order* supports grant of its Extension Request, and elaborates on arguments it has previously made concerning its diligence, its offer to build links, and precedent.<sup>39</sup>

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<sup>30</sup> Supplement #1, FiberTower Corporation (filed Jul. 26, 2012) (“First Supplement”) at 1.

<sup>31</sup> Supplement #2, FiberTower Corporation (filed Jul. 31, 2012) (“Second Supplement”) at 2.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> Letter from Ari Q. Fitzgerald, Counsel for FiberTower Corporation to The Honorable Julius Genachowski, Chairman, Federal Communications Commission (filed Sep. 6, 2012) (“Third Supplement”) at 2.

<sup>34</sup> *Id.*

<sup>35</sup> Supplement #4, FiberTower Corporation (filed Sep. 20, 2012) (“Fourth Supplement”) at 3-4.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 4-7.

<sup>38</sup> *Id.* at 7-9.

<sup>39</sup> Fifth Supplement.

13. In the Sixth Supplement, FiberTower provides further detail on its existing business, its efforts to develop equipment for its 24 GHz and 39 GHz spectrum, and its efforts to market that spectrum.<sup>40</sup> In addition, FiberTower attempts to distinguish its situation from extension applications recently denied by the Bureau's Broadband Division.<sup>41</sup>

14. In the Seventh Supplement, FiberTower requests an expedited ruling on its Extension Request and argues that the Commission's recent action to extend the construction deadline for Wireless Communications Service licensees supports a grant of its Extension Request.<sup>42</sup>

15. Several of FiberTower's suppliers have filed in support of the Extension Request, including DragonWave Inc. and BridgeWave, both of which supply microwave equipment.<sup>43</sup> The Zayo Group, LLC, which supplies fiber to FiberTower, argues that a decision to deny the Extension Request and terminate FiberTower's licenses would result in the cessation of FiberTower's existing services.<sup>44</sup>

16. In addition, several of FiberTower's customers have filed either to support the Extension Request or to express concern about the effect that cancelling FiberTower's licenses would have on the backhaul services utilized by those customers. AT&T Services, Inc., which relies on FiberTower for backhaul services in 11 states and the District of Columbia, supports the Extension Request and "urges the FCC to work with FiberTower in a manner which does not destabilize their reorganization plan and their existing operations, but instead allows FiberTower to both continue its operations and to continue producing viable and innovative solutions for the future."<sup>45</sup> T-Mobile USA, Inc. argues that strict enforcement of buildout requirements would not be in the public interest if it results in FiberTower being unable to continue its business.<sup>46</sup> Sprint Nextel Corporation takes no position on the Extension Request but urges the Commission to act "in a manner that will best ensure the continuation of service to customers such as Sprint."<sup>47</sup> Allegheny County, Pennsylvania, which receives backhaul services from FiberTower for its 911 services, asks the Commission to work with FiberTower.<sup>48</sup> Similarly, CTIA – The

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<sup>40</sup> Supplement #6, FiberTower Corporation (filed Oct. 17, 2012) ("Sixth Supplement") at 3-11 and Attachments. Much of the information in the Sixth Supplement was filed with a request for confidential treatment.

<sup>41</sup> *Id.* at 12-13.

<sup>42</sup> Supplement #7, FiberTower Corporation (filed Oct. 25, 2012) ("Seventh Supplement").

<sup>43</sup> See Letter from Art Stein, Chief Operating Officer, BridgeWave Communications, Inc. to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (filed Oct. 31, 2012); Letter from Erik Boch, Founder, CTO & VP of Engineering, DragonWave Inc. to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (filed July 27, 2012); Letter from Art Stein, Chief Operating Officer, BridgeWave Communications, Inc. to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (filed Aug. 2, 2012).

<sup>44</sup> Letter from Thomas L. Kelly, Associate General Counsel, Zayo Group, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Sep. 5, 2012).

<sup>45</sup> Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Aug. 31, 2012).

<sup>46</sup> Letter from Kathleen O'Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sep. 4, 2012).

<sup>47</sup> Letter from Charles W. McKee, Vice President – Government Affairs, Federal and State Regulatory, Sprint Nextel Corporation to Ruth Milkman, Wireless Bureau Chief, Federal Communications Commission (filed Aug. 31, 2012).

<sup>48</sup> Letter from Radio Systems Coordinator, County of Allegheny, Department of Emergency Services to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Sep. 26, 2012).

Wireless Association, which has several members who are FiberTower customers, urges the Commission “to carefully consider the impact of potential disruptions on those who provision and rely upon wireless services.”<sup>49</sup>

17. The Official Committee of Unsecured Creditors argues that the Bankruptcy Code implicates important public policy objectives and that cancelling these licenses could deny creditors the ability to recover any value.<sup>50</sup> According to the Committee Letter, cancellation of the licenses may allow the secured creditors to terminate the Plan Support Agreement, which would prevent FiberTower from using cash collateral.<sup>51</sup>

### III. DISCUSSION

18. We find that FiberTower has not demonstrated substantial service for 689 of its 39 GHz and 24 GHz DEMS licenses covered by its June 1, 2012 construction notification filing. We further find that it has not justified grant of an extension of time, or waiver of the construction deadline, for these licenses. And without such extension or waiver, FiberTower’s licenses have automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, as of June 1, 2012.<sup>52</sup> We discuss these findings in detail below.

#### A. Substantial Service Notifications

19. As mentioned above, the Bureau granted FiberTower an extension of time to construct for all of its 39 GHz and 24 GHz DEMS licenses until June 1, 2012.<sup>53</sup> Under the Commission’s rules, if FiberTower fails to demonstrate substantial service for any of its licenses on or before June 1, 2012, and no extension is granted, that license automatically terminates.<sup>54</sup>

20. To demonstrate substantial service, FiberTower must show that it meets the Commission’s definition of substantial service or that it meets one of the safe harbors applicable to 39 GHz or 24 GHz DEMS licenses. Thus, FiberTower must show that for each license it provides a level of service “which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.”<sup>55</sup> Alternatively, FiberTower could show that it has met an applicable safe harbor showing. For both the 39 GHz licenses and the 24 GHz DEMS licenses, a safe harbor of four

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<sup>49</sup> Letter from Christopher Guttman-McCabe, CTIA–The Wireless Association to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sep. 7, 2012).

<sup>50</sup> Committee Letter at 2-3.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> 47 C.F.R. §§ 1.946(c) (providing that if a licensee in the Wireless Radio Services fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires) and 1.955(a)(2) (cross-referencing Section 1.946(c) and reiterating that authorizations in the Wireless Radio Services automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements).

<sup>53</sup> *MO&O*, 23 FCC Rcd at 14125-14126 ¶ 20.

<sup>54</sup> 47 C.F.R. §§ 101.17(b), 101.527(c).

<sup>55</sup> *24 GHz R&O*, 15 FCC Rcd at 16951 ¶ 38.

links per million population within a service area applies.<sup>56</sup> There are several additional factors applicable to 24 GHz DEMS licenses, including serving: (1) niche markets; (2) populations outside of areas serviced by other licensees; (3) populations with limited access to telecommunications services; and (4) a significant portion of the population or land of the licensed area.<sup>57</sup>

21. FiberTower, however, does not attempt to show that it has met safe harbors applicable to either the 39 GHz or 24 GHz DEMS licenses for the 689 licenses.<sup>58</sup> Instead, FiberTower argues that it meets the Commission's definition of "substantial service" by undertaking "antecedent activities" and making investments in developing its wireless network and service.<sup>59</sup> FiberTower describes "antecedent activities" as investing significant time, energy, and capital in developing and rolling out its systems, infrastructure, services, and personnel necessary to support the development of large-scale regional and national networks.<sup>60</sup>

22. What FiberTower describes as "antecedent activities," however, do not involve construction of any facilities whatsoever. We find that the requirement to provide a "level of service substantially above mediocre service" presumes construction of at least some facilities and some sort of actual service. While we agree with FiberTower that the Commission's "substantial service" standard permits a finding the standard satisfied even if a safe harbor is not met, both the Bureau and the Commission have specifically rejected the proposition that "antecedent activities" alone satisfy the Commission's requirement to provide substantial service by a particular deadline. Indeed, in 2008, the Bureau told FiberTower that those kinds of activities "cannot support a finding of substantial service in the absence of any actual operation of the stations."<sup>61</sup> In 2011, the Commission affirmed the Bureau's rejection of substantial service "where there is no actual service being provided to the public,"<sup>62</sup> and recently reaffirmed its decision that "antecedent activities" do not constitute the provision of substantial service under current policy.<sup>63</sup> No precedent supports FiberTower's argument that undertaking "antecedent activities" alone would constitute substantial service. We therefore conclude that FiberTower has not demonstrated substantial service under the Commission's rules.

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<sup>56</sup> See 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, 18624-18625 ¶ 46 (1997) ("39 GHz R&O"); *24 GHz R&O*, 15 FCC Rcd at 16951-16952 ¶ 38.

<sup>57</sup> *24 GHz R&O*, 15 FCC Rcd at 16951-16952 ¶ 38.

<sup>58</sup> Substantial Service Exhibit at 8-12. As noted above, the eight licenses for which FiberTower demonstrated actual construction will be addressed separately.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* at 12-16.

<sup>61</sup> *MO&O*, 23 FCC Rcd at 14123 ¶ 14.

<sup>62</sup> Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees, WT Docket No. 10-153, *Report and Order, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 26 FCC Rcd 11614, 11661 ¶ 114 (2011).

<sup>63</sup> Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees, WT Docket No. 10-153, *Second Report and Order, Second Further Notice of Proposed Rulemaking, Second Notice of Inquiry, Order on Reconsideration, and Memorandum Opinion and Order*, 27 FCC Rcd 9735, 9773-9774 ¶ 104 (2012) ("*Wireless Backhaul 2<sup>nd</sup> R&O*").

## B. Extension Requests

23. FiberTower requests a three-year extension of time to demonstrate substantial service until June 1, 2015.<sup>64</sup> As noted above, this is the second extension that FiberTower has requested for constructing these licenses. To be eligible for an extension of time to construct, FiberTower must show that its “failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”<sup>65</sup> We conclude that FiberTower has not met this threshold, as we discuss in greater detail below.

24. FiberTower argues that three factors it contends were outside its control impeded its ability to construct the licenses at issue: (1) the absence of a fully developed nationwide market for wireless backhaul;<sup>66</sup> (2) its loss of business from AT&T and Clearwire Corporation (Clearwire) as customers;<sup>67</sup> and (3) the fact that “viable equipment for the 24 GHz and 39 GHz bands has only recently emerged.”<sup>68</sup> The Commission has consistently found that a licensee’s own business decisions are not circumstances beyond the licensee’s control and are therefore not an appropriate basis for regulatory relief.<sup>69</sup> In view of this precedent, we find that none of the factors cited by FiberTower demonstrates that its failure to construct was caused by circumstances beyond its control, and thus, do not provide a valid basis for granting an extension. Moreover, even if such factors were a valid consideration for an extension request, we find that even on those terms FiberTower has failed to provide the facts to support its reliance on those factors.

25. First, we find that the pace of the development of the market for wireless backhaul, by itself, is not a relevant consideration for granting an extension because the decision to enter that market was a business decision made by FiberTower. The 39 GHz and 24 GHz service rules were designed to allow point-to-point and point-to-multipoint operations and to maximize flexibility so that licensees could “modify their offerings quickly and efficiently to provide the services that consumers demand and that technology makes possible.”<sup>70</sup> Moreover, even if the market for wireless backhaul were a valid consideration, contrary to FiberTower’s arguments, we find that the market for wireless backhaul has

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<sup>64</sup> Extension Request at 1.

<sup>65</sup> 47 C.F.R. § 1.946(e)(1).

<sup>66</sup> Extension Request at 6-10.

<sup>67</sup> *Id.* at 11-13.

<sup>68</sup> *Id.* at 13-16.

<sup>69</sup> *See, e.g.*, Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff’d sub nom.*, *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

<sup>70</sup> *See 39 GHz R&O*, 12 FCC Rcd at 18613-18615 ¶¶ 20-23; *see also 24 GHz R&O*, 15 FCC Rcd at 16939 ¶ 7. The Commission allowed mobile operations in the 39 GHz band but not in the 24 GHz band. *Compare 39 GHz R&O*, 12 FCC Rcd at 18613-18615 ¶¶ 21-25 with *24 GHz R&O*, 15 FCC Rcd at 16939 ¶ 7.

been developing steadily. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.<sup>71</sup> By 2009, that figure increased to 12.3 percent.<sup>72</sup> FiberTower, in fact, has been an active provider of wireless backhaul services with respect to licenses not at issue here. It describes itself as the market leading facilities-based provider of wireless backhaul and access transport services, holding over 3,200 active site-based microwave licenses, maintaining a significant commercial presence in 13 major markets, and providing services to leading wireless carriers and Federal government agencies.<sup>73</sup> FiberTower holds 39 GHz licenses, either RSA or EA, that cover 99 percent of the country and it holds 24 GHz licenses that cover the top 77 metropolitan areas.<sup>74</sup> Despite these extensive license holdings and a business plan built on providing wireless backhaul and middle mile connectivity, FiberTower has taken steps to construct only 48 of its 24 GHz DEMS and 39 GHz licenses. We cannot conclude that the state of the wireless backhaul market is a valid reason for extending FiberTower's obligation to construct its 24 GHz and 39 GHz licenses.

26. Second, we find that FiberTower's loss of AT&T and Clearwire as customers does not justify an extension. The Commission has held that a licensee cannot rely on the actions of third parties (such as customers) as justification for a construction extension.<sup>75</sup> To the extent that FiberTower was relying on AT&T's or Clearwire's business to support buildout of these licenses, it voluntarily assumed the risk that it would lose that business. Furthermore, the loss of customers is hardly a unique circumstance.

27. Third, we also conclude that FiberTower's contention that a lack of viable equipment prevented it from meeting its construction deadline is not a valid reason for granting an extension in this case and, moreover, the contention is not supported by the facts. As mentioned above, FiberTower was granted an extension of time to construct four years ago.<sup>76</sup> At the same time, FiberTower made 32 substantial service showings that were accepted by the Commission.<sup>77</sup> It has demonstrated substantial service for six additional licenses since then, and it has eight pending substantial service notifications which demonstrate actual construction.<sup>78</sup> In addition, in one of its supplemental filings, FiberTower acknowledges that it has acquired a substantial amount of commercially viable network equipment for deployment in the 24 GHz and 39 GHz bands.<sup>79</sup> Furthermore, the Bureau has received more than 300

<sup>71</sup> See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9845 ¶ 320 (2011) (*15th CMRS Competition Report*).

<sup>72</sup> *Id.* In a separate proceeding, Clearwire has indicated that it uses wireless for over 90 percent of its backhaul needs, including almost 13,000 licenses with over 48,000 paths. See Comments of Clearwire Corporation, WT Docket No. 12-156 (filed Jul. 19, 2012) at 2.

<sup>73</sup> Extension Request at 2.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> See e.g., Daniel R. Goodman, Receiver, *Memorandum Opinion and Order*, 10 FCC Rcd 8537, 8548 ¶ 24 (1995) (investor reliance on fraudulent company does not excuse compliance with Commission rules); Kansas City Wireless Partners LLP, *Letter*, 24 FCC Rcd 8625, 8627 (WTB MD 2009); Stephen E. Coran, Esquire, *Letter*, 22 FCC Rcd 1921, 1923 (WTB MD 2007) (reliance on third party for financing does not justify extension).

<sup>76</sup> *MO&O*, 23 FCC Rcd at 14126-14127 ¶ 21.

<sup>77</sup> *Id.* at 14122 ¶ 13.

<sup>78</sup> See File Nos. 0004425505 (WPQV580), 0004425507 (WPQV636), 0004425508 (WPQV662), 0004425509 (WPQV681), 0004424864 (WPQV836), 0004425510 (WPQV865). See also n.14, *supra*.

<sup>79</sup> First Supplement at 1-3.

construction notifications from other 39 GHz licensees who have constructed stations. Thus, there is viable, affordable equipment available. We find that FiberTower, which made a business decision not to commence construction of the vast majority of its 39 GHz and 24 GHz DEMS licenses in advance of the construction deadline, is readily distinguishable from other licensees that attempted to build out their licenses prior to the deadline and that ordered equipment but failed, through no fault of their own, to receive timely delivery of that equipment.<sup>80</sup> FiberTower chose not to build facilities in advance of the deadline because it did not want to “squander its financial resources” in order to build out its licenses.<sup>81</sup> In other words, the failure to construct licenses was the result of a business decision by FiberTower in allocating its own resources.

28. FiberTower cites a series of cases in which the Bureau granted extensions of the buildout requirement in other services.<sup>82</sup> The circumstances addressed in these cases are distinguishable from FiberTower’s situation. In many of these cases, there was a systemic problem with equipment availability that affected all licensees in the band.<sup>83</sup> By contrast, many 39 GHz licensees, including FiberTower itself, have been able to obtain and deploy equipment. In certain other cases that FiberTower cites, there were broader issues with the service rules that delayed or prevented deployment.<sup>84</sup> No party has argued that the 24 GHz or 39 GHz service rules are responsible for delays in deploying service.<sup>85</sup>

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<sup>80</sup> See, e.g., Request for Limited Waiver and Extension, Horry Telephone Cooperative, Inc., File No. 0005233560 (granted July 23, 2012); Request for Additional Time to Demonstrate Substantial Service, Wireless Distribution Services Inc., File No. 0005242352 (granted July 23, 2012).

<sup>81</sup> See Extension Request at 19.

<sup>82</sup> Extension Request at 14 n.25.

<sup>83</sup> See, e.g., Request of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, *Order*, 25 FCC Rcd 10097, 10102 ¶ 10 (WTB 2010) (waiver of interim substantial service deadline granted to MVDDS licensees because “there is a lack of viable, affordable equipment for MVDDS that can be deployed in the 12.2-12.7 GHz band.”); 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, 5905 ¶ 24 (WTB 2008) (LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.); Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules, WT Docket No. 08-60, *Order*, 23 FCC Rcd 17250, 17252 ¶ 7 (WTB 2008) (extension of construction requirement granted for Multilateration Location and Monitoring Service Economic Area licenses, Bureau notes that “no M-LMS equipment is commercially available for current deployment in the United States and . . . no M-LMS licensee provides service today.”); Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, WT Docket No. 06-102, *Order*, 21 FCC Rcd 14134, 14139-14140 ¶ 10 (WTB 2006) (*WCS Order*) (construction deadline extended until July 21, 2010 for WCS licensees; “participation by almost all of the licensees in the WCS industry in this proceeding leads us to believe that the technical and equipment challenges in this band are widespread”); Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Part II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13000-13001 ¶ 15 (WTB 2004) (Five-year construction requirement until November 5, 2007 for all 220 MHz Phase II EA, regional, and nationwide licensees. “The two companies that originally manufactured five kilohertz voice equipment no longer do so. We find that the loss of that equipment was a unique circumstance that have frustrated licensees’ efforts to meet the construction requirements.”); FCI 900, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 ¶ 7 (WTB 2001) (16 month extension of construction deadline granted for 900 MHz Major Trading Area licensees - no digital voice equipment available for the 900 MHz SMR band).

<sup>84</sup> See *WCS Order*, 21 FCC Rcd at 14139 ¶ 10 (noting that restrictive out-of-band emission limits may have impeded development of WCS equipment); Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year

(continued....)

29. FiberTower's situation is also distinguishable from that of 2 Lightspeed LP, which recently received an extension of time to demonstrate substantial service for four of its LMDS licenses.<sup>86</sup> Unlike FiberTower, Lightspeed had made significant progress toward the construction benchmarks, having built out the majority of its licenses prior to the June 1, 2012 deadline.<sup>87</sup> In addition, this progress was impeded when one of the two key partners in the venture was medically incapacitated.<sup>88</sup> Unlike 2 Lightspeed, FiberTower made no attempt to build out the vast majority of its licenses prior to the June 1, 2012 deadline. And unlike 2 Lightspeed, FiberTower has not alleged any medical incapacity on the part of its owners or managers. In the Fourth Supplement, FiberTower asserts that it is similarly situated to 2 Lightspeed because it experienced the departure of key employees, including its Senior Vice President of Network Operations and its Chief Financial Officer.<sup>89</sup> However, while in the case of 2 Lightspeed, the partner's medical incapacity played a role in the applicant's inability to build out all of its licenses<sup>90</sup> FiberTower makes no attempt to argue that the loss of key employees prevented it from building its licenses. Accordingly, FiberTower has failed to demonstrate the relevance of its loss of personnel.

30. We acknowledge FiberTower's efforts to develop equipment for the 39 GHz band and to market its 24 GHz DEMS and 39 GHz licenses.<sup>91</sup> Nonetheless, FiberTower made a voluntary business decision not to build out most of them, including not taking advantage of the safe harbor in the Commission's rules. Accordingly, we cannot make the finding that the failure to meet the June 1, 2012 deadline was caused by factors beyond its control.<sup>92</sup> We therefore deny the Extension Request.

### C. Waiver Request

31. To be granted a waiver of the June 1, 2012 construction deadline, FiberTower must show 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 of the instant case, application of the rule(s) would be

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Construction Deadline, *Order*, 14 FCC Rcd 5190, 5194 ¶ 9 (WTB PS&PWD 1999) (suspending construction benchmark while notice of proposed rulemaking proposing rule changes to service was pending).

<sup>85</sup> Contrary to FiberTower's claims, the Commission's recent grant of an additional six month extension to WCS licensees does not support grant of FiberTower's Extension Request. *See* Seventh Supplement at 3-5. In granting additional time to WCS licensees, the Commission expressed its belief that the construction deadlines it had established in 2010 had overly focused on one type of technology (WiMAX) and that granting an additional six months would be consistent with the goal of maintaining technology neutrality for WCS. *See* Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *et al.*, WT Docket 07-293, *et al.*, *Order on Reconsideration*, FCC 12-130 (rel. Oct. 17, 2012) at ¶ 120. No such circumstances are present here. The record demonstrates that FiberTower could have built but chose not to.

<sup>86</sup> *See* File Nos. 0005222510-0005222513 (filed May 17, 2012, granted July 23, 2012).

<sup>87</sup> *See* File Nos. 0005245422, 0005245426, 0005257919, 0005257935, 0005257944 (filed June 1 and 11, 2012).

<sup>88</sup> Request for Limited Extension, 2 Lightspeed LP (filed May 17, 2012) at 7-8.

<sup>89</sup> Fourth Supplement at 7-8.

<sup>90</sup> Request for Limited Extension, 2 Lightspeed LP (filed May 17, 2012) at 7-8 ("In 2011, one of the Lightspeed Partners experienced a cerebral vascular accident (stroke), which put him on the sidelines for several months and diverted attention from the LMDS project. With a small company such as Lightspeed, the temporary loss of a single partner can disrupt business plans.")

<sup>91</sup> *See* Extension Request at 24-28; Sixth Supplement.

<sup>92</sup> *See* 47 C.F.R. § 1.946(e)(1).

inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>93</sup> As is discussed more fully below, we conclude that FiberTower has failed to make the requisite showing, and we therefore deny its waiver request.

32. First, we conclude that an extension would be inconsistent with the underlying purpose of the substantial service standard, which, as the Commission has said, is to provide “a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.”<sup>94</sup> FiberTower argues that it is contrary to the public interest to require it to spend \$10-12 million to build “links to nowhere” to comply with the safe harbor buildout requirements applicable to the licenses.<sup>95</sup> Moreover, FiberTower asserts that cancellation of the vast majority of its 24 GHz DEMS and 39 GHz licenses would jeopardize competition for backhaul, disrupt service to FiberTower’s customer base, and set back plans to deploy an interoperable public safety broadband network.<sup>96</sup> Contrary to FiberTower’s claims, granting it an additional lengthy extension of time in which to meet substantial service for its 24 GHz DEMS and 39 GHz licenses – resulting in a total of up to 15 years to have built out certain of these licenses – is not consistent with the underlying purpose of that requirement, which is to ensure meaningful construction of licenses and to prevent warehousing of spectrum. In 2008, the Bureau expressed the view that FiberTower might use its 39 GHz spectrum as backhaul, given that services such as 700 MHz, AWS-1, and BRS/EBS were being used to provide 4G service and would need backhaul capacity.<sup>97</sup> Since that time, there has been considerable deployment of wireless broadband service in these bands.<sup>98</sup> Thus, the validity of one of the factors supporting the Bureau’s earlier extension of the construction deadline – that with some additional time, productive opportunities for using 24 GHz DEMS and 39 GHz licenses would develop as these emerging wireless broadband services create a need for supporting backhaul service – has been substantially confirmed.

33. We also conclude that FiberTower has not shown that requiring it to comply with the substantial service requirements is inequitable, unduly burdensome, or contrary to the public interest. As we have previously discussed, FiberTower’s decision not to construct most of its 24 GHz DEMS and 39

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<sup>93</sup> See 47 C.F.R. § 1.925(b)(3); 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); 47 C.F.R. § 1.3.

<sup>94</sup> See *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104, *citing 39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42; see also *id.* at 18625 ¶ 46 (“This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public.”); *id.* at 18626 ¶ 46 (“This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.”); *id.* at 18625 ¶ 47 (“[A]pplying a similar performance requirement to all licensees at the license renewal point will help establish a level playing field without compromising the goals of ensuring efficient spectrum use and expeditious provision of service to the public.”); *Renewal of Licenses to Provide Microwave Service in the 38.6 – 40.0 GHz Band, Memorandum Opinion and Order*, 17 FCC Rcd 4404, 4407 ¶ 11 (WTB PS&PWD 2002) (“The Commission’s overarching purpose behind adopting the substantial service standard for renewal was to ensure that the spectrum was being used to provide service to the public.”).

<sup>95</sup> Extension Request at 18.

<sup>96</sup> *Id.* at 22-23.

<sup>97</sup> *MO&O*, 23 FCC Rcd at 14125-14126 ¶ 20.

<sup>98</sup> For example, Verizon Wireless and AT&T are deploying LTE in the 700 MHz band. See *15<sup>th</sup> Annual Competition Report*, 26 FCC Rcd at 9824 ¶ 275. T-Mobile, Leap Wireless and MetroPCS have deployed service in the AWS-1 band. *Id.* at 9824 ¶ 274. All active BRS and EBS licensees demonstrated substantial service by November 1, 2011. See 47 C.F.R. § 27.14(o). See also National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 (WTB 2011).

GHz licenses was a business decision. Other licensees made other business decisions that led them to build out their licenses. Accepting FiberTower's claims that it would cost \$10-\$12 million to construct facilities sufficient to satisfy the substantial service safe harbor for its 24 GHz DEMS and 39 GHz licenses,<sup>99</sup> we note that this amount is a fraction of the approximately \$300 million that FiberTower says it has spent to acquire its licenses and develop facilities for these bands.<sup>100</sup>

34. Finally, we address FiberTower's recent promise to build its licenses to meet the substantial service safe harbor by the end of 2013.<sup>101</sup> We find that such a promise is insufficient to justify a waiver. The Commission has rejected the argument that after-the-fact construction, by itself, is sufficient to justify a waiver of buildout requirements.<sup>102</sup> It follows that an after-the-fact promise to construct in the future cannot be credited.<sup>103</sup> We agree with the Commission's observation in *Anderson* that, if we credit untimely construction (or an untimely promise to construct), enforcement of the underlying construction requirement "becomes a meaningless or arbitrary exercise."<sup>104</sup> As noted earlier, "any substantial service standard must provide 'a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public.'"<sup>105</sup> If a licensee makes a voluntary business decision not to build out a license before the applicable construction deadline, and then promises to build out the license after that deadline has passed, granting an extension under those circumstances would give licensees no incentive to build out their licenses before the construction deadline, and would effectively eviscerate the Commission's construction requirements. We therefore find that granting an extension to FiberTower based on its recent promises would be inconsistent with the underlying purpose of the substantial service requirement.

35. We note the concerns raised by FiberTower's suppliers and customers about potential disruption to the wireless industry if FiberTower's 24 GHz and 39 GHz licenses at issue here are terminated. Our decision in this item does not affect any of the licenses that FiberTower uses currently to provide service to customers; those licenses remain in full force and effect. FiberTower put most of its 24 GHz and 39 GHz licenses at risk by making the business decision not to build them out. The potential for customer disruption is caused by FiberTower's financial distress and its agreements with its creditors, not by the termination of the 24 GHz and 39 GHz licenses at issue here, which are not being used to serve customers. FiberTower may avoid customer disruption through a variety of options, including finding a buyer to acquire the legacy backhaul assets and other licenses. We remind FiberTower that if such sales do not succeed and it decides to permanently discontinue, reduce, or impair service, it must comply with the applicable rule governing discontinuance of service.<sup>106</sup>

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<sup>99</sup> Extension Request at 18-19.

<sup>100</sup> *Id.* at 6.

<sup>101</sup> See First Supplement, Second Supplement.

<sup>102</sup> See Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order and Order on Remand*, 18 FCC Rcd 4819, 4193-4194 ¶ 11 (2003) (*Anderson*) (denying request for waiver of construction deadline where facilities were built more than four years after deadline); Mr. Tom Holst, City of Springfield, *Letter*, 27 FCC Rcd 2184, 2185 (WTB MD 2012) (*Holst*) (request to waive construction deadline denied where facilities were built well after the construction deadline).

<sup>103</sup> See *In re Mumford Independent School District*, 27 FCC Rcd 3034, 3039 ¶ 9 (WTB 2012) (promise to build out licenses after the expiration of the construction deadline does not justify an extension).

<sup>104</sup> *Anderson*, 18 FCC Rcd at 4194 ¶ 11.

<sup>105</sup> See *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104.

<sup>106</sup> See 47 C.F.R. § 101.305.

36. Finally, we acknowledge the argument of FiberTower and the Official Committee of Unsecured Creditors that the Bankruptcy Code implicates important public policy objectives.<sup>107</sup> The Commission is obligated to be alert to minimize conflict between its policies and other federal policies such as the bankruptcy statutes.<sup>108</sup> The Commission is not required by the Bankruptcy Code, however, to act in a manner that would “unduly interfere” with the Commission’s mandate to ensure that licenses are “used and transferred consistently with the Communications Act.”<sup>109</sup> In this case, for the reasons stated above, we conclude that granting an additional extension of time to FiberTower would be inconsistent with our duty to provide “a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.”<sup>110</sup> We do not find any basis in the bankruptcy proceeding for granting the Extension Request.

37. Under the Commission’s rules, and in circumstances other than those present here, the spectrum associated with 250 of FiberTower’s 39 GHz RSA licenses would immediately revert to the holder of the 39 GHz EA spectrum for the market in question.<sup>111</sup> Four of FiberTower’s 24 GHz DEMS licenses are located at least partially within the service area of other active 24 GHz EA licenses, so that spectrum would typically revert to the 24 GHz DEMS licensees in those markets.<sup>112</sup> However, in view of the Bankruptcy Court’s *Preliminary Injunction Order* and to minimize disruption and uncertainty, on our own motion, we stay any rules and policies that would result in the spectrum covered under FiberTower’s 24 GHz and 39 GHz licenses reverting to another licensee while the *Preliminary Injunction Order* remains in effect. Similarly, with respect to the other licenses, while the *Preliminary Injunction Order* remains in effect, the Bureau will take no action to reassign the spectrum covered under these licenses to any applicant.<sup>113</sup> Nothing in this *Memorandum Opinion and Order* is intended, or shall be construed, to be contrary to the Bankruptcy Court’s *Preliminary Injunction Order*. FiberTower retains its full rights to seek either reconsideration<sup>114</sup> or Commission review<sup>115</sup> of this *Memorandum Opinion and Order*.

38. Authorizations for 24 GHz DEMS and 39 GHz licenses automatically terminate if the licensee fails to meet construction or coverage requirements.<sup>116</sup> In light of our decision to deny FiberTower’s request for an extension or waiver of the construction requirements on the ground that grant of such request is not in the public interest, we find that FiberTower’s licenses listed in the Appendix

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<sup>107</sup> Fourth Supplement at 4-7, Committee Letter at 2-3.

<sup>108</sup> See Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership, MM Docket No. 97-128, *Memorandum Opinion and Order & Hearing Designation Order*, 12 FCC Rcd 5224, 5229 ¶ 11 (1987), citing *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974).

<sup>109</sup> *LaRose v. FCC*, *supra*, 494 F.2d at 1148.

<sup>110</sup> See *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104.

<sup>111</sup> See *39 GHz R&O*, 12 FCC Rcd at 18637 ¶ 79.

<sup>112</sup> See 47 C.F.R. § 101.527(d). The licenses are WPNH315 (Buffalo, NY), WPNH313 (Las Vegas, NV), WMF851 (Phoenix, AZ), and WMT309 (Phoenix, AZ).

<sup>113</sup> Our stay applies only to the reversion or reassignment of the licenses; it does not apply to the actual termination.

<sup>114</sup> See 47 C.F.R. § 1.106.

<sup>115</sup> See 47 C.F.R. § 1.115.

<sup>116</sup> See 47 C.F.R. § 1.955(a)(2).

automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,<sup>117</sup> as of June 1, 2012.

#### IV. CONCLUSION AND ORDERING CLAUSES

39. FiberTower has failed to demonstrate substantial service for the licenses in question. It has failed to justify an extension of time to meet the substantial service deadline for the Stations listed in Appendix or to justify a waiver of the June 1, 2012 deadline for establishing substantial service. We therefore deny the substantial service filings and Extension Request. Accordingly, FiberTower's licenses to operate the stations listed in the Appendix automatically terminated, by operation of Commission rule, as of June 1, 2012.

40. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the requests for findings of substantial service made by FiberTower Spectrum Holdings LLC on May 31, 2012 and June 1, 2012 and listed in the Appendix ARE DENIED.

41. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the request for waivers and the applications for extension of time to demonstrate substantial service (File No. 0005207187 *et seq.*) filed by FiberTower Corporation on May 14, 2012 and listed in the Appendix ARE DENIED.

42. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the Universal Licensing System SHALL BE UPDATED to reflect that the licenses issued to FiberTower Corporation for the Stations listed in the Appendix TERMINATED as of June 1, 2012.

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<sup>117</sup> *Id.*

43. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and in view of the *Order Granting Preliminary Injunction* in *FiberTower Network Services Corp., et al., Debtors; FiberTower Network Services Corp., et al., Debtors v. Federal Communications Commission*, Case No. 12-44027-DML-11, (Bankr. N.D. Tex., issued Sep. 27, 2012), none of the spectrum covered under the licenses declared terminated in this *Memorandum Opinion and Order* shall revert to another licensee without further action by the Commission or Bureau, and the Commission will take no action “transferring, assigning or selling” the spectrum covered by the licenses declared terminated, so that in the event that this *Memorandum Opinion and Order* is reversed upon reconsideration, review or appeal, FiberTower may resume use of the spectrum covered by the licenses terminated herein. As noted, nothing in this *Memorandum Opinion and Order* is intended, or shall be construed, to be contrary to the Bankruptcy Court’s *Preliminary Injunction Order*.

44. 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

Ruth Milkman  
Chief, Wireless Telecommunications Bureau