

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

In the Matter of)
)
FIBERTOWER SPECTRUM HOLDINGS LLC,)
DEBTOR-IN-POSSESSION)
)
Notifications of Completion of Construction for 24) File Nos. 0005244173, 0005244224, and
GHz Digital Electronic Message Service (DEMS)) 0005242330
Licenses WMT336, WMT348, and WPNG641)
)
Applications for Extension of Time to Construct) File Nos. 0005207604, 0005207611, and
24 GHz DEMS Licenses WMT336, WMT348,) 0005207826
and WPNG641)
)
Application for Consent to Assign 24 GHz DEMS)
Licenses WMT336, WMT348, and WPNG641) File No. 0006169289
from FiberTower Spectrum Holdings LLC,)
Debtor-in-Possession to FiberTower Spectrum)
Holdings LLC)
)

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2014

Released: May 5, 2014

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we conclude that FiberTower Spectrum Holdings LLC, Debtor-in-Possession ("FiberTower")¹ has failed to demonstrate substantial service for 24 GHz Digital Electronic Message Service ("DEMS") Licenses WMT336, San Francisco, CA, WMT348, San Francisco, CA and WPNG641, Newport News, VA ("the Licenses"). We also deny FiberTower's requests for extension of time to demonstrate substantial service for the Licenses. Based on these determinations, the Licenses automatically terminated, by operation of Commission rule, as of June 1, 2012. Accordingly, we dismiss as moot an application to assign the Licenses from FiberTower Spectrum Holdings LLC, Debtor-in-Possession to FiberTower Spectrum Holdings LLC.

¹ On June 17, 2012, FiberTower Spectrum Holdings LLC and related companies filed a petition for relief under Chapter 11 of the Bankruptcy Code. In re FiberTower Network Services Corp., et al., Case No. 12-44027-DML-11 (Bankr. N.D. Tex). On January 27, 2014, the United States Bankruptcy Court for the Northern District of Texas approved FiberTower's plan to emerge from Chapter 11 bankruptcy. See Findings of Fact, Conclusions of Law, and Order Confirming Debtors' Fourth Amended Joint Chapter 11 Plan, Case No. 12-44027-DML-11 (Bankr. N.D. Tex Jan. 27, 2014). Unless the context requires otherwise, we will refer to the pre-bankruptcy FiberTower Spectrum Holdings, LLC, FiberTower Spectrum Holdings LLC, Debtor-in-Possession, and the post-bankruptcy FiberTower Spectrum Holdings LLC as "FiberTower."

II. BACKGROUND

2. 24 GHz DEMS licenses are subject to Part 101 of the Commission's Rules, which generally governs terrestrial microwave operations.² 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 1997.³ 24 GHz DEMS licenses are licensed for ten-year terms and licensees must demonstrate "substantial service" at license renewal.⁴

3. 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 24 GHz DEMS licenses (which presumptively qualify as substantial service). 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."⁵ Alternatively, FiberTower could show that it has met an applicable safe harbor showing. For 24 GHz DEMS licenses, a safe harbor of four links per million population within a service area applies.⁶ There are several additional factors applicable to substantial service showings for 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.⁷

4. On August 26, 2010, FiberTower requested an extension of time to demonstrate substantial service for the Licenses until June 1, 2012.⁸ Those requests were granted on October 7, 2010.⁹

5. On May 31, 2012, and June 1, 2012, FiberTower filed timely notifications with substantial service showings for the Licenses.¹⁰ With each notification, FiberTower filed an exhibit setting forth its argument as to why it met the four link per million population safe harbor applicable to 24 GHz DEMS licenses.¹¹ At the request of Bureau staff, and on its own initiative, FiberTower filed a series of supplements providing additional information on FiberTower's operations under these licenses.¹²

² 47 C.F.R. Part 101.

³ 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.

⁴ See 47 C.F.R. §§ 101.526, 101.527.

⁵ See 24 GHz R&O, 15 FCC Rcd at 16951 ¶ 38.

⁶ See 24 GHz R&O, 15 FCC Rcd at 16951 ¶ 38.

⁷ See 24 GHz R&O, 15 FCC Rcd at 16951-16952 ¶ 38.

⁸ See File Nos. 0004368037, 0004368044, 0004368050 (filed Aug. 26, 2010).

⁹ See File Nos. 0004368037, 0004368044, 0004368050 (granted Oct. 7, 2010).

¹⁰ File Nos. 0005244173, 0005244224, and 0005242330 (filed May 31 and June 1, 2012).

¹¹ File No. 0005244173, Attachment A: License Renewal Request and Substantial Service Showing (filed June 1, 2012) ("WMT336 Substantial Service Showing"); File No. 0005244224, Attachment A: License Renewal Request and Substantial Service Showing (filed June 1, 2012) ("WMT348 Substantial Service Showing"); File No.

(continued....)

6. In San Francisco, California, FiberTower estimates that the population within the service area of Stations WMT336 and WMT348 was 4,234,712 as of May 31, 2012.¹³ FiberTower operated one link approximately .0861 miles in length using the frequencies licensed under Station WMT336, and four links less than one mile in length using the frequencies licensed under Station WMT348.¹⁴ In addition, FiberTower used the frequencies licensed under Stations WMT336 and WMT348 to test equipment.¹⁵ FiberTower's main testing laboratory was located within the license area for Stations WMT336 and WMT348 at 185 Berry Street, San Francisco, an address that FiberTower describes as a hub for research and development activities in the 24 GHz band.¹⁶ FiberTower tested systems from most of its equipment partners, including but not limited to JRC, Ceragon, DragonWave, NEC, and BridgeWave, at this location.¹⁷ Engineers from FiberTower's equipment partners visited the facility regularly and worked with FiberTower's own engineers in developing and refining 24 GHz equipment.¹⁸ Testing operations at FiberTower's laboratory included assessing whether a particular transceiver and/or antenna system had potential for future FiberTower use, and testing various equipment configurations in order to obtain the best possible signal for the particular purpose.¹⁹ FiberTower used these tests to determine whether equipment could, among other things, (i) operate on various sized sub-channels, (ii) meet quality standards with various-sized packet frames, (iii) complete transmission at various burst and payload speeds, and/or (iv) operate at various prescribed power levels (in order to ascertain if the equipment could meet various distance and other spectrum and power usage criteria).²⁰ When the data carried over these links revealed that the equipment did not meet these or other thresholds, FiberTower and/or its equipment partners would, among other things, (a) reconfigure antennas, (b) make design changes, (c) utilize different spectrum coordination changes and configurations, (d) make software changes, (e) conduct additional research and development operations, and/or (f) issue a revised version of the relevant equipment design standards.²¹ Once initial tests were complete and FiberTower contracted to purchase

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0005242330, Attachment A: License Renewal Request and Substantial Service Showing (filed May 31, 2012) ("WPNG641 Substantial Service Showing").

¹² See File No. 0005244173, Supplement to Substantial Service Showing (filed Jan. 2, 2014) ("WMT336 First Supplement"); File No. 0005244173, Second Supplement to Substantial Service Showing (filed Jan. 21, 2014) ("WMT336 Second Supplement"); File No. 0005244173, Third Supplement to Substantial Service Showing (filed Mar. 6, 2014) ("WMT336 Third Supplement"); File No. 0005244173, Fourth Supplement to Substantial Service Showing (filed Apr. 23, 2014) ("WMT336 Fourth Supplement"); File No. 0005244224, Supplement to Substantial Service Showing (filed Jan. 2, 2014) ("WMT348 First Supplement"); File No. 0005244224, Second Supplement to Substantial Service Showing (filed Jan. 21, 2014) ("WMT348 Second Supplement"); File No. 0005244224, Third Supplement to Substantial Service Showing (filed Mar. 6, 2014) ("WMT348 Third Supplement"); File No. 0005244224, Fourth Supplement to Substantial Service Showing (filed Apr. 23, 2014) ("WMT348 Fourth Supplement"); File No. 0005242330, Supplement to Substantial Service Showing (filed Dec. 27, 2013) ("WPNG641 First Supplement"); File No. 0005242330, Second Supplement to Substantial Service Showing (filed Jan. 28, 2014) ("WPNG641 Second Supplement"); File No. 0005242330, Third Supplement to Substantial Service Showing (filed Mar. 11, 2014) ("WPNG641 Third Supplement").

¹³ See WMT336 Second Supplement, WMT348 Second Supplement.

¹⁴ See WMT336 First Supplement, WMT348 First Supplement.

¹⁵ See WMT336 Second Supplement, WMT348 Second Supplement; WMT336 Fourth Supplement at 1; WMT348 Fourth Supplement at 1.

¹⁶ See WMT336 Second Supplement, WMT348 Second Supplement.

¹⁷ *Id.*

¹⁸ See WMT336 Fourth Supplement at 1; WMT348 Fourth Supplement at 1.

¹⁹ See WMT336 Second Supplement, WMT348 Second Supplement.

²⁰ See WMT336 Fourth Supplement at 1; WMT348 Fourth Supplement at 1.

²¹ See WMT336 Fourth Supplement at 1-2; WMT348 Fourth Supplement at 1-2.

certain radio transceivers and antennas, the vendors shipped these systems to the laboratory, where FiberTower performed further testing.²² At this stage, the equipment was “burned in”—that is, operated for weeks or months at a time and carefully monitored to make sure there were no anomalies or problems with long-term deployments. Successfully tested equipment was then re-boxed and sent to warehouses or to field offices.²³ Testing was used to help develop FiberTower’s “Installation and Commissioning Guide” for a product.²⁴ Even after products were approved, they would undergo “constant analysis and refinement” at FiberTower’s San Francisco facility.²⁵

7. In Newport News, Virginia, FiberTower constructed a microwave link on the roof of an educational building at ECPI University in Newport News, Virginia, within the geographic service area of Station WPNG641.²⁶ FiberTower claims that this link meets the four links per million population safe harbor because the population within the geographic service area of Station WPNG641 is approximately 340,203.²⁷ Both antennas were located on the same roof, and the indoor unit radio was located inside the school.²⁸ Professors used fixed wireless antennas, technical diagrams, and other materials provided by FiberTower to describe the capabilities and functions of the on-premises fixed wireless link.²⁹ From time to time, professors at ECPI University used the link as an instructional tool in courses on electrical engineering and networking.³⁰ Among other uses, professors brought students to the equipment room where the transceiver was operating, connected each station to a separate computer network, and monitored the transmission of data wirelessly across the link, in order to demonstrate to the students how fixed wireless systems can connect networks over a distance, and why that connection would be broken without the fixed wireless link.³¹ In conjunction with these activities, professors provided a complete overview of the communication system’s operations, including but not limited to: microwave theory, antenna theory, horn antennas, whip antennas, time division duplexing, multiplexing, data processing, interconnection of backhaul to networks, monitoring of fixed wireless links, and maintaining continuous operation of fixed wireless links.³²

8. In addition to claiming substantial service based on the operations for these three Stations, FiberTower argues that it demonstrated substantial service by (1) “investing significant time, energy, and capital in developing and rolling out its systems, infrastructure, services, and personnel necessary to support the deployment of large-scale regional and national networks;”³³ (2) building microwave facilities in other bands;³⁴ and (3) playing a role as a fixed wireless provider for backhaul.³⁵

²² See WMT336 Second Supplement, WMT348 Second Supplement.

²³ *Id.*

²⁴ See WMT336 Fourth Supplement at 3; WMT348 Fourth Supplement at 3.

²⁵ *Id.*

²⁶ See WPNG641 Third Supplement.

²⁷ WPNG641 Substantial Service Showing at 4-5.

²⁸ See WPNG641 First Supplement at 2.

²⁹ See WPNG641 Third Supplement.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ WMT336 Substantial Service Showing at 12-16; WMT348 Substantial Service Showing at 13-16; WPNG641 Substantial Service Showing at 10-13.

³⁴ WMT336 Substantial Service Showing at 19; WMT348 Substantial Service Showing at 19; WPNG641 Substantial Service Showing at 16.

FiberTower argues that in light of these activities, the Commission should find that FiberTower has met its substantial service obligations.”³⁶

9. In the alternative, FiberTower requested a three-year extension of time, until June 1, 2015, to demonstrate substantial service for these Stations³⁷ or 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 2015.³⁸ FiberTower argues that: (1) a lack of a national market for microwave backhaul and access service,³⁹ (2) an unforeseeable loss of traffic and future business opportunities,⁴⁰ and (3) a continuing lack of viable equipment,⁴¹ 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.⁴² Moreover, FiberTower argued at the time it filed the Extension Request in 2012 that 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.⁴³ FiberTower also filed a series of supplements making additional arguments in support of its request for an extension and revising the nature of the relief it was seeking.⁴⁴

10. Several of FiberTower’s suppliers have filed in support of the Extension Request, including DragonWave Inc. and BridgeWave, both of which supply microwave equipment.⁴⁵ The Zayo Group, LLC, which supplies fiber to FiberTower, argues that a decision to deny the Extension Request

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³⁵ WMT336 Substantial Service Showing at 19-20; WMT348 Substantial Service Showing at 20-21; WPNG641 Substantial Service Showing at 17-18.

³⁶ WMT336 Substantial Service Showing at 8; WMT348 Substantial Service Showing at 8. *See also* WPNG641 Substantial Service Showing at 5.

³⁷ File Nos. 0005207604, 0005207611, and 0005207826 (filed May 14, 2012), Request for Extension of Time or, in the Alternative, Limited Waiver of Substantial Service Requirement (dated Apr. 30, 2012) (“Extension Request”) at 1.

³⁸ Extension Request at 1-2.

³⁹ *Id.* at 6-10.

⁴⁰ *Id.* at 11-13.

⁴¹ *Id.* at 13-16.

⁴² *Id.* at 16-19.

⁴³ *Id.* at 19-22. As discussed below, since making those arguments, FiberTower has filed for relief pursuant to Chapter 11 of the Bankruptcy Code and has emerged from bankruptcy.

⁴⁴ Supplement #1, FiberTower Corporation (filed Jul. 26, 2012); Supplement #2, FiberTower Corporation (filed Jul. 31, 2012); Letter from Ari Q. Fitzgerald, Counsel for FiberTower Corporation to The Honorable Julius Genachowski, Chairman, Federal Communications Commission (filed Sep. 6, 2012); Supplement #4, FiberTower Corporation (filed Sep. 20, 2012); Supplement #5, FiberTower Corporation (filed Oct. 8, 2012); Supplement #6, FiberTower Corporation (filed Oct. 17, 2012); Supplement #7, FiberTower Corporation (filed Oct. 24, 2012).

⁴⁵ *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).

and terminate FiberTower's licenses would result in the cessation of FiberTower's existing services.⁴⁶ 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.⁴⁷

11. 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.⁴⁸ 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.⁴⁹ 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."⁵⁰ The *Preliminary Injunction Order* further provides that 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."⁵¹ On April 30, 2013, FiberTower discontinued operations pursuant to authority granted by the Wireline Competition Bureau.⁵² On January 27, 2014, the United States Bankruptcy Court for the Northern District of Texas approved FiberTower's plan to emerge from Chapter 11 bankruptcy.⁵³ Pursuant to that approval, FiberTower has filed an application to assign the Licenses from FiberTower Spectrum Holdings LLC, Debtor-in-Possession to FiberTower Spectrum Holdings LLC.⁵⁴

⁴⁶ Letter from Thomas L. Kelly, Associate General Counsel, Zayo Group, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Sep. 5, 2012).

⁴⁷ See Letter from Radio Systems Coordinator, County of Allegheny, Department of Emergency Services to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Sep. 26, 2012); Letter from Christopher Guttman-McCabe, CTIA-The Wireless Association to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sep. 7, 2012); 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); Letter from Joan Marsh, Vice President - Federal Regulatory, AT&T Services, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Aug. 31, 2012); 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).

⁴⁸ In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex).

⁴⁹ 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*").

⁵⁰ *Id.*

⁵¹ *Id.* at 3.

⁵² See Comments Invited on Application of FiberTower Corporation to Discontinue Domestic Telecommunications Services, WC Docket No. 13-9, *Public Notice*, 28 FCC Rcd 161, 162 (WCB CPD 2013).

⁵³ See Findings of Fact, Conclusions of Law, and Order Confirming Debtors' Fourth Amended Joint Chapter 11 Plan, Case No. 12-44027-DML-11 (Bankr. N.D. Tex Jan. 27, 2014).

⁵⁴ File No. 0006169289 (filed Feb. 24, 2014) ("Assignment Application"). FiberTower also holds 46 licenses for which it has successfully demonstrated substantial service. The Bureau has consented to the assignment of those 46 licenses to the post-bankruptcy FiberTower Spectrum Holdings LLC. See File No. 0006044255 (filed Dec. 24, 2013, consented to Feb. 28, 2014).

III. DISCUSSION

A. Substantial Service Showings

12. Our substantial service analysis with respect to each license requires a determination that the licensee is providing “service” that is “substantial.” With respect to Station WMT336, we credit FiberTower with one operating link on which it is providing service. Similarly, with respect to Station WMT348, we credit FiberTower with four operating and in service links. Because the population in the service areas of those Stations is over four million, however, the links for each Station, by themselves, are insufficient to meet the four link per million population safe harbor. Furthermore, FiberTower has failed to provide additional information concerning those links that would allow us to make a finding of substantial service based on those links on a case-by-case basis.

13. Since the one in-service link for Station WMT336 and the four in-service links for Station WMT348 are insufficient to demonstrate substantial service, we must determine whether we can give credit for FiberTower’s testing of equipment in its lab for Stations WMT336 and WMT348. With respect to Station WPNG641, we must also determine whether we can give credit for the link at ECPI University in Newport News. The key question is whether those operations constitute providing service under Commission precedent. In 2011, the Commission affirmed the Bureau’s rejection of substantial service showings “where there is no actual service being provided to the public.”⁵⁵ The Commission has noted that the underlying purpose of the substantial service requirement is “providing ‘a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public.’”⁵⁶ In other services, both the Commission and the Bureau have held that there is no service when facilities were constructed and operating but there was no use of the facilities. For example, in 2004, the Commission affirmed the cancellation of a license in the 2.5 GHz band for failure to provide service, and noted: “it was clearly unreasonable for San Diego MDS to believe that the periodic broadcasting of signals that nobody received constituted ‘service’ within the meaning of the rule.”⁵⁷ The Bureau’s Mobility Division has also rejected substantial service showings where facilities are constructed and operating but there is no internal use or service to customers.⁵⁸

14. Based on the information available to us, we conclude that FiberTower’s use of Stations WMT336 and WMT348 at its lab to test equipment did not constitute “service” that could be credited for purposes of finding substantial service. When FiberTower tests equipment in its lab, the data transmitted in the lab is not used for operational communications. There is no customer or FiberTower employee who used the links as part of any communications service. In that respect, FiberTower’s operation is no different than San Diego MDS Company’s use of its transmitter to broadcast test signals. We reject FiberTower’s claim that its testing was “completely distinguishable and different in kind” from the test

⁵⁵ 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) (“*Wireless Backhaul MO&O*”). See also FiberTower Spectrum Holdings LLC, *Memorandum Opinion and Order*, 28 FCC Rcd 6822, 6840-6841 ¶ 39 (2013) (“*FiberTower AFR Order*”).

⁵⁶ *Wireless Backhaul MO&O*, 26 FCC Rcd at 11661 ¶ 114, citing 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, 18623 ¶ 42 (1997); 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 PSPWD 2002).

⁵⁷ See San Diego MDS Company, *Memorandum Opinion and Order*, 19 FCC Rcd 23120, 23124 ¶ 10 (2004).

⁵⁸ See Cornerstone SMR, Inc., *Order*, 27 FCC Rcd 5900 (WTB MD 2012); JSM Holding LLC, *Letter*, 27 FCC Rcd 5864 (WTB MD 2012).

signals being transmitted in *San Diego MDS*.⁵⁹ Even if we accept FiberTower's characterization that its testing was "the most advanced and intensive development of 24 GHz equipment in the nation,"⁶⁰ the fact remains that its activities were testing, not service.

15. FiberTower argues that the testing of equipment was for "core internal business purposes" and that "transmission and reception of communications signals over multiple links for its core internal business needs over an extended period of time during the license term" constitutes substantial service.⁶¹ We fully agree with FiberTower that private, internal use of DEMS stations can form the basis for a substantial service showing. In this case, however, the signals FiberTower transmitted for testing were not used as part of any communications system. Nothing in the orders FiberTower cites supports the argument that the testing of equipment constitutes "service" under Commission precedent. We therefore cannot credit FiberTower's testing of equipment in support of its substantial service showing.

16. FiberTower's reliance on the link at ECPI University in support of its substantial service showing for Station WPNG641 suffers from the same defect as FiberTower's reliance on equipment testing: there is no communications use of the data transmitted over the link. The constructed link was shown to students as a teaching tool but was not used as part of a system used for communications. While data was occasionally sent over the link, no use was made of that data for communications. Accordingly, we cannot find that there was any "service" over Station WPNG641, and we cannot credit that link as part of FiberTower's substantial service showing. Since FiberTower has not reported any other operation under the license for Station WPNG641, we must conclude that FiberTower has failed to demonstrate substantial service under that license.

17. Finally, we also reject FiberTower's arguments that we should make a finding of substantial service in the absence of operation of facilities under the licenses in question. In connection with other FiberTower licenses, both the Wireless Telecommunications Bureau and the Commission have rejected FiberTower's argument that "antecedent activities" such as investment in equipment and preparing to provide service are sufficient to meet the substantial service standard.⁶² That holding is controlling here. We find that FiberTower's antecedent activities are insufficient to support a finding of substantial service, even if such activities are considered together with the links FiberTower did build which we have credited above.

B. Extension Requests

18. Since we have concluded that FiberTower has not demonstrated substantial service for the Licenses, we must consider whether to grant their requests for extension of time to demonstrate substantial service, or, alternatively, their request for waiver of the substantial service requirement. 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."⁶³ 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 inequitable, unduly

⁵⁹ See WMT336 Fourth Supplement at 3; WMT348 Fourth Supplement at 3.

⁶⁰ See WMT336 Fourth Supplement at 2; WMT348 Fourth Supplement at 2.

⁶¹ See WMT336 Third Supplement at 2-3; WMT348 Third Supplement at 2-3.

⁶² See FiberTower Spectrum Holdings LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 13562, 13569 ¶¶ 21-22 (WTB 2012) ("*FiberTower Bureau Order*").

⁶³ 47 C.F.R. § 1.946(e)(1).

burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁶⁴

19. FiberTower's Extension Requests are substantively identical to the extension and waiver requests which both the Bureau and the Commission have denied.⁶⁵ FiberTower has not argued that the circumstances with respect to these Licenses would support a different result on its Extension Request than the Bureau and the Commission reached with respect to its other licenses. We therefore view the actions of the Bureau and the Commission to be controlling here and deny the Extension Requests.

C. Action on Licenses and Assignment Application

20. Authorizations for 24 GHz DEMS GHz licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁶⁶ 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 automatically terminated, by operation of sections 1.946(c) and 1.955(a)(2) of the Commission's rules,⁶⁷ as of June 1, 2012. In light of our conclusion that the Licenses have automatically terminated, we direct the dismissal of the Assignment Application as moot.

IV. CONCLUSION AND ORDERING CLAUSES

21. FiberTower has failed to demonstrate substantial service for the Licenses. It has failed to justify an extension of time to meet the substantial service deadline for the Licenses 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 under the Licenses automatically terminated, by operation of Commission rule, as of June 1, 2012.

22. 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 (File Nos. 0005244173, 0005244224, and 0005242330) ARE DENIED.

23. 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 Nos. 0005207604, 0005207611, and 0005207826) filed by FiberTower Spectrum Holdings LLC on May 14, 2012 ARE DENIED.

24. 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 for Digital Electronic Message Service (DEMS) Stations WMT336, WMT348, and WPNG641 issued to FiberTower Spectrum Holdings, LLC, Debtor-in-Possession TERMINATED as of June 1, 2012.

25. 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 1.934 and 1.948 of the

⁶⁴ 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.

⁶⁵ See *FiberTower Bureau Order*, *FiberTower AFR Order*, *recon. denied* FiberTower Spectrum Holdings, LLC, *Order on Reconsideration*, 29 FCC Rcd 2493 (2014), *appeal pending*.

⁶⁶ See 47 C.F.R. § 1.955(a)(2).

⁶⁷ See 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

Commission's Rules, 47 C.F.R. §§ 1.934, 1.948, that the application to assign the licenses for Digital Electronic Message Service (DEMS) Stations WMT336, WMT348, and WPNG641 from FiberTower Spectrum Holdings, LLC, Debtor-in-Possession to FiberTower Spectrum Holdings, LLC filed on February 24, 2014 (File No. 0006169289) SHALL BE DISMISSED AS MOOT.

26. 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*.

27. 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

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau