

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

In the Matter of)	
)	
Application of AT&T Mobility Spectrum LLC and FiberTower Corporation)	ULS File Nos. 0007652635 and 0007652637
)	
For Consent to Transfer Control of 39 GHz Licenses)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2018

Released: February 8, 2018

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider the applications of AT&T Mobility Spectrum LLC (AT&T Mobility), an indirectly wholly-owned subsidiary of AT&T Inc. (collectively with AT&T Mobility, AT&T), and FiberTower Corporation (together with AT&T, the Applicants) for Commission consent to the transfer of control of 39 GHz licenses held by FiberTower Corporation’s subsidiary, FiberTower Spectrum Holdings LLC (FiberTower Spectrum, and, collectively with FiberTower Corporation, FiberTower). Pursuant to a stock purchase agreement, AT&T Mobility will acquire all of the outstanding stock of FiberTower Corporation, after which FiberTower Corporation will become a wholly-owned subsidiary of AT&T Mobility. This will result in a transfer of control of FiberTower Spectrum’s licenses from FiberTower Corporation to AT&T Mobility.¹

2. After carefully evaluating the likely competitive effects of the proposed transfer of control, we find that the likelihood of any competitive harms is low. AT&T’s post-transaction spectrum holdings across the 39 GHz bands do not raise any competitive concerns in light of the current state of the marketplace and our millimeter wave (mmW) spectrum holdings threshold, as recently revised in the *Spectrum Frontiers Second Report and Order*.² Further, we find that public interest benefits are likely to be realized from the transfer, including the expeditious use of this mmW spectrum for the potential introduction of innovative fifth-generation (5G) services to the benefit of American consumers. Based

¹ *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation for Transfer of Control of Licenses*, ULS File No. 0007652635 (filed Feb. 13, 2017, amended Jan. 31, 2018 and Feb. 2, 2018) (Lead Application, and together with ULS File No. 0007652637, Applications), Ex. 1 – Description of Transaction and Public Interest Statement at 3 (Public Interest Statement).

² *Use of Spectrum Bands Above 24GHz for Mobile Radio Services*, Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, FCC 17-152, para. 74 (rel. Nov. 22, 2017) (*Spectrum Frontiers Second Report and Order*).

on the record before us and on our competitive review, we find that the transfer proposed herein will serve the public interest, convenience, and necessity, and therefore we consent to the transfer of control.

II. BACKGROUND

3. *Description of the Applicants.* AT&T Mobility is a wholly-owned indirect subsidiary of AT&T Inc. AT&T states that it is a leading provider in the United States of wireless, Wi-Fi, high-speed Internet, local and long-distance voice, mobile broadband, and advanced television services.³ FiberTower states that it offers point-to-point and point-to-multipoint backhaul, leasing, and equipment connectivity services.⁴

4. *Description of the Transaction.* AT&T Mobility and FiberTower Corporation filed the Applications, pursuant to Section 310(d) of the Communications Act of 1934, as amended (the Act)⁵ on February 13, 2017 and amended them on January 31 and February 2, 2018. The Applications seek Commission consent to the transfer of control of 514 39 GHz licenses held by FiberTower Spectrum.⁶ The Applicants state that, on January 25, 2017, AT&T Mobility, FiberTower, and all of FiberTower's stockholders entered into a stock purchase agreement pursuant to which AT&T Mobility agreed to acquire all of the outstanding stock of FiberTower Corporation.⁷

5. On March 16, 2017, the Wireless Telecommunications Bureau released a Public Notice seeking comment on the proposed transfer of control.⁸ M&M Brothers, LLC (M&M) filed a petition to deny or condition grant of the Applications and a reply.⁹ Several individual former shareholders of FiberTower (Former Shareholders) also filed petitions to deny, and two of the Former Shareholders filed a reply and supplemental comments.¹⁰ The Competitive Carriers Association (CCA) filed comments and

³ Public Interest Statement at 2.

⁴ *Id.*

⁵ 47 U.S.C. § 310(d).

⁶ The Applications also include additional 24 GHz and 39 GHz licenses that will be cancelled. Lead Application, Amendment Implementing Order on Remand at 1 & n.7 (Applications Amendment Description). The licenses to be cancelled are listed in Attachment 1 to the Applications Amendment Description (Cancelled Licenses). We note that as those licenses will be cancelled, they are not included in our competitive review for potential public interest harms in Section V.1 *infra*.

⁷ Public Interest Statement at 3.

⁸ *AT&T Mobility Spectrum LLC and FiberTower Corporation Seek FCC Consent to the Transfer of Control of 24 GHz and 39 GHz Licenses*, ULS File Nos. 0007652635 and 0007652637, Public Notice, 32 FCC Rcd 1932 (WTB 2017) (Accepted for Filing Public Notice).

⁹ M&M Brothers, LLC Petition to Deny or to Place Conditions on the Grant of the Transfer Applications (filed March 30, 2017) (M&M Petition); Reply to Joint Opposition to Petition to Deny or to Place Conditions on the Grant of the Transfer Applications (filed Apr. 13, 2017) (M&M Reply).

¹⁰ Petition to Deny of Sean Steuart (filed March 27, 2017); (Petition to Deny of Richard Fahy (filed March 28, 2017) (Fahy Petition); Petition to Deny of Michael Wright (filed March 29, 2017) (Wright Petition); Petition to Deny of Joseph K. Bachtta (filed March 29, 2017); Petition to Deny of Jermaine Levy (filed March 29, 2017) (Levy Petition); Petition to Deny of Christopher Waldemer (filed March 30, 2017); Petition to Deny of Barbara Johnson (filed March 30, 2017); Richard Fahy Reply to Joint Opposition of AT&T Mobility Spectrum LLC and FiberTower Corporation (filed Apr. 10, 2017) (Fahy Reply); Jermaine Levy Reply to Joint Opposition of AT&T Mobility

(continued....)

a reply,¹¹ and T-Mobile USA, Inc. (T-Mobile) filed reply comments.¹² AT&T Mobility and FiberTower Corporation filed a joint opposition to the petitions to deny and the CCA Comments.¹³

6. On January 26, 2018, the Broadband Division of the Wireless Telecommunications Bureau (Division) released an order,¹⁴ which implemented a settlement agreement between FiberTower Spectrum and the Commission resolving various pending proceedings¹⁵ and waived certain Commission rules. Under the terms of the Settlement Agreement, FiberTower Spectrum agreed, *inter alia*, to relinquish all of its 24 GHz licenses and some of its 39 GHz licenses.¹⁶ In the *Waiver Order*, the Division also granted FiberTower a waiver of the buildout rule applicable to those 39 GHz licenses that FiberTower Spectrum is retaining under the terms of the Settlement Agreement,¹⁷ and it directed the licensing staff of the Division to return those licenses to active status.¹⁸ On January 31 and February 2, 2018, the Applicants amended their Applications to reflect resulting changes in the FiberTower license holdings.¹⁹

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

7. Pursuant to Section 310(d) of the Act,²⁰ the Commission must determine whether the proposed transfer of control of the licenses held by FiberTower Corporation's subsidiary FiberTower Spectrum will serve the public interest, convenience, and necessity. In making this determination, the Commission first assesses whether the proposed transaction complies with the specific provisions of the

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Spectrum LLC and FiberTower Corporation (filed Apr. 13, 2017) (Levy Reply); Supplemental Comments of Richard Fahy (filed Jan. 29, 2018); Supplemental Comments of Jermaine Levy (filed Jan. 30, 2018).

¹¹ Comments of Competitive Carriers Association (filed March 30, 2017) (CCA Comments); Reply Comments of Competitive Carriers Association (filed Apr. 13, 2017) (CCA Reply Comments).

¹² Reply Comments of T-Mobile USA, Inc. (filed Apr. 13, 2017) (T-Mobile Reply Comments).

¹³ Joint Opposition of AT&T Mobility Spectrum LLC and FiberTower Corporation (filed Apr. 6, 2017) (Joint Opposition).

¹⁴ *FiberTower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or, in the Alternative, Limited Waiver of Substantial Service Requirements*, Order on Remand and Memorandum Opinion and Order, DA 18- 78 (WTB Broadband Div. rel. Jan. 26, 2018) (*Waiver Order*). The *Waiver Order* also addressed substantial service waiver requests and other matters pertaining to proceedings, including bankruptcy proceedings and a remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in which FiberTower was involved.

¹⁵ Settlement Agreement, dated January 24, 2018, between the Federal Communications Commission and FiberTower Spectrum LLC (Settlement Agreement). See *Waiver Order*, Appendix 3.

¹⁶ *Waiver Order*, DA 18-78, at para. 10.

¹⁷ *Id.* at para. 13.

¹⁸ *Id.* at para. 14.

¹⁹ See Applications Amendment Description; Applications, as amended.

²⁰ 47 U.S.C. § 310(d). Section 310(d) of the Act requires that we consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308 of the Act, 47 U.S.C. § 308. See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, para. 19 (2007) (*AT&T-BellSouth Order*).

Act, other applicable statutes, and the Commission's rules.²¹ If the proposed transaction does not violate a statute or rule, then the Commission considers whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.²²

8. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.²³ The Department of Justice (DOJ) has independent authority to examine the competitive impacts of proposed mergers and transactions involving transfers of Commission licenses, but the Commission's competitive analysis under the public interest standard is somewhat broader. Notably, the Commission may impose and enforce narrowly tailored, transaction-specific conditions that address the potential harms of a transaction.²⁴ Specifically, the Commission has repeatedly held that it will impose conditions "only to remedy harms that arise from the transaction (i.e., transaction-specific harms)" and "related to the Commission's responsibilities under the Communications Act and related statutes," and it "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction."²⁵

9. If the Commission has determined that a transaction raises no public interest harms or any such harms have been ameliorated by narrowly tailored conditions, the Commission next considers a transaction's public interest benefits. Notably, the Commission has long recognized the clear public

²¹ 47 U.S.C. § 310(d); *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 32 FCC Rcd 9581, 9585, para. 8 (2017) (*CenturyLink-Level 3 Order*) (citing *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9139-40, para. 18 (2015) (*AT&T-DIRECTV Order*)); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4247, para. 22 (2011) (*Comcast-NBCU Order*); *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp., Transferee*, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar-DIRECTV HDO*).

²² *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9585, para. 9 (citing *AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18; *Comcast-NBCU Order*, 26 FCC Rcd at 4247, para. 22; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25).

²³ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9585, para. 9 (citing *Satellite Bus. Sys.*, 62 FCC 2d 997, 1068-73, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*)); *see also Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

²⁴ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9585-86, para. 9 (citing *AT&T-DIRECTV Order*, 30 FCC Rcd at 9141, para. 22; *Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4199, para. 10 (2011) (*Qwest-CenturyLink Order*)).

²⁵ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586, para. 9 (citing *SBC Communications Inc. and AT&T Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18303, para. 19 (2005); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21545-46, para. 43 (2004)); *see also Applications of Nextel Partners, Inc. Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd 7358, 7361, para. 9 (2006); *Applications of AT&T Inc. and CellCo Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, Memorandum Opinion and Order, 25 FCC Rcd 8704, 8747, para. 101 (2010).

interest benefits in a license or authorization holder being able to assign or transfer control of its license or authorization freely.²⁶ Indeed, the Commission has adopted streamlining procedures—including the automatic approval of a transaction—when a “transaction is unlikely to raise public interest concerns.”²⁷ The Commission also will review other claimed public interest benefits of a transaction, with the applicants bearing the burden of proving those benefits by a preponderance of the evidence.²⁸

10. Finally, if the Commission is able to find that narrowly tailored, transaction-specific conditions are able to ameliorate any public interest harms and the transaction is in the public interest, it may approve the transaction as so conditioned.²⁹ In contrast, if the Commission is unable to find that a proposed transaction even with such conditions serves the public interest or if the record presents a substantial and material question of fact, then it must designate the application for hearing.³⁰

IV. QUALIFICATIONS OF APPLICANTS AND COMPLIANCE WITH COMMUNICATIONS ACT AND FCC RULES AND POLICIES

11. Section 310(d) of the Act requires that we make a determination as to whether the Applicants have the requisite qualifications to hold Commission licenses.³¹ Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite

²⁶ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586, para. 10 (citing *Amendment of Section 73.3596 of the Commission’s Rules (Applications for Voluntary Assignments or Transfers of Control)*, Memorandum Opinion and Order, 4 FCC Rcd 1710 (1988), affirming 59 RR 2d 1081 (1982) (affirming elimination of requirement that broadcast licenses be held three years before they can be assigned or transferred, stating “the public interest is usually best served by allowing station sales transactions to be regulated primarily by marketplace forces,” and holding that the listening public benefits from freely allowing sales to new owners); *id.*, 55 RR 2d at 1087-88 (holding buyer who is willing to pay market price more likely to deliver service audiences desire and recognizing public benefit of ready market for broadcast licenses); *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760, 10841-44 (2003) (eliminating anti-trafficking policy for satellite licenses expedites service to the public by facilitating the transfer of licenses to those parties that have the greatest incentive and ability to construct a satellite system; enables satellite spectrum to move more efficiently to its highest and best use; and helps licensees mitigate risk thereby encouraging investment)).

²⁷ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586, para. 10 (citing *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517, 5533-35, paras. 29-34 (2002)).

²⁸ 47 U.S.C. § 309(e); see *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586, para. 10 (citing *AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees*, 21 FCC Rcd 8203, 8217, para. 23 (2006); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574, para. 25)).

²⁹ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586, para. 11 (stating that “[a]lthough the Commission has suggested in the past that it may employ a ‘balancing test,’” see, e.g., *AT&T-DIRECTV Order*, 30 FCC Rcd at 9140, para. 18, or a ‘sliding scale approach,’” see, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5761, para. 203, “in practice the Commission has not allowed potential competitive harms to go unremedied nor allowed them to be offset by benefits that are not transaction-specific, i.e., benefits that do not naturally arise from the transaction at issue.”).

³⁰ 47 U.S.C. § 309(e); *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9586-87, para. 11 (citing *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20562-63, para. 3).

³¹ 47 U.S.C. § 310(d).

“citizenship, character, financial, technical, and other qualifications.”³² Therefore, as a threshold matter, the Commission must determine whether the applicants to a proposed transaction meet the requisite qualification requirements to hold and transfer licenses under Section 310(d) of the Act and the Commission’s rules.³³

12. We note that no issues were raised with respect to the basic qualifications of AT&T or FiberTower. In addition, AT&T has repeatedly been found qualified to hold Commission licenses.³⁴ We therefore find no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications of FiberTower or AT&T under the Act and our rules, regulations, and policies.³⁵

13. The proposed transaction also must comply with the Act, other applicable statutes, and the Commission’s rules before we can find that it is in the public interest.³⁶ We find that the proposed transaction will not violate any statutory provision or Commission rule.

V. POTENTIAL PUBLIC INTEREST HARMS AND BENEFITS

1. Potential Public Interest Harms

14. We find no evidence in the record to support a finding that the transaction will result in potential public interest harms. We therefore deny or dismiss, as discussed below, the various petitions and comments of M&M, CCA, T-Mobile, and the Former Shareholders.

15. *Positions of the Parties.* The Applicants claim that the proposed transaction does not raise any spectrum aggregation or competitive concerns.³⁷ They assert that the proposed transaction will not pose any anticompetitive risk or reduce actual competition in any meaningful way.³⁸ Instead, they argue, the transaction will enhance competition by helping AT&T to be a more effective competitor in the provision of 5G services.³⁹ Moreover, the Applicants assert that, with the instant transaction, AT&T

³² 47 U.S.C. §§ 308, 310(d); *see also AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 24; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, para. 11; *AT&T-BellSouth Order*, 22 FCC Rcd at 5756, para. 191; *SBC-AT&T Order*, 20 FCC Rcd at 18379, para. 171.

³³ *AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 24; *Qwest-CenturyLink Order*, 26 FCC Rcd at 4199, para. 11; *AT&T-BellSouth Order*, 22 FCC Rcd at 5756, para. 191.

³⁴ *See, e.g., Applications of AT&T Inc., Leap Wireless International, Inc., Cricket License Co., LLC and Leap Licenseco, Inc. for Consent to Transfer Control and Assign Licenses and Authorizations*, Memorandum Opinion and Order, 29 FCC Rcd 2735, 2745, para. 19 (WTB, IB 2014) (*AT&T-Leap Order*); *Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company for Consent to Assign and Transfer Licenses*, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16466-67, para. 19 (2012).

³⁵ 47 U.S.C. § 310(d); 47 C.F.R. § 1.948. The Commission generally does not reevaluate the qualifications of transferors unless issues related to basic qualifications have been sufficiently raised in petitions to warrant designation for hearing. *AT&T-DIRECTV Order*, 30 FCC Rcd at 9142, para. 25; *Applications of Sprint Nextel Corp. and SoftBank Corp. and Starburst II, Inc. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642, 9653, para. 27 (2013).

³⁶ *AT&T-DIRECTV Order*, 30 FCC Rcd at 9154, para. 52.

³⁷ Public Interest Statement at 1.

³⁸ *Id.* at 8.

³⁹ *Id.* The Applicants assert that all of the national wireless service providers have plans to deploy 5G services. *Id.* at 8 & n.39.

would not exceed the 1250 megahertz threshold established in the *Spectrum Frontiers Order*⁴⁰ for secondary market transactions involving mmW spectrum.⁴¹

16. M&M, CCA, and T-Mobile argue that we should not grant FiberTower waivers of the substantial service requirements and should not reinstate licenses that were terminated for failure to build out and that were subject to a remand order from the D.C. Circuit. They argue that instead we should reclaim and auction the spectrum associated with FiberTower's unbuilt licenses.⁴² M&M further argues that, in the alternative, we should decline to consent to the transfer of two terminated licenses that would overlap with M&M's 24 GHz Economic Area licenses in the Las Vegas and Phoenix-Mesa Economic Areas.⁴³

17. The Former Shareholders argue that the result of an earlier FiberTower bankruptcy proceeding was unfair to them because FiberTower's spectrum holdings were valued at an artificially low level.⁴⁴ They make various arguments related to the bankruptcy proceeding, including that former shareholders should share in proceeds of the proposed transaction.⁴⁵

18. The Applicants respond that M&M and CCA do not point to any competitive harm that might be caused by the proposed transaction.⁴⁶ The Applicants further respond that the arguments of M&M and CCA that the FiberTower spectrum should be auctioned are not consistent with Commission policy, articulated in the *Spectrum Frontiers Order*, of prioritizing expeditious use of mmW spectrum.⁴⁷ As to the petitions of the Former Shareholders, the Applicants argue that the Former Shareholders lack standing because any interests that they may have had in the pre-bankruptcy FiberTower entity were extinguished in bankruptcy court, but that, to the extent that they have any interests, their allegations raise private, contractual disputes over which the Commission routinely declines to exercise authority under the Act.⁴⁸

19. *Discussion.* In reviewing proposed transactions, the Commission evaluates the potential public interest harms and undertakes a case-by-case review of the competitive effects of any increase in market concentration or in spectrum holdings in the relevant markets.⁴⁹ Spectrum is an essential input in

⁴⁰ *Use of Spectrum Bands Above 24GHz for Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, 8081 n.486 (2016) (*Spectrum Frontiers Order*). We note that in its recent *Spectrum Frontiers Second Report and Order*, the Commission raised this threshold to 1850 megahertz. *Spectrum Frontiers Second Report and Order*, FCC 17-152, para. 74. See *infra* para. 20.

⁴¹ Public Interest Statement at 8.

⁴² M&M Petition at 4-10; CCA Comments at 4-14; M&M Reply at 4-5; CCA Reply Comments at 2-7; T-Mobile Reply Comments at 1-2.

⁴³ M&M Petition at 3, 12-14.

⁴⁴ See, e.g., Fahy Petition at 6; Levy Petition at 7; Fahy Reply at 9-11.

⁴⁵ See, e.g., Wright Petition at 2; Levy Petition at 14; Levy Reply at 6

⁴⁶ Joint Opposition at 2.

⁴⁷ *Id.* at 2, 7.

⁴⁸ *Id.* at 3, 19-20.

⁴⁹ See, e.g., *Applications of SprintCom, Inc., Shenandoah Personal Communications, LLC, and NTELOS Holdings Corp. for Consent To Assign Licenses and Spectrum Lease Authorizations and To Transfer Control of Spectrum Lease Authorizations and an International Section 214 Authorization*, Memorandum Opinion and Order, 31 FCC Rcd 3631, (continued...)

the provision of wireless services, and ensuring that sufficient spectrum is available for incumbent licensees as well as potential new entrants is critical to promoting effective competition and innovation in the wireless marketplace.⁵⁰

20. Although the Commission's spectrum screen historically has not included the mmW bands,⁵¹ the Commission, in the *Spectrum Frontiers Order*, found that the mmW bands are likely to be a critical component in the development of 5G services,⁵² and it concluded that proposed secondary market transactions, such as this one, should be analyzed on a case-by-case basis using a specific mmW spectrum threshold as an initial analytical tool to aid in identifying certain markets for further review.⁵³ In the *Spectrum Frontiers Order*, the Commission adopted a mmW spectrum threshold of 1250 megahertz for proposed secondary market transactions, out of the total of 3250 megahertz of mmW spectrum made available at that time.⁵⁴ In its recent *Spectrum Frontiers Second Report and Order*, the Commission raised this threshold to 1850 megahertz because it adopted rules making an additional 1700 megahertz of mmW spectrum available from the 24 GHz and 47 GHz bands, increasing the total available mmW spectrum to 4950 megahertz.⁵⁵

21. We observe that post-transaction, AT&T will not trigger the mmW spectrum threshold of 1850 megahertz in any county subject to the proposed transaction.⁵⁶ Its maximum spectrum holdings in any given county would be 796.8 megahertz.⁵⁷ Considering that the proposed transaction does not trigger the mmW spectrum threshold of 1850 megahertz, and based on our careful review of the record as well as our examination of the various factors present in this case as described below, we find that AT&T's post-

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3635-36, para. 9 (WTB/IB 2016) (*Sprint-Shentel-NTELOS Order*); *AT&T-Leap Order*, 29 FCC Rcd at 2745, para. 20.

⁵⁰ See, e.g., *Policies Regarding Mobile Spectrum Holdings; Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133, 6238-40, paras. 282-88 (2014) (*Mobile Spectrum Holdings Report and Order*), recon. denied, Order on Reconsideration, 30 FCC Rcd 8635 (2015); *AT&T-Leap Order*, 29 FCC Rcd at 2745-46, para. 21.

⁵¹ See, e.g., *Sprint-Shentel-NTELOS Order*, 31 FCC Rcd at 3637, para. 13; *Mobile Spectrum Holdings Report and Order*, 29 FCC Rcd at 6169, para. 70.

⁵² *Spectrum Frontiers Order*, 31 FCC Rcd at 8081, para. 184.

⁵³ *Id.* at 8082-84, paras 185 & 190.

⁵⁴ *Id.* at 8081-84, paras. 184, 189 & n.493.

⁵⁵ *Spectrum Frontiers Second Report and Order*, FCC 17-153, at para.74. This change in the threshold became effective on January 2, 2018. See *Use of Spectrum Bands Above 24GHz for Mobile Radio Services*, 83 Fed. Reg. 37 (Jan. 2, 2018).

⁵⁶ Lead Application, Exhibit 3, Updated Competitor and Aggregation Chart (Updated Spectrum Aggregation Exhibit). AT&T, through its subsidiary Teleport Communications America, LLC, holds incumbent rectangular service area 39 GHz licenses. Public Interest Statement at 2 n.4. It would acquire from FiberTower 514 39 GHz licenses covering 2,713 counties, or approximately 96 percent of the U.S. population in all or parts of 667 Cellular Marketing Areas. See Updated Spectrum Aggregation Exhibit. Post-transaction, AT&T would hold, in any single county, a maximum of 796.8 megahertz of mmW spectrum, or approximately 16 percent of the 4950 megahertz of mmW spectrum that the Commission made available in the *Spectrum Frontiers Order* and the *Second Spectrum Frontiers Order* for flexible use, including mobile services. *Spectrum Frontiers Order*, 31 FCC Rcd at 8018, para. 4; *Second Spectrum Frontiers Order* at 23-24, paras. 73-74.

As noted above, *supra* note 6, our competitive analysis does not include the Cancelled Licenses.

⁵⁷ Updated Spectrum Aggregation Exhibit.

transaction spectrum holdings across the 39 GHz bands do not raise concerns in light of the current state of the marketplace.

22. We deny the M&M Petition and the relief requested by CCA and T-Mobile for several separate and independent reasons.⁵⁸ First, to the extent that M&M argues, as do CCA and T-Mobile, that we should not grant waivers and extensions of the substantial service requirements, their arguments are not transaction specific. They do not arise out of the transaction at issue here, involving the transfer of control of FiberTower's licenses. Instead, such arguments concern issues relate to FiberTower's requests for license waivers and extensions of the substantial service requirements that were subject to a separate lengthy proceeding, and presenting them now is untimely and unrelated to any competitive harms that may arise out of consent to this transaction. Those parties raising the issues now could have filed informal objections when FiberTower filed its extension and waiver requests originally, but they did not do so. After extensive proceedings at the Commission, a court appeal, and subsequent proceedings on remand, issues relating to those waivers and extension requests have been addressed through the *Waiver Order*. Second, as part of that process, FiberTower agreed to surrender all of its 24 GHz licenses, including the two that overlap with M&M licenses. Accordingly, M&M's request for alternative relief is moot in any event. In addition, none of the arguments in the record points to any competitive harm that might be caused by the proposed transaction. As discussed below, we find that consenting to the transfer of control of FiberTower's 39 GHz licenses to AT&T will most likely enable that spectrum to be used rapidly in 5G development and deployment, and that this would serve the public interest. Accordingly, we are not persuaded by the arguments of M&M, CCA, and T-Mobile that the Applications should be denied.

23. We also deny the petitions of the Former Shareholders. Their arguments of alleged undervaluation of FiberTower assets relate to a separate bankruptcy proceeding that, as the Applicants point out, began in 2012.⁵⁹ Whether the Former Shareholders have any remaining rights in those assets - which the Applicants argue they do not - is not for the Commission to decide. The Commission does not adjudicate private contractual disputes in transaction proceedings.⁶⁰

⁵⁸ We further note that no party other than M&M has satisfied the requirements of Section 309(d)(1) of the Act that it demonstrate that it is a party in interest, supported by specific allegations of fact supported by an affidavit on personal knowledge. See 47 U.S.C. § 310(d)(1). Moreover, while CCA alleges that its members "have a particular interest in the acquisition of spectrum that will be used to provide advanced services," CCA Comments at 2, it fails to demonstrate how any of its members has suffered an injury in fact with respect to these particular licenses, that there is a causal link to that injury from this transaction, or that not granting the application would remedy that injury. See, e.g., *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, 27 FCC Rcd 10698, 10713, para. 36 (2012). Indeed, even in the case where a reauction would be reasonably foreseeable as the result of the denial of an auction winner's application, disappointed bidders must demonstrate that they are able and ready to bid for the specific licenses at issue. *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599 (D.C. Cir. 2002). Finally, as noted below, M&M's demonstration of its party in interest status is limited to the 24 GHz licenses at issue here, as to which its claim is moot.

⁵⁹ Joint Opposition at 18.

⁶⁰ *S.A. Dawson*, Memorandum Opinion and Order, 17 FCC Rcd 472, 474 n.15 (WTB 2002) (citing *AirTouch Paging, Inc.*, Order, 14 FCC Rcd 9658 (WTB CWB P&RB 1999)); *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). See also *Rudolph J. Geist, Esq.*, Letter, 29 FCC Rcd 15282 (WTB BD 2014); *Antilles Wireless, L.L.C. d/b/a USA Digital*, Order on Reconsideration, 24 FCC Rcd 4696, 4699, para. 8 (WTB 2009).

2. Potential Public Interest Benefits

24. Having found there are no significant potential public interest harms of the transaction, we next review the public interest benefits of the transaction, beyond fostering the free transferability of licenses and authorizations. The Commission has recognized that efficiencies generated through a transaction can mitigate competitive harms only “if such efficiencies enhance the merged firm’s ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products.”⁶¹ Specifically, the Commission finds a claimed benefit to be cognizable only if it is transaction-specific—meaning it naturally arises as a result of the transaction⁶²—and verifiable, and is “more likely to find marginal cost reductions to be cognizable than reductions in fixed cost.”⁶³

25. *Claims of the Applicants.* The Applicants claim that AT&T’s acquisition of FiberTower’s mmW spectrum licenses will accelerate the development and deployment of next-generation 5G wireless services and promote competition.⁶⁴ The Applicants maintain that AT&T has been at the forefront of 5G development, conducting field trials working with technology companies to develop 5G standards, and launching the first United States 5G business customer trial in the mmW bands.⁶⁵ The Applicants also maintain that the transfer of the mmW licenses will further the Commission’s objective of fostering a thriving 5G ecosystem throughout the United States.⁶⁶ They assert that AT&T already has been encouraging 39 GHz equipment developers to bring deployable equipment to market.⁶⁷ They further assert that FiberTower’s spectrum currently is either unused or underutilized for limited point-to-point transmission services and that AT&T will be able to develop and deploy FiberTower’s assets rapidly to allow them to be put to use for 5G services.⁶⁸

26. *Discussion.* We have reviewed the Applicants’ claimed public interest benefits. As noted in the *Spectrum Frontiers* proceeding, the 39 GHz spectrum that is included in the proposed transaction, among other bands, is likely to be used for 5G deployment.⁶⁹ We note that AT&T has been taking a number of steps toward developing standards and technology for 5G deployment.⁷⁰ It has announced

⁶¹ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9604, para. 50 (citing *AT&T-BellSouth Order*, 22 FCC Rcd at 5760, para. 201).

⁶² *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9604, para. 50 (citing *AT&T-BellSouth Order*, 22 FCC Rcd at 5761, para. 202 (stating “[o]r as the Commission has previously put it, ‘more likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects’”)).

⁶³ *CenturyLink-Level 3 Order*, 32 FCC Rcd at 9604, para. 50 (citing *AT&T-BellSouth Order*, 22 FCC Rcd at 5761, para. 202).

⁶⁴ Public Interest Statement at 4.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 4; Joint Opposition at 7.

⁶⁷ Public Interest Statement at 6.

⁶⁸ *Id.*

⁶⁹ *Spectrum Frontiers Order*, 31 FCC Rcd at 8044-45, para. 76.

⁷⁰ Public Interest Statement at 5-6; Joint Opposition at 7-8; “AT&T Expanding Fixed Wireless 5G trials to Additional Markets,” http://about.att.com/story/att_expanding_fixed_wireless_5g_trials_to_additional_markets.html (Aug. 30, 2017). See also *supra* para. 25.

(continued...)

that it aims to launch mobile 5G services to consumers in twelve markets beginning in late 2018.⁷¹ We find that, as a direct result of the transaction, AT&T likely would be better able to develop and deploy innovative 5G services to the benefit of American consumers. Therefore, we believe that consenting to the subject transaction will allow AT&T to continue to develop important uses and new technology for this mmW spectrum band.

VI. CONCLUSION

27. Based on our careful evaluation of the likely competitive effects, we find that the transaction is unlikely to result in any significant public interest harms. In addition, we find that the record supports the Applicants' assertions that the transaction likely would result in certain public interest benefits. As a result, based on our review of the record before us, we find that consent to the proposed transfer of control would serve the public interest, convenience, and necessity.

VII. ORDERING CLAUSES

28. Accordingly, having reviewed the applications and the record in this matter, **IT IS ORDERED** that, pursuant to Sections 4(i)-(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), 303(r), 309, 310(d), the applications for consent to the transfer of control filed by AT&T Mobility and FiberTower Corporation **ARE GRANTED**, subject to the condition of full compliance by FiberTower and AT&T Mobility with all of the terms of the Settlement Agreement.

29. **IT IS FURTHER ORDERED** that, pursuant to Sections 63.10, 63.13, and 1.939 of the Commission's Rules, 47 CFR §§ 63.10, 63.13, 1.939, the petitions of M&M and of the Former Shareholders to deny the Applications **ARE DENIED** as discussed above.

30. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order **SHALL BE EFFECTIVE** upon release. Petitions for Reconsideration under Section 1.106 of the Commission's Rules, 47 CFR § 1.106, may be filed within thirty days of the date of release of this Memorandum Opinion and Order.

31. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Donald Stockdale
Chief
Wireless Telecommunications Bureau

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We note that AT&T recently announced that the international wireless standards body has completed and agreed to certain elements of 5G new radio standards, allowing standards-based 5G testing. "Accelerating 5G: Industry Reaches Key 5G Standards Milestone, http://about.att.com/innovationblog/5g_standards (Dec. 21, 2017).

⁷¹ Joint Opposition at 8; "AT&T Preparing to Mobilize 5G," <http://www.broadcastingcable.com/news/platforms/att-preparing-mobilize-5g/170913> (Jan. 5, 2018).