

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

In the 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 et seq.
Construct 24 GHz Digital Electronic Message )
Service (DEMS) Licenses )
)
)
345 Applications for Extension of Time to ) File Nos. 0005207187 et seq.
Construct 39 GHz Economic Area Licenses )
)
)
250 Applications for Extension of Time to ) File Nos. 0005207571 et seq.
Construct 39 GHz Rectangular Service Area )
(RSA) Licenses )

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 2013

Released: May 7, 2013

By the Commission: Commissioner McDowell not participating.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny an application for review ("AFR") filed by FiberTower Corporation, on behalf of itself and its subsidiary FiberTower Spectrum Holdings, LLC (collectively, "FiberTower"). FiberTower seeks review of a Wireless Telecommunications Bureau ("Bureau") decision holding that FiberTower had 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. FiberTower also seeks review of the Bureau's denial of FiberTower's requests for extension of time to demonstrate substantial service for these licenses, and FiberTower's associated requests for waiver of the June 1, 2012 substantial service deadline.

II. BACKGROUND

2. As of November 30, 2012, FiberTower, which was established in 2000, provided wireless backhaul (i.e., the transport of voice and data from the cell site to the switch) and access transport (i.e., the network link between the local area network and the local fiber ring) to approximately 5,390 customer locations at approximately 3,188 deployed sites in thirteen markets throughout the United States, predominantly through more than 3,000 Common Carrier Point-to-Point Microwave licenses in the 11,

18, and 23 GHz bands.<sup>1</sup> Licenses in the 11, 18, or 23 GHz band are licensed under Part 101 of the Commission's Rules on a site-by-site, first-come-first-served non-exclusive basis.<sup>2</sup>

3. In addition, FiberTower holds 352 Economic Area ("EA") licenses in the 39 GHz band, 283 Rectangular Service Area ("RSA") licenses in the 39 GHz band, and 102 DEMS licenses in the 24 GHz band.<sup>3</sup> Licenses in the 24 and 39 GHz bands are also subject to Part 101 of the Commission's Rules, and licensees must demonstrate substantial service at the time of license renewal.<sup>4</sup> According to FiberTower, its spectrum holdings in the 24 and 39 GHz bands constitute a significant asset that includes 740 MHz of spectrum "in the top twenty (20) U.S. Metropolitan areas and, in the aggregate, approximately 1.72 billion channel pops (calculated as the number of channels in a given area multiplied by the population, as measured in the 2010 census, covered by these channels)."<sup>5</sup> Also according to FiberTower, this "Spectrum Portfolio represents one of the largest and most comprehensive collections of millimeter wave spectrum in the U.S., covering areas with a total population of over 300 million."<sup>6</sup> This *Memorandum Opinion and Order* addresses only certain 39 GHz RSA, 39 GHz EA, and 24 GHz DEMS licenses held by FiberTower.<sup>7</sup>

4. Under Sections 101.17 and 101.67 of the Commission's Rules, FiberTower was required to demonstrate substantial service for its 39 GHz EA and RSA licenses at the time of license renewal.<sup>8</sup> On October 2, 2008, however, the Bureau, acting in response to an extension request from FiberTower,

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<sup>1</sup> Debtors' Motion for Approval of Binding Term Sheet with Participating Carriers for Migration of Services Off Debtors' Backhaul Network and Wind-Down of Debtors' Business at 3 ("FiberTower Bankruptcy Motion"), submitted as Exhibit A in Comments of the Affected Carriers, T-Mobile USA, Inc., AT&T Inc., Cricket Communications, Inc., MetroPCS Communications Inc., and Sprint Nextel Corporation, WC Docket No. 12-334 (filed Nov. 30, 2012) ("Comments of Affected Carriers"). The markets where FiberTower was providing service were Dallas/Fort Worth; Washington, DC-Baltimore; Atlanta; Boston; Chicago; Cleveland; Denver; Detroit; Houston; New York/New Jersey; Pittsburgh; San Antonio/Austin/Waco; and Tampa. See FiberTower Bankruptcy Motion at 3. FiberTower received Commission approval to discontinue service for all customers as of April 30, 2013. See ¶ 12, *infra*.

<sup>2</sup> Part 101 of the Commission's Rules generally governs terrestrial microwave operations. See 47 C.F.R. Part 101.

<sup>3</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. 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> 47 C.F.R. §§ 101.17, 101.67, 101.526, 101.527.

<sup>5</sup> FiberTower Bankruptcy Motion at 3.

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

<sup>7</sup> The 39 GHz licenses for which FiberTower has previously demonstrated substantial service and the 24 GHz and 39 GHz licenses for which FiberTower filed substantial service notifications showing actual construction are not under consideration in this *Memorandum Opinion and Order* and remain valid. See FiberTower Spectrum Holdings LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 13562, 13563 nn.5, 6 (WTB 2012) ("FiberTower MO&O").

<sup>8</sup> 47 C.F.R. §§ 101.17, 101.67.

extended the substantial service deadline for 183 RSA licenses and 352 EA licenses to June 1, 2012.<sup>9</sup> The Bureau found that FiberTower potentially could 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>10</sup> The Bureau anticipated that these bands would develop robustly, along with other mobile and fixed wireless services, and that FiberTower potentially could provide wireless backhaul service to these new services.<sup>11</sup> Based on such anticipated developments in these new services and the resulting possibilities in the market for providing wireless backhaul service, the Bureau concluded that an extension of time until June 1, 2012, would provide FiberTower and other 39 GHz licensees with a sufficient amount of additional time to meet their buildout obligations. The Bureau also held that FiberTower had demonstrated substantial service for 31 licenses.<sup>12</sup> Two years later, the Bureau also extended the construction deadline applicable to the 24 GHz DEMS licenses to June 1, 2012.<sup>13</sup>

5. On May 14, 2012, FiberTower filed an Extension Request asking the Bureau to once again extend the construction deadline an additional three years for its 24 and 39 GHz licenses for which it had not yet demonstrated substantial service, until June 1, 2015.<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 later reduced the amount of time sought for the extension to meet the substantial service safe harbor standards to 18 months.<sup>16</sup> FiberTower argued that such relief was justified by (1) a lack of a national market for

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<sup>9</sup> Art Licensing Corporation, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 14116, 14125-14127 ¶¶ 20-21 (WTB 2008) (“*ART Order*”). The Bureau had earlier granted a similar extension to IDT Spectrum, LLC for its 39 GHz licenses. See IDT Spectrum, LLC, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 12005 (WTB 2008). On February 3, 2011, the Bureau granted extensions until June 1, 2012 for an additional 62 39 GHz RSA licenses, consistent with the Bureau’s 2008 order. See File Nos. 0004570076-0004570137 (filed Jan. 12, 2011, granted Feb. 3, 2011).

<sup>10</sup> *ART Order*, 23 FCC Rcd at 14125-14127 ¶¶ 20-21. More specifically, licenses for new wireless services in the 700 MHz band had been auctioned in March 2008, the first group of licenses for AWS-1 band operations was granted on April 16, 2007, and BRS/EBS band licensees were required to meet a construction deadline of May 1, 2011.

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

<sup>12</sup> *Id.* at 14122-14123 ¶ 13.

<sup>13</sup> See the Appendix to the *FiberTower MO&O* for the file numbers of the relevant applications.

<sup>14</sup> A list of the file numbers of the relevant applications is contained in the Appendix to the *FiberTower MO&O*. FiberTower complains that the Bureau “erred by asserting that FiberTower sought a three year extension . . . .” Application for Review, FiberTower Corporation (filed Dec. 7, 2012) (“AFR”) at 23-24. In its original extension request, FiberTower “request[ed] an extension of time, until June 1, 2015, to satisfy the substantial service requirements applicable to its 24 GHz and 39 GHz licenses set forth in Exhibit A.” Request for Extension of Time or, in the Alternative, Limited Waiver of Substantial Service Requirement (dated Apr. 30, 2012, filed May 14, 2012) (“Extension Request”) at 2.

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

<sup>16</sup> FiberTower’s subsequent proposal was to build out and thereby meet the substantial service safe harbor standards for all of its licenses by the end of 2013. Supplement #2, FiberTower Corporation (filed July 31, 2012) (“Second Supplement”) at 2. The Bureau addressed this proposal, explaining that since the Commission has rejected the argument that actual construction completed past the buildout deadline, by itself, is sufficient to justify a waiver, FiberTower’s “after-the-fact promise to construct in the future cannot be credited.” See *FiberTower MO&O*, 27 FCC Rcd at 13575 ¶ 34. FiberTower fails to respond to the Bureau’s reasoning or to address the cases the Bureau cites.

microwave backhaul and access service,<sup>17</sup> (2) an unforeseeable loss of traffic and future business opportunities,<sup>18</sup> and (3) a continuing lack of viable equipment.<sup>19</sup> FiberTower characterized all of these factors as circumstances beyond its control, which have prevented it from providing substantial service. In addition, FiberTower argued 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>20</sup> Moreover, FiberTower argued, 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>21</sup> Over the course of the three months after it filed its Extension Request, FiberTower supplemented its Extension Request seven times.<sup>22</sup>

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>23</sup> In these notifications, FiberTower argued that it demonstrated substantial service by performing the following “antecedent activities:” (1) designing and proposing network builds that meet or exceed similar demonstrations previously found by the Commission to satisfy the construction requirements for other 39 GHz licenses;<sup>24</sup> (2) continuing to play a role as a fixed wireless provider for backhaul;<sup>25</sup> and (3) engaging in equipment development with equipment developers for the wide-area millimeter bands.<sup>26</sup> FiberTower argued, “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>27</sup>

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

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<sup>17</sup> Extension Request at 6-10.

<sup>18</sup> *Id.* at 11-13.

<sup>19</sup> *Id.* at 13-16.

<sup>20</sup> *Id.* at 16-19.

<sup>21</sup> *Id.* at 19-22.

<sup>22</sup> Supplement #1, FiberTower Corporation (filed Jul. 26, 2012) (“First Supplement”); Second Supplement; Letter from Ari Q. Fitzgerald, Counsel for FiberTower Corporation to The Honorable Julius Genachowski, Chairman, Federal Communications Commission (dated Sep. 6, 2012, filed Oct. 2, 2012) (“Third Supplement”); Supplement #4, FiberTower Corporation (dated Sep. 20, 2012, filed Oct. 2, 2012) (“Fourth Supplement”); Supplement #5, FiberTower Corporation (filed Oct. 8, 2012) (“Fifth Supplement”); Supplement #6, FiberTower Corporation (filed Oct. 17, 2012); Supplement #7, FiberTower Corporation (filed Oct. 24, 2012) (“Seventh Supplement”).

<sup>23</sup> See the Appendix to the *FiberTower MO&O* 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>24</sup> Substantial Service Exhibit at 2.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 4-5.

<sup>27</sup> *Id.* at 8.

Chapter 11 of the Bankruptcy Code.<sup>28</sup> FiberTower's licenses in the 11, 18, 23 GHz bands and its 39 GHz RSA, 39 GHz EA, and 24 GHz DEMS licenses are all part of the assets involved in the bankruptcy proceeding.<sup>29</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>30</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>31</sup> 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."<sup>32</sup>

8. After FiberTower had filed for Chapter 11 bankruptcy relief, several customers that receive backhaul or access transport from FiberTower (generally from site-based licenses in the 11, 18, or 23 GHz band) filed either to support FiberTower's Extension Request or to express concern about the effect that cancelling FiberTower's 39 GHz and 24 GHz licenses would have on the backhaul services they receive from FiberTower.<sup>33</sup> The Official Committee of Unsecured Creditors appointed in the FiberTower Chapter 11 bankruptcy case also filed comments in this proceeding and argued that the Bankruptcy Code implicates important public policy objectives and that cancelling FiberTower's 24 and 39 GHz licenses could deny creditors the ability to recover any value.<sup>34</sup> According to the Committee

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<sup>28</sup> In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex).

<sup>29</sup> See FiberTower Network Services Corp., *et al.*, Debtors; FiberTower Network Services Corp., *et al.*, Debtors v. Federal Communications Commission, Adv. No. 12-4104, *Memorandum Opinion* (Bankr. N.D. Tex., issued Oct. 11, 2012) at 10-12.

<sup>30</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*") at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 3.

<sup>33</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); 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).

<sup>34</sup> Letter from David M. Posner, Official Committee of Unsecured Creditors to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sept. 10, 2012) at 2-3 ("*Committee Letter*"). FiberTower's suppliers also filed in support of the Extension Request. See *FiberTower MO&O*, 27 FCC Rcd at 13567 ¶ 15.

Letter, cancellation of the licenses could allow the secured creditors to terminate the Plan and Support Agreement,<sup>35</sup> which would prevent FiberTower from using cash collateral.<sup>36</sup>

9. On November 7, 2012, the Bureau released the *FiberTower MO&O*, in which it held that FiberTower had not demonstrated that it provided substantial service for 689 of its 24 and 39 GHz licenses and denied FiberTower's request for an extension of time to construct those 689 24 GHz DEMS and 39 GHz licenses.<sup>37</sup> The Bureau held that FiberTower did not demonstrate substantial service because FiberTower had not constructed any facilities whatsoever and because no precedent supported FiberTower's argument that undertaking "antecedent activities" alone could constitute substantial service.<sup>38</sup> The Bureau denied FiberTower's extension requests because FiberTower did not show that its failure to meet the construction deadline was due to circumstances beyond its control.<sup>39</sup> Instead, the Bureau found that the state of the wireless backhaul market was not a valid reason for FiberTower's failure to construct.<sup>40</sup> The Bureau further explained that, under Commission precedent, FiberTower is not permitted to rely upon actions of third parties, in this case the actions of AT&T Inc. ("AT&T") and Clearwire Corp. ("Clearwire") cancelling contracts for backhaul service, as justification for an extension request.<sup>41</sup> The Bureau also held that FiberTower did not show that a lack of viable, affordable equipment prevented it from constructing the licenses.<sup>42</sup> Instead, the Bureau found that FiberTower made a business decision to enter the nascent wireless backhaul market even though the service rules allowed FiberTower to provide any type of service consistent with the technology and service rules.<sup>43</sup> Finally, the Bureau denied FiberTower's request to waive the June 1, 2012 substantial service deadline.<sup>44</sup> The Bureau held that granting FiberTower a further waiver, which would give FiberTower a total of 15 years to construct the licenses, was inconsistent with the underlying purpose of the rule, which is to require a sufficient degree of construction to ensure that the licensee will provide a substantial degree of service, and to prevent spectrum warehousing.<sup>45</sup> The Bureau further found that requiring FiberTower to comply with the substantial service requirements was not unduly burdensome when it would have cost FiberTower \$10-12 million to construct licenses that FiberTower said were worth \$300 million.<sup>46</sup> The Bureau's actions concerned only certain of FiberTower's 24 and 39 GHz licenses; thus, FiberTower's licenses in the 11, 18, and 23 GHz band were unaffected by the Bureau's decision and remained operational.

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<sup>35</sup> The Plan and Support Agreement is an agreement between FiberTower and its first lien creditors, which allowed FiberTower to continue to operate and develop its spectrum services during the bankruptcy proceedings.

<sup>36</sup> Committee Letter at 2.

<sup>37</sup> *FiberTower MO&O*, 27 FCC Rcd at 13562 ¶ 1.

<sup>38</sup> *Id.* at 13569 ¶¶ 21-22.

<sup>39</sup> *Id.* at 13570 ¶ 24.

<sup>40</sup> *Id.* at 13570 ¶ 25.

<sup>41</sup> *Id.* at 13571 ¶ 26.

<sup>42</sup> *Id.* at 13571-13572 ¶ 27.

<sup>43</sup> *Id.* at 13570-13571 ¶ 25.

<sup>44</sup> *Id.* at 13573-13574 ¶ 31.

<sup>45</sup> *Id.* at 13574 ¶ 32.

<sup>46</sup> *Id.* at 13574-13575 ¶ 33.

10. On November 9, 2012, FiberTower notified the Commission that it planned to discontinue providing all domestic telecommunications services on or about December 9, 2012.<sup>47</sup> FiberTower told the Commission that, because its “Chapter 11 reorganization plan and the support agreement are contingent upon FiberTower maintaining its 24 and 39 GHz licenses,” there may be no viable plan for reorganizing FiberTower because the Bureau denied its Extension Request and held that its 24 and 39 GHz licenses were terminated as of June 1, 2012.<sup>48</sup>

11. On December 3, 2012, T-Mobile USA, Inc. (“T-Mobile”), AT&T, Cricket Communications, Inc. (“Cricket”), MetroPCS Communications Inc. (“MetroPCS”), and SprintNextel Corporation (collectively, the “Affected Carriers”) notified the Commission that they had reached an agreement (the “Wind-Down Agreement”) with FiberTower in which FiberTower agreed to continue to provide backhaul services to the Affected Carriers for a defined period of time to allow for an orderly migration of backhaul services to other providers.<sup>49</sup> Under the Wind-Down Agreement, the Affected Carriers will provide the funds to enable FiberTower to continue to provide service to the Affected Carriers.<sup>50</sup> The Affected Carriers requested that the Commission deny FiberTower’s Discontinuance Application as submitted and issue an order that permits FiberTower to discontinue service to the Affected Carriers consistent with the timeframe and procedures set forth in the Wind-Down Agreement.<sup>51</sup>

12. On December 4, 2012, FiberTower withdrew its Discontinuance Notification and informed the Commission that it had reached an agreement with the Affected Carriers in which it would continue operations until April 30, 2013, the date it will discontinue service for all customers.<sup>52</sup> On the same date, FiberTower filed a new discontinuance notification informing the Commission that it will discontinue the provision of all domestic telecommunications services on April 30, 2013.<sup>53</sup> This discontinuance notification stated that the denial of the Extension Request ended FiberTower’s chances for a successful restructuring.<sup>54</sup> FiberTower also told Commission staff in an *ex parte* meeting that “it will not have the financial resources to continue to provide service beyond April 30, 2013, except in the limited circumstances set forth in the Term Sheet as to any Extension Periods requested by Participating Carriers.”<sup>55</sup> In the binding term sheet which incorporated FiberTower’s agreement with the Affected

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<sup>47</sup> Notification Regarding the Discontinuance of Telecommunications Service, FiberTower Corporation, WC Docket No. 12-334 (filed Nov. 9, 2012) (“Discontinuance Notification”) at 1. On November 15, 2012, the Competition Policy Division of the Wireline Competition Bureau placed the Discontinuance Notification on public notice. See Comments Invited on Application of FiberTower Corporation to Discontinue Domestic Telecommunications Services, *Public Notice*, WC Docket No. 12-334, 27 FCC Rcd 14209 (WCB CPD 2012).

<sup>48</sup> Discontinuance Notification at 4.

<sup>49</sup> Comments of the Affected Carriers at 2.

<sup>50</sup> *Id.* at 3-4.

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

<sup>52</sup> Withdrawal of Discontinuance Notification, FiberTower Corporation, WC Docket No. 12-334 (filed Dec. 4, 2012) at 1.

<sup>53</sup> Notification Regarding the Discontinuance of Telecommunications Service, FiberTower Corporation, WT Docket No. 13-9 (filed Dec. 4, 2012).

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Ex Parte* Letter from Jean L. Kiddoo, Esq., Counsel to FiberTower to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-334 (filed Nov. 29, 2012) at 1. FiberTower told Commission staff that it had “entered into a Binding Term Sheet (‘Term Sheet’) with certain of its carrier customers (the ‘Participating Carriers’) to extend the discontinuance date until April 30, 2013 (subject, with respect to the

(continued....)

Carriers, the Affected Carriers were given the option of requesting, at least 60 days prior to April 30, 2013, an extension, of up to 90 days, of the April 30 discontinuance date.<sup>56</sup> None of the Affected Carriers sought to extend the discontinuance date. In seeking comment on FiberTower's discontinuance request, the Wireline Competition Bureau stated that FiberTower would have permission to discontinue service as of April 30, 2013 absent further Commission action.<sup>57</sup> The Commission did not take further action. Consequently, on April 30, 2013, FiberTower discontinued operations.

13. On December 5, 2012, FiberTower asked the Bureau to stay the effectiveness of the *FiberTower MO&O*.<sup>58</sup> FiberTower, however, requested leave to withdraw this request on January 19, 2013.<sup>59</sup> On February 11, 2013, the Bureau granted the withdrawal request.<sup>60</sup>

14. On December 7, 2012, FiberTower asked the Commission to reverse the Bureau's decision in the *Memorandum Opinion and Order*, contending that the Bureau erred as a matter of law and public policy in denying FiberTower's request for an extension of time to construct.<sup>61</sup> FiberTower challenges the Bureau's conclusion that it did not demonstrate that its failure to construct was caused by circumstances beyond its control.<sup>62</sup> Alternatively, FiberTower contends that it was entitled to a waiver of the substantial service requirement and that the Bureau ignored a series of benefits that would have resulted if the Bureau had granted its Extension Request.<sup>63</sup> FiberTower also argues that the Bureau's action was inconsistent with precedent<sup>64</sup> and that the Bureau applied an overly broad standard of what constitutes a "voluntary business decision" in rejecting the Extension Request.<sup>65</sup> With respect to the Bureau's rejection of FiberTower's substantial service showing, FiberTower asks the Commission to reverse the Bureau's holding that antecedent, pre-construction activities, by themselves, cannot satisfy

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Participating Carriers, to the possibility of extending such date for up to ninety (90) days in any markets specified by one or more Participating Carriers pursuant to the Term Sheet (an 'Extension Period')." *Id.*

<sup>56</sup> See FiberTower Bankruptcy Motion, Exhibit A, Binding Term Sheet at 1.

<sup>57</sup> See Comments Invited on Application of FiberTower Corporation to Discontinue Domestic Telecommunications Services, WC Docket No. 13-9, *Public Notice*, 28 FCC Rcd 161 (WCB CPD 2013) at 2.

<sup>58</sup> Emergency Motion for Stay, FiberTower Corporation (filed Dec. 5, 2012) ("Stay Request").

<sup>59</sup> Letter from Joseph M. Sandri, Jr., FiberTower Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jan. 19, 2013).

<sup>60</sup> Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau to Joseph M. Sandri, Jr., FiberTower Corporation, 28 FCC Rcd 1139 (WTB BD 2013).

<sup>61</sup> AFR at ii.

<sup>62</sup> *Id.* at 2-5.

<sup>63</sup> *Id.* at 6-12, 19. Although FiberTower seeks alternative forms of relief (*i.e.*, grant of its requests for extension of time, and a waiver), it makes arguments in its AFR without clearly delineating which arguments relate to the requests for extension of time and which relate to its request for waiver. We will fully consider all of FiberTower's arguments in what we believe to be the most appropriate context. Our discussion of an argument in only one context does not indicate that we have not fully considered FiberTower's claims. Rather, we find FiberTower's arguments unpersuasive when considered as grounds for either an extension of time or a waiver of our rules.

<sup>64</sup> *Id.* at 12-16.

<sup>65</sup> *Id.* at 17-19.

substantial service requirements.<sup>66</sup> Finally, FiberTower alleges that the Bureau made erroneous findings of fact.<sup>67</sup>

15. On March 15, 2013, April 3, 2013, and May 3, 2013, FiberTower filed additional arguments why it believes it should receive an extension of the June 1, 2012 substantial service deadline.<sup>68</sup> On April 26, 2013, FiberTower submitted a letter “explaining the buildout proposals it has made during this proceeding.”<sup>69</sup>

### III. DISCUSSION

#### A. Introduction

16. After careful consideration of the *FiberTower MO&O* and the AFR, we affirm the Bureau’s decision and deny the AFR. Although FiberTower repeatedly asserts that the Bureau ignored various factors,<sup>70</sup> we find that it is FiberTower’s AFR that is incomplete in material respects. First, the AFR does not acknowledge certain key facts showing that FiberTower’s failure to construct was a matter within its control. Second, the AFR fails to acknowledge or address significant aspects of the *FiberTower MO&O*. Third, the AFR attributes to the Bureau’s decision harms that are in fact attributable to business decisions made by FiberTower. We thus conclude that the Bureau correctly held that: (1) FiberTower was not entitled to an extension because its failure to construct was caused by factors within its control; (2) FiberTower did not justify a waiver of the substantial service requirements; and (3) the Bureau correctly rejected FiberTower’s attempts to demonstrate substantial service based on “antecedent activities.” We also conclude that the *FiberTower MO&O* correctly identified and applied Bureau and Commission precedent.

17. Initially, we strike FiberTower’s March 15, 2013, April 3, 2013, and May 3, 2013 filings as untimely. Under Section 1.115(d) of the Commission’s Rules, applications for review, plus any supplemental filings, must be filed within 30 days after public notice of the underlying action.<sup>71</sup> In this case, the applicable deadline was December 7, 2012, 30 days after release of the *FiberTower MO&O*.<sup>72</sup> FiberTower’s supplemental filings were therefore untimely, and FiberTower did not acknowledge that fact or seek a waiver. We therefore strike the March 15, April 3, and May 3 filings as untimely.<sup>73</sup> We

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<sup>66</sup> *Id.* at 20-22.

<sup>67</sup> *Id.* at 23-25.

<sup>68</sup> The Missing Link: FiberTower and the Future of Mobile Broadband (filed Mar. 15, 2013); Letter from John P. Janka, Esq., James H. Barker, Esq., Jarrett S. Taubman, Esq., and Matthew T. Murchison, Esq., counsel for FiberTower Corporation to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Apr. 3, 2013); FiberTower and the Advent of Small Cell Wireless Backhaul at 24 GHz and 39 GHz (filed May 3, 2013).

<sup>69</sup> Letter from John P. Janka, Esq., James H. Barker, Esq., and Matthew T. Murchison, Esq., counsel for FiberTower Corporation to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Apr. 26, 2013).

<sup>70</sup> See, e.g., *id.* at 12 (arguing that “in disposing of FiberTower’s request, the Bureau ignored, disregarded, or mischaracterized” criteria discussed in other orders); *Id.* at 15 (“The Bureau’s Order Ignores Longstanding Precedent Against Forcing Licensees to Construct Inefficient Stop-Gap Systems with No Commercial Viability.”); *Id.* at 24 (arguing that “the Bureau simply ignored” the loss of key FiberTower employees).

<sup>71</sup> 47 C.F.R. § 1.115(d).

<sup>72</sup> See 47 C.F.R. § 1.4(b)(2) (public notice date for non-rulemaking items not published in Federal Register is release date).

<sup>73</sup> See Oklahoma Western Telephone Company, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 5306, 5311 ¶ 14 (2008); Warren C. Havens, *Memorandum Opinion and Order*, 17 FCC Rcd 17588, 17593 ¶ 13 (2002).

will accept FiberTower's April 26, 2013 letter for the limited purpose of clarifying the various buildout proposals it has made in this proceeding.

## B. FiberTower's Extension Request

### 1. Analysis of the Extension Request

18. To be eligible for an extension of time to construct, FiberTower was required to show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."<sup>74</sup> FiberTower argues that three factors it contends were outside its control impeded its ability to construct the licenses at issue: (1) the absence of market demand for wireless backhaul;<sup>75</sup> (2) its loss of business from AT&T and Clearwire as customers;<sup>76</sup> and (3) the "historic lack of commercially viable equipment for the 24 and 39 GHz bands."<sup>77</sup> The *FiberTower MO&O* considered each of these factors and concluded that none was caused by factors beyond FiberTower's control.<sup>78</sup> After reviewing the AFR, we conclude that the Bureau's analysis was correct.

19. With respect to the market for wireless backhaul, the Bureau pointed out that the use of microwave for wireless backhaul was increasing, that FiberTower in fact was an active provider of wireless backhaul services, and that there had been considerable deployment of wireless broadband since FiberTower received its last extension in 2008.<sup>79</sup> We reject FiberTower's response that "the widespread deployment of mobile broadband services has not come to fruition."<sup>80</sup> Verizon Wireless and AT&T are deploying LTE in the 700 MHz band, T-Mobile, Leap Wireless, and MetroPCS have deployed service in the AWS-1 band, and all active BRS and EBS licensees successfully demonstrated substantial service by November 1, 2011.<sup>81</sup> While FiberTower is correct that there have been issues in the Lower 700 MHz band and certain AWS licensees have not built out,<sup>82</sup> we agree with the Bureau that the explosive growth in demand for mobile broadband services since 2008, and the corresponding demand for backhaul, would certainly support use of the 24 GHz and 39 GHz bands for wireless backhaul. Moreover, in all 13 markets where FiberTower had existing customers and demand for its services,<sup>83</sup> it had licenses in the 24 GHz or 39 GHz bands that it did not build out. Those facts demonstrate that FiberTower's failure to build was not a result of lack of demand for backhaul services and was in fact a voluntary business decision.

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<sup>74</sup> 47 C.F.R. § 1.946(e)(1).

<sup>75</sup> AFR at 3.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 4-5.

<sup>78</sup> *FiberTower MO&O*, 27 FCC Rcd at 13570-13572 ¶¶ 24-27.

<sup>79</sup> *Id.* at 13570-13571 ¶ 25, 13574 ¶ 32.

<sup>80</sup> AFR at 3.

<sup>81</sup> *FiberTower MO&O*, 27 FCC Rcd at 13574 n.98, *citing* 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, 9824 ¶¶ 274-275 (2011); 47 C.F.R. § 27.14(o); National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 (WTB 2011).

<sup>82</sup> *See* AFR at 3 n.5.

<sup>83</sup> *See* n.1 for a list of those markets. In the 24 GHz band, the unconstructed licenses are in SMSAs that include the cities mentioned by FiberTower. In the 39 GHz band, the unconstructed licenses are in EAs that include the cities mentioned by FiberTower.

Accordingly, we reject the suggestion that FiberTower's failure to build out was caused by lack of demand for wireless backhaul services.

20. FiberTower argues that it could not have foreseen the loss of business from AT&T and Clearwire and accuses the Bureau of blithely dismissing this factor.<sup>84</sup> In fact, the Bureau considered that factor but explained that, under precedent, the actions of third parties such as customers could not justify an extension.<sup>85</sup> While FiberTower is correct that the cases cited by the Bureau involved different types of third party actions,<sup>86</sup> it provides no precedent that contradicts the principle that third party actions generally cannot justify an extension, nor has FiberTower provided any persuasive basis to ignore that principle here, where FiberTower and its predecessors have already had as many as 12 years to meet this requirement. We therefore affirm the Bureau's decision.

21. We also agree with the Bureau that FiberTower's claims concerning equipment are not supported by the record.<sup>87</sup> With respect to the 24 GHz band, FiberTower admits that it has more than 400 24 GHz systems sitting in its warehouse.<sup>88</sup> Thus, now, unlike in 2008, equipment is more widely available, and there has been substantial deployment in the 700 MHz, AWS-1, and BRS/EBS bands.<sup>89</sup> With respect to the 39 GHz band, FiberTower itself has met substantial service or submitted showings purporting to demonstrate substantial service for more than 40 licenses.<sup>90</sup> It has also purchased sufficient equipment to build another 44 links in the 39 GHz band, with an option to purchase equipment to build another 210 links.<sup>91</sup> Furthermore, "the Bureau has received more than 300 construction notifications from other 39 GHz licensees who have constructed stations."<sup>92</sup> While FiberTower is correct that equipment availability has historically been an issue in the upper microwave bands, and that equipment problems played an important role in granting extensions to FiberTower and others in 2008,<sup>93</sup> equipment is clearly more widely available than was the case in 2008. We therefore conclude that equipment availability cannot justify granting FiberTower additional time to demonstrate substantial service.

22. FiberTower accuses the Bureau of applying an overly broad interpretation, with no basis in the Commission's rules or precedents, of what constitutes a "voluntary business decision" in determining whether FiberTower's failure to construct was caused by circumstances beyond its control.<sup>94</sup>

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<sup>84</sup> *Id.* at 4.

<sup>85</sup> *FiberTower MO&O*, 27 FCC Rcd at 13571 ¶ 26.

<sup>86</sup> *See* AFR at 4 n.8.

<sup>87</sup> *FiberTower MO&O*, 27 FCC Rcd at 13571-13572 ¶ 27.

<sup>88</sup> First Supplement at 3.

<sup>89</sup> Verizon Wireless and AT&T are deploying LTE in the 700 MHz band. *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, 9824 ¶ 275 (2011). T-Mobile, Leap Wireless, and Metro PCS have deployed service in the AWS-1 band. *See id.* at 9824 ¶ 274. Virtually all current BRS and EBS licensees successfully demonstrated substantial service by November 1, 2011. *See* 47 C.F.R. § 27.14(o); National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 (WTB 2011).

<sup>90</sup> *FiberTower MO&O*, 27 FCC Rcd at 13571 ¶ 27.

<sup>91</sup> First Supplement at 3.

<sup>92</sup> *FiberTower MO&O*, 27 FCC Rcd at 13571-13572 ¶ 27.

<sup>93</sup> AFR at 4-5.

<sup>94</sup> *Id.* at 17-19.

Contrary to FiberTower's claims, the Bureau cited numerous precedents that hold that a licensee's business decisions are not circumstances beyond its control and cannot provide the basis for regulatory relief.<sup>95</sup> In this case, the Bureau thoroughly considered the circumstances presented by FiberTower, and as discussed above,<sup>96</sup> we agree that, consistent with precedent and sound policy, the three factors cited by FiberTower were either not circumstances beyond its control or should not form the basis for an extension. FiberTower argues that the Bureau's decision was inconsistent with other decisions, such as the 2008 extension grant to Local Multipoint Distribution Service ("LMDS") licensees, where the Bureau found that "'difficulties in obtaining viable and affordable equipment' was a factor beyond the licensees' control—not a voluntary business decision."<sup>97</sup> But, the facts are different here. FiberTower did not build due to a lack of viable, affordable equipment as is evidenced by the choices made by FiberTower and other licensees to construct other 24 GHz and 39 GHz licenses. Second, the facts here do not support FiberTower's argument that slower than expected growth in demand is beyond a licensee's control. The market for wireless mobile broadband services, and the associated need for backhaul services, has grown significantly since FiberTower received its last extension in 2008. The Bureau correctly concluded that the state of the wireless backhaul market was not a valid reason to grant an extension, specifically noting that, despite this growth, FiberTower had chosen only to construct 48 of its 24 GHz and 39 GHz licenses.<sup>98</sup> Third, the Bureau is correct that the loss of customers is a risk assumed by a business and is hardly unique.<sup>99</sup> On the facts presented here, we find nothing unreasonable or inconsistent with precedent in the Bureau's conclusion that FiberTower's proffered justifications did not support grant of its Extension Request.

23. In this regard, we note that the Bureau concluded, "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>100</sup> FiberTower does not address or dispute that conclusion. Because FiberTower's other explanations do not withstand scrutiny or cannot form the basis for justifying an extension, we conclude that FiberTower made the decision not to build these licenses for financial reasons. This conclusion is supported by the statements of FiberTower's own president describing how, in early 2011, FiberTower's revenues were reduced as a result of a series of service terminations, which first caused FiberTower to limit capital expenditures and lay off employees, and then caused FiberTower to forgo growth opportunities because the required capital expenditures were prohibitive due to its inability to raise capital.<sup>101</sup> Such a decision is clearly not a cause outside FiberTower's control and therefore cannot form the basis for an extension.<sup>102</sup> Furthermore, as FiberTower itself admits,<sup>103</sup> our rules expressly prohibit granting an extension when the failure to construct was caused by a lack of

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<sup>95</sup> *FiberTower MO&O*, 27 FCC Rcd at 13570 ¶ 24.

<sup>96</sup> See ¶¶ 19-21, *supra*.

<sup>97</sup> AFR at 17 *citing* Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd 5894 (WTB 2008).

<sup>98</sup> *FiberTower MO&O*, 27 FCC Rcd at 13570-13571 ¶ 25.

<sup>99</sup> *Id.* at 13571 ¶ 26.

<sup>100</sup> *FiberTower MO&O*, 27 FCC Rcd at 13572 ¶ 27.

<sup>101</sup> Declaration of Kirk Van Waganen in Support of Chapter 11 Petitions and First Day Motions, In re FiberTower Network Services Corp., et. al., Case No. 12-44027-DML-11 (Bankr. N.D. Tex), Docket No. 2, ¶¶ 19-21.

<sup>102</sup> 47 C.F.R. § 1.946(e)(1).

<sup>103</sup> See AFR at 4 n.8.

financing.<sup>104</sup> We therefore reject FiberTower's argument that the Bureau's interpretation of "circumstances beyond a licensee's control" relied on an overly broad interpretation of a "voluntary business decision."<sup>105</sup> Under these circumstances, the Bureau correctly concluded that FiberTower did not meet the Commission's standards for grant of an extension of time to construct.

## 2. Precedent

24. We further conclude that the Bureau correctly applied Commission and Bureau precedent in finding that FiberTower did not meet the Commission's criteria for an extension of time to construct. FiberTower argues that the *FiberTower MO&O* ignored, disregarded or mischaracterized criteria and instead applied a more onerous standard to FiberTower. FiberTower highlights three specific alleged errors.<sup>106</sup> First, FiberTower cites a series of cases where the Bureau or the Commission granted buildout extensions to all licensees in a band.<sup>107</sup> Second, FiberTower repeats its argument that it is similarly situated to 2 Lightspeed, LP ("2 Lightspeed"), an applicant in the LMDS that received a construction extension from the Bureau.<sup>108</sup> Third, FiberTower cites a series of cases where the Bureau denied construction extensions and argues that factors cited in those cases to justify the denials issued there are not present here, which FiberTower asserts, supports a grant of an extension in its case.<sup>109</sup> We agree with the Bureau that none of those lines of cases supports FiberTower's Extension Requests.

25. With respect to the cases granting general relief, FiberTower cites those cases for the proposition that "Commission precedent supports the grant of extensions sought by licensees who could not meet a construction deadline due to the absence of a viable market, equipment, or technology."<sup>110</sup> But the Bureau concluded that there is a viable market, equipment, and technology that would have allowed FiberTower to build. We agree. In any event, the Bureau considered the cases FiberTower cites and explained that those cases were distinguishable either because there was a systemic problem with equipment availability that affected all licensees in those bands or because there were broader issues with the service rules that delayed or prevented deployment in those bands.<sup>111</sup> We agree with the Bureau's analysis of those cases. While FiberTower also cites our recent action granting Wireless Communications Service ("WCS") licensees an additional six months to meet their new buildout requirements,<sup>112</sup> it ignores the Bureau's explanation that the WCS extension was granted because the prior buildout deadline had focused on one type of technology (WiMAX systems), and certain technical specifications adopted by the Commission in 2010 "may have inadvertently hindered the ability of [WCS] licensees to deploy mobile broadband services."<sup>113</sup> We reject FiberTower's argument that the reasoning used to justify a further

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<sup>104</sup> 47 C.F.R. § 1.946(e)(2).

<sup>105</sup> See AFR at 17-19.

<sup>106</sup> *Id.* at 12.

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 14-15, 24-25.

<sup>109</sup> *Id.* at 12-14.

<sup>110</sup> *Id.* at 5.

<sup>111</sup> Compare AFR at 5 n.10 and *FiberTower MO&O*, 27 FCC Rcd at 13572 ¶ 28.

<sup>112</sup> AFR at 5 and 18.

<sup>113</sup> 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*, 27 FCC Rcd 13651, 13699-13701 ¶¶ 119-121 (2012).

extension of the WCS construction deadline should apply to its licenses<sup>114</sup> because the flaw in the WCS rules that hindered deployment does not exist in the 24 GHz or 39 GHz service rules.<sup>115</sup> We also note that the Bureau has recently denied a number of extension requests filed by LMDS licensees seeking relief from the June 1, 2012 substantial service deadline.<sup>116</sup>

26. We find that the Bureau properly distinguished this case from its decision in 2 Lightspeed and thus we find that FiberTower's reliance on the Bureau's grant of an extension to 2 Lightspeed is misplaced. While 2 Lightspeed did make some of the same arguments as FiberTower,<sup>117</sup> the Bureau distinguished 2 Lightspeed from FiberTower on the basis that 2 Lightspeed had built out the majority of its licenses and 2 Lightspeed's progress in building out its last four licenses had been impeded because one of its two key partners had been medically incapacitated.<sup>118</sup> FiberTower now argues it was similarly situated to 2 Lightspeed because its Senior Vice President of Network Operations and its Chief Financial Officer left the company.<sup>119</sup> We are not convinced that the situations are comparable. When FiberTower filed its Extension Request, it gave a variety of reasons why it did not meet the June 1, 2012 deadline, but said nothing about the departure of employees. Furthermore, FiberTower provided no information about the circumstances under which those employees left nor any detailed explanation as to how the departure of those employees affected its ability to meet its substantial service requirements. By contrast, 2 Lightspeed, a small company that had constructed more than fifty percent of its licenses prior to the incapacitation of one of the two key partners, explained: "With a small company such as [2] Lightspeed, the temporary loss of a single partner can disrupt business plans."<sup>120</sup> In contrast, FiberTower made no attempt to construct the vast majority of its licenses before the June 1, 2012 deadline.

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<sup>114</sup> AFR at 18.

<sup>115</sup> *FiberTower MO&O*, 27 FCC Rcd at 13573 n.85.

<sup>116</sup> See T-Mobile License, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 12287 (WTB 2012); SpeedUsNY.com, L.P., *Memorandum Opinion and Order*, 27 FCC Rcd 15321 (WTB BD 2012); Windstream Lakedale Link, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 15091 (WTB BD 2012); TWG LMDS, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 15023 (WTB BD 2012); Swayzee Telephone Company, *Memorandum Opinion and Order*, 27 FCC Rcd 14281 (WTB BD 2012); Aircom Consultants, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14274 (WTB BD 2012), *petition for recon. pending*; Star Search Rural TV & Cellular, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14201 (WTB BD 2012), *petition for recon. pending*; Progressive Communications, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14193 (WTB BD 2012), *petition for recon. pending*; Highland Holdings, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 14184 (WTB BD 2012); West Carolina Rural Telephone Cooperative Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 13973 (WTB BD 2012); BTA Associates, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 13966 (WTB BD 2012); Advantage Cellular Systems, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 13959 (WTB BD 2012); E.N.M.R. Telephone Cooperative, *Memorandum Opinion and Order*, 27 FCC Rcd 13240 (WTB BD 2012); Mark Twain Communications Company, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 13159 (WTB BD 2012); LMDS, L.P., *Memorandum Opinion and Order*, 27 FCC Rcd 13153 (WTB BD 2012); Pioneer LMDS, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 12932 (WTB BD 2012); Loralen Corp LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 12924 (WTB BD 2012); American Telecasting Inc. and People's Choice TV Corp., *Memorandum Opinion and Order*, 27 FCC Rcd 12916 (WTB BD 2012).

<sup>117</sup> See AFR at 14-15.

<sup>118</sup> *FiberTower MO&O*, 27 FCC Rcd at 13573 ¶ 29.

<sup>119</sup> AFR at 24-25, citing Supplement #4, FiberTower Corporation (filed Sep. 20, 2012) at 7-8.

<sup>120</sup> Request for Limited Extension, 2 Lightspeed LP (filed May 17, 2012) at 7-8. 2 Lightspeed is a partnership with four principals. *Id.* at 1 n.1.

27. Finally, FiberTower cites factors in its own case that it contends were critically absent in seven other cases denying construction extensions.<sup>121</sup> In an apparent attempt to contrast itself with those other cases, FiberTower argues that it can establish the missing factors and therefore should be granted an extension or waiver. FiberTower is correct that the facts and rationale in many of those cases are different from the facts and rationale for denying FiberTower's Extension Requests. It does not follow, however, that those differences support a grant. Our decision to deny FiberTower's Extension Requests is based on the specific factors cited in the *FiberTower MO&O* and in this *Memorandum Opinion and Order*. The presence here of factors that were absent in those cases that denied construction extension requests does not support a grant of FiberTower's Extension Requests, because the circumstances in this case provide independent grounds for denying the Extension Requests. In other words, FiberTower's success in avoiding certain lapses or gaps that supported the denials under the circumstances present in those other cases does not excuse FiberTower's own lapses that occurred under the set of circumstances involved here.

28. Moreover, a close evaluation of FiberTower's situation demonstrates that it has several factors in common with those applicants whose extensions were denied. For example, below, we affirm the Bureau's conclusion that any harm to customers is a result of FiberTower's business decisions, not the Bureau's termination of its licenses.<sup>122</sup> In *Xanadoo*, the main factor justifying denial of the extension was the licensee's financial difficulties.<sup>123</sup> Similarly, we have concluded here that FiberTower's Extension Request must be denied because its decision not to build was based on financial considerations.<sup>124</sup> In *Havens*,<sup>125</sup> the Mobility Division of the Bureau concluded that a waiver was not warranted because a waiver "would harm the public interest since it would run counter to established Commission precedent and could encourage other present and future licensees to voluntarily pursue regulatory relief instead of providing actual service in their license areas."<sup>126</sup> We believe the same rationale applies here. In *Mumford*, the Broadband Division of the Bureau concluded that the applicant's promises to build systems after the construction deadline came "too late to support an extension."<sup>127</sup> That holding supports the Bureau's ruling in this case that we cannot credit FiberTower's after-the-fact promise to build systems

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<sup>121</sup> AFR at 12-14. The cases FiberTower cites include Warren C. Havens, *et al.*, *Order*, 27 FCC Rcd 5841 (WTB MD 2012) ("*Havens*"); Commnet Supply, LLC, Crossroads License Holding Sub A, and their successors in interest, *Order*, 27 FCC Rcd 5832 (WTB MD 2012) ("*Commnet*"); Metropolitan Area Networks, Inc., *Order on Reconsideration and Memorandum Opinion and Order*, 27 FCC Rcd 3826 (WTB BD 2012) ("*Metropolitan Area Networks*"), *app. for review pending*; Xanadoo, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 3266 (WTB BD 2012) ("*Xanadoo*"); Mumford Independent School District, *et al.*, *Memorandum Opinion and Order*, 27 FCC Rcd 3034 (WTB BD 2012) ("*Mumford*"); Archdiocese of Hartford Diocesan School Office, *Order on Reconsideration and Memorandum Opinion and Order*, 27 FCC Rcd 3027 (WTB BD 2012) ("*Archdiocese of Hartford*"); and LSU Alumni Association, *Memorandum Opinion and Order*, 27 FCC Rcd 3020 (WTB BD 2012) ("*LSU Alumni Association*").

<sup>122</sup> See ¶ 33, *infra*.

<sup>123</sup> Compare AFR at 13 with *Xanadoo*, 27 FCC Rcd at 3276-3277 ¶ 9.

<sup>124</sup> See ¶ 23, *supra*.

<sup>125</sup> See AFR at 13.

<sup>126</sup> *Havens*, 27 FCC Rcd at 5852 ¶ 24.

<sup>127</sup> *Mumford*, 27 FCC Rcd at 3039 ¶ 8.

within 18 months.<sup>128</sup> We find that the remaining cases cited by FiberTower primarily relied on factors that are not applicable here, and thus neither support nor undercut FiberTower's Extension Request.<sup>129</sup>

29. While FiberTower actively worked, to some extent, to facilitate the development of equipment and provide service, it ultimately chose not to construct its licenses for financial reasons and failed to meet the substantial service deadline. FiberTower therefore does not meet the Section 1.946(e) standard for receiving an extension of time.

### C. Waiver

30. While we have concluded that FiberTower does not meet the standard under Section 1.946 of the Commission's Rules for an extension, our inquiry does not end there. FiberTower also sought a waiver of the substantial service deadline, which is an alternate means of obtaining the relief it seeks. 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 burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>130</sup> The Bureau analyzed FiberTower's waiver request under that standard and concluded that FiberTower did not meet that standard.<sup>131</sup>

31. In its AFR, FiberTower does not directly respond to the Bureau's analysis. Instead, it alleges, "denial of the Extension/Limited Waiver Request was tantamount to a directive that FiberTower dismantle its network," and it lists a series of public interest benefits that it claims would flow from allowing FiberTower to continue operating its network.<sup>132</sup> We agree with the Bureau's decision to deny the waiver and find that the public interest supports denial for several reasons.

32. First, FiberTower mischaracterizes the Bureau's action and ignores the fact that the cancellation of the 24 GHz and 39 GHz licenses affects its current operations only because of its own voluntary decisions to tie its continued use of *other* licenses to the relief sought here. Second, benefits FiberTower claims would result from granting an extension are vague and unsupported.

33. The *FiberTower MO&O* did not affect FiberTower's common carrier point-to-point licenses in the 11, 18, and 23 GHz bands, which it uses to provide its existing service. The Bureau also did not take any action against any 24 GHz or 39 GHz license where FiberTower had reported that the

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<sup>128</sup> See *FiberTower MO&O*, 27 FCC Rcd at 13575 ¶ 34.

<sup>129</sup> In *Commnet*, the Mobility Division rejected an extension based on uncertainty concerning the licensee's ownership and a proposal to assign the license to a third party who would construct the license. *Commnet*, 27 FCC Rcd at 5837-5838 ¶¶ 15-17. In *Metropolitan Area Networks*, the Broadband Division concluded that the applicant made a voluntary business decision to acquire licenses at a very early stage of the process and assumed the risk that it would be unable to execute its business plan. *Metropolitan Area Networks*, 27 FCC Rcd at 3831 ¶ 11. In *Archdiocese of Hartford*, the applicant knew about the applicable deadlines and did not meet them because of its inaction. *Archdiocese of Hartford*, 27 FCC Rcd at 3032 ¶ 14. Finally, LSU Alumni Association showed "an extreme lack of diligence and inability to meet Commission deadlines." *LSU Alumni Association*, 27 FCC Rcd at 3024 ¶ 14.

<sup>130</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>131</sup> *FiberTower MO&O*, 27 FCC Rcd at 13573-13576 ¶¶ 31-36.

<sup>132</sup> AFR at 6-12.

license was being used to provide service, regardless of whether the license met a safe harbor or not.<sup>133</sup> Accordingly, as a regulatory matter, FiberTower was free to continue to use the licenses in the 11, 18, and 23 GHz bands to provide service. We agree with the Bureau that “[t]he 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.”<sup>134</sup> The Bureau’s action affects FiberTower’s existing service only because FiberTower chose to formulate its agreement with its lenders for financing around the 24 and 39 GHz licenses, as opposed to its existing service in the 11, 18, and 23 GHz bands. It would be inappropriate for us to abandon the important policy interests behind our buildout requirements in order to accommodate FiberTower’s financial choices.<sup>135</sup> In all events, FiberTower’s decisions on this score do not justify a waiver.

34. In this regard, the Bureau correctly concluded that FiberTower could not justify a waiver under the first prong of the waiver standard because an extension would be inconsistent with the underlying purpose of the substantial service standard, *i.e.*, to provide “a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.”<sup>136</sup> FiberTower argues that granting its Extension Request would actually result in the most expeditious use of the spectrum because there will be delays in relicensing the spectrum, particularly in light of the *Preliminary Injunction Order*.<sup>137</sup> We find that rationale inappropriate as a basis for granting an extension of our construction deadlines. Any licensee who has not built could argue that its licenses should not be cancelled because there would be a delay in relicensing the spectrum. If this argument were taken to its logical conclusion, the Commission would never enforce buildout requirements so long as a licensee claimed the ability to build before a new licensee would have to build the spectrum. Such a result would remove any incentive licensees had to meet the buildout deadlines established by the Commission. We therefore conclude that any delay in relicensing spectrum is not a valid basis for granting FiberTower a waiver of the substantial service deadline.

35. With respect to the second prong of the waiver standard, the Bureau correctly concluded that it was not inequitable, unduly burdensome, or contrary to the public interest to require FiberTower to comply with the substantial service requirement.<sup>138</sup> FiberTower argues that it should receive a waiver in order to encourage other licensees to take the actions it has, including investing more than \$300 million in

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<sup>133</sup> *FiberTower MO&O*, 27 FCC Rcd at 13575 ¶ 35. FiberTower’s argument that the Bureau erred when it found that no facilities had been built out in FiberTower’s terminated license areas misapprehends the Bureau’s Order. AFR at 23. The Bureau recognized that FiberTower had constructed certain licenses and did not take action against any license where construction had been reported, whether or not the construction met a safe harbor. *FiberTower MO&O*, 27 FCC Rcd at 13562-13563 ¶ 2. Moreover, FiberTower does not identify the specific license areas that the Bureau’s order improperly terminated nor detail the facilities that FiberTower had constructed in them.

<sup>134</sup> *Id.*

<sup>135</sup> FiberTower’s current customers will not experience an abrupt loss of service. To keep FiberTower’s existing services running, FiberTower’s customer carriers have agreed to fund FiberTower’s continuing operations so they could complete an orderly migration of services off FiberTower’s network. *See* Comments of Affected Carriers.

<sup>136</sup> *FiberTower MO&O*, 27 FCC Rcd at 13574 ¶ 32, *citing* 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*”).

<sup>137</sup> AFR at 8.

<sup>138</sup> *FiberTower MO&O*, 27 FCC Rcd at 13574-13575 ¶ 33.

spectrum and facilities.<sup>139</sup> In our view, such actions must be viewed in the context of the Commission's overarching policy goal of ensuring that licensees complete a sufficient degree of construction in order to provide substantial service to the public. Despite the investment and activities it had undertaken, when it came time to meet the substantial service requirement as to the licenses at issue here, FiberTower made the decision not to build out its licenses. FiberTower estimates it would have cost \$10 to \$12 million to meet the substantial service requirement.<sup>140</sup> We see nothing inequitable or unduly burdensome in concluding that FiberTower should have built out those licenses if it wanted to keep them.

36. FiberTower argues that it should not be forced to build "inefficient stop-gap systems with no commercial viability."<sup>141</sup> In the cases FiberTower cites for that proposition, the choice all licensees faced was to either deploy stop-gap equipment or build nothing.<sup>142</sup> FiberTower's situation is very different. It had at least eleven years to develop its business plans, work on securing equipment, and deploy service. It had constructed facilities as early as 2008.<sup>143</sup> FiberTower had a customer base, experience providing wireless backhaul services, and access to equipment. Systems utilizing many other 39 GHz band licenses have been successfully constructed.<sup>144</sup> Under those circumstances, FiberTower's argument that it should not be required to build out its service as mandated by the rules is simply not persuasive.

37. We find that FiberTower's remaining arguments provide no basis for granting a waiver. FiberTower's claim that a waiver is needed in order to preserve competition in the wireless backhaul market<sup>145</sup> is unsupported by record evidence of the wireless backhaul market or any analysis thereof. While FiberTower argues that a waiver would avoid disruption to FiberTower's customers,<sup>146</sup> we believe the issue of disruption to customers was adequately addressed in the FiberTower discontinuance of service proceeding, through the agreement of the carrier customers to fund continuing service until April

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<sup>139</sup> AFR at 6-7. The other activities FiberTower mentions are: (1) providing wireless backhaul service, (2) making its spectrum available for lease, (3) helping develop equipment for use in the 24 GHz and 39 GHz bands, (4) developing a network operations center, and (5) acquiring equipment. *Id.*

<sup>140</sup> Extension Request at 18-19.

<sup>141</sup> AFR at 15-16.

<sup>142</sup> See 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 or Extension 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 waived 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>143</sup> See *ART Order*, 23 FCC Rcd at 14122-14123 ¶ 13.

<sup>144</sup> Since January 1, 2010, the Bureau has accepted 752 construction notifications for 39 GHz EA licenses.

<sup>145</sup> AFR at 7-8.

<sup>146</sup> *Id.* at 9-10.

30, 2013, and through sales of assets to carrier customers.<sup>147</sup> FiberTower's claim that denial of the extensions will hinder advancement of mobile broadband service and thwart the deployment of an interoperable public safety broadband network<sup>148</sup> is also unsupported. Moreover, this claim fails to take into account the disincentives to timely buildout that are created – and the corresponding deleterious effects on the development of mobile broadband service and the deployment of such a network – when waivers of the construction requirements are granted without adequate justification. In any event, the denial of the Extension Applications would not have had any impact on FiberTower's existing services except for FiberTower's bankruptcy restructuring decisions. Similarly, while FiberTower touts its role in providing redundant connectivity,<sup>149</sup> it was FiberTower's business decisions, not the Bureau's actions, that placed FiberTower's ability to provide service at risk. We have thoroughly reviewed the benefits, such as achievement of the Commission's broadband, wireless backhaul, public safety and special access competition goals, that FiberTower claims would result from a waiver and conclude that such benefits are speculative or insufficient to justify a waiver.<sup>150</sup> We therefore reject FiberTower's argument that the Bureau failed to adequately consider those factors, and affirm the Bureau's denial of FiberTower's waiver request.<sup>151</sup>

#### **D. Substantial Service - Antecedent Activities**

38. In rejecting FiberTower's substantial service showings, the Bureau was not persuaded by FiberTower's argument that it met the Commission's definition of "substantial service" by undertaking "antecedent activities" such 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>152</sup> The Bureau noted that FiberTower was seeking a finding of substantial service without any construction of facilities and found that such an approach would be inconsistent with precedent.<sup>153</sup> FiberTower responds, arguing that "[t]he Bureau's rigid and limited construction of the substantial service requirement in this manner has a number of adverse consequences contrary to the public interest."<sup>154</sup> We disagree.

39. While FiberTower repeatedly refers to the Bureau's policy, it ignores the fact that the Commission has explicitly approved the policy in question and directed the Bureau to apply that policy to applications such as FiberTower's. As the Bureau stated:

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

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<sup>147</sup> See WC Docket No. 12-334 and Debtors' Motion for Order Pursuant to 11 U.S.C. §§ 363 and 365 and Fed. R. Bankr. P. 2002, 6004, 6006 and 9014 Authorizing and Approving (I) Sale of Certain of the Debtors' Assets to Cellco Partnership d/b/a Verizon Wireless Free and Clear of Liens, Claims, Interests and Encumbrances and (II) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex filed Feb. 8, 2013).

<sup>148</sup> AFR at 10-11.

<sup>149</sup> *Id.* at 11-12.

<sup>150</sup> *Id.* at 19.

<sup>151</sup> *Id.* at 19.

<sup>152</sup> *FiberTower MO&O*, 27 FCC Rcd at 13569 ¶¶ 21-22.

<sup>153</sup> *Id.* at 13569 ¶ 22.

<sup>154</sup> AFR at 20.

some facilities and some sort of actual service. While we agree with FiberTower that the Commission's "substantial service" standard permits a finding [that] the standard [is] 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." In 2011, the Commission affirmed the Bureau's rejection of substantial service "where there is no actual service being provided to the public," and recently reaffirmed its decision that "antecedent activities" do not constitute the provision of substantial service under current policy. No precedent supports FiberTower's argument that undertaking "antecedent activities" alone would constitute substantial service.<sup>155</sup>

We reject FiberTower's attempt to collaterally attack existing Commission policy. Recently, we directed the Bureau to apply existing Commission policy to the June 1, 2012 substantial service filings made by upper microwave licensees and to defer consideration of any possible rule changes to WT Docket No. 10-112.<sup>156</sup> The Bureau was therefore correct in rejecting FiberTower's attempt to change policy after the relevant substantial service deadline.

40. While we do not prejudge what action may be taken in WT Docket No. 10-112, we note that the underlying purpose of the substantial service requirement is to provide "a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public."<sup>157</sup> FiberTower complains about the burdens the requirement to build links places on licensees in terms of expenditures.<sup>158</sup> It is unclear, however, that FiberTower's proposed reinterpretation of our substantial service standard would adequately protect the public's interest in ensuring that spectrum is placed in use in a timely fashion.

#### IV. CONCLUSION AND ORDERING CLAUSES

41. The *FiberTower MO&O* correctly denied FiberTower's Extension Request. FiberTower's failure to construct was caused by financial factors within its control. The *FiberTower MO&O* correctly applied Bureau and Commission precedent. FiberTower also failed to justify a waiver of the substantial service requirements. The Bureau correctly rejected FiberTower's attempts to demonstrate substantial service based on "antecedent activities."

42. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review filed by FiberTower Corporation on December 7, 2012 IS DENIED.

43. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115(d) of the Commission's Rules,

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<sup>155</sup> *FiberTower MO&O*, 27 FCC Rcd at 13569 ¶ 22 (footnotes omitted). FiberTower misconstrues this paragraph as stating that there was no service being provided in areas where the licenses were located. AFR at 23. Because substantial service must be demonstrated on a license-by-license basis, the relevant test is whether there was any service using the spectrum included in the license, rather than a general expenditure for network infrastructure in a license area. See AFR at 23.

<sup>156</sup> See *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104.

<sup>157</sup> *Id.*

<sup>158</sup> AFR at 21.

47 C.F.R. § 1.115(d), that the filings made by FiberTower Corporation on March 15, 2013, April 3, 2013, and May 3, 2013 ARE STRICKEN as untimely.

44. 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 PROMPTLY BE UPDATED to reflect that the licenses issued to FiberTower Corporation for the Stations listed in the Appendix to the *FiberTower MO&O* TERMINATED as of June 1, 2012.

45. 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 subject to 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 action 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*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary