

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 )
)

ORDER ON RECONSIDERATION

Adopted: February 26, 2014

Released: February 27, 2014

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a petition for reconsideration ("FiberTower PFR") filed by FiberTower Spectrum Holdings, LLC, on behalf of itself and affiliated companies, including its parent FiberTower Corporation (collectively, "FiberTower"). FiberTower seeks reconsideration of a Commission order ("AFR Order") affirming a Wireless Telecommunications Bureau ("Bureau") decision ("FiberTower MO&O") denying FiberTower's requests for extension of time to demonstrate substantial service for 94 of its 24 GHz Digital Electronic Message Service ("DEMS") licenses and 595 of its 39 GHz licenses and FiberTower's associated requests for waiver of the June 1, 2012, substantial service deadline.

II. BACKGROUND

2. A full recitation of the background concerning FiberTower and its licenses is contained in the AFR Order.<sup>1</sup> 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 13 markets throughout the United States, predominantly through more than 3,000 Common Carrier Point-to-Point Microwave licenses in

<sup>1</sup> See FiberTower Spectrum Holdings, LLC, Memorandum Opinion and Order, 28 FCC Rcd 6822, 6822-6830 ¶¶ 2-15 (2013) ("AFR Order").

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

3. In addition, FiberTower held 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 meet performance requirements by demonstrating substantial service at the time of license renewal.<sup>4</sup> On October 2, 2008, the Bureau, acting in response to an extension request from FiberTower, extended the substantial service deadline for 183 39 GHz RSA licenses and 352 39 GHz EA licenses to June 1, 2012.<sup>5</sup> Two years later, the Bureau also extended the performance requirement deadline applicable to the 24 GHz DEMS licenses to June 1, 2012.<sup>6</sup>

4. On May 14, 2012, FiberTower filed an Extension Request asking the Bureau to once again extend the performance requirement 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>7</sup> In the alternative, FiberTower sought a "limited waiver" of the performance requirements in Sections 101.17 and 101.527 of the Commission's rules, as another means of extending the performance requirement deadline applicable to the licenses until June 1, 2015.<sup>8</sup> 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>9</sup>

5. On July 17, 2012, FiberTower Network Services Corp., FiberTower Corporation, FiberTower Licensing Corp., and FiberTower Spectrum Holdings LLC filed a petition for relief under Chapter 11 of the Bankruptcy Code.<sup>10</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 assets involved in the bankruptcy proceeding.<sup>11</sup>

6. 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

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<sup>2</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"). FiberTower was providing service in 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.

<sup>3</sup> The relevant licenses are listed in the Appendix to FiberTower Spectrum Holdings LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 13562 (WTB 2012) ("*FiberTower MO&O*").

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

<sup>5</sup> Art Licensing Corporation, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 14116, 14125-14127 ¶¶ 20-21 (WTB 2008).

<sup>6</sup> See the Appendix to the *FiberTower MO&O* for the file numbers of the relevant applications.

<sup>7</sup> A list of the file numbers of the relevant applications is contained in the Appendix to the *FiberTower MO&O*.

<sup>8</sup> Request for Extension of Time or, in the Alternative, Limited Waiver of Substantial Service Requirement (dated Apr. 30, 2012) ("Extension Request") at 1.

<sup>9</sup> See the Appendix to the *FiberTower MO&O* for the file numbers of the construction notifications.

<sup>10</sup> In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex.).

<sup>11</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.

licenses and denied FiberTower's request for an extension of time to construct those licenses.<sup>12</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>13</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>14</sup> The Bureau also concluded that FiberTower had not made the requisite showing to obtain a waiver of the substantial service requirement.<sup>15</sup>

7. On December 4, 2012, FiberTower informed the Commission that it had reached an agreement with its carrier customers under which it would continue operations until April 30, 2013, the date it would discontinue service for all customers.<sup>16</sup> On the same date, FiberTower also filed a discontinuance notification informing the Commission that it would discontinue the provision of all domestic telecommunications services on April 30, 2013.<sup>17</sup> This discontinuance notification stated that the denial of the Extension Request ended FiberTower's chances for a successful restructuring.<sup>18</sup> The Wireline Competition Bureau sought comment on FiberTower's discontinuance request and stated that FiberTower would have permission to discontinue service as of April 30, 2013, absent further Commission action.<sup>19</sup> The Commission did not take further action. Consequently, on April 30, 2013, FiberTower discontinued operations.

8. On May 7, 2013, the Commission denied FiberTower's application for review<sup>20</sup> of the *FiberTower MO&O*.<sup>21</sup> The Commission found 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.'"<sup>22</sup> The Commission also struck as untimely supplements three filings FiberTower made containing additional arguments as to why it believed it should receive an extension of the June 1, 2012, substantial service deadline.<sup>23</sup> The Commission did accept, however, a letter FiberTower submitted for the limited purpose of clarifying the various buildout proposals FiberTower had made in this proceeding.<sup>24</sup>

9. FiberTower filed a petition for reconsideration of the *AFR Order* on June 6, 2013.<sup>25</sup> Comments in support of the PFR<sup>26</sup> were filed by an equipment manufacturer (BridgeWave

<sup>12</sup> *FiberTower MO&O*, 27 FCC Rcd at 13562 ¶ 1.

<sup>13</sup> *Id.* at 13569 ¶¶ 21-22.

<sup>14</sup> *Id.* at 13570 ¶ 24.

<sup>15</sup> *Id.* at 13574 ¶ 31.

<sup>16</sup> Withdrawal of Discontinuance Notification, FiberTower Corporation, WC Docket No. 12-334 (filed Dec. 4, 2012) at 1.

<sup>17</sup> Notification Regarding the Discontinuance of Telecommunications Service, FiberTower Corporation, WT Docket No. 13-9 (filed Dec. 4, 2012).

<sup>18</sup> *Id.* at 6.

<sup>19</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, 162 (WCB CPD 2013).

<sup>20</sup> Application for Review, FiberTower Corporation (filed Dec. 7, 2012) ("AFR").

<sup>21</sup> See *AFR Order*, 28 FCC Rcd at 6822 ¶ 1.

<sup>22</sup> *Id.* at 6830 ¶ 16.

<sup>23</sup> *Id.* at 6830-6831 ¶ 17.

<sup>24</sup> *Id.*

<sup>25</sup> Petition for Reconsideration, FiberTower Spectrum Holdings LLC (filed June 6, 2013) ("PFR").

Communications, Inc. (“BridgeWave”)<sup>27</sup>; holders of FiberTower debt that expect to become principal shareholders in FiberTower if it emerges from bankruptcy (Broadbill Investment Partners (“BIP”)<sup>28</sup> and Solus Alternative Asset Management LP (“Solus”)<sup>29</sup>); a coalition of companies, associations, and individuals interested in the fixed service (Fixed Wireless Communications Coalition (“FWCC”)<sup>30</sup>); a national trade association representing the wireless infrastructure industry (PCIA – The Wireless Infrastructure Association (“PCIA”)<sup>31</sup>); and Vivint Wireless, Inc., a wireless internet service provider that proposes to lease FiberTower’s spectrum.<sup>32</sup>

### III. DISCUSSION

#### A. Introduction

10. We deny the PFR because it does not meet procedural requirements and, independently, because it does not otherwise demonstrate any material error in the *AFR Order*.

11. As to the procedural issue, FiberTower’s PFR fails to comply with the fundamental requirements of and limitations imposed on petitions for reconsideration. Section 1.106(b)(2) of the Commission’s Rules states:

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

(i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or

(ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.<sup>33</sup>

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<sup>26</sup> Except for BridgeWave, none of the commenters have previously participated in this proceeding, and those commenters do not attempt to show why it was not possible for them to participate in earlier stages of the proceeding. See 47 C.F.R. § 1.106(b)(1). We will treat those filings as informal comments pursuant to 47 C.F.R. § 1.41.

<sup>27</sup> Letter from Amir Makleff, CEO, BridgeWave Communications, Inc. to Honorable Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission (filed June 13, 2013) (“BridgeWave Comments”).

<sup>28</sup> Letter from Neil Subin, Chairman, Broadbill Investment Partners to Honorable Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission (filed June 17, 2013) (“BIP Comments”).

<sup>29</sup> Letter from Chris Pucillo, CEO/Chief Investment Officer, Solus Alternative Asset Management LP to Honorable Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission (filed June 17, 2013) (“Solus Comments”).

<sup>30</sup> Letter from Mitchell Lazarus, Counsel for the Fixed Wireless Communications Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission (filed June 19, 2013) (“FWCC Comments”).

<sup>31</sup> Reply to FiberTower Petition for Reconsideration of PCIA – The Wireless Infrastructure Association (filed June 24, 2013) (“PCIA Reply”).

<sup>32</sup> Letter from Luke Langford, Chief Operating Officer, Vivint Wireless to Honorable Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission (filed Sep. 26, 2013).

<sup>33</sup> 47 C.F.R. § 1.106(b)(2).

Reconsideration “will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.”<sup>34</sup> As discussed in further detail below, FiberTower raises claims that either could have and should have been raised at an earlier stage in the proceeding, or repeats claims that the Commission has thoroughly considered and rejected. Furthermore, even if we ignored the procedural deficiencies in the PFR, nothing in the PFR demonstrates any material error in the *AFR Order*. Thus, the repetitious claims were properly rejected on substantive grounds, any arguments FiberTower raises now that should have been presented earlier are insufficient to support the relief sought, and FiberTower’s reliance on developments that it characterizes as having occurred since the *AFR Order* is unavailing because those developments either are not facts that can be raised for the first time in a petition for reconsideration (since, *inter alia*, they are points that could have been raised earlier) or otherwise fail to persuade us to revisit our earlier conclusion.

## B. IDT Substantial Service Filing

12. FiberTower argued in its AFR that it should not have been forced to build “inefficient stop-gap systems with no commercial viability.”<sup>35</sup> The Commission has already addressed this claim. In rejecting FiberTower’s argument, the Commission wrote:

FiberTower argues that it should not be forced to build ‘inefficient stop-gap systems with no commercial viability.’ In the cases FiberTower cites for that proposition, the choice all licensees faced was to either deploy stop-gap equipment or build nothing. 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. 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. 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.<sup>36</sup>

13. Now, FiberTower again argues that it faced a choice of building a stop-gap system or building nothing, and it uses information relating to a substantial service showing made by another 39 GHz licensee, IDT Spectrum LLC (“IDT”), in support of this claim. In FiberTower’s words, “FiberTower has maintained consistently that the equipment ecosystems for the 24 GHz and 39 GHz bands had not developed sufficiently, prior to the applicable build-out deadlines, to facilitate the construction of networks capable of supporting robust service that customers actually want.”<sup>37</sup> In response to the *AFR Order*’s observation that many other 39 GHz systems have been constructed, FiberTower uses a substantial service filing made by IDT in 2011 to purportedly show that those systems were “stop-gap” systems.<sup>38</sup> FiberTower characterizes IDT’s systems as “antiquated” narrowband radios that barely satisfy the substantial service standard and are not capable of supporting “meaningful service” to customers.<sup>39</sup> FiberTower also provides a photograph of an IDT site, which FiberTower says purports to show that, as of May 29, 2013, there was no equipment at the site which could provide the coverage

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<sup>34</sup> See *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

<sup>35</sup> AFR at 15-16.

<sup>36</sup> *AFR Order*, 28 FCC Rcd at 6839 ¶ 36 (footnotes omitted).

<sup>37</sup> PFR at 5.

<sup>38</sup> PFR at 5-10, *citing* Substantial Service Showing, IDT Spectrum, LLC, File No. 0004668095 (filed Mar. 28, 2011, accepted Aug. 18, 2011).

<sup>39</sup> PFR at 6-7.

claimed by IDT.<sup>40</sup> According to FiberTower, the nature of IDT's build purportedly demonstrates that FiberTower's decision to seek a waiver of the buildout deadlines, as opposed to constructing a "save build," was reasonable.<sup>41</sup> FiberTower then repeats arguments it has previously made as to why it believes it was entitled to a waiver of the buildout deadline.<sup>42</sup>

14. FiberTower's invocation in its PFR of the IDT buildout efforts does not provide a basis for granting the petition under Section 1.106(b)(2) of the rules.<sup>43</sup> FiberTower presents IDT's buildout as previously unmentioned information relevant to FiberTower's argument that, without some relief, it had no reasonable choices in dealing with its own buildout requirements.<sup>44</sup> More specifically, FiberTower uses IDT's buildout – which FiberTower characterizes as nothing more than a "stop-gap" system – to describe the type of system it argues it would have had to deploy if it chose to meet the build out requirements.<sup>45</sup> Thus, FiberTower argues that it found itself in an impossible position – *i.e.*, faced with a choice of building a "stop-gap" system, on the one hand, or building nothing and risking license termination, on the other.<sup>46</sup> It therefore asks the Commission to revisit the rejection in the *AFR Order* of FiberTower's argument that it should have been given more time to construct because of the choice it faced.<sup>47</sup> For the following reasons, this argument fails.

15. First, the evidence presented by FiberTower about IDT's buildout is irrelevant to the key question of whether FiberTower was faced with a stop-gap/no-build choice. The *AFR Order*'s factual determination that FiberTower did not face such a choice did not turn on the buildout results of another licensee's efforts, but rather focused appropriately on FiberTower's own actions and admissions.<sup>48</sup> Nothing in FiberTower's invocation of the IDT buildout efforts contradicts or calls into question the strong record evidence demonstrating that FiberTower itself did not face the choice it hypothesizes. FiberTower met the substantial service requirements for a number of its 39 GHz licenses as early as 2008, and built "commercial grade" systems at 24 GHz.<sup>49</sup> Similarly, even if true, the fact that one licensee may

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<sup>40</sup> *Id.* at 7-8 and Exhibit A.

<sup>41</sup> *Id.* at 8-9.

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> See 47 C.F.R. § 1.106(b)(2); see also *WWIZ, Inc.*, 37 FCC at 686.

<sup>44</sup> PFR at 7-9

<sup>45</sup> PFR at 9.

<sup>46</sup> See *AFR Order*, 28 FCC Rcd at 6839 ¶ 36 (rejecting argument that FiberTower was faced with the choice of either building a stop-gap system—which FiberTower's PFR now claims that the IDT system is—or building nothing at all); see also *id.* at 6825 ¶ 5 (recognizing that FiberTower previously argued that "building out these licenses would require it to build 'links to nowhere'").

<sup>47</sup> PFR at 13-14.

<sup>48</sup> *AFR Order*, 28 FCC Rcd at 6839 ¶ 36.

<sup>49</sup> For example, FiberTower has represented to the Commission that in certain markets, such as Washington, D.C., it has built "commercial-grade" links pursuant to its 24 GHz licenses. See, e.g., Substantial Service Filing, Call Sign WMT338, File No. 0005242343 (filed May 31, 2012, accepted Apr. 24, 2013), Attachment A at 4 (stating that, "[a]s of the date of this filing [May 31, 2012], over 100 commercial-grade 24 GHz links are currently operating within the Washington, DC metropolitan area, the geographic area covered under [FiberTower's 24 GHz] license"); see also Substantial Service Filing, Call Sign WMF850, File No. 0005242335 (filed May 31, 2012) (27 commercial-grade links in Baltimore, Maryland market). In the 39 GHz band, FiberTower's compliance with the substantial service standard for 31 licenses (as early as 2008), including compliance demonstrated through services provided by lessees, belies FiberTower's assertion that it was faced with a choice of building stop-gap systems or building nothing. See ART Licensing Corporation, *supra*, 23 FCC Rcd at 14122-14123 ¶ 13. Moreover, FiberTower admits it had acquired nearly 400 24 GHz systems, "all of which remain in FiberTower's warehouse ready for deployment." Supplement #1, FiberTower Corporation (filed Jul. 26, 2012) ("First Supplement") at 3. It also had acquired

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have built a stop-gap system says nothing about whether that licensee was faced with this type of choice or had simply opted, for reasons specific to that licensee (*e.g.*, its own financial condition), to construct a stop-gap system. As FiberTower relies heavily on such irrelevant information in order to justify repeating here the same arguments it made in its AFR, and which the Commission addressed and rejected in the *AFR Order*, we conclude that FiberTower has failed to meet the threshold requirements of Section 1.106(b) for obtaining reconsideration.<sup>50</sup>

16. Second, even if IDT's buildout, standing by itself, could have some relevance to FiberTower's own situation, the information that FiberTower presented to the Commission regarding IDT's system is so vague that we would be unable to reach any conclusion about the sufficiency of IDT's buildout. What we do know is that IDT constructed facilities prior to the deadline, and FiberTower did not. FiberTower's showing concerning the state of IDT's facilities in May 2013 does not contradict IDT's showing that it constructed facilities and demonstrated substantial service in 2011. Indeed, FiberTower's photograph could demonstrate nothing more than the state of that location on one day in May 2013. Moreover, if FiberTower had filed a timely objection to IDT's substantial service showing, the Bureau could have sought further information and made a timely determination on its claims. Instead, the determination that IDT demonstrated substantial service is now a final action. And to the extent that FiberTower's PFR might now raise a question as to whether IDT's licenses are subject to cancellation for permanent discontinuance of operation,<sup>51</sup> we view that issue as having no particular relevance to FiberTower's stop-gap/no-build argument or to its underlying requests for more time to build out its licenses.<sup>52</sup> Accordingly, we conclude that the reasons set forth in this paragraph provide an independent basis for our determinations that the IDT component of FiberTower's arguments on reconsideration has no probative value, that the remaining arguments on this issue were previously made by FiberTower and addressed by the Commission in the *AFR Order*, and that under Section 1.106(a) FiberTower has failed to meet the requirements for obtaining reconsideration of the Commission's rejection of the contention that FiberTower faced a type of choice that might justify additional buildout time.

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sufficient 39 GHz radios to support 44 links, and had the right to acquire more radios to support 210 additional 39 GHz links. First Supplement at 3.

<sup>50</sup> Moreover, FiberTower's reliance on its contentions regarding the IDT system do not undermine the Commission's determination in the *AFR Order* that FiberTower's failure to comply with the build-out requirements resulted from FiberTower's own voluntary business decisions. See PFR at i, 5 (arguing that the Commission's public interest analysis erroneously focused on the actions of "other" licensees and suggesting that the alleged data regarding IDT's "save build" system somehow shows that FiberTower was entitled to a waiver or extension of its build-out requirements). The *AFR Order* affirmed that FiberTower's failure to build was the result of its own voluntary business decisions. And FiberTower's claims regarding the "save build" systems deployed by IDT do not show that FiberTower's decision not to comply with all applicable build-out requirements was somehow not the product of its own voluntary business decisions, particularly where FiberTower had 11-15 years to demonstrate substantial service and did construct what it characterizes as commercial-grade systems in certain markets. Given the irrelevancy of FiberTower's IDT submission to this issue, we conclude that its request for reconsideration of the determination in the *AFR Order* about the voluntary nature of FiberTower's business decisions is based purely on arguments raised and addressed in that Order and thus must be denied under Section 1.106(b) of the Commission's Rules. We also note that to the extent FiberTower is making the literal argument that the agency's decisions mean that FiberTower would have been "compel[led] . . . to complete a 'save build' (with antiquated equipment that soon would have to be replaced)," we find that FiberTower's argument fails. Nothing in either the *AFR Order*, the Bureau's *FiberTower MO&O*, or the relevant substantial service requirement compelled FiberTower to choose between missing the applicable deadlines or installing what it views as "antiquated," "save build" or "stop gap" systems. See *AFR Order*, 28 FCC Rcd at 6839 ¶ 26.

<sup>51</sup> See 47 C.F.R. § 101.305(d) (if a common carrier radio license is not used to provide service for a twelve-month period, or if facilities are not operational because equipment has been removed, license is subject to cancellation).

<sup>52</sup> We direct the Wireless Telecommunications Bureau to investigate whether any of IDT's licenses are subject to cancellation for permanent discontinuance of operation.

17. Third, as a factual matter, FiberTower's reliance on IDT's 2011 substantial service showing does not meet the requirements of Section 1.106(b)(2) of the Commission's Rules.<sup>53</sup> IDT's substantial service filing was filed in the Bureau's Universal Licensing System ("ULS") in 2011, well before FiberTower filed its Extension Request. IDT's construction and its report to the Bureau were events that clearly occurred before the denial of the AFR and were available to FiberTower. Nor has FiberTower shown that it could not have learned about these alleged facts earlier through the exercise of ordinary diligence. While FiberTower's examination of IDT's transmitter site and subsequent photograph did not take place until after the *AFR Order*, we conclude that FiberTower could have provided this or comparable data with its Extension Request. While FiberTower's Senior Vice President, Regulatory and Government Affairs argues that "[g]iven the time, effort, and consents involved, this photographic evidence would not have been gathered but for the need to respond" to findings in the *AFR Order*,<sup>54</sup> we do not agree that FiberTower's need to examine other licensees' deployments was triggered by the *AFR Order*. As noted above, FiberTower argued in its AFR that it should not have been forced to build an inefficient stop-gap system. To the extent FiberTower is using the IDT submission in an effort to dramatize the inefficiencies of the type of system that it was asserting compliance with the buildout requirement would have forced it to construct, it is evident that FiberTower could have provided this or comparable data earlier in the proceeding. Moreover, to the extent FiberTower believes its argument is dispositive, it had every incentive to review IDT's construction prior to filing its Extension Request because it has consistently argued from the beginning "that the construction of temporary 'stop-gap' facilities to satisfy a coverage or service requirement does not serve the public interest."<sup>55</sup> Furthermore, FiberTower knew or could have known the types of facilities IDT was constructing by reviewing ULS in 2011. With ordinary diligence, in 2011, FiberTower could have made its arguments concerning the nature of IDT's systems and conducted the examination that it made in May 2013. Section 1.106(b)(2) of the Commission's Rules therefore bars consideration of the evidence it now presents for the first time in the PFR.

### C. Prior Extensions and FiberTower's Waiver Request

18. FiberTower argues that its case is analogous to other cases where the Commission granted extensions because the licensees allegedly faced the choice of either building stop-gap systems or building nothing.<sup>56</sup> FiberTower's arguments concerning cases where extensions were granted to all licensees in a service do not form a basis for reconsideration because the Commission has previously considered and rejected those arguments.<sup>57</sup> In the *AFR Order*, the Commission distinguished several cases cited by FiberTower where extensions were granted to all licensees on the basis that, in those other cases, the licensees faced the choice of building "stop-gap" systems or building nothing.<sup>58</sup> The Commission noted that, while FiberTower cited those cases for the proposition that licensees are entitled to an extension when they do not build because of a lack of a viable market, equipment, or technology, the Commission has already concluded that none of those market, equipment, or technology deficiencies

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<sup>53</sup> 47 C.F.R. § 1.106(b)(2).

<sup>54</sup> *Id.*, Declaration of Joseph M. Sandri.

<sup>55</sup> Extension Request at 17.

<sup>56</sup> PFR at 10-14.

<sup>57</sup> See 47 C.F.R. § 1.106(b)(2); see also WWIZ, Inc., *supra*.

<sup>58</sup> *AFR Order*, 28 FCC Rcd at 6839 ¶ 36, citing 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); 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); FCI 900, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 ¶ 7 (WTB 2001).

were present for FiberTower.<sup>59</sup> The Commission also distinguished a recent grant of additional time to Wireless Communications Service (“WCS”) licensees to meet their new buildout requirements because that extension was justified based on a flaw in the Commission rules that focused on one type of technology.<sup>60</sup>

19. FiberTower cites to these same cases in its PFR.<sup>61</sup> It argues that it faced the same choice as other licensees in those cases where we granted extensions: deploy stop-gap equipment or build nothing.<sup>62</sup> With respect to the recent WCS extension, FiberTower argues:

Moreover, contrary to the suggestion in the [*AFR Order*], the latest WCS extension is not distinguishable because of an asserted ‘flaw in the WCS rules that hindered deployment.’ The ‘flaw’ at issue stemmed from WCS licensees’ own ‘desire to deploy mobile units’ in a band where mobile service historically had been prohibited, and so the WCS industry’s business decision cannot serve as a basis to distinguish the WCS context from FiberTower’s request.<sup>63</sup>

20. As noted above, reconsideration “will not be granted merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.”<sup>64</sup> Again, FiberTower’s PFR simply repeats arguments previously considered and rejected in the *AFR Order*, and we therefore reject FiberTower’s request for reconsideration on this point.<sup>65</sup>

21. Independently, and in any event, we note that FiberTower misconstrues the nature of the flaw in the WCS rules. The problem in WCS was that “certain technical specifications established in the 2010 WCS R&O may have inadvertently hindered the ability of licensees to deploy mobile broadband services.”<sup>66</sup> When the Commission resolved those issues in the 2012 WCS R&O, it decided it was appropriate to restart the construction period in order to give licensees time to develop equipment under the revised technical rules.<sup>67</sup> The Commission also extended the buildout deadlines by six months to “reasonably accommodate typical equipment development and manufacturing cycles.”<sup>68</sup> By contrast, FiberTower has not alleged any such rule flaw in the 24 GHz or 39 GHz rules.

22. Moreover, we do not find persuasive FiberTower’s argument that the *AFR Order* erred in its analysis of the waiver request because, in FiberTower’s view, the waiver standard, unlike the standard for requests for extensions, “does *not* depend on whether the factors leading to a delay in build-out are within the control of the licensee,”<sup>69</sup> and the Commission erred by focusing unduly on FiberTower’s conduct.<sup>70</sup> As set forth in the *AFR Order*, the Commission examined both prongs of the waiver standard

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<sup>59</sup> *AFR Order*, 28 FCC Rcd at 6834 ¶ 25.

<sup>60</sup> *Id.* at 6834-6835 ¶ 25, citing 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) (*2012 WCS Order*).

<sup>61</sup> PFR at 10-14.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.* at 12 (footnotes omitted).

<sup>64</sup> See *WWIZ, Inc.*, *supra*.

<sup>65</sup> See 47 C.F.R. § 1.106(b)(2); see also *WWIZ, Inc.*, 37 FCC at 686.

<sup>66</sup> *2012 WCS R&O*, 27 FCC Rcd at 13700 ¶ 121.

<sup>67</sup> *Id.* at 13700-13701 ¶ 121.

<sup>68</sup> *Id.* at 13700 ¶ 120.

<sup>69</sup> PFR at 4.

<sup>70</sup> *Id.*

in examining FiberTower's arguments—namely, whether FiberTower demonstrated that (1) the underlying purpose of the rule would not be served or would be frustrated by application of the rule to the instant case, and that 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 would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>71</sup> The *AFR Order* properly applied this standard, and it focused on FiberTower's conduct (in addition to various public interest considerations) as appropriate and relevant to that analysis.<sup>72</sup>

#### D. FiberTower's Claimed Public Interest Benefits

23. In its AFR, FiberTower argued that the Bureau ignored FiberTower's claims of public interest benefits that would flow from granting an extension.<sup>73</sup> Among the alleged benefits FiberTower claimed would result from granting an extension were: promoting the most efficient use of spectrum,<sup>74</sup> facilitating the deployment of mobile broadband service and an interoperable public safety network,<sup>75</sup> and supporting the Commission's policy to enhance the reliability and resiliency of public safety networks.<sup>76</sup> In response, the Commission wrote, "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>77</sup> It also observed that FiberTower "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."<sup>78</sup>

24. In the PFR, FiberTower cites several recent Commission statements and orders as reflecting "a growing recognition by the Commission of the critical need for wireless backhaul services generally and the implementation of small-cell wireless networks specifically."<sup>79</sup> In that regard, FiberTower cites the Commission's most recent wireless competition report,<sup>80</sup> discussions by the Commission's Technical Advisory Council,<sup>81</sup> a Notice of Proposed Rulemaking proposing rules to facilitate small cell deployment in the 3550-3650 MHz band,<sup>82</sup> and a recent order modifying foreign

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<sup>71</sup> See 47 C.F.R. § 1.925(b); see also *AFR Order*, 28 FCC Rcd at 6387-40 ¶¶ 30-37.

<sup>72</sup> *Id.*

<sup>73</sup> AFR at 19.

<sup>74</sup> *Id.* at 8.

<sup>75</sup> *Id.* at 10.

<sup>76</sup> *Id.* at 11.

<sup>77</sup> *AFR Order*, 28 FCC Rcd at 6840 ¶ 37.

<sup>78</sup> *Id.*

<sup>79</sup> PFR at 14.

<sup>80</sup> *Id.* at 14, 16-17, 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. 11-186, *Sixteenth Report*, 28 FCC Rcd 3700, 3909-3910 ¶ 332 (2013).

<sup>81</sup> *Id.* at 15, citing Meeting of the Technical Advisory Council, March 11, 2013, Summary of Meeting, Slide "Resiliency in a Broadband Network"; Meeting of the Technical Advisory Council, December 10, 2012, Summary of Meeting, Slide "FCC Actions on TAC Recommendations - 2011" (available at <http://www.fcc.gov/encyclopedia/technological-advisory-council>).

<sup>82</sup> *Id.* at 15-16, citing Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, GN Docket No. 12-354, *Notice of Proposed Rulemaking and Order*, 27 FCC Rcd 15594 (2012).

ownership limits.<sup>83</sup> FiberTower argues that those pronouncements “underscore the public interest benefits that would flow from facilitating the near-term implementation of FiberTower’s small-cell backhaul network.”<sup>84</sup> FiberTower alleges that its network would “(i) help mobile wireless providers meet the growing consumer demand for mobile broadband, (ii) facilitate the deployment of wireless networks to areas where it is difficult or costly to deploy fiber for backhaul, (iii) support public safety systems such as the national-scope 4G LTE-based FirstNet, and (iv) enable wireless providers to use the limited spectrum resource even more efficiently than they do today.”<sup>85</sup>

25. While FiberTower cites documents filed subsequent to the AFR, the public interest benefits it cites in connection with those documents are the same benefits previously considered by the Commission and found insufficient to support grant of a waiver to FiberTower. In its AFR, FiberTower argued that grant of its waiver request would (1) facilitate the deployment of mobile broadband service, including in unserved markets,<sup>86</sup> (2) support the deployment of an interoperable public safety network (*i.e.*, FirstNet),<sup>87</sup> and (3) promote the efficient use of spectrum.<sup>88</sup> We disagree with FiberTower’s suggestion that there has been a dramatic change in the significance of those benefits such that we are persuaded to reach a contrary conclusion regarding the overall public interest benefits associated with our analysis of FiberTower’s request. We also note that none of the documents cited by FiberTower discusses those benefits in the context of requests for extensions of construction deadlines. Since the Commission has already considered and rejected these arguments in the *AFR Order*, and the recent documents do not significantly change anything directly relevant, reconsideration is not appropriate.

26. Moreover, while FiberTower focuses on what it views as the public interest benefits that would be promoted by granting it relief, it fails to properly consider 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>89</sup> We agree with FiberTower that promoting wireless backhaul use and small cell development are important objectives.<sup>90</sup> We believe that strict enforcement of those buildout requirements in this case, particularly where previous extensions had been granted, best serves those objectives. As the Commission observed in the *AFR Order*, any licensee who has not built could promise to build in the near future.<sup>91</sup> If the Commission credited such after-the-fact promises, licensees would no longer have any incentive to meet the original buildout deadline because they could obtain an extension by promising to build a system in the near future.<sup>92</sup> The result

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<sup>83</sup> *Id.* at 17, *citing* Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended, IB Docket No. 11-133, *Second Report and Order*, 28 FCC Rcd 5742, 5743 ¶ 2 (2013).

<sup>84</sup> PFR at 17.

<sup>85</sup> *Id.* at 17-18.

<sup>86</sup> AFR at 10-11.

<sup>87</sup> AFR at 11.

<sup>88</sup> AFR at 8.

<sup>89</sup> See 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>90</sup> Similarly, we agree with BridgeWave and PCIA on the importance of small cell solutions and heterogeneous networks. BridgeWave Comments, PCIA Reply. We disagree that granting FiberTower relief is an appropriate means of recognizing the importance of those technological developments.

<sup>91</sup> *AFR Order*, 28 FCC Rcd at 6838 ¶ 34.

<sup>92</sup> *Id.* at 6838 ¶ 34.

would be a delay in providing service to carriers and the public, which is not in the public interest. Indeed, in this case, there is no guarantee that FiberTower would be able to provide service even if we granted its Extension Request. Nothing in the BIP Comments or Solus Comments evidences any commitment to provide funding for FiberTower's proposed small cell network.<sup>93</sup>

27. FiberTower also argues that its most recent proposal to build small-cell networks in certain markets in a two-year period is a clearly defined and achievable path forward.<sup>94</sup> We lack sufficient information to reach any conclusion as to whether FiberTower could implement its latest proposal.<sup>95</sup> We need not address that issue because, as explained above, it is improper to consider FiberTower's extremely tardy proposal.

#### **E. FWCC's Comments**

28. While we are not required to address comments filed in response to FiberTower's AFR, we disagree with FWCC's suggestion that the Commission's current renewal procedures are not working as intended because licenses are being cancelled.<sup>96</sup> FWCC argues that cancelling FiberTower's licenses will act as a disincentive to equipment manufacturers to develop equipment for the 24 GHz and 39 GHz bands, thus leading to further license cancellations.<sup>97</sup> While FWCC suggests that the Commission's rules should be changed, it urges the Commission to use the waiver process as a "safety valve" in the meantime.<sup>98</sup>

29. We disagree with FWCC that the decision to cancel FiberTower's licenses is an indication that our processes are not working correctly. Whenever a Commission imposes buildout requirements, there is always a possibility that some licensees will not meet those requirements, and they will have to suffer the consequences of that failure. Here, where FiberTower had 11-15 years to demonstrate substantial service, and it chose not to build for financial reasons,<sup>99</sup> we believe a decision to grant FiberTower yet more time would constitute a failure of our processes. FWCC's analysis is also based on the inaccurate premise that FiberTower was unable to build because of equipment problems.<sup>100</sup> As explained in detail in the *AFR Order*<sup>101</sup> and in this *Order on Reconsideration*,<sup>102</sup> that is not the case. Furthermore, in 2011, the Commission rejected the argument that the renewal standards should be changed for 24 GHz, 39 GHz, and LMDS licensees with 2012 substantial service deadlines.<sup>103</sup> We will not revisit that issue at this time. As for incentive to develop equipment, if the demand for wireless backhaul and small cell systems increases as strongly as the parties believe, equipment manufacturers will

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<sup>93</sup> PFR at 18-19. In that regard, we note BIP's statement that "it is deeply invested" in facilitating FiberTower's proposed network (BIP Comments at 3) and Solus' recitation of its history of restoring viability to financially distressed companies (Solus Comments at 1-2).

<sup>94</sup> *Id.*

<sup>95</sup> For example, it is hard to reconcile FiberTower's current claims with its statement in connection with its discontinuance filing that the *FiberTower MO&O* ended FiberTower's chances for a successful restructuring. *See* Notification Regarding the Discontinuance of Telecommunications Service, FiberTower Corporation, WT Docket No. 13-9 (filed Dec. 4, 2012) at 6.

<sup>96</sup> FWCC Comments at 2.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2-3, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>99</sup> *See AFR Order*, 28 FCC Rcd at 6833 ¶ 23.

<sup>100</sup> FWCC Comments at 2.

<sup>101</sup> *AFR Order*, 28 FCC Rcd at 6832 ¶ 21.

<sup>102</sup> *See* ¶ 17, *supra*.

<sup>103</sup> *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104.

have incentives to develop equipment for other licensees in these bands, present and future. Finally, while we agree with FWCC that the waiver process can act as “safety valve,” we have given FiberTower’s waiver request the required “hard look”<sup>104</sup> and concluded that a waiver is not warranted.

#### F. FiberTower’s Supplements

30. FiberTower contends that the Commission’s decision to strike several of its supplements to its AFR was “contrary to the requirements of administrative law generally and the Commission’s own rules specifically.”<sup>105</sup> It argues that its filings should not be considered supplements within the meaning of Section 1.115 of the Commission’s Rules because its AFR was complete as filed.<sup>106</sup> It describes its filings as akin to *ex parte* filings made subsequent to communications with agency staff.<sup>107</sup> It cites a case from the United States Court of Appeals for the District of Columbia Circuit for the proposition that the Commission cannot strike a supplement on procedural grounds without considering whether the supplement should be considered on the merits.<sup>108</sup> It describes the materials as providing “critical context and substance,” and argues that consideration of the materials would facilitate reasoned decision-making by the Commission.<sup>109</sup>

31. We reject FiberTower’s arguments because they are contrary to the plain language of the rule and applicable precedent. Section 1.115(d) of the Commission’s Rules requires that an “application for review and any supplemental thereto shall be filed within 30 days of public notice of such action . . .”<sup>110</sup> FiberTower’s suggestion that a pleading is not a “supplement” if the application for review is complete has no support in rules or precedent.

32. We also reject FiberTower’s attempt to characterize its filings as *ex parte* presentations subject to the disclosure and filing requirements in Section 1.1206(b) of the Commission’s Rules.<sup>111</sup> As FiberTower admits,<sup>112</sup> those disclosure and filing requirements do not apply because there were no other parties to the underlying applications. Moreover, an obligation to disclose *ex parte* presentations does not necessarily mean that those disclosures must be considered on the merits. Section 1.115(d) of the Commission’s Rules lists permissible filings with respect to applications for review and the time periods within which such filings may be made. FiberTower’s filings could be considered supplements to its application for review, but the rule specifically requires such filings to be made at or before the due date for applications for review.

33. The Commission’s action was also consistent with the cases cited by FiberTower. FiberTower cites *Citizens to Preserve Overton Park, Inc. v. Volpe* for the proposition that the Commission may not simply ignore relevant factors or record evidence.<sup>113</sup> While we agree with that elementary principle, the question in this case is whether FiberTower’s filings are properly part of the record in this proceeding. *Citizens to Preserve Overton Park, Inc. v. Volpe* does not address the issue of an agency’s ability to enforce its procedural rules.

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<sup>104</sup> *WAIT Radio v. FCC*, 418 F.2d at 1157.

<sup>105</sup> PFR at 21.

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

<sup>107</sup> *Id.* at 22-23.

<sup>108</sup> *Id.* at 23, citing *WSTE-TV, Inc. v. FCC*, 566 F.2d 333 (D.C. Cir. 1977).

<sup>109</sup> PFR at 23.

<sup>110</sup> 47 C.F.R. § 1.115(d).

<sup>111</sup> 47 C.F.R. § 1.1206(b).

<sup>112</sup> PFR at 22.

<sup>113</sup> PFR at 21, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

34. In contrast, *WSTE-TV, Inc. v. FCC*, another case cited by FiberTower,<sup>114</sup> recognized “that enforcement of an agency’s procedural, as well as substantive, rules benefits the public interest by prompting finality in administrative litigation.”<sup>115</sup> *WSTE, Inc. v. FCC* holds that the Commission should consider the question of whether the public interest would be served by reviewing an untimely supplement on the merits.<sup>116</sup> The Commission fully met that requirement in this case. With respect to FiberTower’s April 26, 2013, filing, the Commission found it was in the public interest to consider that filing notwithstanding its untimely filing because that letter could serve the purpose of clarifying the various proposals FiberTower had made.<sup>117</sup> In contrast, the other three filings consisted of additional arguments against the Bureau’s reasoning in the *FiberTower MO&O*. FiberTower’s March 15 “white paper” contains no new evidence, but, rather, sets forth FiberTower’s version of its history and precedent.<sup>118</sup> FiberTower’s April 3, 2013 letter attempts to distinguish FiberTower from other licensees whose extensions were denied and discusses the Commission’s waiver standard.<sup>119</sup> Finally, the May 3, 2013 letter discusses developments from 2011 and 2012 and cases that were addressed in the *FiberTower MO&O* and the *AFR Order*.<sup>120</sup> Since FiberTower had a full and fair opportunity to make these types of arguments in its AFR, and the supplements largely repeated arguments actually made in the AFR, the public interest would not be served by reviewing these supplements on the merits. Moreover, the Commission’s interest in enforcing its procedural rules outweighs any benefit to the public in considering FiberTower’s untimely filings.

35. FiberTower appears to believe that it should have been allowed to offer additional arguments in support of its AFR with no limitations. Such a result would not be in the public interest because it would hinder the Commission’s ability to reach decisions in a timely manner.<sup>121</sup> FiberTower had a full and fair opportunity to present its arguments in its AFR, and we see no lack of fairness in requiring FiberTower to make all of its arguments in its AFR. Indeed, particularly in light of FiberTower’s view that its AFR was “complete as filed,”<sup>122</sup> we do not discern any prejudice to FiberTower by our finding that the relevant submissions were untimely. Therefore, a thorough consideration of the relevant public interest factors supports the Commission’s conclusion to strike FiberTower’s March 15, April 3, and May 3 filings.

36. Finally, we emphasize that, even if we fully considered the supplements in question, our decision would not change. As noted above, the supplements set forth FiberTower’s version of history and precedent, attempt to distinguish FiberTower from other licensees whose extensions were denied, discusses the Commission’s waiver standard, and discusses cases addressed in the *FiberTower MO&O*

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<sup>114</sup> PFR at 23.

<sup>115</sup> *WSTE-TV, Inc. v. FCC*, *supra*, 566 F.2d at 337, citing *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (1964); *accord*, *Civic Telecasting Corp. v. FCC*, 523 F.2d 1185, 1188 n.8 (1975), *cert. denied*, 426 U.S. 949 (1976).

<sup>116</sup> *WSTE-TV, Inc. v. FCC*, *supra*, 566 F.2d at 337.

<sup>117</sup> *AFR Order*, 28 FCC Rcd at 6830-6831 ¶ 17.

<sup>118</sup> The Missing Link: FiberTower and the Future of Mobile Broadband (filed Mar. 15, 2013).

<sup>119</sup> 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).

<sup>120</sup> FiberTower and the Advent of Small Cell Wireless Backhaul at 24 GHz and 39 GHz (filed May 3, 2013).

<sup>121</sup> In the context of transactions, various Bureaus have emphasized, “To allow the Commission to consider fully all substantive issues regarding the Applications and Petition in as timely and efficient a manner as possible, petitioners and commenters should raise all issues in their initial filings.” See, e.g., Softbank And Sprint File Amendment To Their Previously Filed Applications To Reflect Sprint's Proposed Acquisition Of De Facto Control Of Clearwire, IB Docket No. 12-343, *Public Notice*, 27 FCC Rcd 16056, 16059 (IB WTB WCB MB 2012).

<sup>122</sup> PFR at 21.

and the *AFR Order*.<sup>123</sup> Each of those factors was thoroughly considered in the *AFR Order*.<sup>124</sup> Although the supplements may emphasize different factors than prior pleadings, we do not find anything novel or of decisional significance that would cause us to reach a different result in this case.

#### IV. CONCLUSION AND ORDERING CLAUSE

37. FiberTower's PFR fails to meet the standards for reconsideration because it either presents evidence that should have been presented earlier or seeks to reargue matters thoroughly considered in the *AFR Order*. FiberTower has also failed to demonstrate any material error in the *AFR Order*. The Commission's decision to strike three of FiberTower's untimely supplements was correct.

38. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.115, that the Petition for Reconsideration filed by FiberTower Spectrum Holdings LLC on June 6, 2013 IS DENIED.

39. 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 *Order on Reconsideration* 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 *Order on Reconsideration* is intended, or shall be construed, to be contrary to the Bankruptcy Court's *Preliminary Injunction Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>123</sup> See ¶ 34, *supra*.

<sup>124</sup> See *AFR Order*, 28 FCC Rcd at 6831-6834 ¶¶ 18-23 (analyzing in detail FiberTower's factual allegations), 6834-6837 ¶¶ 24-29 (discussing in detail the cases cited by FiberTower), 6837-6840 ¶¶ 30-37 (reviewing FiberTower's request for waiver under the waiver standard contained in 47 C.F.R. § 1.925(b)(3)).