

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)	
Construct 24 GHz Digital Electronic Message	)	File Nos. 0005207557 <i>et seq.</i>
Service (DEMS) Licenses)	
)	
345 Applications for Extension of Time to)	
Construct 39 GHz Economic Area (EA) Licenses	)	File Nos. 0005207187 <i>et seq.</i>
)	
250 Applications for Extension of Time to)	
Construct 39 GHz Rectangular Service Area	)	File Nos. 0005207571 <i>et seq.</i>
(RSA) Licenses)	
)	
28 Construction Notifications for 24 GHz DEMS)	
Licenses	)	File Nos. 0005244308 <i>et seq.</i>
)	
3 Construction Notifications for 39 GHz RSA)	
Licenses	)	File Nos. 0005245527 <i>et seq.</i>
)	
11 Construction Notifications for 39 GHz)	
Economic Area (EA) Licenses	)	File Nos. 0005245533 <i>et seq.</i>
)	
FIBERTOWER SPECTRUM HOLDINGS LLC,)	
DEBTOR-IN-POSSESSION)	
)	
Notifications of Completion of Construction for 24	)	File Nos. 0005244173, 0005244224, and
GHz Digital Electronic Message Service (DEMS)	)	0005242330
Licenses WMT336, WMT348, and WPNG641)	
)	
Applications for Extension of Time to Construct	)	File Nos. 0005207604, 0005207611, and
24 GHz DEMS Licenses WMT336, WMT348,	)	0005207826
and WPNG641)	
)	
Application for Consent to Assign 24 GHz DEMS)	
Licenses WMT336, WMT348, and WPNG641	)	File No. 0006169289
from FiberTower Spectrum Holdings LLC,)	
Debtor-in-Possession to FiberTower Spectrum)	
Holdings LLC)	
)	

Adopted: January 26, 2018

Released: January 26, 2018

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

I. INTRODUCTION

1. In this *Order on Remand*, we take various actions to implement a settlement agreement between FiberTower Spectrum Holdings, LLC (FiberTower) and the Commission and to grant FiberTower's request for a limited waiver of the June 1, 2012 substantial service deadline applicable to the 39 GHz licenses listed in Appendix 1 (Reinstated 39 GHz Licenses). We dismiss as moot the construction notifications filed by FiberTower, the requests for extension of time, and the renewal application filed with respect to a 24 GHz license and the 39 GHz licenses listed in Appendix 2 (Abandoned Licenses).

II. BACKGROUND

A. Commission Decisions addressing FiberTower's 24 and 39 GHz licenses

2. On December 7, 2012, FiberTower filed an Application for Review seeking reversal of the decision of the Wireless Telecommunications Bureau (Bureau) in the *FiberTower MO&O*.¹ In the *FiberTower MO&O*, the Bureau held that FiberTower had not shown that it had provided substantial service for 689 licenses (94 licenses in the 24 GHz service and 595 licenses in the 39 GHz service); had not shown that its failure to meet the construction deadline applicable to these licenses was due to circumstances beyond its control, as required under section 1.946 of the Commission's rules; and had not met the standard, under section 1.925 of the Commission's rules, for a waiver of the applicable substantial service deadline.²

3. On May 7, 2013, the Commission, in the *FiberTower AFR Order*, denied FiberTower's application for review. The Commission held that the Bureau had correctly decided that FiberTower was not entitled to an extension because its failure to construct was caused by factors within its control and had not justified a waiver of the substantial service requirements.³ The Commission also found that the Bureau had correctly rejected FiberTower's attempts to demonstrate substantial service based on antecedent activities.⁴

4. On June 6, 2013, FiberTower filed a petition for reconsideration of the *FiberTower AFR Order*.⁵ On February 27, 2014, in the *FiberTower Reconsideration Order*, the Commission denied FiberTower's petition, holding that FiberTower's petition for reconsideration did not meet the Commission's procedural requirements and did not otherwise demonstrate any material error in the

¹ Application for Review, FiberTower Corporation (filed Dec. 7, 2012). A full recitation of the background concerning FiberTower and its licenses is contained in the *FiberTower AFR Order*. See *FiberTower Spectrum Holdings, LLC*, Memorandum Opinion and Order, 28 FCC Rcd 6822, 6822-30, paras. 2-15 (2013) (*FiberTower AFR Order*).

² See *FiberTower Spectrum Holdings, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 13562, 13568-77, paras. 19-38 (2012) (*FiberTower MO&O*).

³ *FiberTower AFR Order*, 28 FCC Rcd at 6837-40, paras. 29, 34-37.

⁴ *FiberTower AFR Order*, 28 FCC Rcd at 6840-41, paras. 38-40.

⁵ Petition for Reconsideration, FiberTower Spectrum Holdings LLC (filed June 6, 2013).

FiberTower AFR Order.⁶

B. Bankruptcy

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.⁷ On September 27, 2012, the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, upon FiberTower's request, issued an order granting a preliminary injunction that enjoined 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.⁸ 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."⁹ The *Preliminary Injunction Order* further provided 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."¹⁰ Although FiberTower has emerged out of bankruptcy,¹¹ the bankruptcy proceeding remains pending, and the *Preliminary Injunction Order* remains in effect.

C. Remand Decision of the Court of Appeals for the DC Circuit

6. FiberTower then appealed the *FiberTower Reconsideration Order* to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).¹² In its appeal, FiberTower argued, among other things, that the Commission made a material factual mistake when it concluded that FiberTower had not constructed any of the 689 licenses.¹³ FiberTower represented to the court that it had in fact constructed 28 of the 24 GHz licenses and at least 14 of the 39 GHz licenses at issue.¹⁴

7. On April 3, 2015, the D.C. Circuit issued its decision, affirming in part and remanding in part the Commission's decision. The D.C. Circuit refused to consider FiberTower's argument that the Commission's interpretation of its performance standard to require actual construction conflicts with the statutory mandate in 47 U.S.C. § 309(j)(4)(B) because FiberTower did not present it to the Commission,

⁶ *FiberTower Spectrum Holdings LLC*, Order on Reconsideration, 29 FCC Rcd 2493 (2014) (*FiberTower Reconsideration Order*).

⁷ In re FiberTower Network Services Corp., *et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex).

⁸ *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*").

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ See File Nos. 0006044255 (consented to Feb. 28, 2014, consummated Mar. 31, 2014).

¹² *FiberTower Spectrum Holdings, LLC v. Federal Communications Commission*, 782 F.3d 692, 693-694 (2015) (*FiberTower*).

¹³ *FiberTower*, 782 F.3d at 699-700.

¹⁴ *FiberTower*, 782 F.3d at 699.

and thus it was not properly before the court under 47 U.S.C. § 405(a).¹⁵ The D.C. Circuit further held that FiberTower's argument that the Commission's interpretation was inconsistent with the relevant substantial service standard was not well-founded.¹⁶ The court stated that "[n]othing in the text [of sections 101.3, 101.17(a)(1), (2), (3), and 101.527(b)(1)] indicates that non-construction activities alone will suffice to show substantial service."¹⁷ Moreover, the court found that "[t]he Commission's interpretation is consistent with the text of the regulations and rulemaking records."¹⁸ The court held, however, that the Commission had erred in applying its "'substantial service' interpretation to 42 licenses because their renewal applications stated that construction had occurred."¹⁹ The court therefore vacated "the orders denying extension and waiver, so that the Commission can rule on those requests based on an accurate understanding of the record."²⁰

8. On August 7, 2015, the Bureau reinstated the 42 licenses at issue to active status, reinstated the corresponding construction notifications to pending status, and returned the applications to provide FiberTower an opportunity to supply additional information about the facilities that were constructed under each license.²¹ The Return Letters indicated that FiberTower had 60 days from the date of the letter to respond.²² On October 6, 2015, FiberTower timely responded to the Return Letters for each of the 42 licenses.

D. FiberTower and AT&T Purchase Agreement

9. On January 25, 2017, AT&T Mobility, LLC (AT&T), FiberTower, and all of FiberTower Corporation's stockholders entered into a stock purchase agreement.²³ Under the terms of this stock purchase agreement, AT&T Mobility agreed to acquire all of the outstanding stock of FiberTower Corporation after which FiberTower Corporation would become a wholly-owned subsidiary of AT&T Mobility.²⁴ If consummated, this would also result in the "transfer of control of FiberTower Spectrum Holdings LLC's licenses from FiberTower Corporation to AT&T Mobility."²⁵ Under the terms of the stock purchase agreement, AT&T is "acquiring *all* of the rights to FiberTower's licenses and authorizations, including the licenses that are the subject of the pending remand from the United States Court of Appeals . . ."²⁶ On February 13, 2017, AT&T filed applications to transfer the control of FiberTower's licenses to AT&T.²⁷

¹⁵ *FiberTower*, 782 F.3d at 693, 696-697.

¹⁶ *FiberTower*, 782 F.3d at 694, 697-699.

¹⁷ *FiberTower*, 782 F.3d at 698.

¹⁸ *FiberTower*, 782 F.3d at 699.

¹⁹ *FiberTower*, 782 F.3d at 694.

²⁰ *FiberTower*, 782 F.3d at 694.

²¹ See e.g., Notice of Return, Ref. No. 6039901 (Aug. 7, 2015) (Return Letters).

²² See Return Letters at 1.

²³ File No. 0007652635, Description of the Transaction and Public Interest Statement (Public Interest Statement) at 3.

²⁴ Public Interest Statement at 3.

²⁵ Public Interest Statement at 3.

²⁶ Public Interest Statement at 3.

²⁷ File Nos. 0007652635 and 0007652637 (filed Feb. 13, 2017). This *Memorandum Opinion and Order* will not address the transfer of control applications or the petitions filed against those applications.

E. FiberTower Settlement Agreement

10. On January 24, 2018, FiberTower and the Commission reached a settlement of various pending proceedings, including the D.C. Circuit's remand, intended "to avoid the delay, uncertainty, inconvenience, and expense of further litigation."²⁸ Under the terms of the Settlement Agreement, FiberTower agreed to (1) relinquish all of its 24 GHz licenses, including those that were among the 42 licenses addressed by the D.C. Circuit, and some of its 39 GHz licenses, a subset of which were also referred to by the court; (2) terminate the remand proceeding and a pending related bankruptcy proceeding; and (3) transfer to the United States Treasury payments totaling \$27 million, conditioned on reinstatement of the remaining licenses and extension of the construction deadline for those licenses; and the closing of the transfer of control of FiberTower Corporation and FiberTower.²⁹

III. DISCUSSION

11. To receive a waiver of the June 1, 2012 substantial service deadline to which its licenses were subject, under the Commission's Rules, FiberTower must show that (1) the underlying purpose of the deadline 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 deadline would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁰

12. We find that this case presents a series of unique circumstances, which, when taken together, demonstrate that a waiver is in the public interest. *First*, under the terms of the Settlement Agreement, FiberTower has agreed to relinquish its pending claims with respect to all of its 24 GHz licenses. The Commission recently adopted rules permitting mobile operations in the 24 GHz band, which will facilitate use of the band for 5G and other advanced wireless services.³¹ With the return of all of FiberTower's 24 GHz licenses and the settlement of litigation, the 24 GHz band will be virtually clear of licenses and can be made available for initial licensing, enabling rapid deployment of 5G and next generation wireless services nationwide. *Second*, FiberTower has agreed to relinquish its pending claims with respect to a significant number of licenses in the 39 GHz band. This action will assist in rebanding the 39 GHz band, as required under the *Spectrum Frontiers Report and Order*, which is necessary prior to auction of the vacant and available licenses in the 39 GHz band.³² *Third*, as noted above, FiberTower has agreed to pay to the U.S. Treasury a total of \$27 million. This payment helps address potential concerns under Section 309(j) about undue enrichment of FiberTower with respect to licenses acquired at auction for which it has not yet demonstrated its compliance with Commission performance requirements, and also serves to put FiberTower in substantially the same position as the holder of the majority of the other licenses in this band, which agreed to make a similar payment to resolve certain enforcement proceedings concerning its compliance with such performance requirements.³³ *Fourth*, FiberTower agrees to end protracted litigation over the question of the extent to which FiberTower has satisfied these performance

²⁸ See Settlement Agreement at 1.

²⁹ A copy of the Settlement Agreement is attached as Appendix 3 to this *Memorandum Opinion and Order*.

³⁰ 47 C.F.R. § 1.925(b)(3).

³¹ *In the Matter of Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Second Report and Order, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, and Memorandum Opinion and Order, FCC 17-152 (Nov. 22, 2017) at paras. 15-42 (*Spectrum Frontiers Second Report and Order*).

³² *In the Matter of Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014, 8053-56 paras. 97-100 (2016) (*Spectrum Frontiers Report and Order*).

³³ *Straight Path Communications, Inc. Ultimate Parent Company of Straight Path Spectrum, LLC*, Order and Consent Decree, 32 FCC Rcd 284, 290-91, paras. 13-26 (EB 2017).

requirements, as well as related bankruptcy litigation. Ending the litigation will help to restore regulatory certainty concerning the status of licensing in the 24 and 39 GHz bands, including identifying unassigned spectrum that could be licensed under the new Upper Microwave Flexible Use Service rules, and permitting service to be deployed more efficiently and expeditiously in these bands.

13. While licensees must “meet a high hurdle at the starting gate”³⁴ in order to justify a waiver grant under Section 1.925 of the Commission’s rules, we find that burden has been met here. Based on these unique circumstances, and in light of the terms of the Settlement Agreement, we conclude that it is in the public interest to waive the June 1, 2012 substantial service deadline applicable to the reinstated 39 GHz licenses. We emphasize that our conclusion is based on the totality of the circumstances presented in this case. In light of the waiver grant, FiberTower is similarly situated to other incumbent licensees in the 39 GHz band. Thus, for these reinstated 39 GHz licenses, FiberTower will be subject to the new construction deadline adopted by the Commission in the *Spectrum Frontiers Report and Order* - June 1, 2024.³⁵ This deadline will allow FiberTower to focus on providing service under the new, more flexible, Upper Microwave Flexible Use Service rules. Accordingly, FiberTower will be required to meet the buildout requirements in Section 30.105 of the Commission’s rules for each of its licenses by June 1, 2024.

14. We will dismiss all the construction notifications filed by FiberTower as moot because FiberTower is either receiving relief from the Part 101 construction requirements (for the Reinstated 39 GHz Licenses) or is abandoning its request for relief (for the Abandoned Licenses). With respect to the Abandoned Licenses, we will take no further action as to the extension applications which were previously denied, we dismiss a pending renewal application³⁶, and we will dismiss the waiver request as moot. For the 39 GHz licenses for which we have granted a waiver, we direct the licensing staff of the Broadband Division to return those licenses to active status and grant the associated extension and waiver applications to the extent determined in this order and consistent with the Settlement Agreement. Finally, we direct FiberTower to file applications to cancel active, constructed licenses that it is abandoning pursuant to the Settlement Agreement.³⁷ We will condition our grant of the waiver on full compliance by FiberTower with the terms of the Settlement Agreement. Finally, we note that included in this waiver are 129 licenses that expired in 2017. Because the *FiberTower MO&O* declared those licenses terminated as of June 1, 2012, FiberTower could not file renewal applications for those licenses within the normal 90-day period prior to the expiration of the licenses.³⁸ To effectuate the reinstatement of these licenses, we will restore to them the balance of the 10-year term that remained at the time of cancellation.³⁹

15. On June 4, 2014, FiberTower filed an application for review of seeking review of the decision of the Division concluding that FiberTower had failed to demonstrate substantial service for 24 GHz DEMS licenses WMT336, WMT348, and WPNG641.⁴⁰ Pursuant to the Settlement Agreement,

³⁴ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

³⁵ *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8091, para. 220.

³⁶ See Application file number 0007887188, which seeks renewal of the license for Station WPNG953. WPNG953 is among the Abandoned Licenses.

³⁷ Appendix 4 lists the licenses for which FiberTower shall file cancellation applications.

³⁸ See 47 C.F.R. § 1.949(a) (renewal applications must be filed prior to license expiration, and no earlier than 90 days prior to license expiration).

³⁹ For example, the license for Station WPNE744 was scheduled to expire on June 4, 2017. For five years and three days (from June 1, 2012 to June 4, 2017) the license was considered terminated and not in good standing. We will return the license for Station WPNE744 to active status and restore its expiration date by extending it for a period of five years and three days from the release date of this *Order on Remand and Memorandum Opinion and Order*.

⁴⁰ Application for Review, FiberTower Corporation (filed June 4, 2014).

FiberTower has agreed to withdraw that application for review. We also condition our grant on the timely filing of a request to withdraw the application for review in compliance with the Settlement Agreement.

IV. CONCLUSION AND ORDERING CLAUSES

16. FiberTower has justified a waiver by demonstrating that in view of the unique circumstances of this case, the application of the June 1, 2012 substantial service deadline to the Reinstated 39 GHz Licenses would be contrary to the public interest.

17. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925 the requests for waivers of the June 1, 2012 deadline to demonstrate substantial service (File No. 0005207187 *et seq.*) filed by FiberTower Spectrum Holdings LLC on May 14, 2012 ARE GRANTED with respect to the licenses listed in Appendix 1 and ARE DISMISSED AS MOOT with respect to the licenses listed in Appendix 2.

18. 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 1.925 of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the licensing staff of the Broadband Division SHALL REINSTATE the licenses listed in Appendix 1 to active status, REINSTATE the applications for extension or waiver of the June 1, 2012 substantial service deadline listed in Appendix 1, and GRANT those applications.

19. 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 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the following condition shall be placed on the grant of the applications for extension of time or waiver listed in Appendix 1:

Grant of this application shall be conditioned upon full compliance by FiberTower Corporation and FiberTower Spectrum Holdings, LLC with the Settlement Agreement between those parties and the Federal Communications Commission dated January 24, 2018.

20. 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 1.946(d) of the Commission's Rules, 47 C.F.R. § 1.946(d), that the pending construction notifications listed in Appendices 1 and 2 SHALL BE DISMISSED as moot.

21. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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