

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In re Applications of

AT&T Mobility Spectrum LLC and  
FiberTower Corporation Seek FCC Consent  
to the Transfer of Control of 24 GHz and 39  
GHz Licenses

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) ULS File Nos. 0007652635 and 0007652637  
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**REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION**

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April 13, 2017

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**REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION**

Competitive Carriers Association (“CCA”)<sup>1</sup> hereby respectfully replies to the opposition jointly submitted by FiberTower Corporation (“FiberTower”) and AT&T Mobility Spectrum LLC (“AT&T”) (collectively, the “Applicants”)<sup>2</sup> related to the above-referenced file numbers (the “Opposition”). CCA reiterates its request that the Federal Communications Commission (“FCC” or “Commission”) auction, as soon as possible, FiberTower’s 650 licenses that previously terminated (the “Terminated Licenses”). In addition to the public interest benefits of

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<sup>1</sup> CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

<sup>2</sup> Joint Opposition of AT&T Mobility Spectrum LLC and FiberTower Corporation, ULS File Nos. 0007652635 & 0007652637 (filed Apr. 6, 2017) (the “Opposition”). *See also In the Matter of AT&T Mobility Spectrum LLC and FiberTower Corporation Seek FCC Consent to the Transfer of Control of 24 GHz and 39 GHz Licenses*, DA 17-261, Public Notice, ULS File Nos. 0007652635 and 0007652637 (rel. March 16, 2017) (“*Public Notice*”).

an auction, the Applicants misrepresent the facts and the law associated with FiberTower's 650 Terminated Licenses. For the benefit of consumers and the United States Treasury, the FCC should promptly auction the Terminated Licenses.

### **SUMMARY**

The decision with respect to this transfer should be fairly simple. Nothing in Applicants' nearly 40-page Joint Opposition changes the fact that the Terminated Licenses were unconstructed by FiberTower at its renewal deadline, and thus terminated automatically by operation of law. First, Applicants manipulate facts and misapply associated law to augment their claims. Applicants likewise apply to the proposed transaction a tortured reading of the *SF Report and Order* that does not support a renewal of the Terminated Licenses. Finally, the Applicants' argument that likens this transaction to the benefits (but not the obligations) of the *Straight Path Order* similarly fails. The FCC should auction the Terminated Licenses after years of lying fallow for the benefit of consumers, the economy, and service providers alike.<sup>3</sup>

### **DISCUSSION**

#### **I. THE TERMINATED LICENSES WERE UNCONSTRUCTED BY THEIR RENEWAL DATE, AND TERMINATED BY LAW.**

Applicants have requested special relief in connection with this transaction to induce a windfall for both parties, in lieu of the public interest. Indeed, the harms associated with resuscitating the Terminated Licenses are all contrary to the public interest; the Terminated

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<sup>3</sup> Applicants argue that CCA's comments should be treated as a Petition to Deny. CCA's filing was properly characterized as "Comments" in response to Applicants' misplaced request to reinstate licenses that should have been properly terminated long ago; i.e., the FiberTower Transaction is completely separate from FiberTower's efforts to resuscitate the Terminated Licenses. There is no reason for the Terminated Licenses to be resuscitated via this transaction simply because AT&T gambled on a risky transaction. Nonetheless, CCA demonstrated its interest in its Comments and the substantive allegations of fact relied upon are those of which official notice may be taken.

Licenses were unconstructed as of their renewal dates, and therefore automatically terminated by operation of law.<sup>4</sup>

As noted, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) held that FiberTower failed to show that “the Commission’s interpretation of the substantial service requirement is inconsistent with the regulatory text or the original rulemakings,”<sup>5</sup> thus confirming the Commission’s interpretation of substantial service. This was a simple, direct remand to the Commission. Yet despite facts, Applicants attempt to complicate the proceeding by repeating failed arguments and highlighting irrelevant “new” facts that should have no effect on the Commission’s current decision.

FiberTower’s litany of arguments attempting to justify a further extension or waiver of the substantial service requirements were all rejected previously by the Wireless Telecommunications Bureau (“Bureau”) in 2012. The Bureau also denied FiberTower’s extension requests,<sup>6</sup> and rejected FiberTower’s laundry list of arguments to support its lack of

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<sup>4</sup> Applicants argue that the Commission may not properly consider the suggestion that a transfer of licenses be blocked to enable someone else to acquire the licenses. Opposition at 6. As noted, CCA is not advocating against a transfer of active licenses to AT&T – rather, it is suggesting that the Terminated Licenses remain properly terminated; an issue that should be – and is – irrelevant to Applicants’ proposed transaction. In any event, Section 310(d) of the Communications Act is inapplicable here. The Commission has not been presented with any “person other than” AT&T for the proposed transaction. Rather, this is a simple matter of whether resuscitating the Terminated Licenses would be in the public interest. As noted herein, it is not.

<sup>5</sup> *FiberTower Spectrum Holdings, LLC v. F.C.C.*, 782 F.3d 692, 699 (2015).

<sup>6</sup> Applications for Extension of Time to Construct 24 GHz Digital Electronic Message Service (DEMS) Licenses; 345 Applications for Extension of Time to Construct 39 GHz Economic Area Licenses; 250 Applications for Extension of Time to Construct 39 GHz Rectangular Service Areas (RSA) Licenses; File Nos. 0005207557, et. seq., 0005207187, et. seq., 0005207571 et seq., 27 FCC Rcd. 13562, ¶¶ 24, 27 (rel. November 7, 2012) (“Bureau Denial Order”) (the Bureau noted that “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.”).

construction of most of its licenses – pointing out that FiberTower and others were able to procure equipment and meet substantial service for numerous other licenses in the 24 GHz and 39 GHz bands in a timely fashion.<sup>7</sup> The full Commission affirmed the Bureau’s conclusions upon consideration of FiberTower’s Application for Review<sup>8</sup> and Petition for Reconsideration.<sup>9</sup>

Despite Applicants’ claims, FiberTower has not met the required heavy burden to receive a waiver or extension of the construction deadline for the Terminated Licenses. At best, FiberTower successfully constructed less than 10% of its licenses, an extremely low proportion of its license portfolio, and certainly not enough to meet the Commission’s high standard for waiver.

What’s more, Applicants are unable to reasonably cite to relevant precedent to justify their claim.<sup>10</sup> In fact, past precedent dictates that the Commission rejects Applicants’ request. For example, in a previous case a spectrum licensee had made significant progress in building out the majority of its licenses (64%) prior to its construction deadline *despite* one of its main business partners suffering a significant health issue in the time leading up to their extension request.<sup>11</sup> Here, FiberTower failed to build out the vast majority of its licenses, and likewise failed to make significant progress in doing so – despite resources and access to equipment. Not only do the Applicants fail to address the central point of the D.C. Circuit’s remand, they also

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<sup>7</sup> *Id.* at ¶¶ 25-27.

<sup>8</sup> *In the Matter of FiberTower Spectrum Holdings, LLC*, Memorandum Opinion and Order, 28 FCC Rcd. 6822 (2013) (“Commission Denial Order”).

<sup>9</sup> *In the Matter of FiberTower Spectrum Holdings, LLC*, Order on Reconsideration, 29 FCC Rcd. 2493 (2014) (“Reconsideration Order”).

<sup>10</sup> *See* 2 Lightspeed LP, File Nos. 0005222510-0005222513 (July 23, 2012).

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

fail to refute that the Terminated Licenses were not constructed by their renewal dates, and thus automatically terminated.

Moreover, as previously noted, allowing the Terminated Licenses to be resurrected for Applicants' benefit would mitigate a key component of Chairman Pai's Digital Empowerment Agenda ("Agenda"): sparking mobile broadband deployment via extensive spectrum license buildout. Granting renewal of unconstructed licenses would ignore years of Commission precedent, legal precedent and undermine the Chairman's broadband Agenda. An auction of the spectrum, on the other hand, would produce enormous public interest benefits for carriers and consumers alike.

## **II. THE TERMINATED LICENSES MUST BE AUCTIONED PURSUANT TO STATUTE AND THE PUBLIC INTEREST.**

As previously explained, the Terminated Licenses are a gateway to finally use unconstructed spectrum in the 39 GHz band (and, potentially in the 24 GHz band as well). Auction of FiberTower's Terminated Licenses would ensure this resource is effectively utilized, and allow an array of carriers the means to provide next generation services to consumers. An auction also would produce funds for the United States Treasury from the spectrum sale, an essential need for deficit reduction.<sup>12</sup> Section 309(j) of the Communications Act compels the Commission to auction the Terminated Licenses via a system of competitive bidding. The Applicants' request for a transfer of control of the Terminated Licenses violates this statutory mandate and should be rejected.

Similarly, Applicants marginalize the Commission's intent in the *SF Report and Order*, by noting that the Commission has already determined that it is more important to convert

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<sup>12</sup> In line with the FCC's broadband Agenda, deficit reduction is a more fortuitous circumstance than rewarding an entity that has failed to meet its construction obligations.

incumbent licenses to Upper Microwave Flexible Use Service licenses than to reacquire them.<sup>13</sup>

While CCA agrees that licensees who actually constructed their licenses should benefit from the new mobile regime in the 39 GHz band, certain conditions also must apply.<sup>14</sup> The FCC must promote policies that allow the Commission to meet its goal of effectively utilizing these bands without wasting valuable spectrum resources, including those of legitimate incumbent licensees. And, though Applicants gloss over this critical point, the Terminated Licenses already terminated and cannot be considered incumbent licenses. Instead, these Terminated Licenses should be auctioned in line with FCC precedent and legal authority.

As noted, an auction would provide the vehicle for a multitude of carriers to deploy next generation services, and also would raise significant proceeds for the United States Treasury and for deficit reduction, both significant public interest benefits. Indeed, AT&T has recently demonstrated the value of mmW licenses by agreeing to pay Straight Path \$1.6 billion for its mmW portfolio earlier this week.<sup>15</sup> While the FCC will receive over \$300 million pursuant to the *Straight Path Order*, the overall price tag is a benchmark that demonstrates that the United

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<sup>13</sup> Opposition at 16, fn 50.

<sup>14</sup> See Petition for Reconsideration of Competitive Carriers Association, GN Docket No. 14-177 *et al.*, at 3, 9 (filed Dec. 14, 2016). While CCA applauds the FCC's progress in releasing the *SF Report and Order*, CCA again requests that the Commission reconsider its decision to subdivide incumbent local multipoint distribution service licenses. Changing the 28 GHz license size from Basic Trading Area to county, and changing the 39 GHz license size from Economic Area to Partial Economic Area, will subject incumbent licensees to costly, unexpected service requirements that may be unachievable for incumbent licensees, especially where the incumbent is a rural provider. As with the proposed transfer of FiberTower's Terminated Licenses, the FCC must dismiss dangerous precedent that could stifle innovation and investment in the future, contravening the public interest.

<sup>15</sup> See Scott Moritz, *AT&T Buys Straight Path in \$1.6 Billion Deal for 5G Arsenal*, BLOOMBERG TECHNOLOGY (Apr. 10, 2017), available at <https://www.bloomberg.com/news/articles/2017-04-10/at-t-to-acquire-straight-path-in-deal-valued-at-1-6-billion>.



States Treasury will raise more essential funds for taxpayers' benefit if the FCC auctions this spectrum. Reinstating the Terminated Licenses and allowing the FiberTower Transaction to proceed as proposed would negate these public interest benefits – with all funds generated from this valuable spectrum going to an entity that failed to meet their FCC construction obligations, and another entity, AT&T, acquiring licenses without having to competitively bid for them in an auction. This outcome would be fiscally irresponsible.

### **III. THE *SF Report and Order* DOES NOT SUPPORT A RESUSCITATION OF THE TERMINATED LICENSES.**

What's more, the *SF Report and Order* authorizes the use of mobile operations in the 39 GHz band, which vastly expands rights associated with 39 GHz licenses – making them considerably more valuable.<sup>16</sup> The Commission also applies this mobile allocation to existing, incumbent licensees in the 39 GHz band. Given these benefits, it is not surprising that Applicants consistently argue that the *SF Report and Order* compels the reinstatement of the Terminated Licenses, for Applicants benefit. However, nothing stated in the *SF Report and Order* coincides with this assertion, but instead, the *SF Report and Order* highlights the importance of auctioning 5G spectrum. In reality, if the Commission accepts Applicants' argument with respect to the *SF Report and Order*, it would seemingly have to reinstate all licenses that the Commission previously terminated for failure to meet license construction requirements – effectively diluting efforts to expand mobile broadband for the benefit of consumers and the economy. Accordingly, the *SF Report and Order* does not justify reinstatement of the Terminated Licenses.

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<sup>16</sup> *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services et al.*, GN Docket No. 14-177 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, ¶ 76 (2016) ("*SF Report and Order*").

#### IV. **THE *STRAIGHT PATH ORDER* DOES NOT COMPEL A WINDFALL FOR APPLICANTS.**

Applicants argue that the *Straight Path Order* compels the reinstatement of the Terminated Licenses, but without the significant penalties required of Straight Path.<sup>17</sup>

As an initial matter, Applicants overemphasize the importance of Straight Path's licenses on the Commission's previous decisions regarding the Terminated Licenses. The Straight Path licenses were referenced in a minor fashion in the Bureau Denial Order and the two FCC orders denying FiberTower's waiver/extension request, and were not the focal point for multiple determinations that FiberTower's Terminated Licenses did not meet substantial service.<sup>18</sup>

As important, the Commission in its Reconsideration Order specifically explained that Straight Path's situation was not a main consideration related to the termination of the Terminated Licenses. The Commission stated that nothing related to the buildout of Straight Path (then IDT) "contradicts or calls into question the strong record evidence" that FiberTower did meet substantial service for some of its licenses and thus was not precluded from meeting such requirements for its other licenses.<sup>19</sup> Indeed, FiberTower met its substantial service requirements for some of its licenses and made a business decision not to do so with others.<sup>20</sup>

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<sup>17</sup> Opposition at 12-13.

<sup>18</sup> The Commission relied on numerous rationales for the denial, including that FiberTower's failure to construct was caused by factors within its control; (2) FiberTower did not justify a waiver of the substantial service requirements; (3) antecedent activities were not an appropriate basis for substantial service; and (4) that suitable equipment was available for construction and FiberTower made a business decision not to construct. Commission Denial Order ¶ 16.

<sup>19</sup> Reconsideration Order ¶ 15.

<sup>20</sup> See, e.g., Bureau Denial Order ¶ 33 (concluding that FiberTower's failure to build was a "business decision" within its control and therefore denying the extension request); Commission Denial Order ¶ 22-23 (agreeing with the Bureau that FiberTower's business  
(continued...))

The Commission should not reward this choice, lest it seeks to incent other carriers to make similar business decisions in the hope of selling unused spectrum for a significant profit.

Further, FiberTower has been blaming Straight Path for its current plight for over five years – arguments the Bureau and Commission dismissed in 2012, 2013, and 2014. Indeed, the Commission noted in its Reconsideration Order that “the evidence presented by FiberTower about IDT’s [Straight Path’s] buildout is irrelevant to the key question of whether FiberTower was faced with a stop-gap/no-build choice” and that Straight Path’s business decision not to construct “did not turn on the buildout results of another licensee’s efforts.”<sup>21</sup> No facts have changed to alter this determination.

Regardless, FiberTower’s and Straight Path’s situations are distinguishable. First, Commission actions taken against Straight Path were in the context of an enforcement proceeding, and involved a negotiation between the Enforcement Bureau and Straight Path, not a transfer of control proceeding.<sup>22</sup> AT&T’s attempted purchase of the Terminated Licenses is not a justification for them to be reinstated.<sup>23</sup>

Second, the fact patterns between FiberTower’s and Straight Path’s situations are not nearly as similar as Applicants would have the Commission believe. Indeed, the Straight Path

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(...continued)

decision to not construct “is clearly not a cause outside FiberTower’s control and therefore cannot form the basis for an extension.”).

<sup>21</sup> Reconsideration Order ¶ 15.

<sup>22</sup> *In the Matter of Straight Path Communications Inc., Ultimate Parent Company of Straight Path Spectrum, LLC*, Order and Consent Decree, DA 17-40 (rel. Jan. 12, 2017) (“*Straight Path Order*”).

<sup>23</sup> Indeed, including such a request in the context of this proceeding raises potential anti-trafficking concerns with respect to the Terminated Licenses. *See* M&M Brothers, LLC Petition To Deny Or To Place Conditions On The Grant Of The Transfer Applications, ULS File Nos. 0007652635 & 0007652637, at 9 (filed Mar. 30, 2017).

licenses met their substantial service requirements and nothing in the Straight Path consent decree or otherwise contradict this key fact.<sup>24</sup> FiberTower had every opportunity to meet its substantial service requirements but knowingly failed to do so – and the Commission has repeatedly declined to grant waivers or extensions based on business decisions.<sup>25</sup> Furthermore, the D.C. Circuit’s remand to the Commission is quite narrow, and should be properly limited to an evaluation of the additional 42 licenses referenced by the Court.

Lastly, when transferring its licenses, Straight Path agreed to (1) voluntarily cancel 196 of its 39 GHz authorizations and (2) pay \$15 million plus 20% of the proceeds of any sale to the United States Treasury. Applicants unbelievably argue that if the Terminated Licenses are reinstated, then no forfeiture penalties should apply. Despite the facts and law at hand, if AT&T were to inherit FiberTower’s Terminated Licenses, AT&T likewise must accept the penalties

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<sup>24</sup> The alleged claims against the Straight Path licenses had to do with the potential removal of equipment and the implication of the Commission’s discontinuance of service rules – not substantial service requirements attached to the renewal of licenses. Oddly enough, the Applicants ignore this critical distinction.

<sup>25</sup> See, e.g., *Redwood Wireless Minnesota, LLC, Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); *Eldorado Communications LLC, Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was a business decision within its control); *Bristol MAS Partners, Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was a business decision); *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); *Business Radio Communications Systems, Inc.*, 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); *Texas Two-Way, Inc.*, 98 FCC 2d 1300 (1984), *aff’d sub nom., Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision). In addition, Applicants argue that FiberTower spent significant amounts of money related to its buildout – arguments considered and rejected previously by the Commission – and not remanded for review by the D.C. Circuit.

associated with these licenses. Additionally, the Commission should consider imposing a fine, late fees, or interest for the years the Terminated Licenses have lied fallow. To be clear, Applicants argue that the situation related to the Terminated Licenses is significantly similar to the Straight Path licenses in all aspects except for how or when forfeitures and fines would apply. Applicants are cherry-picking arguments for past precedent without appropriate context. At its core, the *Straight Path Order* does not compel reinstatement of the Terminated Licenses, and likewise does not suggest that these licenses should be transferred without appropriate penalties.

Coincidentally, AT&T announced this week that it is purchasing Straight Path for \$1.6 billion dollars.<sup>26</sup> Not only is AT&T trying to further corner the market on 39 GHz spectrum, but the FCC will be receiving approximately \$320 million dollars as forfeiture pursuant to the *Straight Path Order*. For AT&T to argue that no penalty should apply in the unlikely event that the Terminated Licenses are resuscitated is simply disingenuous. In addition, this additional purchase belies AT&T's claims that no anti-competitive harm will result from this transaction. Indeed, the Commission must closely examine the potential combined Straight Path/FiberTower/AT&T holdings to ensure that no anticompetitive harm will result.

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<sup>26</sup> See Ciara Linnane, *AT&T to Acquire Straight Path Communications in \$1.6 Billion Deal*, MARKETWATCH (Apr. 10, 2017), available at <http://www.marketwatch.com/story/att-to-acquire-straight-path-communications-in-16-billion-deal-2017-04-10>.

## **CONCLUSION**

For the foregoing reasons, the Commission should reject the pending renewal requests for the Terminated Licenses, and promptly auction these 650 FiberTower licenses.

Respectfully Submitted,

/s/ Rebecca Murphy Thompson

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April 13, 2017

## CERTIFICATE OF SERVICE

I, Courtney Neville, hereby certify that on the 13th day of April, 2017, I caused a true and correct copy of the foregoing Reply to be sent by electronic mail to:

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/s/ Courtney Neville

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