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January 15, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: DIRECTV Enterprises, LLC, Application for Modification of Earth
Station License, File No. SES-MOD-20121212-01095

Dear Ms. Dortch,

FiberTower Corporation hereby enters its appearance in the above captioned proceeding, a “major modification” application in which DIRECTV seeks to add authority to operate on frequencies licensed to FiberTower, which licenses are subject to federal bankruptcy court and pending FCC proceedings.¹ By virtue of this filing, this proceeding is now restricted under the Commission’s *ex parte* rules.²

While the Commission assesses whether the DIRECTV Application is acceptable for filing and warrants the issuance of a public notice,³ FiberTower requests that the Commission consider the information contained in the enclosed filing, entitled “Motion to Strike DIRECTV’s Opposition to Stay,” which FiberTower has made in another Commission proceeding, and which details the relationship of the DIRECTV Application to the FiberTower matters noted above.

FiberTower reserves the right to submit a substantive response to the DIRECTV Application at a future date.

¹ See *FiberTower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of the Substantial Service Requirements*, Memorandum Opinion and Order, File Nos. 0005207557 *et seq.*, File Nos. 0005207187 *et seq.*, and File Nos. 0005207571 *et seq.*, (WTB Nov. 7, 2012).

² See 47 C.F.R. §§ 1.1202(d), 1.1208.

³ See 47 C.F.R. § 25.151.

Respectfully submitted,

/s/

Joseph M. Sandri, Jr.
FiberTower Corporation

cc: Sean Lev, General Counsel, FCC
Mindel De La Torre, Chief, International Bureau, FCC
Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC
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William M. Wiltshire, Counsel for DIRECTV
Michael Nilsson, Counsel for DIRECTV

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
FiberTower Corporation)	
Request for Extension of Time or, in the)	File No. 0005207557 <i>et al.</i>
Alternative, Limited Waiver of Substantial)	
Service Requirement)	

MOTION TO STRIKE DIRECTV’S OPPOSITION TO STAY

FiberTower Corporation hereby moves to strike the Opposition to Emergency Motion for Stay filed by DIRECTV, LLC on January 10, 2013 (the “Opposition”).

BACKGROUND

On November 7, 2012, the Wireless Telecommunications Bureau issued an order that effectively resulted in the termination of 94 of FiberTower’s 24 GHz licenses and 595 of FiberTower’s 39 GHz licenses.¹ On December 5, 2012, FiberTower filed an emergency motion to stay the effectiveness of that order until FiberTower has exhausted all of its rights of appeal.² As an initial step in that appeal process, FiberTower filed an Application for Review, asking the Commission to review the Order, on December 7, 2012.³

¹ *FiberTower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of the Substantial Service Requirements*, Memorandum Opinion and Order, File Nos. 0005207557 *et seq.*, File Nos. 0005207187 *et seq.*, and File Nos. 0005207571 *et seq.*, (WTB Nov. 7, 2012).

² *See* Emergency Motion For Stay, *FiberTower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of the Substantial Service Requirements*, File No. 0005207557 *et al.*, (filed Dec. 5, 2012).

³ *See* Application For Review, *FiberTower Spectrum Holdings LLC Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of the Substantial Service Requirements*, File No. 0005207557 *et al.*, (filed Dec. 7, 2012).

The 25.05-25.25 GHz segment of spectrum covered by the 24 GHz licenses is governed by Commission rules that expressly protect terrestrial licensees (such as FiberTower) from the impact of earth station transmitters. More specifically: (i) Commission rules do not allow earth station transmitters to be licensed in this spectrum segment inside a 24 GHz terrestrial license's authorized service area,⁴ and (ii) even outside those terrestrial service areas, Commission rules require that all proposed earth station transmitters in this spectrum segment be coordinated with all potentially affected 24 GHz terrestrial licensees.⁵ In other words, the bundle of rights that a 24 GHz terrestrial licensee holds includes the right to exclude 25.05-25.25 GHz earth station transmitters from its service areas, as well as the right to ensure that any such earth station transmitters outside its service areas do not cause interference or otherwise prevent the 24 GHz licensee from fully enjoying the benefits of its spectrum license throughout its entire authorized service areas (the "License Priorities").

One of FiberTower's 24 GHz licenses provides spectrum rights in the Denver Standard Metropolitan Statistical Area.⁶ On December 12, 2012, DIRECTV filed an application that seeks to modify its current authorization for an earth station in Denver to also use frequencies governed by FiberTower's 24 GHz license—frequencies for which DIRECTV could not obtain

⁴ 47 C.F.R. § 25.203(l) ("Applicants for feeder link earth station facilities operating in the 25.05-25.25 GHz band may be licensed only in Economic Areas where no existing FS licensee has been authorized . . ."). FiberTower is an "FS" (or fixed service) licensee at 24 GHz and in the 25.05-25.25 GHz segment more specifically.

⁵ *Id.* ("Applicants for feeder link earth station facilities operating in the 25.05-25.25 GHz band . . . shall coordinate their operations with 24 GHz fixed service operations if the power flux density of their transmitted signal at the boundary of the fixed service license area is equal to or greater than -114 dBW/m² in any 1 MHz.").

⁶ *See* Call Sign WMT329.

authorization as long as FiberTower remained licensed.⁷ Put another way, DIRECTV is attempting to divest FiberTower of its License Priorities. DIRECTV in fact seeks a waiver of the Commission's rules specifically because of uncertainty about FiberTower's rights, apparently in light of FiberTower's pending bankruptcy proceeding, the Bankruptcy Court's orders in that proceeding, and FiberTower's pending appeal before the Commission.⁸

DISCUSSION

I. DIRECTV'S OPPOSITION IS UNTIMELY UNDER COMMISSION RULES

DIRECTV's Opposition is almost a full month late. Under Section 1.45(d) of the Commission's rules, oppositions to FiberTower's December 5, 2012 stay request were due on December 12, 2012.⁹ Commission policy is to strictly enforce this time limit "in view of the parties' need for prompt action on such requests."¹⁰ Thus, the Commission will strike from the record oppositions to motions for stay that are filed *even one day after the deadline in its Rules*.¹¹ DIRECTV filed its opposition nearly *a full month* after the deadline—and it has offered no justification whatsoever for its extreme tardiness. Although not mentioned in its Opposition, DIRECTV clearly was aware of the FiberTower Emergency Motion for Stay over a month ago, as DIRECTV cited to it in its December 12, 2012 application seeking to operate on FiberTower's

⁷ See DIRECTV Enterprises, LLC, FCC Application for Space and Earth Station Modification, File No. SES-MOD-20121212-01095 (filed Dec. 12, 2012).

⁸ *Id.*, Ex. B (Waiver Request).

⁹ 47 C.F.R. § 1.45(d) ("oppositions to a request for stay of any order ... shall be filed within 7 days after the request is filed").

¹⁰ *Price Cap Performance Review for Local Exchange Carriers*, Order, 10 FCC Rcd. 11991, ¶ 3 (1995) (internal quotations omitted) (striking MCI opposition to stay filed one day after deadline).

¹¹ *Id.*; see also *InterMedia Partners; Petition for Reconsideration*, Order on Reconsideration and Rate Order, 13 FCC Rcd. 10180, ¶ 30 (1998) (rejecting opposition to stay because it was not timely filed).

licensed frequencies in Denver.¹² The Commission’s deadlines would become meaningless if all filers acted in this manner.¹³ The Commission therefore should strike DIRECTV’s Opposition from the record.

II. DIRECTV’S ACTIONS CONTRAVENE THE BANKRUPTCY PROCESS

DIRECTV’s Opposition, coupled with DIRECTV’s recently-filed 24 GHz earth station application—both of which are aimed at divesting FiberTower of its License Priorities—is an unauthorized attempt by DIRECTV to end-run the efforts of the Bankruptcy Court specifically designed to avoid a situation whereby FiberTower’s license rights may be impaired, or otherwise have to be recovered from third parties in the future.¹⁴ For that reason, the Bankruptcy Court has enjoined, among other things, “any action with respect to the FCC licenses that would impair or otherwise adversely alter Debtors’ rights...”¹⁵ The Bankruptcy Court explained that its decision was intended “to preserve the property of Debtors’ bankruptcy estate” until the Commission’s

¹² See DIRECTV Enterprises, LLC, FCC Application for Space and Earth Station Modification, File No. SES-MOD-20121212-01095 (filed Dec. 12, 2012), Ex. B (Waiver Request) at 2, n.5.

¹³ Cf. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (“The *Accardi* doctrine [*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)] requires federal agencies to follow their own rules ... Courts, of course, have long required agencies to abide by internal, procedural regulations.”) (internal quotation and citation omitted).

¹⁴ See Transcript, *In re: FiberTower Network Services Corp.*, No. 12-44027-dml (Bankr. N.D. Tex. Sept. 12, 2012), at 151 (“I am, however, going to grant an injunction under Section 105 that would be narrowly tailored to insure that the debtors’ ability to appeal any determination by the FCC, that the licenses have or should be terminated will be protected such that we will not have a situation as Mr. Randolph [counsel for FCC] described in *NexWave* [sic] where the licenses had to be recovered from parties who bought them after the fact.”).

¹⁵ *FiberTower Network Services Corp. v. FCC*, Order, Dkt. 40, Adversary No. 12-4104 (Bankr. N.D. Tex. Sept. 27, 2012), at 2 (the “Injunction”).

orders become final and non-appealable,¹⁶ and to “ensure that Debtors do not wrongfully lose property of potentially substantial value to creditors, the protection of which is essential to the reorganization process.”¹⁷

Rights under the 24 GHz and 39 GHz licenses—including the License Priorities—constitute part of the “property of potentially substantial value to creditors.”¹⁸ DIRECTV correctly acknowledges that one element of FiberTower’s 24 GHz license rights is superiority over any potential use of the same spectrum by DIRECTV.¹⁹ The spectrum rights provided by FiberTower’s licenses (which include the License Priorities) unquestionably constitute part of the value of those licenses and therefore are an important component of the bankruptcy estate. Put simply, a 24 GHz license under which FiberTower has priority usage rights of the licensed spectrum, and under which other potential users of the spectrum must protect FiberTower from interference, is exactly the kind of right (as part of a bundle of rights) that the Bankruptcy Court’s Injunction was designed to protect. Were it otherwise, and were the Commission to grant DIRECTV’s request, FiberTower’s existing authorized service areas could become full of “Swiss cheese” holes created by those newly authorized spectrum uses, and FiberTower would be compelled to “work around” the spectrum rights of any newly licensed entities that may be authorized in FiberTower’s service areas. Or, stated another way, the *status quo* could be changed while FiberTower appeals the Commissions rulings, despite the Bankruptcy Court’s entry of the Injunction, designed to protect the *status quo*.

¹⁶ *FiberTower Network Services Corp. v. FCC*, Memorandum Opinion, Dkt. 46, Adversary No. 12-4014 (Bankr. N.D. Tex. Oct. 11, 2012), at 20 (the “Memorandum Opinion”).

¹⁷ *Id.* at 22.

¹⁸ *Id.*; *cf. L. B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798 (D.C. Cir. 1948) (“a broadcast license confers a private right...”).

¹⁹ *See* Opposition at 5; 47 C.F.R. § 25.203(l); *see also supra* at 2-3.

DIRECTV admits that, “to the extent FiberTower’s . . . licenses are deemed terminated, the locations available for [DIRECTV’s] earth stations increases [sic] significantly.”²⁰ Moreover, in a separate proceeding, DIRECTV is seeking Commission authority to operate an earth station transmitter right in the middle of one of FiberTower’s 24 GHz licensed service areas, and on 24 GHz frequencies reserved for FiberTower’s use, even though FiberTower has not yet exhausted its right to appeal Commission decisions with respect to the purported termination of its 24 GHz licenses. FiberTower, as demonstrated in the record, has diligently sought to continue to develop those licenses, including WMT329.²¹ DIRECTV’s legal “theory” is that all of FiberTower’s license rights ceased by virtue of the Wireless Telecommunications Bureau’s Order, and that another Bureau of the Commission, the International Bureau, thus is now free to effectively award those spectrum rights to DIRECTV.²² Clearly, however, that is not the case, given the scope and purpose of the Bankruptcy Court’s injunction, wherein it specifically enjoined (i) any transfer, assignment or sale of FiberTower’s licenses to any entity other than FiberTower or its assignee, and (ii) the taking of any action with respect to FiberTower’s licenses that would impair or adversely affect FiberTower’s rights before the Commission on, or appeal of, the Commission’s decision with respect to FiberTower’s licenses.²³

In FiberTower’s view, DIRECTV’s actions directly threaten the Bankruptcy Court process and interfere with the Injunction. Any alteration of spectrum rights in the areas covered

²⁰ Opposition at 5.

²¹ *Supra* at footnotes 1-3.

²² See DIRECTV Enterprises, LLC, FCC Application for Space and Earth Station Modification, File No. SES-MOD-20121212-01095 (filed Dec. 12, 2012), Ex. B (Waiver Request) at 1-2.

²³ Injunction at 2.

by FiberTower’s 24 GHz licenses would “adversely alter Debtors’ rights”²⁴ and would cause FiberTower and its creditors to “wrongfully lose property of potentially substantial value to creditors, the protection of which is essential to the reorganization process.”²⁵ A situation where a new party effectively acquires some or all of the spectrum usage rights covered by FiberTower’s 24 GHz licenses is precisely the sort of interim harm to the bankruptcy estate that the Bankruptcy Court intended to prevent in its September 27, 2012 Injunction. In fact, the Commission has acknowledged that application of its rules and policies would preclude the full restoration of FiberTower’s spectrum rights in such a case:

“[W]e anticipate that additional 24 GHz FS systems may be authorized subsequent to future Commission action. Such systems locating near an authorized 17/24 GHz BSS feeder link earth station may not claim protection from interference from the feeder link earth station’s transmissions, provided that these transmissions are compliant with our rules. Rather, future 24 GHz FS applicants will be required to take into account the transmissions from the previously authorized earth station when considering system designs, including the choice of location for its license area.”²⁶

The types of legal maneuvering in which DIRECTV is engaging—or which may be attempted by others that have no cognizable interest in FiberTower or its bankruptcy estate—are precisely why FiberTower was compelled to seek an injunction from the Bankruptcy Court, and why it now seeks a stay from this Commission. FiberTower believes that the factual circumstances and policy arguments underlying its Application for Review provide a compelling basis for the full Commission to reverse the Wireless Telecommunications Bureau’s order. FiberTower looks forward to working with the Commission to develop a plan that would allow FiberTower to deploy its authorized 24 GHz and 39 GHz facilities on a timely basis, in a manner

²⁴ Injunction at 2.

²⁵ Memorandum at 20.

²⁶ See *Broadcasting-Satellite Service*, 22 FCC Rcd. 8842, at ¶ 128 (2007).

