EXHIBIT A

PART 1 of 3

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed October 11, 2012

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
FIBERTOWER NETWORK SERVICES CORP., ET AL., DEBTORS.	§	
	§	
	§	CHAPTER 11
FIBERTOWER NETWORK SERVICES CORP., ET AL., DEBTORS.	§	CASE NO. 12-44027-DML-11
	§	JOINTLY ADMINISTERED
V.	§	
	§	
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.	§	ADVERSARY NO. 12-4104
	§	

MEMORANDUM OPINION

Before the court is *Debtors' Emergency Motion (I) To Enforce Automatic Stay Against the Federal Communications Commission or, In the Alternative, (II) For Injunctive Relief Barring the Actual Cancellation of the Debtors' Spectrum Licenses Until Such Time As a Final,*

Non-Appealable Order Has Been Entered In Respect of Cancellation of the Licenses (the "Motion") at docket no. 2,[1] filed in the above-captioned adversary proceeding[2] by Fibertower Network Services Corporation *et al.*[3] (collectively, "Debtors"). By the Motion, Debtors ask that the court either (1) determine that the automatic stay of section 362(a) of the Bankruptcy Code (the "Code")[4] prevents certain actions by the Federal Communications Commission (the "Commission" or "Defendant"), which will be described below, or (2) stay the Commission pursuant to Code section 105 as described below.[5] The court held a hearing on the Motion on September 12, 2012 (the "Hearing"). At the Hearing, the court heard testimony from Kurt Van Wagenen ("Van Wagenen"), Debtors' President and Chief Executive Officer. The court also admitted into evidence portions[6] of two declarations made by Van Wagenen prior to the Hearing: the *Declaration of Kurt Van Wagenen in Support of Chapter 11 Petitions and First Day Motions* (the "Petition Declaration") and the *Declaration of Kurt Van Wagenen in Support of Debtors'*

---

1 All documents cited from the docket in this memorandum opinion may be located in the underlying adversary proceeding, cause no. 12-4104-dml, unless otherwise noted.

2 *See* FED. R. BANKR. P. 7001(7). Although Debtors brought the instant case as an adversary proceeding, Debtors filed only a single motion requesting either to enforce the automatic stay or, alternatively, for injunctive relief. To the extent Debtors ask this court to enforce the automatic stay, the Motion also constitutes a contested matter pursuant to FED. R. BANKR. P. 9014.

3 Debtors in these jointly administered chapter 11 cases are: (1) FiberTower Network Services Corp.; (2) FiberTower Corporation ("FTWR"); (3) FiberTower Licensing Corp.; and (4) FiberTower Spectrum Holdings, LLC.

4 11 U.S.C. §§ 101 *et seq.*

5 Debtors filed their *Memorandum of Law in Support of Debtors' [Motion]* at docket no. 4 on August 23, 2012. In response, Defendant filed *[Defendant's] Objection to Debtors' Emergency Motion to Enforce Automatic Stay or for Injunctive Relief* (the "Objection") at docket no. 14 on September 4, 2012. Debtors filed *Debtors' Reply in Support of [the Motion]* (the "Reply") at docket no. 17 on September 7, 2012.

6 The portions admitted are set forth at Transcript of Proceedings, September 12, 2012 at 31-37 at docket no. 38. Hereinafter, the transcript will be cited as TR (*name of witness, if applicable*) at __.

Verified Complaint for Declaratory and Injunctive Relief (the "Complaint Declaration").[7] Following the Hearing, the court denied the Motion in part and granted the Motion in part from the bench. The court issued its *Order Granting Preliminary Injunction* respecting the Motion on September 27, 2012 (the "9/27 Order") at docket no. 40. In the 9/27 Order, the court stated it would explain its decision in this memorandum opinion.

The court exercises core jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A). This memorandum opinion constitutes the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.[8]

I. BACKGROUND

A. Debtors' Capital Structure and Bankruptcy

Debtors are in the business of providing facilities-based backhaul services, principally to wireless carriers, as well as millimeter-band spectrum services. Petition Declaration ¶ 5. Backhaul is defined as the transport of voice, video, and data traffic from a wireless carrier's mobile base station, or cell site, to its mobile switching center or other exchange point. *Id.* Debtors provide spectrum leasing services directly to other carriers and enterprise clients, and additionally offer their spectrum services through spectrum brokerage agreements and fixed wireless equipment partners. *Id.* Debtors have customer service agreements with major U.S. wireless carriers, including AT&T, Verizon Wireless, T-Mobile, Sprint, and MetroPCS. *Id.* ¶ 8.

---

[7] The court also received into evidence letters to the Commission from Debtors, Debtors' customers, and a trade organization.

Following the Hearing, Defendant also filed a conditionally unopposed motion to file a supplemental statement to correct certain allegedly incorrect statements Van Wagenen made during his testimony regarding whether, under applicable administrative law, a licensee can revive or shield automatically terminated licenses by expanding its network infrastructure after the termination deadline. *See* docket no. 37. Debtors then filed a response. *See* docket no. 39. However, the court's opinion does not require the court to resolve whether actions taken after a termination deadline affect a licensee's entitlement to its licenses. *See infra* note 18.

[8] *See also supra* note 2.

Debtors also hold national-scope service agreements with Verizon Business and CenturyLink, which allow Debtors to provide fixed wireless government-grade transport services. *Id.*

Debtors' capital structure consists of secured debt, unsecured debt, and equity. *Id.* ¶ 10. On November 9, 2006, FTWR issued $402.5 million of 9% Senior Secured Convertible Notes due 2012 (the "2012 Notes"), which were jointly and severally guaranteed by each of the other Debtors and by certain non-debtor affiliates.[9] *Id.* ¶ 13. The 2012 Notes were secured by a first priority pledge of substantially all the assets of Debtors and their non-debtor affiliates and the stock of all the guarantors.[10] *Id.* Debtors principally utilized the proceeds of the 2012 Notes to expand their network infrastructure. *Id.*

Debtors underwent a restructuring on December 22, 2009 (the "2009 Restructuring") to reduce their total outstanding debt. *Id.* ¶ 11. Through the 2009 Restructuring, Debtors redeemed $266,791,438 in principal amount of the 2012 Notes, amounting to roughly 90.8% of the outstanding notes. *Id.* Each $1,000 in principal amount of the 2012 Notes was redeemed for $47.65 cash, 114.616 shares of common stock, and $425.46 in principal amount of 9.00% Senior Secured Notes due 2016 issued by FTWR (the "2016 Notes"). *Id.* The 2016 Notes are jointly and severally guaranteed on a senior basis by each Debtor and by non-debtor affiliates.[11] *Id.* ¶ 12. The 2016 Notes rank *pari passu* in right of payment to the 2012 Notes, but, under the terms of the 2009 Restructuring, the 2016 Notes are secured by a first priority pledge of substantially all the assets of Debtors and their non-debtor affiliates and the stock of all the subsidiary

---

9 These guarantors were (1) FiberTower Broadband Corp.; (2) FiberTower Licensing Corp.; (3) Teligent Services Acquisition, Inc.; (4) FiberTower Network Services Corp.; (5) FiberTower Solutions Corp.; and (6) FiberTower Spectrum Holdings LLC. Petition Declaration ¶ 12 n.6.

10 *See supra* note 9.

11 *See supra* note 9.

guarantors,[12] while the 2012 Notes are secured by a second priority pledge of the same assets. *Id.* ¶¶ 12, 14.

As of the 2009 Restructuring, holders of the 2012 Notes (the "2012 Noteholders") and holders of the 2016 Notes (the "2016 Noteholders"), along with their respective indenture trustees, entered into an Amended and Restated Intercreditor Agreement (the "Intercreditor Agreement"). *Id.* ¶ 15. Under the Intercreditor Agreement, the 2012 Notes are subject to and subordinate in priority to the 2016 Notes. *Id.* The 2012 Noteholders also consented to, and agreed not to contest or oppose, the use of cash collateral and any adequate protection (including superpriority replacement liens) provided to the 2016 Noteholders. *Id.* Based on Debtors' recent valuation of their business, the 2012 Notes are wholly unsecured.[13] *Id.* ¶ 14.

Beginning in 2011, Debtors experienced a series of adverse economic events that impacted Debtors' revenue and ability to raise capital. *See id.* ¶¶ 19-22. According to Debtors, their liabilities currently outweigh their assets. *See id.* ¶ 9. Pursuant to negotiations with an ad hoc committee of the 2016 Noteholders, Debtors formulated a proposed plan of reorganization (the "Proposed Plan"),[14] and filed a petition under chapter 11 of the Code, along with the Proposed Plan, on July 17, 2012. *Id.* ¶¶ 24-26; Complaint Declaration ¶ 1. On the same day,

---

12 *See supra* note 9.

13 In addition to the 2016 Notes and 2012 Notes, Debtors have approximately $30 million of unsecured liabilities, consisting of trade payables and other general unsecured pre-petition claims. Petition Declaration ¶ 16. Debtors are also parties to numerous executory contracts. *Id.*

FTWR is authorized to issue 400 million shares of common stock, par value of $0.001, of which approximately 48 million shares are outstanding. Approximately 16 million shares are owned by insiders. *Id.* ¶ 17. Although FTWR's common stock was once traded on NASDAQ, it was delisted effective January 30, 2012, and is now traded over the counter. *Id.*

FTWR also owns, directly or indirectly, 100% of the equity interests in each Debtor and non-debtor subsidiary. *Id.*; *see also supra* note 9.

14 The Proposed Plan may be found at Plan Support Agreement, *infra* note 15, Ex. B. A concise summary of the Proposed Plan may be found at Petition Declaration, Ex. A.

Debtors and the 2016 Noteholders entered into a plan support agreement (the "Plan Support Agreement"),[15] the relevant terms of which will be discussed as necessary below.

B. The Spectrum Portfolio and the Commission's Regulatory Regime

At issue in the above-captioned adversary proceeding is Debtors' national spectrum portfolio (the "Spectrum Portfolio") of 24 GHz and 39 GHz wide-area spectrum licenses (collectively, the "Licenses"). Petition Declaration ¶¶ 6-7, 38. The Spectrum Portfolio extends over substantially all the continental United States, covering areas with a total population of over 300 million. *Id.* ¶ 6. Debtors lease portions of this spectrum to various customers. *Id.*

The Licenses are issued and regulated by the Commission pursuant to its authority to allocate the electromagnetic spectrum and regulate wireless communications used in interstate and foreign commerce under 47 U.S.C. §§ 151 *et seq.* (the "Communications Act"). In accordance with the Commission's regulations, "[e]ach licensee must make a showing of 'substantial service' within ten years of its license grant" as a condition precedent to license renewal (alternatively, "Substantial Service," "Substantial Service Showing," or "Substantial Service Standard," as appropriate). 47 C.F.R. § 101.527(a). The regulations define Substantial Service as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal during its past license term." *Id.* While the Commission has identified safe harbors by satisfaction of which licensees may ensure that they satisfy the Substantial Service Standard ("Safe Harbors"), compliance with the Safe Harbors is not a necessary condition to license renewal; the Commission evaluates licensees' compliance with the Substantial Service Standard on a case-by-case basis.[16]

---

15 The Plan Support Agreement may be found at Petition Declaration, Ex. B.

16 *See, e.g., Amendments to Part 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, Report and Order, 26 F.C.C.R. 11614 (2000) ("24 GHz Order"); *Amendment of Commission's Rules*

Wide-spectrum licenses "in general remain valid until terminated in accordance with" Commission regulations. 47 C.F.R. § 1.955(a). "Authorizations automatically terminate, without specific Commission action," if the license expiration date passes before the licenseholder files a timely application for renewal, or "if the licensee fails to meet applicable construction or coverage requirements." *Id.* § 1.955(a)(1). A licensee's failure to satisfy the Substantial Service Standard results in termination of the licenses. *Id.* § 1.955(b).

"Any person aggrieved by any action taken pursuant to" authority delegated by the Commission "may file an application requesting review of that action by" the full Commission. *Id.* § 1.115(a). "In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought." *Id.* § 1.115(h)(2); *see also id.* § 1.102. "The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority." *Id.* § 1.115(k). Following a final action by the full Commission, a licensee may file a petition requesting reconsideration of the final Commission action. *Id.* § 1.106. "[U]pon good cause shown, the Commission will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration." *Id.* § 1.106(n). Appeals may then be taken "from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia" (the "D.C. Circuit"). 47 U.S.C. § 402(b). Once a licensee files a notice of appeal to the D.C. Circuit, that court has the power "to grant such temporary relief" to stay the effect of the Commission's decision

> as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo . . . or the restoration of a position or status terminated or adversely affected by the order appealed from.

Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking, 2012 WL 3195374 (1998) (the "39 GHz Order"). These documents may be found in *Appendix in Support [of the Motion]*, Exs. A-B, at docket no. 18, which Debtors filed on September 7, 2012. *Accord* TR (Van Wagenen) at 40, 45.

Id. § 402(c).

The Commission initially granted the Licenses to Debtors around 1998.[17] In 2008, the Commission renewed the Licenses to dates ranging from 2017 to 2021, subject to Debtors making a Substantial Service Showing for each License. TR (Van Wagenen) at 39; Petition Declaration ¶ 31. In 2008, upon Debtors' request, the Commission granted Debtors a four-year extension, thereby pushing the deadline for the Substantial Service Showing to June 1, 2012. Petition Declaration ¶ 32; TR (Van Wagenen) at 78. In April 2012, Debtors petitioned the Commission for either a waiver of the Safe Harbor rules, or an additional three-year extension of the June 1, 2012 deadline. Petition Declaration ¶ 32.

The record indicates that the overwhelming majority of the Licenses do not presently satisfy the Safe Harbor requirements. TR (Van Wagenen) at 78-79, 82-84. Debtors maintain that they currently possess the resources to comply with the Safe Harbor requirements, *id.* at 54-55, but that doing so would necessitate the construction of "links to nowhere:" installation of costly, suboptimal equipment that (1) serves no immediate customer demand, (2) would require substantial further investment to become operative even if customer demand subsequently developed, and (3) would need to be rebuilt if, as is likely, later-arising consumer demand did not coincide with the geographical bounds of the initial installation.[18] *Id.* at 43, 46-52. In other

---

[17] Neither the Petition Declaration nor the Complaint Declaration specify precisely when the Licenses were initially granted. Nor did Van Wagenen explicitly specify at the Hearing the exact date the Licenses were first granted. *See* TR (Van Wagenen) at 24-26, 28-43. The court has inferred that the Licenses were granted in 1998 because, according to Van Wagenen, the Licenses were "granted for ten years, subject to renewal," and "were renewed back in 2008." *Id.* at 39.

[18] The parties dispute whether, under the Communications Act and the cases and regulations implementing and interpreting it, a Commission licensee's network build-out after the expiry of a termination deadline can shield licenses from termination or revive licenses that have been terminated. *See supra* note 7. As will become clear below, it is unnecessary to resolve this question here. No matter whether Debtors currently hold an interest in the Licenses that can be revived or shielded through further construction, or if instead they merely hold an interest in, *inter alia*, the right to seek reconsideration of and appeal an adverse decision by the Commission, that interest is property of the bankruptcy estate and therefore falls within this court's jurisdiction. Code § 541(a)(1); 28 U.S.C. §§ 1334, 157(b)(2)(A).

words, constructing these links would serve no business purpose other than securing compliance with the Safe Harbor. *Id.* at 47. Consequently, Debtors have instead pursued market-based solutions to cater to their existing customer base. *Id.* at 79-80.

On and before June 1, 2012, Debtors filed individualized showings for each License with the Commission, arguing that although nearly all the Licenses do not fall within the Safe Harbor, they nonetheless comply with the Substantial Service Standard. Petition Declaration ¶¶ 33, 35; TR (Van Wagenen) at 52-53.

C. The Cash Collateral Order

On August 21, 2012, the court entered its *Final Order (I) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (II) Providing Adequate Protection to Secured Parties Pursuant to Sections 361, 362, and 363 of the Bankruptcy Code* (the "Cash Collateral Order").[19] The Cash Collateral Order and the Plan Support Agreement provide that Debtors' authority to use cash collateral will terminate upon five business days' prior written notice if "the [Commission] issues, with respect to the [Licenses], a binding adverse order, ruling or determination: (i) finding that [Debtors] do not meet the [S]ubstantial [S]ervice conditions; and/or (ii) denying [Debtors'] request for an extension or waiver of the [S]afe [H]arbor[] construction rules." Plan Support Agreement § 7.1(a)(vi). *See also* Cash Collateral Order § 4; Complaint Declaration ¶ 4.

D. Defendant Allegedly Threatens to Cancel Debtors' Licenses

On August 20, 2012, Debtors received word that Defendant was likely to terminate a large portion of the Licenses for failure to satisfy the Safe Harbor by the June 1, 2012 deadline. Complaint Declaration ¶ 3; *see also* TR (Van Wagenen) at 61. By the terms of the Cash

---

[19] This document may be located in the underlying bankruptcy proceeding, cause no. 12-44027-dml-11, at docket no. 219.

Collateral Order and the Plan Support Agreement, this would eliminate Debtors' financing in chapter 11. *See* Plan Support Agreement § 7.1(a)(vi); Cash Collateral Order § 4; Complaint Declaration ¶ 4. This, Debtors argue, would in turn completely derail their reorganization, and force Debtors to liquidate. TR (Van Wagenen) at 62-63. Debtors therefore filed this adversary proceeding and the Motion seeking a determination that the automatic stay of Code section 362(a) applies to any action Defendant may take with respect to the Licenses during the pendency of the chapter 11 case, and that Code section 362(b)(4)'s exception from the automatic stay for actions brought by government entities does not apply to an act by the Commission to divest Debtors of the Licenses. Alternatively, Debtors seek an injunction under Code section 105(a) preliminarily and permanently enjoining the actual termination of any License until Debtors have exhausted all avenues of administrative and appellate review of the Commission's actions, and a final, non-appealable order regarding the Licenses' status has been entered. Specifically, Debtors request that the Commission be enjoined from including a termination clause in its denial of Debtors' extension request (in the event a denial should issue) to the effect of "Accordingly, the Licenses, as outlined in Appendix __, TERMINATED AUTOMATICALLY on [date]," or, if any such clause is included, that the effect of such clause be stayed until Debtors exhaust their administrative and appellate remedies.

Defendant opposes the Motion, citing the need to preserve its congressionally-mandated authority to regulate the telecommunications industry. Moreover, Defendant maintains that the Licenses may have already terminated automatically as of June 1, 2012 by virtue of Debtors' failure to satisfy the Safe Harbor/Substantial Service Standard.

II. DISCUSSION

A. Whatever Rights Debtors Have in the Licenses are Part of the Bankruptcy Estate