Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of AT&T Mobility Spectrum LLC and FiberTower Corporation	)	ULS File Nos. 0007652635 and 0007652637
	)	
	)	
For Consent to Transfer Control of 39 GHz Licenses	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 2018 **Released: July 2, 2018**

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we dismiss, and in the alternative, deny the Application for Review, or in the alternative, Petition for Reconsideration filed by the Competitive Carriers Association (CCA)[1] and affirm the decision of the Wireless Telecommunications Bureau (Bureau) approving the transfer of 514 39 GHz licenses from FiberTower Corporation's subsidiary FiberTower Spectrum Holdings LLC (collectively with FiberTower Corporation, FiberTower) to AT&T Mobility Spectrum LLC (AT&T Mobility), an indirect wholly-owned subsidiary of AT&T Inc. (collectively with AT&T Mobility, AT&T).[2] In light of our action on these pleadings, we also dismiss as moot a Petition for Stay of the Bureau's consent to the Transaction that CCA also filed.[3]

II. BACKGROUND

2. *Transfer of Control Application.* In February 2017, AT&T and FiberTower filed applications pursuant to Section 310(d) of the Communications Act of 1934, as amended (the Act),[4] seeking Commission consent to a transfer of control whereby FiberTower Spectrum Holdings LLC, a wholly-owned subsidiary of FiberTower Corporation, would become a wholly-owned subsidiary of AT&T.[5] Pursuant to those applications, FiberTower and AT&T argued that AT&T's acquisition of

[1] Application for Review, or in the Alternative, Petition for Reconsideration of Competitive Carriers Association (filed March 12, 2018) (AFR).

[2] *Application of AT&T Mobility Spectrum LLC and Fiber Tower Corporation for Transfer of Control of 24 GHz and 39 GHz Licenses*, Memorandum Opinion and Order, 33 FCC Rcd 1251 (WTB 2018) (*Consent Order*). The transaction consented to in the *Consent Order* is referred to herein as the "Transaction."

[3] Petition for Stay, Competitive Carriers Association (filed Mar. 12, 2018) (Petition for Stay).

[4] 47 U.S.C. § 310(d).

[5] *Application of AT&T Mobility Spectrum LLC and FiberTower Corporation for Transfer of Control of Licenses*, ULS File Nos. 0007652635 (filed Feb. 13, 2017, amended Jan. 31, 2018 and Feb. 2, 2018) (Lead Application, and together with ULS File No. 0007652637, Applications), Ex. 1 – Description of Transaction and Public Interest Statement at 3 (Public Interest Statement). The Applications also included additional 24 GHz and 39 GHz licenses that were cancelled. Lead Application, Amendment Implementing Order on Remand at 1 & n.7.

FiberTower's millimeter wave (mmW) spectrum licenses would accelerate the development and deployment of next-generation 5G wireless services and promote competition.[6] The Bureau released a public notice seeking comment on the proposed transfer of control.[7] Several parties filed in response to the Accepted for Filing Public Notice,[8] including CCA, which filed informal comments and a reply.[9]

3. The Bureau denied CCA's informal comments, as well as petitions to deny filed by other parties, and consented to the Transaction. The Bureau found "no evidence in the record to support a finding that the transaction will result in potential public interest harms…[and] therefore den[ied] or dismiss[ed], the various petitions and comments...."[10] The Bureau applied the Commission's revised mmW spectrum threshold of 1850 megahertz to the Transaction, and observed that post-Transaction, AT&T's maximum spectrum holdings in any given county would be 796.8 megahertz.[11] Accordingly, given that the proposed transaction did not trigger the mmW spectrum threshold, and based on its careful review of the record, as well as its examination of the various relevant factors, the Bureau found that AT&T's post-Transaction spectrum holdings did not raise competitive concerns.[12] The Bureau also rejected Petitioners' and Commenters' arguments that FiberTower should not have been granted waivers of the substantial service requirements or reinstatement of licenses and that the spectrum should instead be subject to competitive bidding, finding that they were not transaction specific and were unrelated to any potential competitive harms that may arise from the Transaction.[13] After finding that "as a direct result of the transaction, AT&T likely would be better able to develop and deploy innovative 5G services to the benefit of American consumers,"[14] the Bureau consented to the Transaction as serving the public interest, convenience, and necessity.[15]

4. Prior to acting on the transfer of control applications, and in response to a remand by the DC Circuit, the Bureau released an order[16] that implemented a settlement agreement between FiberTower

[6] Public Interest Statement at 4.

[7] *AT&T Mobility Spectrum LLC and FiberTower Corporation Seek FCC Consent to the Transfer of Control of 24 GHz and 39 GHz Licenses*, ULS File Nos. 0007652635 and 0007652637, Public Notice, 32 FCC Rcd 1932 (WTB 2017) (Accepted for Filing Public Notice).

[8] *Consent Order*, 33 FCC Rcd at 1252-53, para. 5, nn.9 & 10.

[9] Comments of Competitive Carriers Association (filed March 30, 2017) (CCA Comments); Reply Comments of Competitive Carriers Association (filed Apr. 13, 2017) (CCA Reply Comments).

[10] *Consent Order* at 33 FCC Rcd at 1256, para. 14. The Bureau noted that the Commission had previously adopted a mmW spectrum threshold of 1250 megahertz for proposed secondary market transactions. *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services, Report and Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 8014, 8083-84, paras. 188-189 (2016) (*Spectrum Frontiers Report and Order or FNPRM*, as appropriate). In the *Spectrum Frontiers Second Report and Order*, this threshold was increased to 1850 megahertz. *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, 32 FCC Rcd 10988, 11011, para. 74 (2017) (*Spectrum Frontiers Second Report and Order*). After notice and comment rulemaking, this change in the threshold became effective on January 2, 2018. *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 83 Fed. Reg. 37 (Jan. 2, 2018).

[11] *Consent Order,* 33 FCC Rcd at 1258, para. 21.

[12] *Id.* at 1258-59, para. 21.

[13] *Id.* at 1259, paras. 22-23.

[14] *Id.* at 1260-61, para. 26.

[15] *Id.* at 1261, para. 27.

[16] *FiberTower Spectrum Holdings LLC et al.,* Order on Remand and Memorandum Opinion and Order, 33 FCC Rcd 253 (WTB 2018) ("*Order on Remand*"). The *Order on Remand* also addressed substantial service waiver requests

and the Commission[17] resolving various pending proceedings and waiving certain Commission rules. Under the terms of the Settlement Agreement, FiberTower agreed, *inter alia*, to relinquish all of its 24 GHz licenses and some of its 39 GHz licenses.[18] In the *Order on Remand*, the Commission also granted FiberTower a waiver of the buildout rule applicable to those 39 GHz licenses that FiberTower retained under the terms of the Settlement Agreement,[19] and directed the licensing staff to return those license licenses to active status.[20] CCA filed an application for review of the *Order on Remand*,[21] which has been addressed in a separate order.[22]

5. CCA filed the subject AFR of the *Consent Order*.[23] CCA alleges that WTB violated its own rules and statutory provisions in assigning FiberTower's unbuilt licenses by accepting the transfer of control Applications and reinstating the 39 GHz licenses that the Commission had previously terminated.[24] Specifically, CCA claims that the Bureau did not appropriately analyze the state of the marketplace,[25] consider the unjust enrichment to FiberTower from approval of the Transaction,[26] or whether the public interest required the FiberTower licenses be auctioned instead of being transferred to AT&T.[27] Based on what CCA alleges are Bureau "failures," CCA urges review of the *Consent Order* by the full Commission.[28] CCA discusses the *Order on Remand*, claims that "the Bureau plainly considered the merits of the *Order on Remand* and the *Consent Order* together,"[29] and argues "the *Order on Remand* was merely the handoff to the *Consent Order*'s end-run around Section 309(j)."[30]

(Continued from previous page)
and other matters pertaining to proceedings, including bankruptcy proceedings and a remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in which FiberTower was involved.

[17] Settlement Agreement, dated January 24, 2018, between the Federal Communications Commission and FiberTower Spectrum LLC (Settlement Agreement). *See Order on Remand*, 33 FCC Rcd at 276, App. 3.

[18] *Order on Remand*, 33 FCC Rcd at 257, para. 10.

[19] *Id.* at 258, para. 13.

[20] *Id.* at 258, para. 14.

[21] Application for Review, or in the Alternative, Petition for Reconsideration of Competitive Carriers Association (filed Feb. 26, 2018) (Waiver Order PFR).

[22] *FiberTower Spectrum Holdings LLC, Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of Substantial Service Requirements*, Memorandum Opinion and Order, FCC 18-87 (rel. July 2, 2018) (*Remand PFR Order*).

[23] AFR. AT&T filed an opposition to the AFR. Opposition to Application for Review, AT&T Mobility Spectrum LLC (filed Mar. 19, 2018) (Opposition). T-Mobile USA, Inc. filed comments in support of CCA. Comments, T-Mobile USA, Inc. (filed Mar. 27, 2018) (T-Mobile Comments). CCA filed a reply. Reply to Application for Review, Competitive Carriers Association (filed Apr. 3, 2018) (CCA Reply).

[24] AFR at 5-8.

[25] *Id.* at 10-16.

[26] *Id.* at 16-19.

[27] *Id.* at 19-21.

[28] *Id.* at 22-23. In addition to its AFR, CCA concurrently seeks a stay during the Commission's review of the subject AFR Petition for Stay. AT&T filed an Opposition to the Petition for Stay. Opposition to Petition to Stay, AT&T Mobility Spectrum LLC (filed Mar. 19, 2018). As we are addressing the AFR herein, we dismiss the Petition for Stay as moot. In addition, the Petition for Stay was filed on March 12, 2018, after the consummation notices had previously been filed on February 22, 2018 (ULS File Numbers 0008109169 & 0008109170).

[29] AFR at 8.

[30] AFR at 9.

III. DISCUSSION

6. AT&T claims that CCA lacks standing to file the AFR and alternative PFR.[31] We agree. To submit a petition for reconsideration or application for review of a licensing action, a filer "must plead facts to establish that he is (1) a party in interest or (2) any other person aggrieved or whose interests are adversely affected by our licensing actions and (3) show good reason why he did not participate in the earlier stages of the proceedings."[32] To establish party-in-interest standing to challenge an application, a petitioner must allege facts sufficient to demonstrate that grant of the application would cause it to suffer a direct injury.[33] In addition, petitioners must demonstrate a causal link between the claimed injury and the challenged action.[34] To demonstrate a causal link, petitioners must establish that the injury can be traced to the challenged action and that the injury would be prevented or redressed by the relief requested.[35] For these purposes, an injury must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[36] There must be more than an "objectively reasonable likelihood" of threatened injury; such injury must be "certainly impending."[37] An organization may meet these standards in its own right or may demonstrate that one or more of its members meets these requirements.[38]

7. In applying those standards to CCA's AFR, we conclude that CCA has not adequately demonstrated standing. CCA has not made any allegations of specific competitive harm that was the direct result of the Commission's consent to the subject Transaction and has not established that it is aggrieved or injured by the *Consent Order*. It makes generalized statements about "expense to taxpayers, consumers and 5G competition"[39] and "unjust enrichment" to FiberTower,[40] neither of which demonstrates how it, or its members, are aggrieved or injured by the consent to the Transaction. Accordingly, we agree with AT&T that CCA has not established standing. We therefore dismiss the AFR.

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[31] AT&T Opposition at 4-6.

[32] *Daniel R. Goodman*, Memorandum Opinion and Order, 13 FCC Rcd 21944, 21962, para. 29 (1998) (*Daniel Goodman); see also* 47 CFR §§ 1.106(b) & 1.115.

[33] *See, e.g., Applications of AT&T Mobility Spectrum LLC*, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16465, para. 16 (2012); *Wireless Co., L.P.*, Order, 10 FCC Rcd 13233, 13235, para. 7 (WTB 1995) (*Wireless Co*.), *citing Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). *See also New World Radio, Inc. v. FCC,* 294 F.3d 164 (D.C. Cir. 2002). *See generally T-Mobile License LLC, AT&T Mobility Spectrum LLC, New Cingular Wireless PCS LLC*, Memorandum Opinion and Order, 29 FCC Rcd 6350, 6355, para. 12 (2014).

[34] *Wireless Co*., 10 FCC Rcd at 13235, para. 7.

[35] *Id*. Because "a licensing proceeding before the Commission is not an Article III proceeding," the Commission may determine in the public interest to allow participation by parties pursuant to Section 309(d) of the Communications Act who would lack Article III standing. *Channel 32 Hispanic Broadcasters, Ltd.*, Order, 15 FCC Rcd 22649, 22651, para. 7 (2000), *aff'd per curiam,* 22 Fed. Appx. 12 (2001). However, wireless applications have generally been reviewed using the foregoing Article III standard. *Rockne Educational Television, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 14402, 14405, para. 7 (WTB BD 2011). *See, e.g., Cellco Partnership,* 27 FCC Rcd at 10713, para. 36. For the reasons stated above, we find no public interest reason to depart from this practice here. *See Airadigm Communications, Inc.*, Order on Reconsideration, 21 FCC Rcd 3893, 3897, para. 14 & n.30 (WTB 2006), *review dismissed,* 26 FCC Rcd 6739 (WTB 2011).

[36] *Conference Group, LLC v. FCC,* 720 F.3d 956 (D.C. Cir. 2013), *quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

[37] *Clapper v. Amnesty International USA,* 568 U.S. 398, 410 (2013).

[38] *See, e.g., Friends of the Earth, Inc.,* Memorandum Opinion and Order, 18 FCC Rcd 23622, 23622-23, paras. 2-3 (2003).

[39] AFR at 4.

[40] *Id.* at 16-19.

8. We also reach the same conclusion when we consider CCA's pleading as a petition for reconsideration. As the Commission has held, "to qualify as a party in interest, a petitioner for reconsideration generally must have filed a valid petition to deny against the application whose grant the petitioner now seeks to have reconsidered."[41] Here, CCA did not file a petition to deny with respect to the Transaction. Moreover, the informal Comments filed by CCA do not constitute a petition to deny or convey "Petitioner" status to the filer.[42] If—as in this case—a petition for reconsideration is filed by one "who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."[43] CCA has made no showing in this regard. However, in order to provide a clear resolution of the substantive issues, we also, in the alternative, address CCA's arguments and reject them on the merits below.

9. CCA's claim that "that the *Order on Remand* was merely the handoff to the *Consent Order*'s end-run around Section 309(j)" conflates and confuses the *Order on Remand* and the *Consent Order*. In the *Consent Order*, the Bureau applied existing Commission standards to determine that transfer of control of FiberTower and its 39 GHz licenses from FiberTower to AT&T is in the public interest. Policy issues that were resolved by the Bureau in the *Order on Remand*, such as the Settlement Agreement, waivers of buildout deadlines, relinquishment of licenses, and whether the licenses should have been cancelled and made available through competitive bidding, are separate from the determination of whether the Transaction is in the public interest. Those issues were resolved separate and distinct from the Transaction in the *Order on Remand*. As the Bureau made clear in the *Consent Order*, the only issues relevant to determining whether consent to the Transaction is in the public interest, convenience and necessity are those that are specific to the subject Transaction.[44] Whether or not FiberTower was entitled to the reinstatement of its licenses or whether those licenses should have been cancelled and made subject to competitive bidding were issues asked and answered in the *Order on Remand* and not subject to further consideration in this separate proceeding because they relate to whether FiberTower keeps its licenses. They do not arise out of the Transaction at issue here, which relates to whether the licenses may be transferred. Despite CCA's attempts to attach those policy issues to the Transaction, they are not related to the Transaction, have been resolved in the *Order on Remand*, and have been addressed on review in a

[41] *See Daniel Goodman*, 13 FCC Rcd at 21962, para. 30.

[42] *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Timothy E. Welch, Hill & Welch*, 21 FCC Rcd 692, 694 (MB 2006) (affirming "the staff's treatment of Dallavalle's pleading as an informal objection, rendering Dallavalle a non-party in this proceeding"), *citing University of North Carolina*, Memorandum Opinion and Order, 4 FCC Rcd 2780, para. 3 (1989). CCA attempts to distinguish the Dallavalle case on the basis that the Bureau acknowledged its status as a participant. CCA Reply at 4-5. That status, however, does not satisfy the statutory requirements under Section 5(a)(4) that CCA be "aggrieved" by the *Consent Order* and under Section 309(d) that a petitioner show it is adversely affected in a concrete manner by the *Consent Order*, i.e., through "specific allegations of fact sufficient to show that the petitioner is a party in interest. *See* 47 U.S.C. §§ 155(a)(4), 309(d)(4).

[43] 47 CFR § 1.106(b).

[44] *Consent Order,* 33 FCC Rcd at 1259, para. 22 ("to the extent that [parties argue] that we should not grant waivers and extensions of the substantial service requirements, their arguments are not transaction specific. They do not arise out of the transaction at issue here, involving the transfer of control of FiberTower's licenses. Instead, such arguments concern issues related to FiberTower's requests for license waivers and extensions of the substantial service requirements that were subject to a separate lengthy proceeding and presenting them now is untimely and unrelated to any competitive harms that may arise out of consent to this transaction. Those parties raising the issues now could have filed informal objections when FiberTower filed its extension and waiver requests originally, but they did not do so. After extensive proceedings at the Commission, a court appeal, and subsequent proceedings on remand, issues relating to those waivers and extension requests have been addressed though the *Waiver Order*.").

separate order.[45]

10. In the *Consent Order*, the Bureau found, "We find no evidence in the record to support a finding that the transaction will result in potential public interest harms."[46] CCA alleges that the Bureau's public interest analysis was "woefully deficient"[47] because it allegedly applied the incorrect spectrum threshold, ignored arguments about spectrum availability, did not consider existing concentration of mmW spectrum, did not consider unjust enrichment to FiberTower; and did not consider auctioning the spectrum instead of approving the Transaction. We disagree and affirm that the Bureau's consent to the Transaction was in the public interest. We address each of the issues raised by CCA below.

11. *Spectrum Threshold.* CCA argues that the Bureau improperly applied the 1850 megahertz mmW spectrum threshold to the transaction in the *MO&O* instead of the prior 1250 megahertz threshold, because the spectrum made available in the *Spectrum Frontiers Second Report and Order* which formed the basis for raising the threshold would allegedly not be accessible for years.[48] Initially, we note that the issue of which threshold to apply is non-decisional because AT&T's maximum spectrum holdings in any market would be 796.8 megahertz, well below the existing 1850 megahertz spectrum threshold, as well as the earlier 1250 megahertz threshold. Additionally, the Commission proposed to revise the mmW spectrum threshold before the filing of the Transaction,[49] and updated that threshold pursuant to notice and comment.[50] It also expressly noted that this increase in the mmW spectrum threshold would become effective upon publication in the Federal Register,[51] which occurred on January 2, 2018.[52] The Bureau's application of the revised threshold is consistent with past practice of applying law in existence at the time it takes action. Indeed, the Commission has revised an analogous tool -- its general spectrum screen that it applies to secondary market transactions -- in various orders and has applied it to pending transactions.[53] Accordingly, there was no basis for the Bureau to apply any threshold other than the 1850 megahertz screen adopted by the Commission and effective as of the date the *Consent Order* was adopted.[54]

12. *Spectrum Availability.* CCA argues that "the Bureau dramatically overstates the amount

[45] *See Remand PFR Order*.

[46] *Consent Order,* 33 FCC Rcd at 1256, para. 14.

[47] AFR at 10.

[48] *Id.* at 11.

[49] *Spectrum Frontiers FNPRM*, 31 FCC Rcd at 8180, para. 491 ("to the extent these bands to be made available have similar technical characteristics and potential uses as the 28 GHz, 37 GHz, and 39 GHz bands, we propose to use the approximately one-third threshold of the total amount of spectrum as our starting point").

[50] *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, para.74.

[51] *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, 11074, paras. 74, 268, n.189.

[52] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 83 Fed. Reg. 37 (Jan. 2, 2018).

[53] *See, e.g., Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company*, Memorandum Opinion and Order, 27 FCC Rcd 16459, 16470, para. 31 (2012) (adding WCS A and B blocks to the spectrum screen); *Applications of AT&T Corporation and Dobson Communications Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 20295, 20312-13, paras. 30-31 (2007) (adding 700 MHz spectrum to the spectrum screen).

[54] Additionally, contrary to CCA's assertion, *see* AFR at 4, this screen is not an *ipso facto* indicator that a transaction will or won't receive approval—it is merely a threshold informing Commission review of a transaction. And here, the Bureau concluded, "based on our careful review of the record as well as our examination of the various factors present in this case as described below, we find that AT&T's post- transaction spectrum holdings across the 39 GHz bands do not raise concerns in light of the current state of the marketplace." *Consent Order*, 33 FCC Rcd at 1258-59, para. 21.

of mmW spectrum generally available for mobile broadband use" because spectrum that has not yet been auctioned is not currently "available."[55] As discussed above, CCA's argument is an untimely request for reconsideration of the *Spectrum Frontiers Second Report and Order*. The mmW spectrum threshold was changed in a rulemaking proceeding,[56] and to the extent that CCA is arguing that some of the spectrum included in the mmW spectrum threshold will not be available for years, its remedy was to file a petition for reconsideration of the *Spectrum Frontiers Report and Order* and/or the *Spectrum Frontiers Second Report and Order*. It did not do so. In addition, the Commission plans to make the bands to which the spectrum threshold applies available as soon as practicable.[57] For instance, the Commission recently sought comment on procedures for the auction process for the 24 GHz and 28 GHz bands, with bidding on 28 GHz scheduled to begin November 14, 2018.[58]

13. *Spectrum Concentration.* In addition, CCA's attempts to demonstrate that the combined mmW holdings of AT&T and Verizon somehow negatively impact the public interest determination of the Transaction must be rejected. In the *Consent Order*, the Bureau found that AT&T's acquisition of this mmW spectrum did not raise concerns in light of the current state of the marketplace.[59] CCA provides no basis for reversing that holding. The relevant issue is not the combined mmW holdings of AT&T and Verizon (for which the Commission has already accounted with the secondary market screen for transactions involving mmW spectrum). Rather, the relevant issue is that we ensure that sufficient spectrum is available for incumbent licensees as well as potential new entrants in order to promote competition and innovation in the wireless marketplace, and balance that against other policies and considerations informing the Commission's determination of what is in the public interest when evaluating a proposed transaction.[60] CCA has previously asked us to consolidate review of various transactions concerning the mmW spectrum, and the Bureau correctly declined to do so.[61] Moreover, since use cases for the mmW spectrum are still under development,[62] CCA's allegations of negative competitive impact from the transaction are speculative at best, and must be denied.

14. *Unjust Enrichment.* CCA's allegations that the Bureau failed to adequately address FiberTower's unjust enrichment through the Transaction are unfounded.[63] CCA cites Section 309(j)(4) of the Communications Act, but that section requires us to consider unjust enrichment in the context of systems of competitive bidding.[64] Unjust enrichment is an issue with respect to the assignment or transfer of spectrum that was awarded to a designated entity, using bidding credits, as defined pursuant to Section

[55] AFR at 12-13.

[56] The Commission determined that the threshold warranted inclusion of mmW spectrum planned for auction but not yet auctioned, because it found that "this frontier spectrum is likely to become increasingly valuable to the advent of 5G services," "the spectrum screen applicable to lower-band spectrum has been one tool used to help identify particular markets for further competitive analysis," and use of the mmW spectrum threshold (updated to reflect that more bands are "available") "identifies those markets that may warrant further competitive analysis." *Spectrum Frontiers Report and Order*, 31 FCC Rcd at 8083, para. 189; *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11011, para. 74.

[57] *See Spectrum Frontiers Second Report and Order*, 32 FCC Rcd 10991, para. 6.

[58] *See Auctions of Upper Microwave Flexible Use Licenses for Next-Generation Wireless Licenses*, Public Notice FCC 18-43 (rel. Apr. 17, 2018).

[59] *Consent Order,* 33 FCC Rcd at 1258-59, para. 21.

[60] *Consent Order*, 33 FCC Rcd at 1257-59, paras. 19-21.

[61] *Application of Cellco Partnership d/b/a Verizon Wireless and XO Holdings*, Memorandum Opinion and Order,32 FCC Rcd 10125, 10132, para. 20 (WTB 2017).

[62] *Spectrum Frontiers Second Report and Order*, 32 FCC Rcd at 11022, para. 105.

[63] AFR at 16-19.

[64] *Id. citing* 47 U.S.C. § 309(j)(4)(B)-(C) & (E).

1.2110 of the Commission's rules, pursuant to a competitive bidding process.[65] That is not the case here.[66] CCA does not cite a single case supporting its contention that Section 309(j)(4) is a requirement that applies to all license transfers, nor a single case where the FCC has applied unjust enrichment outside the bidding credit context. Thus, CCA fails to convince us that any alleged unjust enrichment of FiberTower serves to justify a reconsideration of the grant of the Transaction. In addition, as noted above, CCA's argument is premised on claims about FiberTower's entitlement to the licenses that have been rejected in the *Order on Remand* and the Commission's *Order on Reconsideration* affirming the *Order on Remand*.

15. *Auctioning FiberTower's Spectrum.* Finally, contrary to arguments raised by CCA and others,[67] the public interest analysis undertaken by the Bureau when reviewing a transfer of control application cannot consider whether the spectrum proposed to be transferred would be better awarded to an entity other than the proposed transferee or through a license mechanism other than the one proposed in the subject Transaction. CCA cites *MG-TV Broadcasting v. FCC*, 408 F.2d 1257 (D.C. Cir. 1968) (*MG-TV Broadcasting*), to support its argument that Section 310(d) does not prohibit the Commission from deciding, in the context of a transfer of control application, that the public interest would be better served by cancelling the licenses and auctioning the spectrum.[68] CCA is incorrect. Therein, the Court stated that the Commission can first consider whether an "assignor's permit is valid" prior to determining whether an assignment is in the public interest.[69] In that case, the Commission had not ruled on the validity of the license before ruling on the assignment application, raising a question as to whether the license could be assigned at all.[70] Here, the validity of the licenses being transferred was previously decided by the Bureau in the *Order on Remand*. Section 310(d) of the Communications Act states that "the Commission may not consider whether the public interest, convenience and necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee."[71] Whether or not the underlying spectrum should have been subject to competitive bidding is a policy question not relevant to the *Consent Order* and is more appropriately reviewed in resolving CCA's Waiver Order PFR.

IV. CONCLUSION

16. CCA has not demonstrated standing. CCA's AFR mostly repeats arguments considered and rejected in the *Consent Order* or that are being considered pursuant to CCA's AFR of the *Order on Remand*. CCA has not demonstrated that the Bureau erred in its analysis or was inconsistent with precedent. Accordingly, we dismiss CCA's AFR. In the alternative, we deny the AFR on the merits.

V. ORDERING CLAUSES

17. Accordingly, having reviewed the application and the record in this matter, **IT IS ORDERED** that, pursuant to the authority of Sections 1, 4(i), 4(j), 5, 310 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c)(5), 310, 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review, or in the Alternative, Petition for Reconsideration filed by the Competitive Carriers Association **IS DISMISSED.** In the alternative, the Application for Review/Petition for Reconsideration **IS DENIED**.

18. **IT IS FURTHER ORDERED**, pursuant to Section 4(i) of the Communications Act of

[65] 47 CFR § 1.2110.

[66] *See* AT&T Opposition at 15-16 (FiberTower did not obtain the spectrum subject to the Transaction through competitive bidding, such that designated entity bidding credits could never have even been a consideration).

[67] AFR at 19-21; T-Mobile Comments at 2-6.

[68] AFR at 21.

[69] *MG-TV Broadcasting*, 408 F.2d at 1264.

[70] *Id.*

[71] 47 U.S.C. § 310(d).

1934, as amended, 47 U.S.C. § 154(i), and Sections 1.43 and 1.102, of the Commission's rules, 47 C.F.R. §§ 1.43, 1.102, that the Petition for Stay filed by the Competitive Carriers Association **IS DISMISSED AS MOOT.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary