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FiberTower Injunction Raises Fresh Questions About the Interplay Between Telecommunications and Bankruptcy Law

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Judge Michael Lynn of the United States Bankruptcy Court for the Northern District of Texas (the ''Texas Bankruptcy Court'') recently enjoined the Federal Communications Commission (the ''FCC'') from terminating approximately 700 wireless spectrum licenses held by Chapter 11 debtor FiberTower Networks, Inc. (''FiberTower'').[1] Under the preliminary injunction, FiberTower's license may not be cancelled until the FCC completes its administrative review of FiberTower's licensure status and through the duration of any appeal of the FCC's decision. This ruling, from which the FCC unsuccessfully sought leave to appeal, raises anew the clash between telecommunications law and policy and the Bankruptcy Code. Approximately 10 years ago, a similar conflict reached the Supreme Court in *FCC v. NextWave Personal Communications, Inc.*, where the court ruled that, under Section 525 of the Bankruptcy Code, the FCC could not cancel NextWave's C-block spectrum licenses despite NextWave's failure to make full payment for them.[2] The *FiberTower* decision demonstrates that *NextWave* was not the last word on this issue, and that courts continue to grapple with harmonizing these disparate bodies of law. Moreover, looming on the horizon is the LightSquared, Inc. Chapter 11 case, which raises similar issues. This article summarizes the competing legal and policy aims of federal telecommunications law and the Bankruptcy Code. It next turns to *NextWave* and illustrates how the conflict between bankruptcy and telecommunications law was resolved in that case, before turning to an analysis of the *FiberTower* ruling. Finally, it outlines the issues looming in LightSquared, and considers how that case may be impacted by the *FiberTower* decision.

Telecommunications Policy and the FCC

Since the enactment of the Federal Communications Act of 1934 (the ''FCA''), the FCC has been the primary regulator of interstate and international communications by radio, television, wire, satellite and cable.[3] Under the FCA, no party may broadcast over the airwaves without an FCC-granted license.[4] The FCC has two broad policy mandates: to establish and maintain fair rules of competition in the diverse telecommunications markets, and to ensure that spectrum is used efficiently for the benefit of American businesses and consumers.[5]

In recent years Congress has been concerned with increasing competition in telecommunications markets

[1] *FiberTower Network Services Corp. et al. v. FCC*, case 12-44027, United States Bankruptcy Court for the Northern District of Texas (the ''Adversary Proceeding''), ECF #46, Oct. 11, 2012 (''Memorandum Opinion'').

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[2] *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

[3] Federal Communications Act of 1934, 47 U.S.C. § 151 et seq.

[4] See 47 U.S.C. § 301.

[5] See, Federal Communications Commission Spectrum Policy Task Force, Report of the Spectrum Efficiency Working Group, November 15, 2002 available at transition.fcc.gov/sptf/files/SEWGFinalReport_1.pdf.

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and making it possible for new entrants to participate in those markets.[6] Since 1993, the FCC has generally been required by statute to auction off unused spectrum on the theory that market forces would allocate it to users who would make the best and most efficient use of it.[7] The Telecommunications Act of 1996 (the ''1996 Act'') was the first overhaul of national telecommunications policy since the FCA was enacted; its goal was to remove all barriers to entry in the telecommunications market.[8]

In some respects, the 1996 Act, succeeded brilliantly: thousands of new firms entered the telecommunications markets, and billions of dollars of debt and equity capital were invested in these start-ups. But for creditors and investors, the telecommunications revolution has had decidedly mixed results. Bankruptcies have been frequent, and have included some of the largest U.S. Chapter 11 cases ever filed, including WorldCom, Inc., Global Crossing, Ltd., Adelphia Communications, Corp., NextWave Communications, and more recently, DBSD, Inc., TerreStar Networks, Inc. and LightSquared. Indeed, one commentator has suggested that the entire telecommunications industry is likely to be subject to persistent cyclicality and instability.[9] For the FCC, the spectre of persistent failures poses a different policy problem: ensuring that the spectrum allocated to these firms is used and does not sit idle. Accordingly, the FCC has made many of its spectrum licenses conditional on proof that the licensees are using or developing the spectrum to provide service or risk loss of their licenses.[10]

Bankruptcy has quite different policy goals, including providing a fresh start to a troubled company.[11] The bankruptcy laws also presume that reorganizing a troubled business will yield better overall results to a business, its employees and creditors than would piecemeal liquidation of its assets.[12] For many troubled telecommunications companies, their FCC licenses represent their most valuable asset. Indeed, without their FCC licenses, these companies literally have no business, and thus bankruptcy courts have often been protective of debtors' efforts to maintain their licenses, thus creating the conflict between the public policy goals of the different areas of the law.

FCC v. NextWave

The starting point for any discussion of the FCC and bankruptcy issues is the Supreme Court's decision in *FCC v. NextWave Personal Communications, Inc*.[13] NextWave Personal Communications, Inc. (''NextWave'') was formed in 1995 to bid on C-block spectrum licenses for personal communications. In 1996, NextWave was awarded 90 licenses for approximately $4.85 billion in a competitive auction. In accordance with FCC regulations, NextWave made a down payment of $500 million and signed notes for the balance of the purchase price.[14] The FCC regulations then in place provided that NextWave's authorization to use the licenses was conditioned upon it making full payment, and that failure to make payment in full would result in automatic cancellation of the licenses.[15]

After the C-block spectrum auctions were conducted, several bidders, including NextWave, had difficulty obtaining financing to complete their purchases. The FCC responded by revising the payment rules, but set a deadline for licensees to make the next installment payment.[16] NextWave sought additional time beyond that deadline from the FCC and the Court of Appeals for the District of Columbia, but when those efforts were unsuccessful, it filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York (the ''New York Bankruptcy Court''). NextWave then commenced litigation against the FCC, seeking to halt the threat by the FCC to cancel its licenses, and claiming that its license payment obligations should be avoided as a fraudulent conveyance.

The core of the dispute was whether the FCC was acting as a commercial creditor when it sought to cancel NextWave's licenses or whether it was acting in its regulatory capacity. The FCC contended that irrespective of its status as a creditor, it was acting in its regulatory capacity when it cancelled the licenses. The FCC also argued that the New York Bankruptcy Court lacked jurisdiction over it in its regulatory capacity, and that the question was solely governed by communications law.[17] The New York Bankruptcy Court acknowledged that it had no authority to restrain the FCC when it was acting as a regulator, but held that by seeking payment of the unpaid portion of the purchase price for the licenses, the FCC was acting as a creditor.[18] The ruling was affirmed by the United States District Court for the Southern District of New York,[19] but the Second Circuit reversed, holding that although the case involved interplay between bankruptcy and communications law, communications law governed the case.[20]

[6] See, Connecting the Globe, A Regulations Guide to Building a Global Information Community, available at transition.fcc.gov/connectglobl./sec5.html.

[7] See, 47 U.S.C. 309(j)(1) (authorizing competitive bidding).

[8] See transition.fcc.gov/telecom.html/.

[9] Noam, *The Emerging Cyclicality of the Telecom Industry*, published in *Global Economy and Digital Society* (Bohlin, Levin, Sung and Yoon, eds.) 2004.

[10] See, generally, 47 C.F.R. Part 90; see also FCC, Wireless Telecommunications Bureau, Construction/Coverage Requirements, available at http://wireless.fcc.gov/licensing/index.htm?job=const_req_by_service.

[11] Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 787 (1987).

[12] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

[13] *FCC v. NextWave Personal Communications, Inc.*, *Id*.

[14] *See In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, 12 F.C.C.R. 16436, 16439, 16452-70 (Oct. 16, 1977), *In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees, Order on Reconsideration of the Second Report and Order, 13 F.C.C.R. 8345, 8350-51 (Mar. 24, 1998). *In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs (PCS) Licensees, Second Order on Reconsideration of the Second Report and Order, 14 F.C.C.R. 6571, 6576 (April 5, 1999).

[15] FCC, Radio Station Authorization for Broadband PC52 (issued to NextWave January 3, 1997)

[16] Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licenses, 13 F.C.C.R. 7413 (April 17, 1998).

[17] *NextWave Pers. Communications, Inc. v. FCC* (*In re NextWave Pers. Communications, Inc.*), 235 B.R. 263 (Bankr. S.D.N.Y 1988) *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd* 200 F.3d 43 (2d Cir. 1999).

[18] *Id*. at 269-270.

[19] 241 B.R. 311 (S.D.N.Y. 1999).

[20] 200 F.3d 43 at 53-54.

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The Second Circuit's opinion downplayed the FCC's position as a creditor; the court agreed with the FCC's argument that it was exercising its regulatory power in awarding the licenses, and that it was within its regulatory authority to revoke them for failure to make payment. The Second Circuit also said that the Bankruptcy Court had no jurisdiction to enjoin the FCC from exercising its regulatory power.[21] After the Second Circuit's decision, the FCC announced that it would re-auction the licenses previously awarded to NextWave. NextWave returned to the New York Bankruptcy Court and got an order directing the FCC to cancel the auction.[22] In response, the FCC obtained a writ of mandamus from the Second Circuit that nullified the New York Bankruptcy Court's order.[23]

In addition to the litigation in the Second Circuit, NextWave petitioned the FCC to reconsider its decision to re-auction the spectrum licenses.[24] When the FCC denied the petition, NextWave appealed to the D.C. Circuit.[25] In the D.C. Circuit, NextWave raised a new claim, that the FCC's actions violated Section 525(a) of the Bankruptcy Code, which prohibits governmental entities "from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy." The FCC countered by arguing that NextWave's claims had been decided by the Second Circuit and were barred by res judicata. The D.C. Circuit rejected the FCC's res judicata claim and its argument that its cancellation of the licenses was permitted by the governmental powers exception to the automatic stay under Section 362(b)(4) of the Bankruptcy Code. It held that Section 525(a) of the Bankruptcy Code did not permit the FCC to cancel NextWave's licenses.[26] The FCC appealed the decision to the Supreme Court, which affirmed the D.C. Circuit in an 8-1 decision written by Justice Scalia that emphasized the plain language of Section 525(a) of the Bankruptcy Code. Justice Scalia rejected the FCC's argument that Section 525 did not apply because the FCC had a valid regulatory purpose in cancelling the licenses.[27] He reasoned that to adopt the FCC's position would be contrary to the "clear" and "express" language of the statute and would create an unworkable exception.[28]

The *NextWave* decision is important in several respects: first, it made clear that federal agencies are subject to the limitations of the Bankruptcy Code, even when acting in a regulatory capacity. The corollary is that under Section 525(a) of the Bankruptcy Code, governmental agencies will not be permitted to cancel licenses for failure to satisfy pecuniary obligations, which means that the Bankruptcy Code overrules inconsistent agency statutes and regulations. Further, *NextWave* demonstrated that the Supreme Court would not subordinate the policies of the Bankruptcy Code to FCC policy, but would instead seek to harmonize them. But because *NextWave* turned on the FCC's actions as a creditor, it left open the issue of harmonizing purely regulatory actions by the FCC with bankruptcy policy.

FiberTower

On September 27, 2012, the United States Bankruptcy Court for the Northern District of Texas (the "Texas Bankruptcy Court") entered an order enjoining the FCC from terminating FCC licenses held by FiberTower until the conclusion of the FCC's internal review of FiberTower's application for an extension or waiver of certain licensing conditions and through the duration of any appeals.[29] The initial order was followed by a written decision dated October 11, 2012.[30] At issue in *FiberTower* is how courts are balancing non-pecuniary FCC regulatory issues with bankruptcy policy.

FiberTower provides backhaul services to wireless carriers, businesses and governmental entities.[31] Backhaul is the transport of voice, video and data traffic from a wireless carrier's cell site or tower to a switching center or other transfer point.[32] FiberTower runs a hybrid network of conventional copper lines and fiber optic cable and microwave networks operated pursuant to FCC wireless spectrum licenses.[33] FiberTower filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Texas on July 17, 2012 with the goal of implementing a bankruptcy reorganization that had been agreed to with the majority of its bondholders. FiberTower's Chapter 11 filing was driven by two factors: in 2011, AT&T and Clearwire terminated their relationships with FiberTower, resulting in a reduction in revenue of approximately 63%.[34] The Chapter 11 filing was also an attempt by FiberTower to protect its FCC licenses, which were at risk of cancellation. A licensee must make a showing of "substantial service" to qualify for a renewal.[35] FCC regulations define "substantial service" as "service which is sound, favorable, and substantially above a mediocre level of service which just might minimally warrant renewal."[36] The FCC had promulgated a "safe harbor" for meeting the "substantial service" requirements, which FiberTower had not met.[37] In 2008, the FCC had granted FiberTower a four year extension to meet the "substantial service" requirements, but by June 2012, FiberTower had not satisfied the safe harbor requirements.[38] Prior to commencing the Chapter 11 case, FiberTower took a multi-pronged approach at the FCC, filing an application seeking a new three-year waiver or extension of time to satisfy the substantial service requirement; it also sought a ruling that it had satisfied the substantial service requirement on a non-safe harbor basis.[39] FiberTower argued to the FCC that it should be excused from meeting the substantial service requirements because it said there was insufficient commercial demand

[21] 200 F.3d at 55.

[22] *In re NextWave Pers. Communications, Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000).

[23] *In re FCC*, 217 F.3d 125 (2d Cir. 2000).

[24] *In re NextWave Pers. Communications, Inc.*, Order on Reconsideration, 15 F.C.C.R. 17500 (Sept. 6, 2000).

[25] *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Civ. 2001).

[26] *Id*. at 153.

[27] 537 U.S. at 301-302.

[28] *Id*. at 302.

[29] Adversary Proceeding, ECF #40.

[30] Memorandum Opinion.

[31] Declaration of Kurt Van Wagenen In Support of Chapter 11 Petitions and First Day Motions, filed in case 12-44027, United States Bankruptcy Court for the Northern District of Texas, ECF #2 at ¶ 5.

[32] *Id*.

[33] *Id*.

[34] *Id*. at ¶ 19.

[35] 47 C.F.R. § 101.527(a).

[36] *Id*.

[37] Memorandum Opinion at 8.

[38] *.Id*.

[39] *Id*. at ¶ 33-34.

to support such service and that building what it called ''links to nowhere'' was wasteful and inefficient.[40]

On August 23, 2012, FiberTower filed an action seeking an injunction to prevent the FCC from terminating its licenses.[41] FiberTower asserted that cancellation of its licenses violated the automatic stay under Section 362 of the Bankruptcy Code and that Section 362(b)(4)'s exception for governmental entities exercising their regulatory functions did not apply.[42] In the alternative, it sought an injunction under Section 105(a) of the Bankruptcy Code restraining such cancellations pending full administrative and judicial review of the FCC's actions.[43] In an attempt to bring itself within the *NextWave* ruling, FiberTower argued that the FCC's purpose in cancelling its FCC Licenses was pecuniary, in that it would then re-auction the forfeited licenses.[44]

The FCC objected, arguing that because it had exclusive regulatory authority over the FCC licenses, it could validly continue its administrative proceedings under the Section 362(b)(4) exception to the automatic stay.[45] It noted that even under *NextWave*, it had the jurisdictional authority to exercise its regulatory powers over the FCC licenses.[46] But the FCC also sought to confine the *NextWave* ruling to situations where the FCC was acting as a creditor: here, it said its purpose in seeking to cancel FiberTower's FCC licenses was not pecuniary: rather that it was acting because FiberTower had failed to meet the substantial service requirements.[47]

The Texas Bankruptcy Court first rejected FiberTower's arguments that the automatic stay barred the FCC from cancelling its licenses. Initially, the court questioned whether the automatic stay under Section 362(a)(1) of the Bankruptcy Code applied because it only stays proceedings *against* a debtor, whereas in FiberTower, the debtor had initiated FCC proceedings to seek an extension or waiver of the substantial service requirements. Assuming that the automatic stay was applicable, the Texas Bankruptcy Court found that the Section 362(b)(4) exception applied, observing that the FCC's ''decision whether or not the Licenses are or should be terminated for non-compliance with the Substantial Service Standard lies within the heart'' of its police and regulatory power.[48] The court also acknowledged that it lacked authority to preclude the FCC from determining whether FiberTower had satisfied the substantial service requirements.

The court then analyzed whether an injunction could issue on the alternative ground sought by FiberTower, Section 105(a) of the Bankruptcy Code, using the traditional four part test: (1) likelihood of success on the merits: (2) irreparable injury: (3) balance of the equities: and (4) the public interest.

Under the four-part test for injunctive relief, the Texas Bankruptcy Court framed the issue on ''success on the merits'' as whether FiberTower was likely to succeed in its adversary proceeding against the FCC, not on whether FiberTower was likely to prevail in its FCC administrative proceeding or in any appeal. In doing so, the Texas Bankruptcy Court distinguished *In re Commonwealth Oil Refining*, 805 F.2d 1175 (5th Cir. 1986), which held that the test for ''success on the merits'' was whether the debtor was likely to prevail in the underlying enforcement action by the Environmental Protection Agency. *Commonwealth Oil* was distinguishable, the Texas Bankruptcy Court said, because there the debtor sought a total halt to the agency's enforcement proceedings, whereas in this case the preliminary injunction was merely intended to preserve the status quo while the debtor litigated its right to retain its FCC licenses. The Texas Bankruptcy Court buttressed its ruling by citing with approval numerous cases in which bankruptcy courts had enjoined actions of federal agencies.[49] From this it then enunciated the core theory of the opinion: ''Once the holder of a license regulated by the Commission declares bankruptcy, the commencement of that bankruptcy case results in *shared* jurisdiction over the licenses. . .the Commission exercises jurisdiction by virtue of its statutorily-granted regulatory authority, while the bankruptcy court exercises jurisdiction pursuant to its control over the property of the estate.''[50]

Although the Texas Bankruptcy Court emphasized the limited nature of the injunctive relief it was granting, its ruling appears to break ground in at least two ways: (1) it fundamentally departs from the *Commonwealth Oil* standard on success on the merits, and (2) its theory of shared jurisdiction over the FCC licenses raises the issue of whether the effect of its injunction is to diminish the FCC's regulatory power. For although the Texas Bankruptcy Court was careful to say repeatedly in its opinion that it had no expertise or power to circumvent the FCC's regulatory authority, its shared jurisdiction theory bars the FCC from the ultimate exercise of its regulatory power, cancelling the licenses.

The Texas Bankruptcy Court had no difficulty in finding that FiberTower faced the risk of irreparable injury if the FCC cancelled the licenses and reallocated them to other licensees. It noted that a loss of the licenses would result in an immediate default in FiberTower's right to use cash collateral, and that FiberTower's ability to reorganize would likely be doomed; thus, it said, the risk was ''not speculative, theoretical, or remote.''[51] Moreover, it said that if the FCC cancelled the licenses, resulting in a failure of FiberTower's reorganization, even a subsequent victory on appeal would require them to spend scarce resources, further jeopardizing their reorganization prospects.[52] On the balance of the equities, the Texas Bankruptcy Court noted FiberTower's risk of irreparable injury, and contrasted it to the minimal harm that might be caused to the FCC: ''The possible death of Debtors' businesses is a consequence weightier than any harm a temporary stay could cause''

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[40] *Id*. at ¶¶ 31-37.
[41] Adversary Proceeding, ECF #1.
[42] *Id*. at ¶ 30.
[43] *Id*. at ¶ 31.¶
[44] Memorandum of Law in Support of 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 the Licenses, Adversary Proceeding, ECF #2 at 10-11.
[45] FCC's Objection to Debtors' Emergency Motion to Enforce Automatic Stay or For Injunctive Relief, Adversary Proceeding, ECF #14 at 5-6.
[46] *Id*. at ¶ 6-8.
[47] *Id*. at ¶ 9.
[48] Memorandum Opinion at 13.
[49] Memorandum Opinion at 19, fn. 30.
[50] *Id*. at 19 (emphasis in original).
[51] Id. at 24.
[52] *Id*.

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the FCC.[53] It similarly made short work of the public interest issue, simply declaring that the public interest in seeing debtors reorganize successfully under the Bankruptcy Code was sufficient.[54] The opinion engaged in no analysis of any potential harm to the public interest that might result from the licenses continuing to be held by a debtor that had demonstrated a prolonged inability to meet the ''substantial service'' requirements, and where litigation could result in the licenses remaining in a limbo state for an indefinite period of years.[55]

The FCC sought to appeal the Texas Bankruptcy Court's issuance of the injunction, but on November 6, 2012, the United States District Court for the Northern District of Texas denied leave to appeal, finding that the FCC had not satisfied the grounds for appeal of an interlocutory order under 28 U.S.C. § 1292(a), which means that the Texas Bankruptcy Court's ruling will remain in place until there is a trial on the merits of the Adversary Proceeding.[56] The very next day, the FCC issued a decision denying FiberTower's requests for relief from the substantial service standard with respect to approximately 700 licenses.[57] The FCC found that FiberTower had not met the substantial service standard with respect to the licenses at issue. It noted that FiberTower had made a business decision not to provide service in the areas covered by the licenses, and that FiberTower's failure to meet the substantial service standard was not the result of circumstances beyond its control, but rather a business judgment that had proven unwise. For those reasons, and because FiberTower had already been granted a previous extension in 2008, the FCC that there was no basis to grant FiberTower additional time to meet the substantial service requirements or waive compliance with them. It therefore held that the licenses had terminated as a matter of law as of June 1, 2012. In its decision, the FCC indicated that it would comply with the preliminary injunction issued by the Texas Bankruptcy Court and that it would not seek to re-auction or otherwise dispose of the licenses so long as the injunction remained in effect.

The result for now is a procedural impasse; FiberTower's FCC licenses have terminated, subject to its right to appeal to the full FCC and the Court of Appeals for the District of Columbia. But by the same token, the FCC has seen its ability to re-sell the idle FCC licenses stymied by the District Court decision denying its right to appeal.

LightSquared

LightSquared is a high-profile Chapter 11 case that raises the possibility of another bankruptcy - telecommunications clash. LightSquared was formed to develop a 4G broadband network covering the entire United States using a combination of satellite coverage and ground-based transmitter towers. The network, which is intended to be made available on a wholesale basis to wireless spectrum users, has yet to be fully built, although LightSquared has already spent more than $4 billion on it.[58] On May 14, 2012, LightSquared and its affiliates filed Chapter 11 petitions with the New York Bankruptcy Court. When it announced the filing, LightSquared said it sought bankruptcy relief to give it time to resolve regulatory issues.[59] LightSquared's regulatory problem is that its proposed network interferes with GPS navigation systems and the FCC has said it intends to revoke LightSquared's authority to operate its network.[60]

To develop its network, LightSquared assembled a swath of contiguous L-band frequencies, which were originally intended for ground-to-satellite communications. Initially, the FCC was highly supportive of LightSquared because it saw LightSquared's network as having the potential to increase competition among wireless providers. In January 2011, the FCC granted LightSquared a conditional waiver that allowed it to operate its network using satellite and terrestrial tower transmission, although that approval was subject to further testing and approval.[61]

When the FCC issued the Conditional Waiver Order, users and manufacturers of global positioning system (''GPS'') navigation units objected that LightSquared's network would interfere with GPS operations.[62] The interference problem has two aspects: the strength of LightSquared's signal and the ''bleed'' of GPS signals into the LightSquared frequency. The signal bleed problem is that much of the GPS equipment in use picks up signals from outside its allocated L-1 band, including signals from LightSquared's portion of the L-band. In addition, the signals between GPS satellites and terrestrial GPS receivers are relatively weak, whereas the signals that would be sent through LightSquared's ground-based broadband system would be very powerful, and tests showed, would overwhelm or interfere with the weaker GPS signals. The GPS community was also concerned that millions of existing GPS users could be forced to upgrade their devices and/or accept GPS performance losses to accommodate the LightSquared network.[63]

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[53] Id. at 26.

[54] Id. at 27.

[55] The Texas Bankruptcy Court's reference to a temporary stay is interesting because in colloquy with FCC counsel at the hearing on the preliminary injunction, the court was told that the FCC's internal review could last up to a year, with review by the Court of Appeals for the District Circuit taking additional time beyond that. Adversary Proceeding, transcript of hearing, September 12, 2012 at 138.

[56] *U.S. v. FiberTower Network Services Corp.*, case 12-00766, United States District Court for the Northern District of Texas, ECF#8.

[57] *In the Matter of FiberTower Spectrum Holdings LLC*, Memorandum and Order, November 7, 2012, __ F.C.C. Rec.

[58] Declaration of Marc R. Montagner (''Montagner Declaration''), Chief Financial Officer and Interim Co-Chief Operating Officer of LightSquared Inc. (a) In Support Of First Day Pleadings And (b) Pursuant To Rule 1007-2 Of Local Bankruptcy Rules For United States Bankruptcy Court For Southern District Of New York, filed in case 12-12080, United States Bankruptcy Court Southern District of New York, ECF#3 at ¶ 6.

[59] Montagner Declaration at ¶ 12.

[60] Montagner Declaration at ¶ 11.

[61] In the Matter of LightSquared Subsidiary LLC, Request for Modification of its Authority for an Ancillary Terrestrial Component, Order and Authorization, 26 FCC, Rcd 566 (IB, rel. Jan. 26, 2011) (the ''Conditional Waiver Order'').

[62] See, e.g., Petition for Reconsideration of the U.S. GPS Industry Council, In the Matter of Fixed and Mobile Service in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz, ET Docket 10-142 (filed June 30, 2011).

[63] Comments of the U.S. GPS Industry Council, In the Matter of LightSquared Subsidiary, LLC, Technical Working Group Report, IB Docket 11-109, In re the Application of LightSquared Subsidiary LLC, Request for Modification of its Au-

To investigate the interference problem, during 2011 LightSquared and various federal agencies extensively tested GPS receivers in an effort to determine the extent of the interference concerns and investigate potential remedies.[64] The tests were supervised by the National Telecommunications and Information Administration (''NTIA''), an arm of the Department of Commerce, and covered cellular devices, general purpose GPS devices and GPS systems used by military and commercial aviation operations.[65] The NTIA determined that ''there appear to be no practical solutions or mitigations that would permit the LightSquared broadband service, as proposed, to operate in the next few months or years without significantly interfering with GPS.''[66] The NTIA also stated that ''no additional testing is warranted at this time.''[67] On February 14, 2012, the FCC announced that, based on the test results, it would not allow LightSquared's terrestrial operations to be completed, and that it planned to withdraw the Conditional Waiver Order.[68] As of this date, the FCC has not issued a final order withdrawing the Conditional Waiver. LightSquared has acknowledged that the FCC's preliminary decision to suspend LightSquared's authority to use the terrestrial component of its network was the precipitating factor that led to its Chapter 11 filing.[69]

LightSquared has also admitted that it cannot predict the duration of the stalemate regarding its regulatory status, and that a resolution could be months or even years off.[70] Indeed, it cited that uncertainty in its Chapter 11 case as a basis for extending its exclusive period to file a plan of reorganization, arguing that until its regulatory problems were resolved, it was not in a position to develop a plan of reorganization.[71] It has also not ruled out pursuing a litigation strategy; in testimony before the New York Bankruptcy Court on May 29, 2012, a LightSquared executive said that if a consensual resolution could not be obtained, LightSquared might bring a claim against the FCC.[72]

In response to these developments, LightSquared has pursued two paths. Before the FCC, LightSquared originally argued that it should be allowed to operate its planned network pursuant to the Conditional Waiver Order.[73] Its position was that it was operating lawfully, that the GPS interference problem was caused by flaws in the design and manufacture of GPS devices, and it sought a ruling that its operations could continue.[74] It also lobbied Congress and the FCC for a spectrum swap in which it would trade in the portion of the L-band that was adjacent to the GPS band for new spectrum that would not pose the same problems.[75] In late September, LightSquared made a new proposal to the FCC. It asked to be allowed to use 5 MHz of spectrum currently used by the federal government for weather balloon applications to operate its broadband network.[76] According to LightSquared, that government spectrum, plus an additional 5 MHz of spectrum already controlled by it, would be sufficient to allow it to operate its network. If that proposal were accepted, LightSquared said it would release its rights to use 10MHz of L-band spectrum that is adjacent to the GPS band, presumably ending the interference problem.[77] In addition, LightSquared has also asked the FCC to relieve it of certain obligations relating to the build-out of its 4G network.[78] Among other things, LightSquared would have had to demonstrate that it had terrestrial coverage available to at least 100 million people by December 31, 2012. In its filing with the FCC, LightSquared argued that in light of the current uncertainty regarding its ability to use its ground-based transmitter system, its build-out obligations be suspended.[79]

LightSquared's FCC legal problems are similar to those of FiberTower. In seeking to rescind its Conditional Waiver Order based on GPS interference, the FCC is clearly exercising its regulatory jurisdiction. But LightSquared does not appear to have a strong case that revocation of the Conditional Waiver Order would constitute an automatic stay violation. The FCC led the extensive testing conducted in 2011 and 2012, and has conducted an administrative proceeding on this issue in accordance with its own regulations. For those reasons, the FCC has a strong position that any revocation of the Conditional Waiver Order would be exempt from the automatic stay under Section 362(b)(4) of the Bankruptcy Code. But like FiberTower and most other troubled telecom debtors, there can be little doubt that LightSquared's L-band spectrum represents its most valuable asset, the loss or curtailment of the use of

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thority for an Ancillary Terrestrial Component, File No. SAT-MOD-20101118-00239 at 17-18 (filed August 1, 2011).

[64] Letter from Lawrence E. Strickling, (''Strickling Letter'') Assistant Secretary for Communications and Information, United States Dept. of Commerce, to Julius Genachowski, Chairman, FCC (Feb. 14, 2012), available at http://www.ntia.doc.gov/files/ntia/publications/lightsquared_letter_to_chairman_genachowski_-_feb_14_2012.pdf.

[65] Strickling Letter at 3-6.

[66] Strickling Letter at 2-3.

[67] Strickling Letter at 3.

[68] Public Notice, International Bureau Invites Comment on NTIA Letter Regarding LightSquared Conditional Waiver, IB Docket 11-109 (Feb. 15, 2012).

[69] Montagner Declaration at ¶ 12.

[70] Motion for Entry of Order Pursuant to Section 1121(d) Extending LightSquared's Exclusive Periods to File a Plan of Reorganization and Solicit Acceptances Therefor, In re LightSquared Inc., case number 12-12080, United States Bankruptcy Court for the Southern District of New York, ECF#294 at ¶ 23.

[71] *Id.*

[72] Testimony of Marc R. Montagner, Chief Financial Officer and Interim Co-Chief Operating Officer of LightSquared, May 29, 2012, in In re LightSquared Inc., case number 12-12080, United States Bankruptcy Court for the Southern District of New York, ECF#86 at 59.

[73] Comments in Opposition of LightSquared Inc., In the Matter of LightSquared Technical Working Group Report, IB Docket 11-109, DA 12-214; and LightSquared Subsidiary LLC Request for Modification of its Authority for an Ancillary Terrestrial Component, File No. SAT-MOD-20101118-00239 (March 16, 2012).

[74] *Id.* at 46-69.

[75] Katherine Burton and Saijel Kishan, *Falcone Said to Be Seeking Spectrum Swap to Salvage LightSquared*, Bloomberg, February 12, 2012, available at http://www.bloomberg.com/news/2012-02-16/falcone-said-to-be-seeking-spectrum-swap-to-salvage-lightsquared.html.

[76] See, In the Matter of LightSquared Subsidiary, LLC, Petition for Rulemaking (filed September 28, 2012).

[77] *Id.* at 3.

[78] *See*, LightSquared Ex Parte Communication and Request for Action, IB Docket Nos. 08-184, 11-109; ET Docket No. 10-142; IBFS File no. SAT-MOD-2010118-00239 (filed September 24, 2012).

[79] *Id.* at 2-3.

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which would severely damage its prospects for reorganization. LightSquared can argue that a revocation of the Conditional Waiver Order would doom its prospects for reorganization. But for the time being, it appears that LightSquared is still hoping to achieve a negotiated resolution with the FCC. Indeed, it is notable that since it commenced its Chapter 11 proceeding in May 2012, LightSquared has not initiated litigation in the Bankruptcy Court seeking any form of relief from its FCC problems, instead pursuing the dual path of FCC lobbying and litigation. However, in light of the *FiberTower* decision, LightSquared may determine that it has a stronger basis to halt any revocation on the Conditional Waiver Order until the FCC completes its internal review and through any appeal to the Court of Appeals for the District of Columbia.

Conclusion

FiberTower demonstrates that the interplay between telecommunications and bankruptcy law remains an active fault line, one that threatens to send unexpected shock waves at any time. If an appeals court reverses or vitiates the Texas Bankruptcy Court's ruling, it will strengthen the FCC's power; if *FiberTower* is affirmed, it will encourage other debtors, perhaps including LightSquared, to further test the interplay between these regulatory schemes.