

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

In the Matter of )
LEACO RURAL TELEPHONE )
COOPERATIVE, INC. )
Request for Waiver and Reinstatement of )
Broadband Radio Service Authorization for the )
Hobbs, New Mexico Basic Trading Area, )
MDB191 )

ORDER

Adopted: February 3, 2006

Released: February 3, 2006

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we grant Leaco Rural Telephone Cooperative, Inc. ("Leaco") a nunc pro tunc waiver of section 1.2110(g)(4)(iv) of the Commission's rules with respect to automatic cancellation of a Broadband Radio Service ("BRS") license for the Hobbs, New Mexico Basic Trading Area ("BTA"). As explained below, Leaco was paying for the subject license through the Commission's installment payment loan program. After the Commission did not receive Leaco's installment payments as required by section 1.2110(g)(4)(iv) of the rules, Leaco was in default, the license automatically cancelled, and Leaco was subject to debt collection procedures. Upon receiving a notice of debt acceleration from the Commission, Leaco fully satisfied its entire outstanding loan obligation and now seeks relief from the automatic cancellation provision of the Commission's payment rule.

2. Examining the totality of the circumstances in the instant matter, we conclude that Leaco has met the Commission's waiver standard. Specifically, we find that Leaco's seven year record of

1 On July 29, 2004, the Commission released a Report and Order and Further Notice of Proposed Rulemaking that modified the rules governing the Multipoint Distribution Service ("MDS") in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, et al.; WT Docket Nos. 03-66, et al., Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS as BRS. Because the new rules are now in effect, we will refer to the service by its new name.

2 47 C.F.R. § 1.2110(g)(4)(iv).

3 Petition for Waiver and Reinstatement of BTA Authorization, filed by Leaco Rural Telephone Cooperative, Inc. on September 16, 2005 ("Request for Waiver") at 2. Responding to the Commission's debt acceleration letter, Leaco made "full payment" of the "outstanding debt owed as calculated by the Commission." Id. at n.2.

4 Id. Insofar as we are addressing the waiver portion of Leaco's request affirmatively, their request for reinstatement is moot.

5 47 C.F.R. § 1.925

meeting its payment obligations under the installment payment plan, including its full payment of the debt associated with the subject license, as well as the facts associated with the failed payments made through the Auction Installment Payment (“AIP”) program<sup>6</sup> demonstrate that the underlying purposes of the automatic cancellation rule would not be served by application to the instant case. Furthermore, given Leaco’s particular circumstances, we conclude that a grant of a waiver serves the public interest because it preserves the prior assignment of the license that is more likely to result in speeding service to consumers than automatic cancellation. For these reasons, we find that Leaco has met the Commission’s waiver standard and that grant of a *nunc pro tunc* waiver of the automatic cancellation provision of section 1.2110(g)(4)(iv) serves the public interest.<sup>7</sup>

## II. BACKGROUND

3. When the Commission established the licensing and service rules for BRS, it provided an option to those entities that qualified as small businesses to pay for licenses won at auction in installments over the initial ten-year license term.<sup>8</sup> The auction for BTA licenses in BRS (Auction No. 6) began on November 13, 1995, and when it concluded on March 28, 1996, Leaco was the winning bidder on the Hobbs, New Mexico BTA.<sup>9</sup> Leaco qualified for the installment payment option and elected to pay for the license under that arrangement.<sup>10</sup> The Commission, therefore, granted Leaco a BRS license for the Hobbs, New Mexico BTA on the condition that Leaco would timely meet its payment obligations under the installment payment program.<sup>11</sup>

4. Pursuant to the Commission’s rules, a licensee participating in the installment payment program has additional time beyond the initial payment deadline to make an installment payment provided the licensee meets certain requirements.<sup>12</sup> Under the current rules, which were in effect in the period in question, a licensee is permitted to make a payment on or before the last day of the quarter following its payment deadline (i.e., the “first additional quarter”) so long as it also pays a late payment fee equal to five percent of the amount of its past due installment payment.<sup>13</sup> Moreover, if a licensee fails to make its required installment payment on or before the last day of the first additional quarter, it still is permitted to make its required installment payment on or before the last day of the second quarter following its payment deadline (i.e., the “second additional quarter”) so long as it also pays an additional late payment fee of ten percent of the amount of the past due required installment payment.<sup>14</sup> If, however,

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<sup>6</sup> Request for Waiver at 2-4.

<sup>7</sup> See 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>8</sup> See 47 C.F.R. § 21.960(c) (1996). In 1997, the Commission determined that installment payments will not be used in the immediate future as a means of financing small business participation in its auction program. See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 397 ¶ 38 (1997) (“*Part 1 Third Report and Order*”).

<sup>9</sup> Request for Waiver at 1.

<sup>10</sup> *Id.*

<sup>11</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391 ¶ 240 (1994) (“*Competitive Bidding Second Report and Order*”).

<sup>12</sup> *Competitive Bidding Second Report and Order* at 2391 ¶ 240. Initially, licensees were required to request this additional time period. *Id.* The Commission, however, eventually instituted an automatic grace period. See *Part 1 Third Report and Order* at 436 ¶ 106.

<sup>13</sup> *Id.* See also 47 C.F.R. § 1.2110(g)(4)(i).

<sup>14</sup> See *Part 1 Third Report and Order* at 436 ¶ 106. See also 47 C.F.R. § 1.2110(g)(4)(ii).

a licensee fails to pay its total required installment payment and any associated late payment fees within two quarters of the initial installment due date (i.e., by the last day of the second additional quarter), it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures.<sup>15</sup>

5. In conjunction with the installment payment program, the Commission and Mellon Bank (the financial institution responsible for processing installment payments owed to the Commission) offered licensees the option of participating in AIP, a program designed, at least in part, to facilitate and expedite installment payments. As stated in its promotional literature, the AIP program was established in an effort to help licensees avoid delays in making installment payments.<sup>16</sup> Under the AIP program, a licensee provides certain financial information to the Commission and Mellon Bank thereby allowing the licensee or its representative to call Mellon Bank and authorize the initiation of a payment from the licensee's designated account. In accordance with the procedures for AIP, the licensee (or its representative) can then specify the date that Mellon Bank processes the licensee's payment to the Commission.<sup>17</sup>

6. For approximately seven years, Leaco made installment payments on the license in question consistent with the Commission's rules.<sup>18</sup> Problems arose, however, with regard to Leaco's installment payments in late 2004 and early 2005.<sup>19</sup> Specifically, Leaco had until February 28, 2005, to pay its August 31, 2004 installment payment without defaulting, so long as it also paid the combined late fees (i.e., the five percent late fee for the first additional quarter and the ten percent late fee from the second additional quarter). Pursuant to its enrollment in the AIP program, a representative from Leaco purports to have called Mellon Bank in November 2004, and March 2005 to authorize the transfer of funds to pay Leaco's installment payment obligations and associated late fees.<sup>20</sup> As per custom, the Mellon Bank representative verified the telephone transaction by providing a confirmation number to Leaco's representative for the authorization of the transfer of funds.<sup>21</sup> Although Leaco initiated the AIP payment process in a manner that would have complied with the Commission's installment payment rules, the funds did not transfer from Leaco's financial institution to Mellon Bank to satisfy the installment obligations for three consecutive quarters.<sup>22</sup> In this regard, Leaco's financial institution, Wells Fargo Bank, confirms that it did not receive a request from Mellon Bank to transfer funds from Leaco to Mellon during the months of August – November 2004 and/or February or March 2005.<sup>23</sup> The deadline for making a late payment in the second additional quarter for the August 31, 2004 installment was February 28, 2005. When the Commission did not receive the August 2004 installment payment by the end of the second additional quarter (i.e. February 28, 2005), Leaco was in default, the license

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<sup>15</sup> See *Part 1 Third Report and Order* at 438 ¶ 107. See also 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>16</sup> See generally AIP brochure.

<sup>17</sup> The brochure that accompanies the set-up form for the AIP program specifically states: "you simply call Mellon's toll-free telephone number or input your payment via a computer terminal at least one business day before your payment is due...." It also states that "[the licensee's] bank account will be debited and your FCC customer account will be credited the business day after you report your payment information (if it is reported by 9:30 P.M. EST)."

<sup>18</sup> See Request for Waiver at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3-4.

<sup>21</sup> *Id.* at 2. See also Letter to Gary Michaels, Auctions and Spectrum Access Division from Bob Young, Controller, Leaco Rural Telephone Cooperative dated July 21, 2005 ("Division Letter").

<sup>22</sup> Request for Waiver at 3-4.

<sup>23</sup> *Id.* at 4 and Attachment 4.

automatically cancelled, and Leaco became subject to the debt collection procedures pursuant to section 1.2110(g)(4)(iv).<sup>24</sup>

7. Consistent with its responsibilities under the Debt Collections Improvement Act (“DCIA”), the Commission sent Leaco a debt acceleration letter dated July 20, 2005. Leaco subsequently responded by paying the entire outstanding loan obligation.<sup>25</sup> Additionally, on September 16, 2005, Leaco filed the instant waiver request seeking relief from the automatic cancellation provision of the Commission’s payment rules.

### III. DISCUSSION

8. We now turn to Leaco’s request for a waiver of section 1.2110(g)(4)(iv), the provision of our rules which holds that a licensee that fails to make its installment payment, interest, and any late fees by the end of the second additional quarter will be in default, its license will automatically cancel and it will be subject to debt collection procedures.<sup>26</sup> We note that Leaco does not dispute that the facts set forth in its pleading constitute a default under the Commission’s rules and it does not contest the Commission’s debt collection.<sup>27</sup> Rather, Leaco argues that the rule should not be applied in its particular circumstances and it therefore seeks relief solely from the provision of section 1.2110(g)(4)(iv) that resulted in the March 1, 2005 automatic cancellation of the subject license.

9. As a general matter, to obtain a waiver, a party must show either that: (i) the underlying purpose of the applicable rule would not be served, or would be frustrated by its application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or the applicant has no reasonable alternative.<sup>28</sup>

10. Based on a totality of the circumstances, we conclude that Leaco has satisfied the Commission’s waiver standard. First, given the confirmation numbers provided by Mellon Bank, we know that Leaco initiated consecutive quarterly payments through AIP in a manner that would have complied with the Commission’s payment rules if the payments had been successfully transmitted.<sup>29</sup> Second, both Leaco’s financial institution and Leaco’s Controller corroborate Leaco’s claims that it had

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<sup>24</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>25</sup> Request for Waiver at 2.

<sup>26</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>27</sup> See Request for Waiver at 2 and n.1. The Commission has repeatedly emphasized the importance of full and timely payment. See, e.g., Licenses of 21<sup>st</sup> Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25117-18 ¶ 10 (2000) (“21<sup>st</sup> Century Order”), *reconsideration denied*, Licenses of 21<sup>st</sup> Century Telesis Joint Venture, *Order on Reconsideration*, 16 FCC Rcd 17257 (2001), *review denied in part, dismissed in part*, *21st Century Telesis Joint Venture v. F.C.C.*, 318 F.3d 192 (D.C. Cir. 2003). See also Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103 (2000), further reconsideration denied, *Second Memorandum Opinion and Order*, 16 FCC Rcd 18357 (2001); Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10853 (1996).

<sup>28</sup> 47 C.F.R. § 1.925; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972) *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461 (1972).

<sup>29</sup> See Division Letter at Attachment 2.

sufficient funds on hand at the time each AIP payment was initiated.<sup>30</sup> Third, Leaco's long term and prior successful participation in the AIP program provides additional evidence of its intent to render timely installment payments in compliance with the Commission's payment rules. Fourth, Leaco's unsuccessful payment in March 2005 is also indicative of its belief, albeit erroneous, that it was still in compliance with the Commission's payment rules. Fifth, Leaco's financial institution confirms Leaco's representation that the failure of timely payments resulted from a breakdown in the electronic processing of the transaction.<sup>31</sup> Finally, upon the acceleration of the debt, Leaco quickly paid its installment payment obligation in full thereby making clear that financial ability to be a Commission licensee should not be a concern. Accordingly, given Leaco's seven year payment history, including its full payment of the debt, as well as the facts associated with its failed payments made through the AIP program, we find that the underlying purposes of the automatic cancellation provision of section 1.2110(g)(4)(iv) are not served by application to the instant case. Furthermore, in the circumstances presented here, the grant of the requested waiver serves the public interest because preservation of Leaco's license assignment is more likely to result in speeding service to consumers than license cancellation.

11. In determining Leaco's satisfaction of the Commission's waiver standard, we review the underlying purposes of the automatic cancellation rule. The Commission adopted section 1.2110(g)(4) to provide licensees a degree of flexibility while, at the same time, to protect the integrity of the Commission's assignment of licenses based on high bids in an auction and to help ensure that licensees have access to the capital necessary to both pay for the license and provide service to the public.<sup>32</sup> As the Commission has noted:

Insisting that licensees demonstrate their ability to pay as a condition to continuing to hold licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace. When licensees fail to pay winning bids, or the principal and related interest when paying winning bids in installments, on a timely basis in compliance with the Commission's rules, the presumption that the auction assigned the license to the party that placed the highest value on the license is lost.<sup>33</sup>

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<sup>30</sup> See Request for Waiver at 3, Attachment 3 (Letter from Gayle Bussell, Personal Banker, Wells Fargo to Marvin Washington, FCC stating "[t]his letter confirms that Leaco Rural Telephone Coop...did have sufficient funds to cover the...withdrawal.") and Attachment 7 (Declaration of Robert A. Young).

<sup>31</sup> Request for Waiver at 3-4 and Attachment 4 (Letter from Deena Williams, Business Relationship Manager, Wells Fargo to Federal Communications Commission dated July 21, 2005 stating "Wells Fargo did not receive a ACH originated debit(s) authorizing a transfer from Leaco Rural Telephone Cooperation checking account...to Mellon Bank &/or Colson Services Corp. during the months of August – November 2004 &/or February or March 2005.").

<sup>32</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348-49 ¶ 8 (1998).

<sup>33</sup> Letter to David Irwin and Nathaniel Hardy, Counsel for MBO Wireless, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011, 4016 (2004) (citing *21<sup>st</sup> Century Order*, 15 FCC Rcd at 25123-24, ¶ 22). In the *21<sup>st</sup> Century Order*, the Commission determined that a party that lacked the financial wherewithal to make its installment payment by the deadline was not entitled to a waiver to give it additional time to find the requisite funds because grant of such a waiver would be unfair to auction participants, and would undermine the integrity of the auction and the Commission's rules. *21<sup>st</sup> Century Order* at 25123-24, ¶ 22. In the instant matter, however, Leaco took the actions it believed were necessary to pay by the deadline, and has satisfied the Commission that it had the requisite funds to do so. Its mistake was the result of an electronic administrative payment processing error as confirmed by its financial institution. Therefore, our grant

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Absent that presumption, the integrity of the Commission's licensing process may be compromised. The underlying purpose of the automatic cancellation provision of section 1.2110(g)(4)(iv) therefore serves to safeguard these principles.

12. Here, Leaco's full payment of its entire outstanding debt makes clear its financial ability and willingness to pay for the license and strongly indicates its intent and capability to provide service to the public. Simply demonstrating an ability to pay in compliance with the Commission's installment payment rules, however, does not satisfy all the purposes underlying the automatic cancellation rule. As noted above, when a licensee fails to comply with the installment payment rules, the automatic cancellation of the license also safeguards the integrity of the Commission's competitive bidding and licensing process. In addition to the ability to pay, a licensee's willingness to timely and fully satisfy all of its obligations created by the winning bid helps ensure that the license was assigned to the party that valued it most highly. Absent the licensee's compliance with the Commission's installment payment rules, there is inevitably uncertainty regarding whether the license should have been assigned to another party. The extent of this doubt diminishes, however, when presented with factors such as those discussed above which establish that there was a seven year history of successful participation in the installment payment program, there has been full payment of the debt obligation, and where the failure to comply with the rules was the result of electronic administrative payment processing errors.

13. Furthermore, full payment of the outstanding debt obligation supports our conclusion that a grant of the requested waiver serves the public interest because it precludes any similar future errors from disrupting the assignment of the license to Leaco. Preserving the existing license assignment under these particular circumstances provides greater assurance that the spectrum will be used for speeding service to consumers than automatic cancellation of the license. In reaching our conclusion in this matter, we note that the Commission has historically established a high bar for meeting the Commission's waiver standard in the context of failed installment payments. While we recognize that any one of Leaco's proffered facts alone would not suffice to meet the Commission's waiver standard, we believe that when taken together, Leaco has demonstrated that automatic cancellation of the license in this case would not serve the underlying purposes of the Commission's payment rules. For these reasons, we conclude that automatic cancellation of the license is not necessary to serve the underlying purposes of the payment rule to either preserve the integrity of the auction and licensing process or to ensure Leaco's financial qualifications to be a Commission licensee.

14. Given the totality of the facts, we find the present circumstances distinguishable from those cases in which we have denied waiver of the automatic cancellation rule for late payment based on the assurance of a future ability to pay debt. For instance, there have been several cases where a licensee has requested a waiver in order to assign the license to an entity that can pay the Commission in full. Assignment to a different party cannot protect against any lingering uncertainties about the initial assignment of the licenses and cannot safeguard the integrity of the Commission's licensing and auction process.<sup>34</sup> In contrast, Leaco's error in tendering payment through the AIP program and its subsequent payment in full diminishes the possibility that Leaco's noncompliance reflects an erroneous initial license

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of a waiver in these circumstances is neither unfair nor harmful to the integrity of the Commission's rules and processes.

<sup>34</sup> See Letter to J. Curtis Henderson, Senior Vice President and General Counsel for Nucentrix Spectrum Resources, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 559, 561-62 (2002) ("Strict enforcement of the payment rules . . . is fair to all participants in our auctions, including those who won licenses in the auction and those who did not"); Letter to Russell H. Fox, Esq., Counsel for Capital Two-Way Communications, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 11786, 11787-88 (2001). In both of these cases, the licensee intended the assignor to relieve it of its payment obligations.

assignment and does not cast doubt upon general auction or licensing integrity. Moreover, Leaco's circumstances are distinguishable from those cases where installment payments were initiated only after the final time for the grace period had lapsed.<sup>35</sup> Contrary to such cases, and as explained fully above, Leaco's failure to successfully render installment payments through the AIP program is not reflective of whether it had the necessary financial qualifications to be a Commission licensee and does not cast doubt upon the license assignment. Thus, unlike cases where we have denied relief from section 1.2110(g)(4)(iv), we believe that automatic cancellation of this BRS license is not required to protect the integrity of the auction and licensing process. Furthermore, based on all the facts before us, we believe that the public will benefit by eliminating the possibility of disruption to the Commission's prior assignment of this BRS license. Under these particular circumstances, where the question of the licensee's financial qualifications has been eliminated by full payment of the obligation, the benefit of preserving the license assignment outweighs any public benefit gained by the automatic cancellation of a license. This is especially true here where the facts evidence that the automatic cancellation resulted from electronic, administrative payment processing errors that prevented the AIP payments from successfully reaching Mellon Bank despite being authorized by the licensee.

15. In sum, we find that Leaco has met the Commission's waiver standard and that grant of a *nunc pro tunc* waiver of section 1.2110(g)(4)(iv) serves the public interest.<sup>36</sup> Based on the facts before us, and in keeping with the Commission's statutory obligations, we believe that the preservation of this BRS license assignment to Leaco provides the best assurance that the spectrum license will be used for the development and rapid deployment of new technologies, products and services for the benefit of the public without administrative delay.<sup>37</sup> We therefore believe that a *nunc pro tunc* waiver of the automatic cancellation provision of section 1.2110(g)(iv) best serves the public interest.

#### IV. CONCLUSION

16. When Leaco failed to pay its installment payments by the deadline of the second additional period, the BRS license automatically cancelled. Given the totality of the circumstances, we find that a *nunc pro tunc* waiver of the automatic cancellation of the license serves the public interest.

17. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), and sections 1.3 and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, Leaco is GRANTED a *nunc pro tunc* waiver of the automatic cancellation of its licenses pursuant to section 1.2110(g)(4)(iv), 47 C.F.R. § 1.2110(g)(4)(iv).

18. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Catherine W. Seidel  
Acting Chief  
Wireless Telecommunications Bureau

<sup>35</sup> See Request of Inforum Communications, Inc. for Petition for Reconsideration and Waiver Request for Late Acceptance of BTA Installment Payment, *Order*, 19 FCC Rcd 83, 86 (2004), petition for reconsideration pending.

<sup>36</sup> 47 C.F.R. § 1.2110(g)(4)(iv).

<sup>37</sup> See 47 U.S.C. § 309(j)(3)(A).