

ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—————
No. 02-1359 (CONSOLIDATED WITH No. 02-1360)

—————
WARREN C. HAVENS,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

—————
ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL
COUNSEL

PAMELA L. SMITH
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. *Parties:*

All parties, intervenors, and amici in this case are listed in the Brief for Appellant.

B. *Rulings Under Appeal:*

Regionet Wireless License, LLC, Memorandum Opinion and Order, 17 FCC Rcd 21263 (2002) (JA) and *Regionet Wireless License, LLC*, Memorandum Opinion and Order, 17 FCC Rcd 21269 (2002) (JA).

C. *Related Cases:*

The orders on review have not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.



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GLOSSARY

<i>2002 AMTS Rulemaking Order</i>	<i>Amendment of the Commission's Rules Concerning Maritime Communications, Second Memorandum Opinion and Order and Fifth Report and Order, 17 FCC Rcd 6685 (2002)</i>
Bureau or Wireless Bureau	Wireless Telecommunications Bureau, Public Safety and Private Wireless Division
Commission or FCC	Federal Communications Commission
Havens	Warren C. Havens
<i>Order on Further Reconsideration (Grant)</i>	<i>Regionet Wireless Licensee, LLC, Order on Further Reconsideration, 16 FCC Rcd 22097 (WTB PSPWD 2001) (JA)</i>
<i>Order on Reconsideration (Grant)</i>	<i>Regionet Wireless Licensee, LLC, Order on Reconsideration, 16 FCC Rcd 16321 (WTB PSPWD 2001) (JA)</i>
<i>Order on Reconsideration (Renewal)</i>	<i>Regionet Wireless License, LLC, 16 FCC Rcd 19375 (WTB PSPWD 2001) (JA)</i>
<i>Order on Review (Grant)</i>	<i>Regionet Wireless License, LLC, Memorandum Opinion and Order, 17 FCC Rcd 21263 (2002) (JA)</i>
<i>Order on Review (Renewal)</i>	<i>Regionet Wireless License, LLC, Memorandum Opinion and Order, 17 FCC Rcd 21269 (2002) (JA)</i>
Regionet	Regionet Wireless LLC

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BRIEF FOR APPELLEE

ISSUE PRESENTED

In 2000, the staff of the Federal Communications Commission (“FCC” or “Commission”) granted unopposed applications filed by Regionet Wireless LLC (“Regionet”), an intervenor in these consolidated cases, for various maritime wireless radio licensees. In 2001, the FCC staff granted an application to renew a different license held by Regionet. After the staff issued these licensing decisions, appellant Warren C. Havens (“Havens”) – a competitor of Regionet’s and a non-party to both proceedings – asked the staff to reconsider each decision. In each

instance, the staff dismissed his petition, finding that Havens lacked standing to seek reconsideration. Havens then asked the Commission to review the staff dismissal orders; in both instances, the Commission denied his applications for review and affirmed the staff's dismissals of his petitions for reconsideration. The Commission pointed out that Havens had failed to challenge either licensing decision by filing a petition to deny Regionet's applications in accordance with the FCC's rules. Moreover, as a non-party to both proceedings, Havens had failed to show why he was unable to have timely participated in either proceeding.

In Case No. 02-1359, Havens challenges the Commission's order affirming the dismissal of his petition for reconsideration of the staff's grant of Regionet's initial license applications; in consolidated Case No. 02-1360, Havens challenges the Commission's order affirming the dismissal of his petition for reconsideration of the staff's license renewal. Each appeal presents the same question:

Whether the FCC acted within its discretion in denying review of the staff's dismissal of Havens's petition for reconsideration for lack of standing, where Havens failed to file a petition to deny Regionet's license applications and, as a non-party to both license proceedings, had failed to show "good cause" why he could not have participated earlier in the proceedings, as required by an FCC rule.

STATUTES AND REGULATIONS

Pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. REGULATORY BACKGROUND

The Licensing Process for Wireless Radio Services. The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, authorizes the FCC to issue licenses to permit license holders to use portions of the electromagnetic spectrum in order to provide radio services. 47 U.S.C. §§ 308, 309. When such an application is filed, the statute prescribes a process by which “[a]ny party in interest” may file with the FCC a petition to deny the application. 47 U.S.C. § 309(d). When an application for wireless radio services has been accepted for filing, the FCC’s Wireless Telecommunications Bureau (“the Wireless Bureau” or “the Bureau”) may issue a public notice announcing the filing (47 C.F.R. § 1.933(b)), which then opens a thirty day window to allow other persons to file petitions to deny the application. 47 C.F.R. § 1.939(a)(2). If no one files such a petition, the Wireless Bureau may grant the application under authority delegated to it by the Commission. *See* 47 C.F.R. §§ 0.131(a) (functions of Wireless Bureau), 0.331 (delegation of authority to Wireless Bureau); *see also* 47 U.S.C. § 155(c) (generally authorizing delegation of authority to FCC staff).

Review of Staff Licensing Actions. Under specified circumstances, petitions for reconsideration may be filed to challenge FCC staff-level decisions, including licensing decisions by the Wireless Bureau. Under the FCC's rules, any "party to the proceeding" may petition the staff to reconsider its decision. 47 C.F.R. § 1.106(b)(1). But a petition for reconsideration filed by a person "who is not a party to the proceeding" will be accepted only if the petitioner states "with particularity the manner in which the person's interests are adversely affected by the action taken" and "show[s] good reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.* This requirement ensures that all interested entities raise their arguments at the earliest stages of a proceeding, thus promoting administrative efficiency and sound decision-making.

"Any person aggrieved" by staff action taken on delegated authority may file an application for review by the full Commission. 47 U.S.C. § 155(c)(4); *see also* 47 C.F.R. § 1.115(a).

Licenses for AMTS Service. One type of wireless radio service that is subject to this regulatory regime is the Automated Maritime Telecommunications System ("AMTS") service. AMTS service uses antennas at coast stations to provide marine voice and data communications, akin to a cellular phone system, for tugs, barges, and other vessels on waterways. *Amendment of the Commission's Rules Concerning Maritime Communications*, Second Memorandum Opinion and

Order and Fifth Report and Order, 17 FCC Rcd 6685, 6695 ¶ 22 (2002) (“*2002 AMTS Rulemaking Order*”). Like other radio services, AMTS service relies on portions of the electromagnetic spectrum. As relevant here, the AMTS frequency band is divided into two parts, known as “Block A” and “Block B.” See 47 C.F.R. § 80.385(a)(2).

The Commission’s treatment of AMTS licenses has changed over time. Before 2002, licenses for AMTS stations were site-based – that is, granted for specific antenna sites – and were made available on a first-come, first-served basis. Under this regime, one competitor might hold the Block A license for a specific site along a river while a competitor holds the Block B License for the same site. Or, in certain circumstances, upon a showing of need, a single AMTS service provider may hold both the A and B Block licenses for a particular site.

In 2002, the Commission revised its rules to adopt a “geographic” (rather than site-based) approach to AMTS licensing by designating ten licensing regions. *2002 AMTS Rulemaking Order*, 17 FCC Rcd at 6686 ¶ 2, 6695 ¶ 21. The Commission also “permit[ted] AMTS applicants to acquire both, rather than only one, spectrum block” (*i.e.*, both A and B Blocks), *id.* at 6686 ¶ 2, and instituted auctions for AMTS licenses, *id.* at 6687 ¶ 2. The Commission further decided that, under the new licensing regime, holders of existing site-based AMTS licenses would be permit[ted] to continue to operate those licenses pursuant to their terms,

while new licensees would be required to adhere to a technical standard to prevent signal interference with the existing site-based licenses. *Id.* at 6699-70 ¶ 31.

II. FACTUAL BACKGROUND

A. Appeal No. 02-1359: Regionet's Initial License Applications

(1) The Wireless Bureau's Grant of Regionet's Unopposed Block B Applications.

On June 9, 2000, Regionet filed applications for Block B AMTS licenses to serve, among other waterways in the southeastern United States, the Cape Fear and Haws Rivers; the Cooper, Congaree, Broad and Saluda Rivers; and the Savannah River. The FCC's Wireless Bureau issued a public notice on June 27, 2000, announcing the filing of these applications. Neither Havens nor anyone else filed a petition to deny any of Regionet's Block B applications¹ and, on November 8, 2000, the Wireless Bureau granted the unopposed applications. *See Public Notice, Report No. 2119 (rel. Nov. 14, 2000) (JA)*, *recon. dismissed, Regionet Wireless Licensee, LLC*, 16 FCC Rcd 16321 (WTB PSPWD 2001) (“*Order on Reconsideration (Grant)*”) (JA), *further recon. denied*, 16 FCC Rcd 22097 (WTB

¹ In July 2000, Havens filed a petition to deny Regionet's separate applications for Block A licenses along some of the same waterways. On January 31, 2001, the Wireless Bureau partially granted Havens's petition and dismissed, among others, Regionet's application for a Block A license along the Savannah River. *Regionet Wireless License, LLC, Order*, 16 FCC Rcd 2534 (WTB PSPWD 2001).

PSPWD 2001) (“*Order on Further Reconsideration (Grant)*”) (JA), review denied, 17 FCC Rcd 21263 (2002) (“*Order on Review (Grant)*”) (JA).

(2) The Wireless Bureau’s Dismissal of Havens’s Petition for Reconsideration.

On December 14, 2000, Havens filed a petition asking the Wireless Bureau to reconsider its grant of the unopposed Block B applications. The Bureau dismissed his petition, finding that Havens “lack[ed] standing” under the Commission’s rules “to challenge the grant of the [] applications.” *Order on Reconsideration (Grant)*, 16 FCC Rcd at 16323 ¶ 7 (JA). Emphasizing that Havens had not filed a petition to deny the licenses before they were granted, the Bureau concluded that Havens was not “a party to the proceeding involving Regionet’s channel block B applications.” *Id.* ¶ 5 (JA). The Bureau noted that Havens had filed a different petition to deny applications that Regionet previously had filed to serve some of the same waterways on channel Block A. But the Bureau explained that Havens’s petition to deny the *Block A* licenses – different licenses that were considered in a separate proceeding – “cannot be extended, along with the arguments raised therein, to the separate proceeding regarding Regionet’s channel *block B* applications.” *Id.* ¶ 5 (JA) (emphasis added).

Because Havens was not a party to the Block B proceeding at the time the Bureau granted the applications, the Bureau considered whether he had demonstrated, as required by Section 1.106(b)(1) of the FCC’s rules: (1) that his

interests were adversely affected by the Commission's grant of the applications, and (2) "that there was good reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.* ¶ 6 (JA); *see also* 47 C.F.R. § 1.106(b)(1). The Wireless Bureau explained that the second requirement serves "the public interest" by ensuring that "all interested parties raise their arguments concerning an application in the earliest stages of a proceeding." 16 FCC Rcd at 16321 ¶ 6 (JA). The Bureau "agree[d] with Regionet" that Havens had failed to demonstrate "any reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.* (JA). And it rejected Havens's attempt in his reply comments "to bolster the procedural validity of the underlying [reconsideration] petition" by relying on the Bureau's grant of a brief extension of time to Regionet over the winter holiday season to oppose the reconsideration petition. *Id.* (JA).² Concluding that the "procedural defect in his petition for reconsideration" deprived Havens of standing to challenge Regionet's channel block B applications, the Bureau dismissed his petition. *Id.* ¶ 7 (JA).

² Under the Commission's rules, Regionet had until December 29, 2000, to file an opposition to Havens's petition for reconsideration of the grant of Regionet's Block B applications. *See* 47 C.F.R. §§ 1.4(h) and 1.106(g). The Wireless Bureau granted Regionet's timely request to extend the filing deadline to January 5, 2001. *January 3, 2001 Letter from Scot Stone to Martin W. Bercovici, Esq.* (JA).

(3) Further Reconsideration by the Wireless Bureau.

On October 9, 2001, Havens petitioned the Wireless Bureau to further reconsider the dismissal of his petition for reconsideration, renewing arguments that the Bureau had considered, but found wanting, when it determined that he lacked standing to file his original petition for reconsideration. In the *Order on Further Reconsideration (Grant)*, 16 FCC Rcd at 22099 ¶ 6 (JA), the Bureau again rejected Havens's attempt to extend his petition to deny the Block A license applications to the separate proceeding addressing Regionet's Block B license applications. The Bureau explained that those two sets of applications, bearing different file numbers, "appeared on separate public notices, which triggered separate petition to deny filing periods and separate licensing proceedings." *Id.* (JA). Accordingly, the Bureau concluded that "the channel block B applications cannot be viewed in form or substance as amendments to the channel block A applications," as Havens claimed. *Id.* (JA).

The Wireless Bureau also rejected Havens's renewed claim that its decision to grant Regionet a brief extension of time over the winter holidays to oppose Havens's original petition for reconsideration afforded him standing that he otherwise lacked. *Id.* ¶ 5 (JA). The two issues were "unrelated," the Bureau explained, "because the Commission places greater procedural demands on a party that files a petition for reconsideration" under section 1.106(b)(1) "than on a party

that files an opposition thereto, which is merely a responsive pleading.” *Id.* (citing 47 C.F.R. § 1.106(g)).

Finally, the Wireless Bureau addressed and rejected Havens’s new argument that Section 1.106(c) of the Commission’s rules permitted him to present new information that was unavailable at the time he filed his original petition for reconsideration. The Bureau explained that Havens had misconstrued that rule, which describes the circumstances when a petitioner with a “procedurally valid” petition for reconsideration can rely on facts not previously presented to the staff. *Id.* ¶ 8 (JA). “It has no relevance,” the Bureau observed, “to a procedurally defective petition” such as the one filed by Havens. *Id.* (JA).

The Bureau accordingly denied Havens’s petition for further reconsideration, and affirmed its previous finding that “Havens lacked standing to challenge the grant” of Regionet’s Block B license applications. *Id.* ¶ 10 (JA).

**(4) The Commission’s Order on Review
(Grant).**

On January 17, 2002, Havens filed an application for Commission review of the Wireless Bureau’s refusal to again reconsider its decision to dismiss his original petition for reconsideration of the Bureau’s grant of Regionet’s Block B

applications.³ The Commission denied review. *Order on Review (Grant)*, 17 FCC Rcd at 21263 ¶ 1 (JA).⁴

Havens argued that Commission review of the *Order on Further Reconsideration* was warranted because the Wireless Bureau impermissibly had “relied on facts and arguments presented in Regionet’s opposition that were not supported by an affidavit pursuant to Section 1.939(f) of the Commission’s Rules.” 17 FCC Rcd at 21265 ¶ 7 (JA). The Commission disagreed. It found that “the *Order on Further Reconsideration* did not ‘rely’ on Regionet’s opposition” but instead “evaluated and rejected Havens’s contentions on their own merits.” *Id.* at

³ The Commission excused Havens’s late filing of his application for review, which he filed at midnight the day after it was due. The Commission denied Havens’s request for leave to file an amended application for review, which Havens had faxed to the Commission later that day. *Order on Review (Grant)*, 17 FCC Rcd at 21265 ¶ 6 (JA).

⁴ The Commission noted that it would address the application for review with respect to the *Order on Further Reconsideration* (in which the Wireless Bureau denied reconsideration of its dismissal of the original petition for reconsideration), but not with respect to the *Order on Reconsideration (Grant)* (in which the Bureau dismissed the petition to reconsider its initial grant of Regionet’s Block B applications). The Commission explained that under Section 1.104(b) of its rules, 47 C.F.R. § 1.104(b), a “person may file a petition for reconsideration or an application for review of a Commission action, but not both,” as Havens improperly tried to do. 17 FCC Rcd at 21265 n.26 (JA). Because “Havens already [had] filed a petition for reconsideration of the *Order on Reconsideration*,” he was precluded from also filing an application for review of that order. *Id.* (JA). In any event, the Commission noted that, “as a practical matter,” it was of “little import” which reconsideration order was before it, “because Havens raise[d] the same arguments with respect to both the *Order on Reconsideration* and the *Order on Further Reconsideration*.” *Id.*

21266 ¶ 7 (JA). Because Section 1.939(f)'s "affidavit requirement applies only to an opposition to a petition to deny" but not "to an opposition to a petition for reconsideration," the Commission explained that Section 1.939(f) had "no relevance" to this proceeding. 17 FCC Rcd at 21266 ¶ 7 (JA).

Turning to the sole issue before it – whether the Wireless Bureau properly denied reconsideration of its earlier reconsideration order – the Commission rejected Havens's argument that, by allowing Regionet a brief extension of time to oppose Havens's reconsideration petition, the Bureau had "set a precedent of providing standing to an entity that heretofore had not been a party to the proceeding." *Id.* ¶ 9 (JA). As the Commission explained, "[e]xtending status as a party to a proceeding after a final action has been taken is a different matter from merely granting to an entity that already is a party to the proceeding a brief extension of time to file a responsive pleading." *Id.* at 21267 ¶ 9 (JA).

The Commission similarly found unpersuasive Havens's argument that the Wireless Bureau had erred in rejecting his claim "that his petition for reconsideration was procedurally valid under Section 1.106(c)(2) of the Commission's Rules." *Id.* ¶ 10 (JA). The Commission explained that Section 1.106(b)(1) — not Section 1.106(c) — determines "who may file a petition for reconsideration." *Id.* (JA). In contrast, Section 1.106(c) only "addresses the circumstances under which an otherwise proper petition for reconsideration may

rely on facts not previously presented” and so “does not in any way affect or provide relief from the requirement in Section 1.106(b)(1) that a person seeking reconsideration of a Commission action must either already be a party to the proceeding or explain why earlier participation was not possible.” 17 FCC Rcd at 21267 ¶ 10 (JA).

The Commission agreed with the Bureau that “Havens was not a party to the proceeding, and did not provide such an explanation.” Accordingly, the Commission denied Havens’s application for review, and affirmed the Bureau’s denial of his second petition for reconsideration. *Id.* ¶ 12 (JA).

B. Appeal No. 02-1360: The Renewal Application

On May 9, 2001, the Wireless Bureau issued a public notice announcing that Regionet had applied to renew its license to provide AMTS service to the Atlantic Coast. Neither Havens – nor any other person – filed a petition to deny the application. On July 2, 2001, the Bureau granted Regionet’s renewal application. Wireless Telecommunications Bureau, Site-by-Site Action, *Public Notice*, Report No. 908 (WTB July 11, 2001) (JA), *recon. dismissed, Regionet Wireless License, LLC*, 16 FCC Rcd 19375 (WTB PSPWD 2001) (“*Order on Reconsideration (Renewal)*”) (JA), *review denied*, 17 FCC Rcd 21269 (2002) (“*Order on Review (Renewal)*”) (JA).

Instead of filing a petition to deny Regionet's renewal application, Havens on June 26, 2001, submitted to the Wireless Bureau a "general informal request" in which he broadly alleged that Regionet had improperly constructed various AMTS radio systems covering the Atlantic Coast, Erie Canal, and Great Lakes. *Order on Review (Renewal)*, 17 FCC Rcd at 21270 ¶¶ 4-6 (JA). Treating Havens's inquiry as an informal request under 47 C.F.R. § 1.41, the Bureau informed Havens on July 6, 2001 that his informal request was insufficient to form the basis for Commission action "because it did not specify which Regionet facilities Havens believed were improperly constructed." *Id.* & n.13 (JA).

**(1) The Bureau's Dismissal of Havens's
Petition for Reconsideration.**

On August 1, 2001, Havens filed a petition seeking reconsideration of the Bureau's grant of Regionet's license renewal application. The Bureau explained that Havens had failed to satisfy the "Commission's procedural requirements for filing a petition for reconsideration." *Order on Reconsideration (Renewal)*, 16 FCC Rcd at 19376 ¶ 5 (JA). Because Havens had not filed a petition to deny Regionet's renewal application, the Bureau explained that he was not "a party to this proceeding prior to the [Bureau's] grant of the subject renewal application." *Id.* (JA). Section 1.106(b)(1) of the Commission's rules therefore required Havens "to demonstrate 1) that his interests were adversely affected by the Commission's grant of the application, and 2) that there was good reason why it

was not possible for him to participate in the earlier stages of the proceeding.” *Id.* ¶ 6 (JA).

Havens argued that he was unable to participate in the proceeding earlier because he needed “more than thirty days” to compile various information, including an engineering study, to support a petition to deny. 16 FCC Rcd at 19376 ¶ 7 (JA). Rejecting this argument, the Wireless Bureau explained that, “[i]f Havens believed that Regionet’s renewal application was defective because it did not include an engineering study, then the appropriate course of action under such circumstances would have been to timely file a petition to deny rather than delaying the filing of his petition to conduct the study himself.” *Id.* (JA). The record also showed that “Havens had at his disposal much of the information that he would eventually use to support his petition for reconsideration during the thirty-day period for filing a petition to deny,” but he “did not raise any arguments opposing the . . . renewal application until after it was granted.” *Id.* & n.14 (JA). The Bureau therefore concluded that Havens had failed to adequately explain why he could not have participated in the renewal application proceeding earlier, and dismissed the petition for reconsideration. *Id.* ¶ 8 (JA).

**(2) The Commission’s Order on Review
(Renewal).**

On December 3, 2001, Havens filed an application for Commission review of the Bureau’s dismissal of his petition for reconsideration. The Commission denied review. *Order on Review (Renewal)*, 17 FCC Rcd at 21269 ¶ 1 (JA).

The Commission noted the Bureau’s finding that “because Havens failed to file a valid petition to deny, he was not a party to [the] proceeding prior to the [Bureau’s] grant of the . . . renewal application.” *Id.* at 21271 ¶ 8 (JA). Before the Commission, Havens argued that he became a party when he submitted his “general information request” regarding Regionet’s construction of various radio systems covering the Atlantic Coast, Erie Canal, and Great Lakes, but the Commission rejected this argument on two grounds. *Id.* (JA). First, because Havens had not raised the argument below, the Bureau “had no opportunity to pass on the issue” and Havens therefore could not “raise the issue for the first time in his Application for Review.” *Id.* (citing 47 C.F.R. § 1.115(c)) (JA). Second, the Commission’s records showed that Havens submitted his informal request on June 26, 2001 – *i.e.*, after the expiration of the thirty-day period for filing a petition to deny (which commenced when the Bureau issued a public notice announcing the filing of the renewal application on May 9, 2001). 17 FCC Rcd at 21271 ¶ 8 (JA). The Commission thus agreed with the Bureau that “Havens did not file a petition to deny the license renewal application,” and affirmed the Bureau’s

“conclusion that he did not become a party to this proceeding prior to the grant.”

Id. (JA).

Nor had Havens, as a non-party to the proceeding, shown “good reason why it was not possible for him to participate in the earlier stages of the proceeding” under Section 1.106(b)(1) of the Commission’s rules. *Id.* ¶ 9 (JA). Havens argued that “he could not participate earlier in the proceeding because as a very small business, he needed more than thirty days to complete the engineering studies that formed the basis of his petition for reconsideration.” 17 FCC Rcd at 21272 ¶ 9 (JA). But that argument was unavailing because Havens failed to explain his failure “to raise *any* arguments opposing the . . . renewal application until after the filing period for petitions to deny had expired.” *Id.* (JA) (emphasis added).

The Commission also rejected Havens’s contention that the Bureau allegedly had erred in disposing of his argument Section 1.106(c)(2) of the Commission's Rules. *Id.* ¶ 10 (JA). The Commission explained that Havens’s reliance on Section 1.106(c) was misplaced because that rule “does not relate to who may file a petition for reconsideration” and “does not in any way affect or provide relief from the requirement in Section 1.106(b)(1) that a person seeking reconsideration of Commission action must either already be a party to the proceeding or explain why earlier participation was not possible.” *Id.* (JA).

The Commission accordingly denied Havens's application for review, and affirmed the Bureau's conclusion "that Havens lacks standing now to challenge the grant of the renewal of the [renewed] license." *Id.* at 21273 ¶ 12.

C. This Court's Order to Show Cause.

On December 20, 2002, this Court consolidated the two cases appealing the Commission's denials of Havens's applications for review. Shortly thereafter, on January 17, 2003, the Court granted Havens's motion to place the cases in abeyance. They have remained in abeyance – at Havens's request – for almost eight years while Havens pursued various administrative appeals in other AMTS-related proceedings before the FCC. In response to the Court's January 5, 2010, order directing the parties to show cause why the case should not be administratively terminated, the FCC informed the Court that it stood ready to defend its orders and urged the Court to establish a briefing schedule; the Court did so by order dated July 20, 2010.

SUMMARY OF ARGUMENT

The sole issue before the Court in both of these consolidated appeals is whether the Commission lawfully denied review of the Wireless Bureau's dismissal of Havens's underlying petitions for reconsideration. The Commission did not abuse its discretion or otherwise act unlawfully when it concluded that each petition was procedurally defective and therefore should be dismissed. As both the

Bureau and the Commission repeatedly found, because Havens failed to file a petition to deny Regionet's license applications in either case, he was not a party to the underlying license proceedings at the time the Bureau granted those applications. Nor had he complied with the FCC rule applicable to petitions for reconsideration that are filed by non-parties.

When a non-party like Havens seeks to challenge a licensing decision by filing a petition for reconsideration, 47 C.F.R. § 1.106(b) requires the non-party to "show good reason" why he could not have participated earlier in the proceeding. That rule promotes the public interest in administrative efficiency and sound agency decision-making by requiring all interested persons to make themselves heard regarding a pending license application at the earliest possible opportunity.

In Case No. 02-1359, Havens made no attempt to meet the requirements of Section 1.106, instead protesting that he *was* a party to the proceeding involving Regionet's applications for Block B licenses because he had filed a petition to deny *other* Regionet applications for Block A licenses. The FCC rightly rejected that argument. In Case No. 02-1360, the Commission likewise acted reasonably in rejecting as unpersuasive Havens's attempt to show why he could not have participated earlier in the proceeding. The Court should affirm in each case.

ARGUMENT

I. STANDARD OF REVIEW

The Court must affirm the orders on review in these consolidated appeals unless Havens demonstrates that the FCC's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard applies equally where, as here, a court reviews "an agency's dismissal of pleadings on procedural grounds." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003).

The Court sits "not to judge the wisdom of the FCC's . . . rules but to determine whether [the] decision was an abuse of discretion." *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 901 (D.C. Cir. 2004). As this Court has explained, when reviewing "what the Commission may require of post-grant petitions," such as Havens's petitions for reconsideration, the Court is only "concerned with whether the Commission has abused its discretion in concluding that the petition was not sufficient." *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 919 (D.C. Cir. 1964). Thus, the Court need not "speculate as to what the Commission would or should have done" if the relevant issue had been raised in "a pre-grant petition to deny under Section 309(d)" of the Communications Act, nor speculate as to the result if "the Commission [had] treated [the pleading] as a pre-grant petition." *Id.*

Moreover, the Commission's interpretation "of its own rules is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Star Wireless LCC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (internal quotation marks and citation omitted); *see also Damsky v. FCC*, 199 F.3d 527, 535 (D.C. Cir. 2000) (the Court affords substantial deference to the Commission's interpretation of its own rules and policies, and "will uphold the FCC's interpretation unless it is 'plainly erroneous or inconsistent with the regulation'") (internal quotation marks and citation omitted).

II. THE COMMISSION REASONABLY APPLIED ITS PROCEDURAL RULES IN DENYING REVIEW OF THE BUREAU'S DISMISSAL OF HAVENS'S PETITIONS FOR RECONSIDERATION.

Typically, the parties to a licensing proceeding consist of the applicant for the license and any persons who wish to oppose the FCC's grant of the license by timely filing a petition to deny the application. In such proceedings, the Commission has determined that the public interest is best served if "all interested parties raise their arguments concerning an application in the earliest stages of a proceeding," and, accordingly, the Commission's rules require that persons "seeking reconsideration who did not raise their arguments until after final action has been taken, must explain why they could not have participated earlier in the proceeding." *Order on Review (Renewal)*, 17 FCC Rcd at 21273 ¶ 12 (JA); *see*

also Order on Review (Grant), 17 FCC Rcd at 21267 ¶ 12 (“those seeking reconsideration that were not parties to the proceeding must explain why they could not have participated earlier in the proceeding”) (JA).

Consistent with that requirement – which Havens does not dispute – the Commission has specified in its rules “who may file a petition for reconsideration.” *Order on Review (Grant)*, 17 FCC Rcd at 21267 ¶ 10 (JA); *Order on Review (Renewal)*, 17 FCC Rcd at 21272 ¶ 10 (JA). Thus, Section 1.106(b)(1) provides:

Subject to the limitations set forth in paragraph (b)(2) of this section [which addresses a petition for reconsideration following a denial of an application for review], any party to the proceeding, or any other persons whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person 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.

47 C.F.R. § 1.106(b)(1). So as the Commission reads its own rule, “a petitioner for reconsideration [must] demonstrate that it already is a party to the proceeding or explain why it was not possible to participate earlier in the proceeding.” *Order on Review (Grant)* ¶ 9 (JA); *Order on Review (Renewal)* ¶ 9 (JA). That reading is sound and entitled to deference. *Star Wireless LLC*, 522 F.3d at 473; *Damsky*, 199 F.3d at 536. As we explain below, the Commission reasonably applied its rule by determining that Havens was neither a party to the license proceedings in these

cases, nor had he shown that he was unable to participate earlier in those proceedings. The agency's decisions denying Havens's applications for review therefore should be affirmed.

A. Havens Was Not a Party to Either License Proceeding.

As noted above, generally an interested person becomes a party to a licensing proceeding by filing a petition to deny the license under the process prescribed by 47 U.S.C. § 309(d); *see also* 47 C.F.R. § 1.939. Havens did not, however, file a petition to deny Regionet's Block B applications, nor did he file a petition to deny Regionet's license renewal application. The FCC thus reasonably determined that Havens was not a party to either licensing proceeding.

The Initial License Grant (Case No. 02-1359). As he has throughout the administrative process, Havens argues (Opening Brief at 29-33) that he was a party to the proceeding involving Regionet's applications for Block B licenses because he filed a petition to deny various Block A licenses sought by Regionet. Havens claims that both sets of applications "must be viewed as a single unitary 'proceeding'" (Opening Brief at 29) and thus his partially successful petition to deny the Block A applications is sufficient to establish that he was a "party" to the "proceeding" involving Block B licenses under 47 C.F.R. § 1.106(b). Havens is mistaken. The two sets of applications involved different licenses; appeared on separate public notices issued on different dates (under different file numbers); and

were subject to different pleadings cycles for petitions to deny. *See Order on Further Reconsideration (Grant)*, 16 FCC Rcd at 22099 ¶ 6 (JA). In short, they were entirely separate proceedings, and Havens's filing in one did not relieve him of his obligation to file a petition to deny in the other any more than a filing with this Court in one case would excuse a litigant from making an appropriate filing in a different case.

Havens's other arguments fare no better. Havens emphasizes that, at the time the Commission granted Regionet's Block B license applications, the FCC had not assigned both AMTS frequency blocks "at one time to one licensee" absent a showing of need. *See* Opening Brief at 31 n.19. But nothing in the Communications Act or the Commission's implementing rules forbade Regionet from filing applications for both Block A and Block B licenses. *See* p. 5, *supra*. Nor did any statute or rule prohibit Havens from filing a petition to deny in both proceedings or relieve him of his obligation under Section 1.106(b)(1) to show that he was a party to the Block B proceeding.

Havens also reads too much into the fact that Section 1.106(b)(1) does not specifically reference proceedings involving petitions to deny license applications. *See* Opening Brief at 32. Section 1.106(b)(1) addresses the general procedures for petitions for reconsideration governing an array of FCC proceedings, none of which are specifically listed. That this general procedural rule fails to single out

petitions to deny is neither significant nor an excuse for Havens's failure to comply with the rule.

The License Renewal (Case No. 02-1360). Havens asserts that he was a party to Regionet's proceeding to renew one of its AMTS licenses, but that claim also lacks merit. Havens's "informal request" vaguely complaining about Regionet's construction of unspecified AMTS stations (*see* p. 14, *supra*) did not make Havens a party for purposes of Section 1.106(b)(1). As an initial matter, the Commission found that Havens had failed to present this argument to the Wireless Bureau and thus was barred by 47 C.F.R. § 1.115(c) from asserting it in his application for review by the Commission. *Order on Review (Renewal)*, 17 FCC Rcd at 21271 ¶ 8 (JA). Havens likewise is barred from pressing the same argument before this Court on appeal. *See* 47 U.S.C. § 405 (barring petitioner from raising an issue of fact or law to the court that the Commission has not had an adequate opportunity to pass upon). In any event, the Commission pointed out that Havens's informal request was filed well beyond the deadline for submitting petitions to deny Regionet's renewal application. 17 FCC Rcd at 21271 ¶ 8 (JA). The Commission thus acted well within its discretion in concluding that Havens was not a party to the renewal proceeding.

B. Havens, as a Non-Party to Both Licensing Proceedings, Failed To Demonstrate Why He Could Not Participate Earlier in the Proceedings, as Required By Section 1.106(b)(1).

Having determined that Havens was not a party to either licensing proceeding at the time the Bureau granted the applications, the Commission reasonably concluded that Havens had failed to “show good reason” for why he had not participated earlier in the proceedings, as Section 1.106(b)(1) requires.

The Initial License Grant (Case No. 02-1359). Before the Commission, Havens mistakenly argued that he was a party to the proceeding in which Regionet sought various Block B licenses and that the “good reason” requirement of Section 1.106(b)(1) accordingly did not apply to him. As a result, Havens did not even try to show that he had good reason for failing to participate earlier in the proceeding. Now, on appeal, Havens argues that the 30-day period for filing petitions to deny was insufficient to allow him to gather necessary information (including an engineering study) to effectively oppose the Block B license applications. *See* Opening Brief at 36. Because he did not make this argument before the FCC, he

may not raise it now in Case No. 02-1359. *See* 47 U.S.C. § 405(a); *see also* *Qwest Corp. v. FCC*, 482 F.3d 471, 474 (D.C. Cir. 2007).⁵

The License Renewal (Case No. 02-1360). In the renewal proceeding, Havens did attempt to justify his failure to participate earlier in that proceeding by asserting that he was unable to gather complete information (including the engineering report) within the 30-day deadline. But the Commission reasonably rejected that excuse. As the FCC pointed out, nothing prevented Havens from making his other claims within the 30-day filing period or, for that matter, seeking an extension of the deadline to file petitions to deny. *Order on Review (Renewal)* ¶ 9 (JA); *see also* 47 C.F.R. § 1.3 (Commission may waive its rules upon good cause shown). Havens thus cannot meet his burden of demonstrating that the Commission abused its discretion in finding that he had failed to show good cause under 47 C.F.R. § 1.106(b) for his failure to participate earlier in the proceeding. As this Court has previously stated, “[t]he Commission abuses its discretion when

⁵ Before the Commission, with respect to Case No. 02-1359, Havens argued “that the Regionet applications were defective and therefore should never have been accepted for filing, let alone granted.” *Order on Review (Grant)*, 17 FCC Rcd at 21266 ¶ 8 (JA); *see also* Opening Brief at 29 n.18. As discussed *infra*, Havens made, and the Commission rejected, an argument about the insufficiency of the petitions to deny filing period with respect to the Regionet renewal application proceeding – the subject of Case No. 02-1360. *See Order on Review (Renewal)*, 17 FCC Rcd at 21271-72 ¶ 9 (JA).

it arbitrarily violates its own rules, not when it follows them.” *BDPCS, Inc.*, 351 F.3d at 1184.

C. The Commission Reasonably Rejected Havens’s Attempt To Rely on Section 1.106(c) To Avoid the Standing Showing Required by Section 1.106(b).

Havens further argues in both cases that Section 1.106(c) exempts him from having to make the showing required by Section 1.106(b)(1). As the Commission held, Havens’s reliance on Section 1.106(c) is misplaced. *Order on Review (Grant)*, 17 FCC Rcd at 21267 ¶ 10 (JA); *Order on Review (Renewal)*, 17 FCC Rcd at 21272 ¶ 10 (JA). The Commission explained that Section 1.106(c) does not address who may file a petition for reconsideration; rather, that subsection specifies when an otherwise procedurally valid petition for reconsideration may rely on new facts that were not previously presented to the decision maker.⁶

Contrary to Havens’s suggestion, therefore, Section 1.106(c) does not override

⁶ Section 1.106(c) provides that “[a] petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted” only if (1) “[t]he facts fall within one or more of the categories set forth in § 1.106(b)(2)” or (2) the Commission or its staff determines that consideration of the facts is “required in the public interest.” Section 1.106(b)(2), in turn, refers to facts concerning “events which have occurred or circumstances which have changed since the last opportunity to present such matters,” and “facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.” 47 C.F.R. § 1.106(b)(2). The Commission reasonably construed Section 1.106(c) as applying only to otherwise valid petitions for reconsideration. *See Star Wireless*, 522 F.3d at 473.

Section 1.106(b)(1) which, by its plain terms, requires a non-party who files a petition for reconsideration to demonstrate why he could not participate earlier in the proceeding. Particularly in light of the great deference that courts afford to agencies' construction of their own rules of procedure, the Court should reject Havens's contrary reading of the rules and affirm the FCC's reasonable interpretation. *See Star Wireless LLC*, 522 F.3d at 473; *Damsky*, 199 F.3d 527.

In addition, Havens complains of supposed disparate treatment by pointing to the Wireless Bureau's grant of a brief extension of time over the winter holidays to Regionet to respond to Havens's petition for reconsideration. *See* Opening Brief at 46-47. The Commission reasonably explained that the staff's action had no bearing on the procedural defect in Havens's pleading because "[e]xtending status as a party to a proceeding after a final action has been taken is a different matter from merely granting to an entity that *already is a party to the proceeding* a brief extension of time to file a responsive pleading." *Order on Review (Grant)*, 17 FCC Rcd at 21267 ¶ 9 (JA) (emphasis added).⁷

⁷ In the Regionet license renewal proceeding, the Commission declined to consider the merits of Havens's disparate treatment argument because Havens had failed to raise it before the Bureau. *Order on Review (Renewal)*, 17 FCC Rcd at 21272-73 ¶ 11 (JA).

D. Havens's Remaining Arguments Are Not Properly Before the Court.

Havens appears to argue in his opening brief that, even if the Commission properly denied review of the dismissal of his petitions for reconsideration, the public interest nonetheless required the agency to consider the merits of those petitions on its own motion. *See, e.g.*, Opening Brief at 24-28, 48-50, 55-56. Havens, however, did not make this argument to the Commission and thus is precluded from raising it on appeal. 47 U.S.C. § 405(a); *see also In re Core Commc'ns*, 455 F.3d 267, 276 (D.C. Cir. 2006) (under Section 405 of the Communications Act, "the filing of a petition for reconsideration is a condition precedent to judicial review of any FCC order where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass," and thus the Court "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission") (internal quotation marks and citation omitted).⁸

Moreover, to the extent Havens has invited the Court to consider the merits of his petitions for the purpose of deciding whether the Commission abused its

⁸ This Court has further "held that, even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review." *In re Core*, 455 F.3d at 276-77 (quoting 47 U.S.C. § 405(a)); *accord, Qwest Corp.*, 482 F.3d at 474.

discretion in denying review of their dismissal, the Court should decline. *See BDPCS, Inc.*, 351 F.3d at 1183 (noting that petitioner was unable to cite “any case in which [the Court] granted relief on the merits, notwithstanding the fact that the Commission had *properly* dismissed the pleading on procedural grounds”) (emphasis in original).

CONCLUSION

The Commission acted well within its discretion when it denied Havens’s applications for review. Accordingly, the orders on review should be affirmed.

Respectfully submitted,

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

/s/ Pamela L. Smith
PAMELA L. SMITH
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

January 20, 2011

IN THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

WARREN C. HAVENS,)	
)	
APPELLANT,)	
)	
V.)	
)	No. 02-1359 (CONSOLIDATED
FEDERAL COMMUNICATIONS COMMISSION,)	WITH No. 02-1360)
)	
APPELLEE.)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case complies with the applicable type-volume limitations and contains 7194 words.

/s/Pamela L. Smith
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

January 20, 2011

STATUTORY APPENDIX

47 U.S.C. § 309(d)

47 U.S.C. § 405(a)

47 C.F.R. § 1.106(b)(1)

47 C.F.R. § 1.106(b)(2)

47 C.F.R. § 1.106(c)

47 C.F.R. § 1.939(a)(2)

47 C.F.R. § 1.939(f)

47 U.S.C.

§ 309. Application for license

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

§ 405. Reconsiderations

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R.

§ 1.106 Petitions for reconsideration.

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person 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.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:

(i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts fall within one or more of the categories set forth in § 1.106(b)(2);
or

(2) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

§ 1.939 Petitions to deny.

(a) Who may file. Any party in interest may file with the Commission a petition to deny any application listed in a Public Notice as accepted for filing, whether as filed originally or upon major amendment as defined in § 1.929 of this part.

. . . .

(2) Petitions to deny for non-auctionable applications that are subject to petitions under § 309(d) of the Communications Act must comply with the provisions of this section and must be filed no later than 30 days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing.

. . . .

(f) Oppositions and replies. The applicant and any other interested party may file an opposition to any petition to deny and the petitioner may file a reply thereto in which allegations of fact or denials thereof, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof. Time for filing of oppositions and replies is governed by § 1.45 of this part for non-auctionable services and § 1.2108 of this part for auctionable services.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Warren C. Havens, Appellant

v.

Federal Communications Commission, Appellee.

CERTIFICATE OF SERVICE

I, Pamela Smith, hereby certify that on January 20, 2011, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

*Warren C. Havens
2649 Benvenue Avenue
Suite 2
Berkeley, CA 94704

*Dennis Curtis Brown
Law Office of Dennis C. Brown
126/B North Bedford Street
Arlington, VA 22201
*Counsel for: Amicus Curiae for
Appellee*

Jane E. Mago
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

Tamir D. Damari
Nossaman, LLP
1666 K Street, N.W., Suite 500
Washington, D.C. 20006-2803
Counsel for: Warren C. Havens

/s/ Pamela Smith