BRIEF FOR APPELLEE

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

NO. 11-1270

ROYCE INTERNATIONAL BROADCASTING COMPANY,

APPELLANT,

V.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE.

ON APPEAL OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

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

2. Rulings under review.

Royce Int'l Broad. Co. Request for Additional Time to Construct New Unbuilt Station KIEV(AM), Culver City, California, 23 FCC Rcd 9010 (2008) (JA).

3. Related cases.

The Order on appeal has 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

Bureau	Federal Communications Commission Media Bureau
Commission or FCC	Federal Communications Commission
LSP	Levine/Schwab Partnership
Ontario	Ontario Broadcasting LLC
Royce	Royce International Broadcasting Company
Stocker	Stocker Resources, Inc.

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BRIEF FOR APPELLEE

JURISDICTION

The Federal Communications Commission ("FCC" or "Commission") released the *Order* on appeal on July 5, 2008. *Royce Int'l Broad. Co. Request for Additional Time to Construct New Unbuilt Station KIEV(AM), Culver City, California*, 23 FCC Rcd 9010 (2008) (JA) ("*Order*"). Appellant Royce International Broadcasting Company ("Royce") sought administrative reconsideration, thereby tolling the period within which Royce could seek

judicial review of the *Order*.[1] The Commission's Media Bureau ("Bureau"), acting on delegated authority, dismissed Royce's petition for reconsideration of the *Order* on June 28, 2011. *Royce Int'l Broad. Co. Request for Additional Time to Construct New Unbuilt Station KIEV(AM), Culver City, California,* 26 FCC Rcd 9249 (Media Bur. 2011) (JA) ("*Order on Reconsideration*"). Royce filed its notice of appeal in this Court on July 28, 2011. The Court has jurisdiction to review the Commission's 2008 *Order*, but not the Bureau's 2011 *Order on Reconsideration*, under 47 U.S.C. § 402(b).[2]

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[1] *See, e.g., Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-597 (D.C. Cir. 1997).

[2] In addition to the Commission's 2008 *Order*, Royce purports to challenge the Bureau's 2011 *Order on Reconsideration*, Br. i, 3. That decision, however, is not reviewable for two independent reasons. First, it merely denied rehearing of matters decided in the 2008 *Order*. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987) ("[W]here a party petitions an agency for reconsideration on the ground of 'material error,' *i.e.*, on the same record that was before the agency when it rendered its original decision, 'an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.'") (citation omitted). Second, "the filing of an application for review by the [full] Commission [is] 'a condition precedent to judicial review' of a decision taken pursuant to delegated authority" by a subordinate bureau of the FCC. *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1303 (D.C. Cir. 1997) (quoting 47 U.S.C. § 155(c)(7)). Thus, Royce cannot judicially challenge the Bureau-level *Order on Reconsideration* because it failed to exhaust its administrative remedies.

QUESTION PRESENTED

An FCC rule provides that any person aggrieved by an action taken by the Commission's staff under delegated authority may ask the full Commission to review that action, but must do so within 30 days. 47 C.F.R. § 1.115(d). Royce failed to file an application for Commission review of a Bureau action within the 30-day filing window. It subsequently sought leave to file an application out-of-time, citing a misunderstanding with its attorney as the reason for missing the deadline. In the *Order* on review, the Commission denied Royce's request for additional time and dismissed Royce's untimely application for review.

The question presented is whether the Commission lawfully exercised its discretion when it denied Royce's motion to file an application for review out-of-time and dismissed Royce's untimely application on procedural grounds.

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT OF THE CASE

Applicants for FCC permits to construct radio stations must complete construction of facilities within a period specified by the Commission. In this case, Royce obtained a permit to construct an AM radio station in 1984, yet it

still has not initiated construction – let alone built a radio station. After obtaining 12 extensions of its original construction deadline, in December 2001 (two weeks before its construction period was to expire), Royce requested an additional three-year waiver of its construction deadline. According to Royce, it was entitled to another extension because it had encountered difficulties in obtaining zoning approval due to disagreements with the owner of the property upon which Royce planned to construct its broadcasting facilities. The FCC's Media Bureau denied Royce's request, finding that such "run of the mill" zoning difficulties are not the type of rare and exceptional circumstance that would justify another waiver of the construction deadline.

Royce sought to take an administrative appeal of the Bureau's decision to the full Commission, but failed to file an application for review of the Bureau's action within the 30-day deadline specified by the FCC's governing rule. In a late-filed motion, Royce sought permission to file an application for review out-of-time, citing a miscommunication with its attorney as the reason for its tardiness. The Bureau denied Royce's request, and dismissed its untimely application for review.

In the *Order* on appeal, the Commission affirmed the Bureau's decision. The Commission explained that alleged miscommunications

between Royce and its own attorney provided no basis to extend the filing deadline for seeking review of staff-level action. The Commission further determined that granting Royce's motion could prejudice two other companies whose licensing proposals could not be considered until final disposition of Royce's construction permit. And, even if Royce's application for review were properly before the agency, the Commission explained that it lacked merit because the routine zoning difficulties cited by Royce are not a rare and exceptional circumstance that would justify a waiver of the construction deadline.

COUNTERSTATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The FCC is charged with licensing radio stations under the Communications Act of 1934. *See, e.g.,* 47 U.S.C. § 301. Station licenses and construction permits are granted on written application, if the Commission determines that "the public interest, convenience, and necessity will be served" thereby. 47 U.S.C. §§ 307-309.

Section 319(a) of the Communications Act provides that "[n]o license shall be issued … for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. § 319(a). Pursuant to section 319(b), such construction permits "shall provide" that a

permit "will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." 47 U.S.C. § 319(b).

For many years, the FCC required permitees to complete construction of radio stations within relatively short periods – *i.e.,* 24 months to construct a full-power television station and 18 months to construct other broadcast facilities. Construction permits did not automatically expire at the end of their specified construction period, and a permit was not deemed forfeited or canceled until the Commission affirmatively acted to effectuate a forfeiture or cancelation. *See 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes,* 13 FCC Rcd 23056, 23087-88 (¶¶ 77-78) (1998) (*"Streamlining Order*"), *recon. granted in part and denied in part,* Memorandum Opinion and Order, 14 FCC Rcd 17525 (1999) ("*Streamlining Reconsideration Order*") (together, the "*Streamlining Orders*").

This approach proved problematic. The Commission explained in 1998 that "applicants have in some instances filed for permits without taking preliminary steps to ensure that they can begin – much less complete – construction once an authorization is received." *Streamlining*

Reconsideration Order, 14 FCC Rcd at 17539 (¶ 36). This "deprive[s] the public of prompt initiation of additional broadcast service and represent[s] an abuse of the Commission's processes." *Id.*

"[T]o address the warehousing of radio spectrum by permittees unable or unwilling to build" (*Order* (¶ 3) (JA) (citing *Streamlining Order,* 13 FCC Rcd at 23087-88 (¶¶ 77-78))), the Commission in 1998 revised its rules implementing section 319 of the Act. The revised rules expanded the construction deadline to three years after the grant of the construction permit. *See* 47 C.F.R. § 73.3598(a). If a permittee fails to complete construction by the end of this period, the permit expires and is automatically forfeited without further action by the Commission. *See* 47 C.F.R. § 73.3598(e); *Streamlining Order,* 13 FCC Rcd at 23091 (¶ 89). The revised rules thus "establish an incentive for all potential applicants to plan construction carefully even prior to applying for a permit and, once a permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors." *Streamlining Reconsideration Order,* 14 FCC Rcd at 17539 (¶ 36). "[E]ven if the permittee encounters significant construction difficulties," the Commission found that the new "three-year construction period," should "allow sufficient time for a diligent permittee to complete construction of a facility." *Streamlining Order*, 13 FCC Rcd at 23088 (¶ 80).

The construction deadline in rule 73.3598(a) can be extended, or "tolled," but "only in limited circumstances directly preventing construction and not within the applicant's control," including, for example, "natural disasters." *Order* (¶ 3) (JA) (citing 47 C.F.R. § 73.3598(b)). A waiver of the standard three-year construction deadline set forth in rule 73.3598(a) also may be granted in "rare and exceptional circumstances other than those delineated" in the Commission's regulations. *See Streamlining Reconsideration Order,* 14 FCC Rcd at 17541 (¶ 42). Only "[i]n these very limited circumstances … will [the Commission] entertain requests for waiver." *Id.*

Zoning delays – and, as relevant here, a permittee's difficulties obtaining initial zoning approval – generally do not trigger tolling or constitute a "rare and exceptional" circumstance justifying a waiver of the three-year construction deadline. *Order* (¶ 3) (JA); *Streamlining Order,* 13 FCC Rcd at 23091 (¶ 86); *Streamlining Reconsideration Order*, 14 FCC Rcd 17359-40 (¶¶ 37-38). The Commission specifically excluded zoning from the tolling exceptions in rule 73.3598(b) based on its determination that "[t]he three-year construction period" – which doubled the period to construct a radio station (*i.e.,* from 18 months to three years) – "provides ample time to

complete th[e zoning] process and construct the station or choose a new site free from zoning difficulties." *Streamlining Order,* 13 FCC Rcd at 23091 (¶ 86).

As the Commission has explained, "diligent permittees will not find zoning difficulties to be an insurmountable problem because permittees can, in the vast majority of cases, find a way to resolve zoning issues either by securing an alternative site or obtaining necessary approvals." *Streamlining Reconsideration Order,* 14 FCC Rcd at 17539 (¶ 37). Moreover, "diligent permittees can eliminate or mitigate zoning delays by applying for approval from the pertinent local authorities *prior* to the issuance of a construction permit." *Id.,* 14 FCC Rcd at 17540 (¶ 38).

II. FACTUAL BACKGROUND

The Commission granted Royce a permit to construct KIEV(AM), a new AM radio station to serve Burbank, California, on October 23, 1984. At Royce's request, the Bureau subsequently extended the station's original construction deadline (October 23, 1985) ten times after Royce sequentially lost its original transmitter site, encountered difficulties obtaining local approval to build at alternative sites, and initiated litigation concerning its proposed transmitter site. *Order* (¶ 2) (JA). Royce further benefitted from two separate construction deadline adjustments made by the Commission to

ease existing permittees' transition to the new, stricter construction rules adopted in 1998. *See id.* (¶ 3 & n.7) (JA). As a result, KIEV(AM)'s original construction deadline cumulatively was extended to December 21, 2001. *Id.* (¶ 3).

On January 28, 2000, more than 15 years after Royce obtained its construction permit, Royce applied to the FCC to change its community of license from Burbank, California to Culver City, California. *Id.* (¶ 4) (JA). Stating that the transmitter tower site identified in its initial application had become unavailable, Royce amended its application on August 6, 2001, to specify a new tower location, this time in the City of Montebello, California, on an operating oil field owned by Stocker Resources, Inc. ("Stocker"). *Id.* Stocker already held a local use permit for one microwave tower and a satellite dish on the site, which Royce planned to use in conjunction with construction of new facilities. *Id.* The Bureau granted Royce's application on September 28, 2001. *Id.* The revised construction permit required Royce to complete construction at the Stocker site by the *existing* construction deadline (*i.e.,* December 21, 2001). *Id.*

A. The Bureau's Denial Of Royce's Petition For Waiver Of Rule 73.3598(a).

On December 7, 2001 – two weeks before the expiration of its then-17-year-old construction permit – Royce sought a waiver of the construction

period rule (47 C.F.R. § 73.3598(a)) and a three-year extension of its construction deadline. *Order* (¶ 5) (JA). Royce, which conceded that it had not yet sought zoning approval to construct on the Stocker property, predicted that the zoning process could take at least another five months. *Id.* Royce nonetheless argued that it was entitled to a waiver of rule 73.3598(a) due to circumstances beyond its control. *Id.* According to Royce, its new construction plans were hindered after the property manager who offered to assist Royce left Stocker in June 2001, and his replacement refused to allow Royce to begin construction until it obtained appropriate authorization from the City of Montebello. *Id.*

The Bureau denied Royce's waiver request on December 20, 2001. *See Letter from Chief, Audio Services Division, Mass Media Bureau, FCC, to Andrew S. Kersting, Esq.,* Ref. No. 1800B3-GDG (Dec. 20, 2001) ("*Dec. 20, 2001 Bureau Letter*") (JA). The Bureau explained that problems associated with initial zoning approval generally do not entitle a permittee to "additional construction time under the Commission's revised rules." *Order* (¶ 6) (JA). And it found unpersuasive Royce's proffered reasons for why it had been unable to obtain local zoning approval. *Id.*

In the same decision, however, the Bureau temporarily waived Royce's construction deadline based on the FCC staff's mistaken understanding that

the KIEV(AM) permit required approval from the International Telecommunications Union ("ITU").[3] *Order* (¶ 6, n.19) (JA). Believing that ITU approval encumbered the KIEV(AM) construction permit, the Bureau, on its own motion, stipulated that the permit "will expire 84 days after receipt of approval from the [ITU] (equal to the 84 days between conditional grant of KIEV's major modification application and the permit's December 21, 2001 expiration)." *Dec. 20, 2001 Bureau Letter* at 4 (JA).

Shortly thereafter, the Bureau learned that it had granted this waiver in error. The FCC requests ITU approval for operations that may cause interference in countries other than Mexico and Canada. *Order* (n.19) (JA). Because Royce's construction permit affected only Mexican stations, and the Mexican government cleared Royce's proposal on November 8, 2001, there was no need for ITU approval. *Id.* After discovering its mistake, the Bureau promptly issued corrected decisions on January 8, 2002, and January 11, 2002, which removed the international condition from Royce's construction permit. *See Letter from Chief, Audio Services Division, Mass Media Bureau,*

[3] The ITU is an international organization in which governments and the private sector coordinate global telecom networks and services. The ITU process allows ITU member states to coordinate use of radio frequency spectrum to eliminate harmful interference between radio stations in different countries.

FCC, to Andrew S. Kersting, Esq., Ref. No. 1800B3-GDG at 1 (Jan. 8, 2002) ("*Jan. 8, 2002 Bureau Letter*") (JA); *Letter from Chief, Audio Services Division, Mass Media Bureau, FCC, to Andrew S. Kersting, Esq.,* Ref. No. 1800B3-1B at 4 (Jan. 11, 2002) ("*Jan. 11, 2002 Bureau Letter*") (JA). To hold Royce harmless for the staff's error, the Bureau "[i]n the interest of fairness" also waived rule 73.3598(a) "to provide Royce with 84 days from its current expiration date (until April 25, 2002) to complete construction." *Jan. 11, 2002 Bureau Letter* at 5 (JA).

Despite having thereby obtained another extension of its construction deadline, Royce sought reconsideration of the Bureau's denial of its waiver request. Relying on a January 23, 2002 letter from the City of Montebello, Royce asserted that it could not have initiated zoning proceedings on its own because the city "required written consent of the landowner to commence zoning." *Order* (¶ 7) (JA). Royce then disclosed for the first time that Stocker was unwilling to give its consent because the parties had not yet

resolved several issues concerning the location of the required transmitter towers on Stocker's property.[4] *See id.* (¶ 7 & nn.22-23) (JA).

The Bureau denied Royce's petition on both procedural and substantive grounds. *Letter from Chief, Audio Division, Media Bureau, FCC, to Andrew S. Kersting, Esq.,* Ref. No. 1800B3-IB/GDG (July 8, 2004) ("*July 8, 2004 Bureau Letter*") (JA). With respect to the petition's procedural deficiencies, the Bureau noted that reconsideration is appropriate only "when a petitioner raises additional facts not known or not existing until after its last opportunity to present such matters, or when there is a material error or omission in the original action." *July 8, 2004 Bureau Letter* at 3 (JA) (citation omitted). The Bureau acknowledged that "each new document" filed by Royce in support of its petition "is dated after our denial of the waiver request." *Id.* at 3 (JA). But it explained that those filings could not serve as grounds for reconsideration because "Royce offer[ed] no evidence that such documents" – all of which concerned matters that transpired before it filed its December 2001 waiver request – "could not have been submitted with th[at] … request." *Id.* at 4 (JA).

[4] Royce filed an application for a new use permit with the City of Montebello on April 1, 2002. *Order* (¶ 8, n.27) (JA). The City denied that application because Royce was unable to obtain Stocker's signature. *Id.* (¶ 8) (JA).

On the merits, the Bureau held that Royce had failed to "establish that Montebello's zoning processes are unique or even unusual so as to warrant an exception to the general principle that initial zoning problems do not form a basis for grant of additional construction time." *Id.* at 4 (JA). The Bureau explained that "[a]n applicant must have reasonable assurance of the availability of its specified tower location when it applies" for a construction permit, and an applicant lacks such assurance "unless it contacts the local authority prior to filing the construction permit application" with the Commission. *Id.* Royce, by its own admission, "specified the Stocker tower site in [its] August 2001 [modification application] but did not contact local zoning authorities until January of 2002." *Id.*

Separately, the Bureau rejected Royce's claim that its construction permit was "encumbered" because it required ITU approval. *Id.* at 6 (JA). The Bureau reiterated that the Commission's International Bureau "notif[ied] … the ITU about the particulars of Royce's authorization … solely to update that organization's records," not to seek that organization's consent. *Id.* Accordingly, the Bureau held that the ITU referral "forms no basis for granting Royce additional time to construct." *Id.*

B. Impact Of The KIEV(AM) Construction Permit On Third-Party Applications For Radio Stations.

Because Royce – since its original permit grant in 1984 – still had not constructed any station facilities and had not received a waiver of its extended construction deadline, its construction permit for KIEV(AM) expired by its terms on April 25, 2002.

In January 2004, the Commission initiated a new auction for AM radio station licenses. *Order* (¶ 9) (JA). Royce and three other entities, including the Levine/Schwab Partnership ("LSP"), filed mutually exclusive applications to construct new radio stations in the Los Angeles area. *Id.* None of these applications could co-exist with the (now-expired) KIEV(AM) construction permit because they proposed to use radio frequency that could interfere with the frequency assigned to KIEV(AM).[5] Subsequently, in November 2004, Ontario Broadcasting LLC ("Ontario"), licensee of

[5] The Commission's rules are designed to prevent broadcast stations from interfering with one another. While a construction permit is outstanding, the facilities specified in that permit are "protected" from interference as if those facilities were in full operation. Other broadcasters operating on the same frequencies (or adjacent frequencies) cannot alter their own facilities if doing so would contravene the protection requirements. Likewise, the Commission will not grant a new construction permit if it will cause interference with a previously issued permit. Once a construction permit is forfeited, however, the facilities specified in that permit are no longer entitled to interference protection.

KSPA(AM), Ontario, California, filed an application proposing improvements to KSPA(AM). *Id.* Due to concerns about interference posed by the competing applications, the Bureau declined to act on the applications "absent confirmation of [its] conclusion that the KIEV(AM) permit ha[d] expired." *Id.*

C. The Bureau's Denial Of Royce's Motion To File An Application For Review.

The Bureau denied reconsideration of Royce's waiver request on July 8, 2004, and released a public notice of that denial on July 13, 2004. *Order* (¶ 10 & n.33) (JA). Under the Commission's rules, the deadline for filing an application for review of that decision was August 12, 2004.[6] *Id.* (¶ 10) (JA). Royce did not file an application for review by that date, however. Instead, on August 17, 2004, Royce filed a motion to extend the filing deadline to September 10.[7] *Id.* Royce stated that it had retained new counsel

[6] Applications for Commission review of actions taken on delegated authority must be filed within 30 days of public notice, as that date is defined in the Commission's rules. 47 C.F.R. § 1.115(d).

[7] Motions for extension of time generally must be filed at least seven days prior to the filing deadline, except that the motion may be filed within the last seven days if the party orally notifies parties and the Commission staff responsible for acting on the motion that the motion has been or is being filed. *See* 47 C.F.R. § 1.46(c). As described above, Royce failed to comply with these requirements when it filed its motion five days after the deadline had passed.

after discovering on August 10 (which Royce mistakenly believed was the filing deadline) that its previous counsel had not filed an application for review. Royce Int'l Broad. Co. Motion for Extension of Time at 1 (filed Aug. 11, 2004) (JA). The extension, Royce asserted, would provide its new counsel with sufficient time to prepare that application. *Id.* at 2 (JA).

The Bureau denied Royce's motion, finding no good cause to accept its late-filed application for review. *Letter from Chief, Audio Division, Media Bureau, FCC, to Lauren A. Greenberg, Esq.,* Ref. No. 1800B3-IB/GDG at 1 (Aug. 20, 2004) ("*Aug. 20, 2004 Bureau Letter*") (JA). The Bureau explained that "[m]otions for extension of time will not be routine[ly] granted," *Aug. 20, 2004 Bureau Letter* at 2, citing 47 C.F.R. § 1.46(a) (JA), and "[w]aiver of [a] filing deadline … is appropriate only where equities so require and no party would be prejudiced thereby." *Id.*, citing *Crystal Broad. Partners,* 11 FCC Rcd 4680, 4681 (1996). The Bureau "f[ound] no equities in the instant matter." *Id.* "Counsel" the Bureau reasoned, "is merely an applicant's agent," so "[i]f counsel does not vigorously prosecute the applicant's interests, the applicant is ultimately responsible." *Id.* The Bureau further noted that Royce could have timely filed its application for review, but did not, because Royce miscalculated the filing deadline. *Id.* "Miscalculat[ing] … th[e] due date," the Bureau explained, "does not

constitute good cause for granting Royce's motion for acceptance of a late-filed appeal." *Id.* (citing *Meredith New Heritage Strategic Partners, L.P.,* 9 FCC Rcd 6841, 6842 (1994)).

Royce petitioned for reconsideration of the Bureau's procedural ruling, *Order* (¶ 10) (JA), contending that no party would be prejudiced if the Bureau accepted the late filing and further extended Royce's construction deadline. The Bureau disagreed, noting that granting Royce's request would further delay the Bureau's consideration of Ontario's pending request to modify its facilities. *Letter from Chief, Audio Division, Media Bureau, FCC, to Lauren A. Greenberg, Esq.,* Ref. No. 1800B3-IB/GDG at 3 (Dec. 17, 2004) ("*Dec. 17, 2004 Bureau Letter*") (JA). The Bureau thus denied Royce's request, concluding that "grant of additional time based on Royce's flawed reading of the Commission's procedural rules would effectively warehouse scarce broadcast spectrum" – an outcome that "would disserve the public interest." *Id.*

The Bureau, however, subsequently referred disposition of the KIEV(AM) construction permit to the full Commission. *Order* (¶ 11) (JA). The Bureau authorized Royce to file a substantive application for review of the staff's waiver denial, and permitted Ontario to file an opposition thereto, to "preserve[e] the Commission's ability to reach the merits of the case." *Id.*

On February 22, 2006, Royce filed an application for review and an application to modify the KIEV(AM) permit to specify a new transmitter site. *Id.* (¶ 11 & n.42) (JA).

D. The *Order* On Appeal.

In its June 5, 2008 *Order*, the Commission dismissed Royce's application for review as untimely. *Order* (¶¶ 13-14, 17) (JA). It also denied Royce's petition for reconsideration of the *Aug. 20, 2004 Bureau Letter* (JA), which held the same. *Id.* (¶ 16) (JA).

The Commission explained that Royce's untimely motion did not comply with the FCC's rules concerning extensions of time because it was submitted after the filing deadline. *Id.* (¶ 13 & n.48); *see also* n.7, above (discussing 47 C.F.R. § 1.46(c)). Moreover, Royce's "misunderstanding with its former counsel regarding the preparation of an Application for Review" provided no basis for a waiver, because Royce, as the applicant, "is ultimately responsible if counsel does not vigorously prosecute [its] interests." *Order* (¶ 13) (JA). The Commission further explained that considering Royce's late-filed application for review could prejudice other parties – specifically, LSP and Ontario – which have "applications … in queue" that could "become ripe for consideration with the expiration of the KIEV(AM) permit." *Id.* Finally, the FCC held that Royce's "post-construction deadline efforts" to

find a replacement for the Stocker site "warrant neither a waiver of the Commission's procedural rules nor of the [s]ection 73.3598-mandated construction deadlines." *Id.* (¶ 14) (JA).

The Commission "conclude[d] that the KIEV(AM) permit expired under its own terms on April 25, 2002, as a result of the Bureau's denial of Royce's request for additional construction time and Royce's failure either to file a timely Application for Review of that ruling or to construct within the time allotted." *Id.* "Having resolved this case procedurally," the FCC dismissed Royce's untimely application for review as well as its 2006 application to modify the expired construction permit for KIEV(AM). *Id.*

The Commission went on to explain that "Royce would not have prevailed even had [the agency] found a basis for reaching the merits of its Application for Review." *Id.* (¶ 15) (JA). The Commission reiterated that it "expan[ded] … radio station construction periods from eighteen months to three years" in 1998 "to eliminate zoning issues as a basis for obtaining additional time to complete station construction." *Id.* The Commission further noted that it "rejected suggestions to add site-related difficulties" like Royce's "to the tolling criteria" in rule 73.3958(a). *Id.* Moreover, "[u]nder [the Commission's] current broadcast station policies, the selection of a transmitter site is an independent business decision within a permittee's

control." *Id.* Thus, "[e]ven accepting *arguendo* that Royce's delay in initiating zoning stemmed from restrictions required by Stocker," this "fact[] would not have warranted a waiver of the construction deadline" because it "remains the case that Royce's selection of the site and acceptance of Stocker's terms were matters within Royce's control." *Id.*[8]

SUMMARY OF ARGUMENT

Royce obtained a construction permit more than 27 years ago, yet it has never built the broadcast station authorized by that permit, let alone initiated service to the public. Royce nonetheless contends that the Commission was required to grant another extension of that permit's construction deadline, even though Royce's permit, by its terms, expired on April 25, 2002. It was not.

Royce's failure to seek timely administrative review of the Media Bureau's decision is fatal to its appeal. Royce concedes that it did not file its application for review within the 30-day window prescribed by 47 C.F.R.

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[8] On June 28, 2011, the Bureau dismissed on procedural grounds Royce's subsequent petition for reconsideration. *Order on Reconsideration* (¶ 1) (JA). The Bureau explained that Royce's petition merely "reiterates arguments already considered and rejected [by] the Commission[]" – notably, Royce's claim that LSP and Ontario would not be prejudiced if the Commission waived the filing deadline for Royce's untimely application for review. *Id.* (¶ 2 & n.3) (JA). As noted above (n.2), the 2011 *Order on Reconsideration* is not properly before the Court on this appeal.

§ 1.115(d). Consistent with its own precedent and precedent from this Court, the Commission found that error by counsel does not provide an equitable basis for waiving that filing deadline. The Commission further found that other parties could be prejudiced if it considered and granted Royce's late-filed request for a deadline extension, because their pending applications would not become ripe for consideration until final disposition of Royce's construction permit. The Commission thus did not abuse its discretion when it dismissed Royce's untimely application for review on procedural grounds.

Even if this Court were to reach the merits, the Commission properly concluded that Royce was not entitled to a waiver of its construction deadline. Royce failed to show that it missed its deadline due to rare and exceptional circumstances beyond its control. Rather, as the Commission explained, Royce encountered run-of-the-mill zoning problems – the type of problems that do not justify waiver or tolling of the three-year construction deadline in section 73.3598(a) of the FCC's rules. Indeed, policy considerations strongly militate *against* the grant of a waiver here: Royce's case presents a classic example of the type of "spectrum warehousing" that led the Commission to tighten its broadcast construction rules in 1998.

ARGUMENT

I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL

Under the Administrative Procedure Act, this Court must uphold agency action so long as it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The scope of review "is a narrow one"; the Court "is not empowered to substitute its judgment for that of the agency," but instead may determine only whether the agency has "articulate[d] a rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285 (1974) (internal quotation marks and citations omitted). Further, the Court must afford "deference … to an agency's decision whether to waive one of its own procedural rules." *NetworkIP, LLC v. FCC,* 548 F.3d 116, 127 (D.C. Cir. 2008). Review of the FCC's denial of a waiver is "'extremely limited;'" the Court "will 'vacate such denials only when the agency's reasons are so insubstantial as to render that denial an abuse of discretion.'" *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900 (D.C. Cir. 2004) (citation omitted).

As explained below, applying this "limited review," *Delta Radio*, 387 F.3d at 901, the Court should affirm the FCC's *Order*.

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN DISMISSING ROYCE'S UNTIMELY APPLICATION FOR REVIEW

Under the Commission's rules, applications for review must be filed within 30 days of public notice. 47 C.F.R. § 1.115(d); *see also* 47 U.S.C. § 155(c)(4) (any person "aggrieved by" any decision taken by the FCC's staff on delegated authority "may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe"). "Waiver of the deadline is appropriate only where equities so require and no party would be prejudiced thereby." *Order* (¶ 12) (JA) (citing *Crystal Broad. Partners,* 11 FCC Rcd at 4681). Motions for extension of time

generally must be filed at least seven days before the filing deadline, *see* 47 C.F.R. § 1.46(c), and are not routinely granted, *id.* § 1.46(a).[9]

The Commission acted well within its discretion in denying Royce's motion for additional time to file its application for review. Royce concedes that it missed the deadlines for both (1) its application for review and (2) its

[9] Royce thus wrongly contends that "[t]he FCC has routinely granted waivers of applicable filing deadlines." Br. 53. As set forth above, the Commission's rules expressly discourage such waivers. *See* 47 C.F.R. § 1.46(a). And the waiver grants cited by Royce are easily distinguished. In *Regionet Wireless License LLC,* 17 FCC Rcd 21263, 21265 (2002), *MTD, Inc.,* 6 FCC Rcd 34, n.2 (1991), and *Noble Syndications, Inc.,* 74 F.C.C. 2d 124, 128-29 (1979), the Commission found that no other parties would be prejudiced if it accepted a party's untimely filing. That is not the case here, where the Commission found that LSP and Ontario could be prejudiced if it considered Royce's late-filed application for review and granted its request to extend the KIEV(AM) construction deadline. *Order* (¶ 13) (JA). Moreover, in *Clear Channel Broad. Licenses, Inc.,* 26 FCC Rcd 7153, 7156-57 (2011), *pet. for rev. pending, Blakeney Commc'ns, Inc. v. FCC* (D.C. Cir. No. 11-1203), the Commission waived the filing deadline for an FM radio station that had completed construction of an upgrade, but had filed its license application two days late. In those circumstances, "a waiver does not undermine [s]ection 73.3598's purpose" because the modified facilities were "constructed and operating at the time the Construction Permit expired." *Clear Channel,* 26 FCC Rcd at 7157 (¶ 10). In sharp contrast, Royce has not even commenced construction, let alone initiated service to the public in connection with a construction permit it obtained more than 27 years ago. This is the type of "indefinite warehousing of spectrum" that revised rule 73.3598(a) was designed to eliminate. *Order* (¶ 15) (JA).

subsequent motion for an extension of time to file that application.[10] Br. 22-23; *see also Order* (¶ 13)(JA). It asserts (Br. 22) that its procedural default nonetheless should be excused because it allegedly arose from a misunderstanding with its counsel. But, as the Commission explained, "[c]ounsel is merely an applicant's agent, chosen by the applicant." *Order* (¶ 13) (JA). "[T]hus[,] the applicant is ultimately responsible if counsel does not vigorously prosecute the applicant's interests." *Id.* Indeed, the Commission has repeatedly held that it will not waive a missed filing deadline due to counsel's error. *See, e.g., Application of Indep. Commc'ns, Inc.*, 15 FCC Rcd 7080, 7081 (¶ 6) (1999) (counsel's illness does not justify waiver of filing deadline); *Applications of Northwest Broad., Inc., Assignor, and Western Pacific, Inc., Assignee*, 6 Comm. Reg. (P&F) 685 (¶ 9) (1997) (declining to consider petitioners' untimely objection to a license assignment, which petitioners attributed to inexperienced counsel); *Crystal Broad. Partners*, 11 FCC Rcd at 4681 (¶ 8) (declining to waive deadline after counsel filed application for review four days late); *Application of RDH Ltd.*

[10] This is not the first time that Royce "sought to be excused from the [FCC's] filing rules." *Royce Int'l Broad. Co. v. FCC,* 820 F.2d 1332, 1334 & n.2 (D.C. Cir. 1987) (describing Royce's failure to comply with the FCC's procedural requirements); *see also id.* at 1336 (describing Edward Stolz, Royce's principal, as "not a broadcasting neophyte, but rather a licensee with considerable, if troubled, experience in the ways of the Commission.").

P'ship, 6 FCC Rcd 4764, 4765 (¶ 5) (1991) ("[r]egardless of … whether the omission occurred in the office of applicant's counsel, or in transit, the applicant bears the full burden of its (or its agents') failure to file a complete application.").

The Commission's routine application of the filing-deadline rule, moreover, is fully consistent with this Court's precedent. The Court has recognized that "[w]hen an agency imposes a strict deadline for filings, as the FCC has done, many meritorious claims are not considered; that is the nature of a strict deadline." *NetworkIP,* 548 F.3d at 116. Accordingly, this Court has "discourage[d] the Commission from entertaining late-filed pleadings 'in the absence of extremely unusual circumstances.'" *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting *21st Century Telesis Joint Venture v. FCC,* 318 F.3d 192, 200 (D.C. Cir. 2003)). And it has consistently held that error by counsel – like the "misunderstanding" cited by Royce here – is not an "unusual circumstance" that justifies a waiver. *See, e.g., NetworkIP*, 548 F.3d at 126 (waiver of filing deadline after counsel failed to timely remit the correct filing fee was arbitrary and capricious); *Virgin Islands Tel. Corp. v. FCC,* 989 F.2d 1231, 1237 (D.C. Cir. 1993) (tardiness caused by miscommunication among petitioner's counsel was not an "unusual circumstance" that excused its late-filed petition for reconsideration);

Reuters LTD. v. FCC, 781 F.2d 946, 952 (D.C. Cir. 1986) (FCC "acted beyond its lawful authority when it entertained" a petition for reconsideration filed two days late).

Royce contends that the Commission erred when it found that LSP and Ontario could be prejudiced if the agency considered Royce's late-filed application for review and granted Royce's requested extension of its construction permit. Br. 54-56. According to Royce, such prejudice should be discounted because there is no assurance that the Commission will ultimately grant the competing applications filed by LSP and Ontario. Br. 54-55. This argument misses the point: the Commission's rules protecting against interference (*see* n.5, above) prevent the FCC from even considering those applications until final disposition of the KIEV(AM) construction permit. *See Order* (¶ 9) (JA); *see also* Br. 20 (conceding that LSP's application "w[as] filed subject to the proviso that [it could not] be granted until final disposition of the KIEV Revised Construction Permit."). Thus, the Commission reasonably found that LSP and Ontario could be prejudiced if it granted Royce's motion for an extension of time and, after consideration of its late-filed application for review, revived the KIEV(AM) construction

permit.[11] Simply stated, consideration and grant of Royce's untimely application would prevent Commission consideration of the competing LSP and Ontario applications – applications that have now been pending for more than seven years.[12] *Order* (¶ 13) (JA); *Dec. 17, 2004 Bureau Letter* at 3 (JA).

The Commission has long held that "strict adherence to the principle of finality" in licensing "promotes the prompt initiation of service." *Hancock Commc'ns, Inc.,* 10 FCC Rcd 13068, 13069 (1995) (citing *Florida Inst. of Tech. v. FCC,* 952 F.2d 549, 554 (D.C. Cir. 1992)). Here, valuable AM radio spectrum has gone unused for more than 27 years, and granting Royce's motion to file an untimely application for review would have enabled Royce

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[11] In a somewhat analogous context, this Court has held that to demonstrate the "injury in fact" required for Article III standing, a "disappointed bidder" in an FCC spectrum auction "need not show that it would be successful if the license were auctioned anew, but only that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis." *High Plains Wireless L.P. v. FCC,* 276 F.3d 599, 605 (D.C. Cir. 2002) (citing *DirecTV v. FCC,* 110 F.3d 816, 829 (D.C. Cir. 1997)).

[12] Royce complains that *Aug. 20, 2004 Bureau Letter* did not discuss Royce's argument that no parties would be prejudiced by waiver of the filing deadline. Br. 56. That claim was later considered and rejected by the Bureau and the Commission. *See Dec. 17, 2004 Bureau Letter* at 3 (JA); *Order* (¶ 13) (JA). Likewise, Royce complains the Bureau and the Commission declined to consider its post-construction deadline efforts to locate a new site for KIEV(AM). Br. 56. The Commission in fact did consider those efforts; it simply found them to be unpersuasive. *Order* (¶ 14) (JA).

to continue to "warehouse scarce broadcast spectrum" – an outcome that "would disserve the public interest." *Dec. 17, 2004 Bureau Letter* at 3 (JA). Thus, there is no merit to Royce's effort to minimize (*see* Br. 56) the prejudice that, the Commission explained, would flow from the relief Royce requested.

* * *

Royce's conceded failure to file a timely application for review is dispositive of this appeal. The Commission does not abuse its discretion when it follows its own rules. *See BDPCS*, 351 F.3d at 1184. Here, the Commission followed its settled rules – and this Court's precedent – in declining to excuse Royce's untimely filing. That decision should be affirmed.

III. THE COMMISSION PROPERLY CONCLUDED THAT ROYCE WAS NOT ENTITLED TO A WAIVER OF THE CONSTRUCTION DEADLINE

Even if the Court were to reach the merits (which is unnecessary in light of the FCC's correct procedural ruling), it should defer to the Commission's determination that Royce was not entitled to a waiver of the three-year construction deadline set by 47 C.F.R. § 73.3598(a). *Order* (¶ 15) (JA).

A. Royce's Zoning Problems Did Not Justify A Waiver And Further Extension Of The KIEV(AM) Construction Deadline.

The purpose of the three-year construction period in rule 73.3598(a) is to ensure prompt station construction and the initiation of new radio service. *Streamlining Reconsideration Order,* 14 FCC Rcd at 17539 (¶ 36). To achieve that goal, the Commission "establish[ed] an incentive for all potential applicants to plan construction carefully even prior to applying for a [construction] permit and, once the permit is received, to bring to the construction process the same degree of urgency brought to other business endeavors." *Id.* The Commission thereby sought to minimize instances in which applicants file for permits without taking preliminary steps to begin – much less complete – construction. *Id.* Yet that is precisely what happened here: the Commission granted Royce the KIEV(AM) construction permit more than 27 years ago, but Royce has never even commenced construction of a radio station. Under those circumstances, the Commission reasonably concluded that Royce was not entitled to a waiver and yet another extension of the three-year construction period required by rule 73.3598(a).

Royce's waiver request was predicated on the asserted problems it encountered in obtaining initial zoning approval for the Stocker site. But when the Commission revised its broadcast construction rules in 1998, it

unequivocally "exclu[ded] zoning matters from the category of circumstances" that would toll the three-year construction deadline in rule 73.3598(a). *Streamlining Reconsideration Order,* 14 FCC Rcd at 17539 (¶ 37). The Commission reasoned that doubling the radio construction period from 18 months to three years would provide "diligent permittees" enough time to "resolve zoning issues[,] either by securing an alternate site or obtaining the necessary approvals." *Id.*; *see also Order* (¶ 15) (JA). The Commission, moreover, explained "that diligent permittees can eliminate or mitigate zoning delays by applying for approval from pertinent local authorities *prior* to the issuance of a construction permit." *Streamlining Reconsideration Order,* 14 FCC Rcd at 17540 (¶ 38).

Royce claims it is entitled to an exception to the general rule that zoning problems will not justify tolling or waiver because the zoning delays it experienced were allegedly beyond its control. That claim is not supported by the record. Royce first sought Commission approval to build at the Stocker site when it amended its major change application on August 6, 2001. *July 8, 2004 Bureau Letter* at 2 (JA). The Bureau granted that amendment on September 28, 2001. *Id.* Royce, however, did not contact local zoning authorities until January 2002, approximately four months after the Commission issued the revised construction permit (*i.e.,* Sept. 28, 2001) and

one month after its waiver request had been denied (*i.e.,* Dec. 20, 2001). *Id.* at 4 (JA).

Royce protests that it was not responsible for this delay because "Montebello's policies precluded [Royce] from filing a zoning approval application without [Stocker's] consent" (Br. 36) – consent that Stocker ultimately refused to provide. *Id.* at 37. This argument ignores Commission precedent holding that "the selection of a transmitter site is an independent business decision within a permittee's control." *Order* (¶ 15 & n.58) (JA) (citing *Streamlining Reconsideration Order,* 14 FCC Rcd at 17539 (¶ 38 & n.51)). With fewer than five months remaining before the expiration of the December 21, 2001 construction deadline, Royce knowingly chose the Stocker property as its transmitter site without having first applied for zoning approval – approval that required the participation and consent of the landowner. "Even accepting *arguendo* that Royce's delay in initiating zoning stemmed from restrictions required by Stocker," the Commission observed, "Royce's selection of the site and acceptance of Stocker's terms were matters within Royce's control." *Order* (¶ 15) (JA). The Commission was well

within its discretion in concluding that a waiver of the construction deadline was not warranted under these circumstances. *Id.*[13]

B. The ITU Condition Does Not Entitle Royce To An Extension Of The KIEV(AM) Construction Deadline.

Equally unavailing is Royce's reliance on the Bureau's initial misunderstanding that the construction permit required ITU approval (Br. 38-42) – an error the Bureau promptly corrected after discovery, and to Royce's *benefit*. As an initial matter, this argument is not properly before the Court because it was not raised before the full Commission. *See* 47 U.S.C. § 405(a); *Environmentel, LLC v. FCC,* 661 F.3d 80, 83-84 (D.C. Cir. 2011). In any event, the argument is meritless.

The Commission does not dispute that on December 20, 2001, the Bureau erroneously found that the KIEV(AM) construction permit required ITU approval. *Dec. 20, 2001 Bureau Letter* at 4-5 (JA). Based on its

[13] In an attempt to indirectly attack the *Commission's* decision, Royce launches a scattershot attack on two of the *Bureau's* decisions (*i.e.*, the *January 11, 2002 Bureau Letter* and the *July 8, 2004 Bureau Letter*). Br. 34-42. The Commission, however, did not rely on those staff-level decisions when it found that Royce was not entitled to a waiver of its construction deadline. *See Order* (¶ 15) (JA). In any event, there is no dispute that Royce designated the Stocker property as its transmitter site and that it selected that site subject to the terms and conditions imposed by Stocker. It follows that the subsequent zoning delays were "matters within Royce's control," making it ineligible for a waiver of the construction deadline established by rule 73.3598(a). *Id.*

understanding that the international condition precluded construction at the authorized site, the Bureau, on its own motion, waived the deadline in rule 73.3598(a) to provide Royce 84 days following ITU approval to complete construction (*i.e.,* the time between the September 28, 2001 grant of the revised construction permit and that permit's expiration on December 21, 2001). *See Dec. 20, 2001 Bureau Letter* at 4 (JA).

As it turned out, Royce's construction permit only affected Mexican stations, and the Mexican government cleared Royce's proposal on November 8, 2001; hence, as the Bureau quickly discovered, there was no need for ITU approval. *Jan. 11, 2002 Bureau Letter* at 4 (JA); *Order* (n.19) (JA). Accordingly, the Bureau promptly issued corrected decisions on January 8, 2002 and January 11, 2002 that removed the international condition from Royce's construction permit. *Jan. 8, 2002 Bureau Letter* at 1 (JA); *Jan. 11, 2002 Bureau Letter* at 4 (JA).

Royce now claims that it found this "series of events … ambiguous and confusing" until the Bureau released the *July 8, 2004 Bureau Letter*. Br. 44. By that date, Royce asserts, "the KIEV construction deadline had lapsed" so that "the damage had been done." *Id.* Royce's claim is undercut by the facts. The earlier *January 11, 2002 Bureau Letter* (at 4 (JA)) clearly states: "The International Bureau informs us that Mexico cleared this matter on

November 8, 2001, and that there are no remaining international impediments to construction." Thus, Royce was notified more than two years earlier that the KIEV(AM) permit was not encumbered by the ITU approval process, and that construction could commence. Royce accordingly cannot attribute its failure to construct KIEV(AM) to the international condition that the Bureau mistakenly (and only briefly) placed on the permit.

The Bureau, moreover, waived rule 73.3598(a) to provide Royce an additional 84 days to construct KIEV(AM) (*i.e.,* until April 25, 2002) even though Royce was not entitled to an extension. As the Bureau explained, "[h]ad we known at the time of our December 20, 2001 letter that the only international impediment to construction was a Mexican clearance received almost two months earlier, we would have found that Royce had an opportunity to construct … and would not have given it any additional time." *Jan. 11, 2002 Bureau Letter* at 5 (JA). Royce was hardly "penalized" by the Bureau's mistake (Br. 45); quite to the contrary, it received the benefit of "an error in [its] favor." *Jan. 11, 2002 Bureau Letter* at 5 (JA).

C. The Commission's Application of Its Waiver Policy In This Case Is Consistent With The Agency's Precedent.

Royce contends that the Commission's denial of its waiver request was "inconsistent with the agency's treatment of similarly-situated applicants." Br. 28. That is wrong. The Commission has consistently denied requests to

extend the three-year construction deadline in rule 73.3598(a) based on a permittee's zoning difficulties. *See, e.g., Cram Commc'ns, LLC,* 23 FCC Rcd 658, 662-63 (2008) (city-imposed moratorium on building permits was not grounds for tolling permittee's construction deadline); *Birach Broad. Corp.,* 23 FCC Rcd 3141, 3145-46 (2008) (permittee that did not seek zoning approval until 27 months into the station's construction period was not entitled to tolling); *JNE Invs., Inc.,* 23 FCC Rcd 623, 629-31 (2008) (permittee that abandoned a permitted site in favor of an alternative site where it encountered zoning difficulties was not entitled to tolling).

Royce ignores that precedent and instead relies on various staff-level decisions granting waivers of the three-year construction deadline. Br. 45-50. But reliance on *staff-level* decisions to set forth a claim of *Commission* discrimination is foreclosed by this Court's opinion in *Comcast v. FCC,* 526 F.3d 763, 769 (D.C. Cir. 2008). In that decision, this Court rejected just such a claim and affirmed its "well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions." *Id.* (internal quotation marks and citations omitted). *Comcast* makes clear that a litigant must point to conflicting *Commission-level* decisions to establish a claim of discriminatory treatment by the agency.

In any event, Royce's reliance on the agency's staff-level decisions is unavailing because Royce is not similarly situated to the permittees that received waivers in those cases.

1. In *Hoyt Sherman Place Foundation,* 21 FCC Rcd 10760 (Media Bur. 2006) (Br. 45-46), for example, the Media Bureau granted a waiver to a permitee because it "had acquired all necessary equipment to operate the station but would be unable to complete construction by the expiration date because … the owner had stripped the facilities down to the concrete walls, removing all bathrooms, carpeting, soundproofing, etc." *Id.* at 10761. In contrast, Royce had not obtained initial zoning approval – let alone begun construction of its station – when its permit finally expired on April 25, 2002.

2. Nor is *Letter to Rebecca Duke, Esq.,* 18 FCC Rcd 5034, 5035-36 (Media Bur. 2003) (Br. 46-49) to the contrary. There, the Bureau waived a permittee's construction deadline after the local school system exercised eminent domain over the station's licensed transmitter site. *Id.,* 18 FCC Rcd at 5035. The Bureau explained that "[t]he forc[ible] taking of private land for government use is rare and exceptional," *id.,* whereas "initial zoning is not a tolling encumbrance." *Id.*, 18 FCC Rcd at 5036, n.6. Royce concedes that it "did not lose its site as a result of a government acquisition," Br. 47; *Letter to Rebecca Duke, Esq.* is therefore inapposite.

3. Royce's reliance on *Oxenford* is equally misplaced. *See* Br. 49-51 (citing *Letter from Chief, Audio Division, Media Bureau, FCC to David Oxenford, Esq.,* Ref. No. 1800B3-1B at 2 (Jan. 28, 2008) (JA) ("*Oxenford*")). In that unpublished decision, the Bureau waived the permittee's construction deadline after the Federal Aviation Administration barred it from modifying its facilities due to concerns about interference with air traffic control signals. *Oxenford* at 1 (JA). The Bureau reasoned that the permittee "merit[ed] a waiver because it is unusual for an auction winner to potentially create an air hazard within the entire area in which it could locate a Commission-allotted channel." *Id.* at 3. Royce, by contrast, failed to "establish that [the City of] Montebello's zoning processes are unique or even unusual so as to warrant an exception to the general principle that initial zoning problems do not form a basis for grant of additional construction time." *July 8, 2004 Bureau Letter* at 4 (JA).

Like the staff-level decisions discussed above, the sole Commission-level waiver case cited by Royce lends no support to its claim of disparate treatment. *See* Br. 51-52 (discussing *Texas Grace Commc'ns,* 16 FCC Rcd 19167, 19170-71 (2001) ("*Texas Grace*")). In *Texas Grace,* the Commission found that the permittee "might have concluded" from the *Streamlining Reconsideration Order,* 14 FCC Rcd at 18538, "that reliance on mere

facilities modifications involving frequency or class would be insufficient to trigger tolling, but that a facility change coupled with a community of license change might be treated differently." 16 FCC Rcd at 19171 (¶ 10). "In view of this circumstance," the Commission waived its rules to provide the permittee an additional three years to complete construction. *Id.*

Contrary to Royce's claim (Br. 51) that it was entitled to a similar waiver "because it too proposed a facilities change coupled with a community of license change," the Commission explained in the *Order* on appeal that "[t]he equities applicable to the permittee in *Texas Grace,* which had initiated a rulemaking and modification process well before adoption of the revised construction rules, are not present for Royce, which filed its modification application *after* the rule change, and whose application did not stem from a

rulemaking proceeding."[14] *Order* (¶ 15, n.60) (JA) (emphasis added). In other words, while the Commission's "intent" in the 1998 *Streamlining Reconsideration Order* "may not have been completely clear to permittees [like Texas Grace] with then-outstanding modification requests," *Texas Grace,* 16 FCC Rcd at 19171 (¶ 10), it should have been clear to Royce, which did not propose a facilities change coupled with a community of license change until *three years later*, in 2001.[15] *Order* (¶ 4) (JA). The Commission, moreover, released *Texas Grace* prior to Royce's December 7,

[14] Royce further contends that the Commission's rulemaking distinction is "arbitrary." Br. 52. It is not. *Texas Grace* involved a two-part commercial FM licensing procedure. Under the Commission's former rules, the permittee in *Texas Grace* had to initiate a rulemaking to change its community of license – a process that usually took one to three years to complete. *Texas Grace,* 16 FCC Rcd at 19167 (¶ 2). Only after the permittee successfully completed the rulemaking could it file an application to modify the facilities designated in its construction permit. *Id.* Based on the foregoing, it was not unreasonable for the permittee in *Texas Grace* to conclude that the Commission devised a different construction rule for those cases where the licensing process is likely to stretch across the entire three-year construction period. This assumption would have been unreasonable in the context of AM licensing, however. A permittee like Royce (during the relevant period and now) may use a single application to request a change in its community of license and modification of its facilities.

[15] If Royce believed that the *Streamlining Reconsideration Order* did not hold permittees requesting both facilities modification and a community of license change to the three-year construction deadline in rule 73.3598(a), then it should have objected when the Bureau issued the revised construction permit for KIEV(AM) on September 28, 2001. *Order* (¶ 4) (JA). That permit held Royce to its December 21, 2001 construction deadline. *Id.*

2001 waiver request, and that decision unambiguously placed permittees like Royce on notice that the FCC in "future cases" would toll a construction permit "only [in] the circumstances explicitly identified in [s]ection 73.3598(b) of [its] rules." 16 FCC Rcd at 19171 (¶ 10).

CONCLUSION

For the above reasons, the *Order* should be affirmed.

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February 9, 2012

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

ROYCE INTERNATIONAL BROADCASTING COMPANY, APPELLANT, v. FEDERAL COMMUNICATIONS COMMISSION APPELLEE.	NO. 11-1270

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 contains 9,176 words.

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Statutory and Regulatory Appendix

5 U.S.C. § 706
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47 C.F.R. § 73.3958

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 155

(a) Chairman; duties; vacancy

The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports, except that any commissioner may present his own or minority views or supplemental reports, to represent the Commission in all matters requiring conferences or communications with other governmental officers, departments or agencies, and generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission. In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.

(b) Organization of staff

From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. Each such integrated bureau shall include such legal, engineering, accounting, administrative, clerical, and other personnel as the Commission may determine to be necessary to perform its functions.

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining,

ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

(2) As used in this subsection the term "order, decision, report, or action" does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. 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, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

(9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

(d) Meetings

Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.

(e) Managing Director; appointment, functions, pay

The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule.

47 U.S.C. § 301

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 307

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) Terms of licenses

(1) Initial and renewal licenses

Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

(2) Materials in application

In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the

Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.

(3) Continuation pending decision

Pending any administrative or judicial hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 or section 402 of this title, the Commission shall continue such license in effect.

(d) Renewals

No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

(e) Operation of certain radio stations without individual licenses

(1) Notwithstanding any license requirement established in this chapter, if the Commission determines that such authorization serves the public interest, convenience, and necessity, the Commission may by rule authorize the operation of radio stations without individual licenses in the following radio services: (A) the citizens band radio service; (B) the radio control service; (C) the aviation radio service for aircraft stations operated on domestic flights when such aircraft are not otherwise required to carry a radio station; and (D) the maritime radio service for ship stations navigated on domestic voyages when such ships are not otherwise required to carry a radio station.

(2) Any radio station operator who is authorized by the Commission to operate without an individual license shall comply with all other provisions of this chapter and with rules prescribed by the Commission under this chapter.

(3) For purposes of this subsection, the terms “citizens band radio service”, “radio control service”, “aircraft station” and “ship station” shall have the meanings given

them by the Commission by rule.

(f) Notwithstanding any other provision of law, (1) any holder of a broadcast license may broadcast to an area of Alaska that otherwise does not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery even if another holder of a broadcast license begins broadcasting to such area, (2) any holder of a broadcast license who has broadcast to an area of Alaska that did not have access to over the air broadcasts via translator, microwave, or other alternative signal delivery may continue providing such service even if another holder of a broadcast license begins broadcasting to such area, and shall not be fined or subject to any other penalty, forfeiture, or revocation related to providing such service including any fine, penalty, forfeiture, or revocation for continuing to operate notwithstanding orders to the contrary.

47 U.S.C. § 308

(a) Writing; exceptions

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or

form, including by electronic means, as the Commission may prescribe by regulation.

(c) Commercial communication

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

(d) Summary of complaints

Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.

47 U.S.C. § 309

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application--

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe, shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(c) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(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.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after

publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of temporary operations under subsection (b)

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(i) Random selection

(1) General authority

Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law--

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such

preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) Not later than 180 days after August 10, 1993, the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection.

(5) Termination of authority

(A) Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997.

(B) Subparagraph (A) of this paragraph shall not apply with respect to licenses or permits for stations described in section 397(6) of this title.

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this

subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed; and

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments,

or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with

the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), and (E), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each

expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraph (E)(ii);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(D) Disposition of cash proceeds

Cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(E) Transfer of receipts

(i) Establishment of fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system

under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term “recovered analog spectrum” has the meaning provided in paragraph (15)(C)(vi).

(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993; until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2012.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report--

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent--

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications.

--In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial full-power television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(D) Redesignated (C)

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding; conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of--

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Report

Within one year after the date of enactment of this paragraph, the Commission shall submit a report to Congress--

(I) specifying when the Commission intends to reschedule auctions 31 and 44 (other than the blocks excepted by clause (i)); and

(II) describing the progress made by the Commission in the digital television transition and in the assignment and allocation of additional spectrum for advanced mobile communications services that warrants the scheduling of such auctions.

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term “recovered analog spectrum” means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

(I) the spectrum required by section 337 to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after the date of enactment of this paragraph, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of

auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the total cash proceeds from any auction of eligible frequencies described in section 923(g)(2) of this title shall at least equal 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 923(g)(2) of this title if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

(k) Broadcast station renewal procedures

(1) Standards for renewal

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e) of this section, that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited
In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

(l) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) of this section to assign such license or permit;

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on August 5, 1997.

47 U.S.C. § 319

(a) Requirements

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(b) Time limitation; forfeiture

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Licenses for operation

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a)-(g)

of this title shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

(d) Government, amateur, or mobile station; waiver

A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction, except that the Commission may by regulation determine that a permit shall not be required for minor changes in the facilities of authorized broadcast stations. With respect to any other station or class of stations, the Commission shall not waive the requirement for a construction permit unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver.

47 U.S.C. § 402

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person

who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 405

(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.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.46

(a) It is the policy of the Commission that extensions of time shall not be routinely granted.

(b) Motions for extension of time in which to file responses to petitions for rulemaking, replies to such responses, comments filed in response to notice of proposed rulemaking, replies to such comments and other filings in rulemaking proceedings conducted under Subpart C of this part shall be filed at least 7 days before the filing date. If a timely motion is denied, the responses and comments, replies thereto, or other filings need not be filed until 2 business days after the Commission acts on the motion. In emergency situations, the Commission will consider a late-filed motion for a brief extension of time related to the duration of the emergency and will consider motions for acceptance of comments, reply comments or other filings made after the filing date.

(c) If a motion for extension of time in which to make filings in proceedings other than notice and comment rule making proceedings is filed less than 7 days prior to the filing day, the party filing the motion shall (in addition to serving the motion on other parties) orally notify other parties and Commission staff personnel responsible for acting on the motion that the motion has been (or is being) filed.

47 C.F.R. § 1.115

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(d) Except as provided in paragraph (e) of this section, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

(e)(1) Applications for review of interlocutory rulings made by the Chief Administrative Law Judge (see § 0.351) shall be deferred until the time when exceptions are filed unless the Chief Judge certifies the matter to the Commission for review. A matter shall be certified to the Commission only if the Chief Judge determines that it presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The request to certify the matter to the Commission shall be filed within 5 days after the ruling is made. The application for review shall be filed within 5 days after the order certifying the matter to the Commission is released or such ruling is made. Oppositions shall be filed within 5 days after the application is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. A ruling certifying or not certifying a matter to the Commission is final: Provided, however, That the Commission may, on its own motion, dismiss the application for review on the ground that objections to the ruling should be deferred and raised as an exception.

(2) The failure to file an application for review of an interlocutory ruling made by the Chief Administrative Law Judge or the denial of such application by the Commission, shall not preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed. Such requests will be considered in the same manner as exceptions are considered.

(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a

controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when exceptions in the initial decision in the case are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Enforcement Bureau's Accelerated Docket (see, e.g., § 1.730) shall be filed within 15 days of public notice of the decision, as that date is defined in § 1.4(b). These applications for review oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

(f) Applications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52, and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-space typewritten pages. Applications for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted (see paragraph (e)(3) of this section), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted (see paragraph (e)(3) of this section), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on parties to the proceeding.

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition

requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

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

(2) 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.

(h)(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See § 1.102.) Following the completion of such further proceedings the Commission may affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note: For purposes of this section, the word “order” refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the “memorandum opinion” or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall

a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

47 C.F.R. § 73.3598

(a) Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. Except as provided in the last two sentences of this paragraph, each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit. An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121 through 201, at the time the transaction is approved by the FCC, and holds

(1) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or

(2) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

(3) More than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.

(b) The period of construction for an original construction permit shall toll when construction is prevented by the following causes not under the control of the permittee:

(1) Construction is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes);

(2) The grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement; or

(3) A request for international coordination, with respect to an original construction permit for a new DTV station, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received, or the licensee or permittee is challenging the response from Canada or Mexico on the grounds that the facility as approved would not permit the station to serve the population that is both approved by the Commission and served by the station's TV (analog) facility to be vacated by June 12, 2009.

(c) A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation. All notifications must be filed in triplicate with the Secretary and must be placed in the station's local public file.

(d) A permittee must notify the Commission promptly when a relevant administrative or judicial review is resolved. Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments.

(e) Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.

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

Royce International Broadcasting Company, Appellant

v.

Federal Communications Commission, Appellee.

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on February 9, 2012, 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.

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