BRIEF FOR APPELLEE

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

NO. 14-1039

FIBERTOWER SPECTRUM HOLDINGS, LLC,

APPELLANT,

V.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL FROM ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
ACTING DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

MAUREEN K. FLOOD
COUNSEL

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

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.

FiberTower Spectrum Holdings LLC, 28 FCC Rcd 6822 (2013), *reconsideration denied*, *FiberTower Spectrum Holdings LLC*, 29 FCC Rcd 2493 (2014).

3. Related cases.

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ADMINISTRATIVE DECISIONS

OTHER AUTHORITIES

** Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Bureau or Wireless Bureau	FCC's Wireless Telecommunications Bureau
FCC or Commission	Federal Communications Commission
GHz	Gigahertz
WCS	Wireless Communications Service

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

NO. 14-1039

FIBERTOWER SPECTRUM HOLDINGS, LLC,

APPELLANT,

V.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL FROM ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

JURISDICTION

The Federal Communications Commission ("FCC" or "Commission") released its initial *Order* on May 7, 2013. *See FiberTower Spectrum Holdings LLC*, 28 FCC Rcd 6822 (2013) (JA___) ("*Order*"). Appellant FiberTower Spectrum Holdings, LLC ("FiberTower") sought administrative reconsideration, thereby tolling the period within which FiberTower was required to seek judicial review. *E.g.*, *Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997). The Commission denied FiberTower's petition for reconsideration on February 27, 2014. *See FiberTower Spectrum Holdings LLC*, 29 FCC Rcd 2493 (2014) (JA___) ("*Reconsideration Order*").

FiberTower filed its notice of appeal in this Court on March 28, 2014. The Court has jurisdiction to review both the *Order* and the *Reconsideration Order* under 47 U.S.C. § 402(b)(5).

QUESTIONS PRESENTED

The Commission's rules require licensees in the 24 GHz and 39 GHz spectrum bands to provide "substantial service" by the end of their ten-year license term, unless extended. If they do not, their licenses automatically cancel by operation of law. FiberTower held 689 licenses in the 24 GHz and 39 GHz bands for more than a decade, but when the deadline (which had been extended once) arrived to demonstrate substantial service, FiberTower was providing no service whatsoever. In the *Order* on appeal, the Commission rejected FiberTower's substantial-service showings for each of those licenses, and denied its request to further waive or extend the deadline for demonstrating substantial service.

The questions presented are:

1. Whether the Commission acted consistently with the Communications Act and its own rules when it found that FiberTower failed to provide substantial service under its licenses; and

2. Whether the Commission lawfully exercised its discretion to deny FiberTower's requests to waive or extend the deadline for demonstrating substantial service.

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY FRAMEWORK

The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum, vests in the Commission the exclusive authority to grant radio licenses, and provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. The Commission has authority under the Communications Act to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter…." 47 U.S.C. § 303(r). For licenses awarded by auction, the Commission must adopt "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." 47 U.S.C. § 309(j)(4)(B).

Consistent with Congress's directive, the Commission has imposed "build-out" requirements on wireless licenses to ensure that spectrum is used effectively and that service is deployed rapidly. Those requirements differ across spectrum bands. Licenses in the 24 GHz and 39 GHz bands (the bands at issue in this case) are awarded for ten years, and the licensee must demonstrate "substantial service" in the area covered by the license at the time of renewal. *Order*, ¶ 2 (JA___); 47 C.F.R. §§ 101.67, 101.17, 101.527.[1]

For the 24 GHz band, the Commission defined "substantial service" as "a service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal." *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). The Commission has applied the same definition to the 39 GHz band. *See 39 GHz Order*,12 FCC Rcd at 18623-26 (¶¶ 41-50). As the Commission has explained, this broad standard "permit[s] flexibility in system design and market development" while "ensuring that service is being provided to the public." *39 GHz Order*, 12 FCC Rcd at 18623

[1] The FCC has licensed the 24 GHz and 39 GHz bands for point-to-point, point-to-multipoint, and multipoint-to-multipoint fixed wireless technologies. Licensees in the 39 GHz band are also permitted to offer mobile services. *See Amendments to Parts 1,2,87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, 15 FCC Rcd 16934 (2000) ("*24 GHz Order*"); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 12 FCC Rcd 18600 (1997) ("*39 GHz Order*").

(¶ 46); *see id.*, 18624 (¶¶ 41-42), 18625 (¶ 47); *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38).

Licensees in the 24 GHz and 39 GHz bands can satisfy the substantial-service requirement if they comply with one of the "safe harbors" established by the Commission. *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). Those safe harbors include "a showing of four links [2] per million population within a service area or service to an area that has very limited access to either wireless or wireline telecommunications services." *Id.*; *see 39 GHz Order*, 12 FCC Rcd at 18625 (¶ 46). "[T]his list is not exhaustive," and "the substantial service requirement can be met in other ways." *24 GHz Order*, 15 FCC Rcd at 16951-52 (¶ 38); *see 39 GHz Order*, 12 FCC Rcd at 18624-25 (¶ 46).

To demonstrate substantial service, a 24 GHz licensee must, "at a minimum, provide the Commission with a description of its current service in terms of geographic coverage and population served or links installed" on a license-specific basis. *24 GHz Order*, 15 FCC Rcd at 16953 (¶ 42); *see* 47 C.F.R. § 101.527. This requirement "ensure[s] that the licensee is using the spectrum efficiently to provide service to the public." *24 GHz Order*, 15 FCC Rcd at 16953 (¶ 42). The Commission's rules similarly require 39 GHz

[2] A "microwave link" is a "communications circuit between two points." *See* 47 C.F.R. § 101.3.

licensees to provide, for each license, a "description of [its] current service in terms of geographic coverage," a "description of [its] current service in terms of population served," and a "description of [its] investments in its system(s)," including the "type of facilities constructed and their operational status." 47 C.F.R. § 101.17.

If the holder of a 24 GHz or 39 GHz license fails to demonstrate "substantial service," the license automatically cancels by operation of law. *See* 47 C.F.R. §§ 101.17(b), 101.527(c); *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). However, where a wireless licensee shows that its "failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control," the Commission can extend the construction period. *See* 47 C.F.R. § 1.946(e)(1). The Commission also may waive the rules associated with wireless licenses, including construction deadlines, where either (1) "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that grant of the requested waiver would be in the public interest;" or (2) "[i]n view of the unique or unusual circumstances of the instant case, application of the rule[s] would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative." 47 C.F.R. § 1.925(b)(3)(i),(ii).

II. FACTUAL BACKGROUND

At the time of the *Order*, FiberTower provided wireless backhaul service to more than 5,000 customer locations in thirteen markets throughout the United States. *Order*, ¶ 2 (JA___). Wireless backhaul service transports voice and data from a wireless carrier's cell site (*i.e.*, a tower) to its local switch (*i.e.*, the computer that routes voice and data traffic), and between the local switch and the carrier's larger nationwide network. *Id*. FiberTower provided those services using more than 3,000 microwave licenses in the 11, 18, and 23 GHz bands. *Id.* FiberTower also held 635 licenses in the 39 GHz band and 103 licenses in the 24 GHz band. This case involves 689 of FiberTower's 738 licenses in the 24 GHz and 39 GHz bands.

A. The 2008 And 2010 Extensions

In October 2006, ART Licensing (a wholly owned subsidiary of FiberTower) sought waivers of and extensions of time to comply with the substantial-service requirement set forth in section 101.17 of the FCC's rules for 214 of its 39 GHz licenses. *See ART Licensing Corp.*, 23 FCC Rcd 14116, 14118-20 (¶¶ 5-8) (WTB 2008) ("*FiberTower MO&O*"). The licenses, which FiberTower acquired through a 2006 merger, had been awarded in 1996 and 1997. *Id.*, 11418 (¶ 4). As such, the deadline for demonstrating substantial service was then fast approaching. In the alternative, FiberTower asked the

Commission to find that it had demonstrated substantial service for all 214 of the subject licenses. *Id.*, 14120-21 (¶¶ 9-11).

Upon review, the FCC's Wireless Telecommunications Bureau concluded that FiberTower satisfied the substantial-service requirement for 31 of the 214 licenses. *Id.*, 14122-23 (¶ 13). In the areas covered by the 183 remaining licenses, FiberTower "ha[d] not constructed any 39 GHz links." *Id.*, 14123 (¶ 14). FiberTower conceded that fact, but asserted that "non-license-specific" activities, such as "establishing billing systems" and "back office systems to support national operations," satisfied the substantial-service requirement. *Id.* The Wireless Bureau disagreed, holding that "in the absence of any actual operation of…stations," those activities "cannot support a finding of substantial service." *Id.*

The Wireless Bureau nonetheless concluded that an extension would "be in the public interest" based on the Bureau's anticipation that FiberTower could provide a potential "backhaul solution" for licensees in spectrum bands that had recently been auctioned, licensed, or put into use (*i.e.*, the 700 MHz, Advanced Wireless Service-1, and Broadband Radio Service/Educational Radio Service bands). *Id.*, 14126 (¶ 20). Predicting that "services in these bands would develop robustly," the Wireless Bureau extended the deadline to

construct FiberTower's 39 GHz licenses until June 1, 2012. *Id.*, 14125-26 (¶¶ 20-21).

Two years later, FiberTower asked the Wireless Bureau to extend the construction deadline for its licenses in the 24 GHz band to June 1, 2012, commensurate with the deadline extension granted for its licenses in the 39 GHz band. The Wireless Bureau granted that request on October 7, 2010. *See FiberTower Spectrum Holdings LLC*, 27 FCC Rcd 13562, 13653 (¶ 4) (WTB 2012) ("*Bureau Order*") (JA___).[3]

B. The *Bureau Order*

On May 14, 2012, FiberTower sought an additional three-year extension of time (until June 1, 2015) to demonstrate substantial service for 689 of its licenses in the 24 GHz and 39 GHz spectrum bands.[4] *See Bureau Order*, ¶ 5 (JA___). Alternatively, FiberTower sought a "limited waiver" of the substantial-service deadline to allow the same. *See id.* In support of its requests, FiberTower argued that "circumstances beyond its control" had prevented it from providing substantial service by the then-applicable

[3] In 2009 and 2011, the Wireless Bureau similarly extended the deadline to construct FiberTower's other 39 GHz licenses to June 1, 2012.

[4] Months later, FiberTower filed a supplement that purported to reduce its extension request to 18 months. *See Order*, ¶ 5 (JA___).

deadline, notably "a lack of a national market for microwave backhaul and access service," and "a continuing lack of viable equipment." *Id.*

Two weeks after filing its extension and waiver requests, FiberTower submitted construction notifications that purported to demonstrate substantial service for the 689 24 GHz and 39 GHz licenses. Like FiberTower's 2008 extension request, those notifications asserted that FiberTower had demonstrated substantial service through activities antecedent to build-out, such as "designing and proposing network builds," and "engaging in equipment development." *Id.*, ¶ 6 (JA___).

While its extension and waiver requests were pending before the FCC, FiberTower filed a petition for relief under Chapter 11 of the Bankruptcy Code.[5] *Order*, ¶ 7 (JA ___). FiberTower's licenses in the 11, 18, 23, 24, and 39 GHz bands were at issue in the bankruptcy proceeding. *Id.* On FiberTower's request, the bankruptcy court granted a preliminary injunction that enjoined the Commission from "granting, transferring, assigning, or selling FiberTower's 24 GHz and 39 GHz licenses to any entity other than

[5] *In re FiberTower Services Corp. et al.*, Case No. 12-44027-DML-11 (Bankr. N.D. Tex.).

FiberTower or FiberTower's designee" pending FiberTower's exhaustion of its administrative and judicial remedies.[6]

In a November 7, 2012 Order, the Wireless Bureau rejected the substantial-service showing FiberTower had filed for each of its 689 licenses. *Bureau Order*, ¶¶ 19-22 (JA___-___). The Wireless Bureau held that the service requirements for 24 GHz and 39 GHz licenses "presume[] construction of at least some facilities and some sort of actual service"; thus, the "antecedent activities" relied upon by FiberTower, which "d[id] not involve construction of any facilities whatsoever," could not satisfy that standard. *Id.*, ¶ 22 (JA___).

The Wireless Bureau also denied FiberTower's request for an extension of time, holding that FiberTower failed to demonstrate that circumstances beyond its control prevented it from constructing its licenses. *See id.*, ¶¶ 23-30 (JA___); 47 C.F.R. § 1.946(e)(1). The Wireless Bureau found that FiberTower was not impeded by a lack of demand for wireless backhaul

[6] Order Granting Preliminary Injunction, *In re FiberTower Network Servs. Corp., et al., Debtors v. FCC*, Adv. No. 12-4104 (Bank. N.D. Tex., Sept. 27, 2012). The bankruptcy court made clear that nothing in its order "shall stay or otherwise affect proceedings before the Commission, adjudicatory or otherwise, or stay or otherwise affect any appeal from any order of the Commission which proceedings or appeals precede the transfer, assignment or sale of the FCC Licenses to any entity other than Debtors or Debtors' assignee or designee."

given record evidence showing that the wireless backhaul market "ha[d] been developing steadily" and that FiberTower "ha[d] been an active provider of wireless backhaul services" using its licenses in the 11, 18, and 23 GHz bands. *Id.*; *see id.*, ¶ 32 (JA___). The Wireless Bureau separately found that FiberTower did not face an equipment shortage, citing hundreds of substantial-service showings filed by FiberTower and other licensees and FiberTower's own "acknowledge[ment] that it ha[d] acquired a substantial amount of commercially viable network equipment for deployment in the 24 GHz and 39 GHz bands." *Id.*, ¶ 27 & n.79 (JA___).

Finally, the Wireless Bureau denied FiberTower's request to waive the June 1, 2012 substantial-service deadline. *Id.*, ¶¶ 31-34 (JA___-___). The Wireless Bureau held that providing FiberTower more than the 11-15 years it had already had to construct its 24 GHz and 39 GHz licenses would be inconsistent with the underlying purpose of the substantial service requirement, "which is to ensure meaningful construction of licenses and to prevent warehousing of spectrum." *Id.*, ¶ 32 (JA ___). It further held that requiring FiberTower to demonstrate substantial service was not unduly burdensome or contrary to the public interest because "[o]ther licensees…buil[t] out their licenses," and FiberTower's own estimate of the cost to construct all of the licenses (about $10-$12 million) "[wa]s a fraction"

of the $300 million that FiberTower purportedly spent to acquire licenses and develop facilities in the 24 GHz and 39 GHz bands. *Id.*, ¶ 33 (JA___).

In denying FiberTower's requests, the Wireless Bureau emphasized that its decision "d[id] not affect any of the licenses that FiberTower uses currently to provide service to customers; those licenses remain in full force and effect." *Id.*, ¶ 35 (JA___). The Wireless Bureau also clarified that it "w[ould] take no action to reassign the spectrum covered under [the subject licenses] to any applicant" while the bankruptcy court's preliminary injunction remained in effect. *Id.*, ¶ 37 (JA___).

Nevertheless, FiberTower's Chapter 11 reorganization plan was contingent on maintaining its 24 GHz and 39 GHz licenses. *Order*, ¶ 33 (JA__). In light of the Wireless Bureau's denial of the company's waiver and extension requests, FiberTower ceased all operations on April 30, 2013 after reaching a transition agreement with its wireless backhaul customers. *Id.*, ¶ 12 (JA___)

C. The Commission *Order*

On December 7, 2012, FiberTower asked the full Commission to reverse the Wireless Bureau's denial of its extension and waiver requests and its rejection of FiberTower's substantial-service showings.

In a May 7, 2013 Order, the Commission upheld the Wireless Bureau's finding that FiberTower had not demonstrated substantial service under the FCC's rules. *Order*, ¶¶ 38-40 (JA___-___). Having "explicitly approved" the Wireless Bureau's interpretation of substantial service to require the construction of some facilities, the Commission "reject[ed] FiberTower's attempt to collaterally attack existing Commission policy," which the Commission found the Wireless Bureau applied correctly in FiberTower's case. *Id.*, ¶ 39 (JA ___).

The Commission also affirmed the Wireless Bureau's denial of FiberTower's extension request. *Order*, ¶¶ 18-23 (JA___). The Commission found that "the explosive growth in demand for mobile broadband services since 2008," combined with FiberTower's failure to build out its 24 GHz and 39 GHz licenses even in "markets where [it] had existing customers and demand for its services," undercut FiberTower's claim that a lack of demand for wireless backhaul should excuse the June 1, 2012 construction deadline. *Id.*, ¶ 19 (JA___). And like the Wireless Bureau, the Commission found no record support for FiberTower's claim that it lacked access to viable equipment, noting that FiberTower's own pleadings asserted that the company "ha[d] more than 400 24 GHz systems sitting in its warehouse," and that it had "purchased sufficient equipment to build another 44 [39 GHz]

links…, with an option to purchase equipment to build another 210 links." *Id.*, ¶ 21 (JA___).

Finding that "FiberTower's other explanations d[id] not withstand scrutiny," the Commission concluded that FiberTower did not construct its licenses for "financial reasons." *Id.*, ¶ 23 (JA___). A declaration by FiberTower's president filed in the bankruptcy proceeding stated that the "capital expenditures" needed to satisfy the substantial-service requirement "were prohibitive due to [FiberTower's] inability to raise capital." *Id.*[7] Explaining that its rules "expressly prohibit granting an extension when the failure to construct was caused by a lack of financing," the Commission affirmed the Wireless Bureau's determination that FiberTower was not eligible for an extension of time to construct its licenses. *Id.*, ¶ 23 (JA___); 47 C.F.R. § 1.946(e)(2).

Additionally, the Commission found no merit to FiberTower's claim that the company was similarly situated to licensees that had received extensions of time to complete construction. *Order*, ¶¶ 24-29 (JA___-___).

---

[7] *See* Declaration of Kirk Van Waganen in Support of Chapter 11 Petitions and First Day Motions, *In re FiberTower Network Services Corp. et. al.*, Case No. 12-440027-DML-11 (Bankr. N.D.Tex.) ¶¶ 19-21 (JA___-___) (explaining that after FiberTower received "termination notices" from two large customers, "expenditures were limited to on-going operations with capital investment restricted to projects with short-term paybacks").

The Commission held that those cases were distinguishable from this one, where there was "a viable market, equipment, and technology that would have allowed FiberTower to build," and no "flaw in the [FCC's] rules" that would have "hindered deployment." *Id.*, ¶ 25 (JA___).

Finally, the Commission affirmed the Wireless Bureau's denial of FiberTower's waiver request. *Id.*, ¶¶ 30-37 (JA___-___). The Commission rejected as "inappropriate" FiberTower's argument that, by avoiding relicensing delays, grant of a waiver "would actually result in more expeditious use of the spectrum." *Id.*, ¶ 34 (JA___). Because "[a]ny licensee" could make this argument, the Commission "would never enforce buildout requirements" under this standard – a "result" that "would remove any incentive licensees had to meet the buildout deadlines" in the FCC's rules. *Id.* Nor was the Commission persuaded by FiberTower's argument that absent a waiver, the substantial-service requirement would have "forced [it] to build 'inefficient stop-gap systems with no commercial viability.'" *Id.*, ¶ 36 (JA___). Unlike recipients of prior staff-level waivers, which had faced the choice of "deploy[ing] stop-gap equipment or build[ing] nothing," FiberTower had "constructed facilities" and enjoyed "a customer base, experience providing wireless backhaul services, and access to equipment." *Id.*

D. The *Reconsideration Order*

FiberTower filed a timely petition for administrative reconsideration of the *Order*. On February 17, 2014 the Commission denied that petition because it "raise[d] claims that either could have and should have been raised at an earlier stage in the proceeding, or repeat[ed] claims that the Commission has thoroughly considered and rejected." *Reconsideration Order*, ¶ 11 (JA___); *see* 47 C.F.R. § 1.106(b)(2). The Commission further found that the petition failed to demonstrate "any material error" in the *Order*. *Id.*

The Commission observed that "[w]henever [it] imposes buildout requirements, there is always a possibility that some licensees will not meet those requirements, and they will have to suffer the consequences of that failure." *Id*., ¶ 29 (JA __). "Here," where "FiberTower had 11-15 years to demonstrate substantial service" but "chose not to build for financial reasons," the Commission "believe[d] that a decision to grant FiberTower yet more time would constitute a failure of [its] processes." *Id*.

SUMMARY OF ARGUMENT

The Commission reasonably determined that FiberTower had not complied with rules that require the holder of a 24 GHz or 39 GHz license to use that license to provide substantial service to the public by the end of the license term. FiberTower's licenses were awarded as long as 15 years before

their eventual termination, yet the company never built facilities for those licenses, let alone initiated service to the public. No service is not service, much less substantial service. The Commission also appropriately exercised its discretion to deny waiver of the rules or extension of the deadline for demonstrating substantial service. Having already granted FiberTower one extension, the Commission reasonably determined that any public-interest benefits that would result from granting FiberTower additional relief were outweighed by the spectrum warehousing that could result from the agency's failure to enforce its build-out requirements.

1. The Commission's rules require licensees in the 24 GHz and 39 GHz spectrum bands to provide "substantial service" by the end of the license term. If they do not, their licenses automatically cancel by operation of law. The Commission reasonably balanced the objectives set forth in section 309(j)(4)(B) of the Act, 47 U.S.C. § 309(j)(4)(B), when it promulgated that performance requirement. By providing licensees an incentive to construct their licenses and provide some service to the public by a date certain, the substantial-service rules promote the deployment of new technologies and services, ensure the delivery of service in rural areas, and prevent spectrum warehousing.

Before the Commission and this Court, FiberTower makes the extraordinary argument that a licensee that provides *no* service can satisfy the agency's requirement that it provide *substantial* service. This argument finds no support in the statute or the Commission's orders and rules. It also has been expressly rejected by the Commission on multiple prior occasions for being inconsistent with the agency's longstanding goal of ensuring the prompt delivery of service to the public. Absent enforceable performance requirements that mandate license holders to deploy facilities and provide service, licensees like FiberTower could hold exclusive rights to spectrum indefinitely, without ever putting that spectrum to productive use. The Commission thus reasonably found that FiberTower's investment in general activities such as research and development, without more, was insufficient to demonstrate substantial service. The Commission also correctly found that FiberTower had not demonstrated substantial service for each of the 689 licenses at issue here.

2. The Commission did not abuse its discretion when it denied FiberTower's request for a waiver of the substantial-service rules. Indeed, policy considerations strongly militate against the grant of a waiver here: were the Commission to reward FiberTower's voluntary business decision not to build out its licenses after granting a prior extension, the agency would

promote the type of spectrum warehousing that section 309(j)(4)(B) of the Communications Act and the substantial-service requirement seek to prevent.

3. Nor did the Commission abuse its discretion when it denied FiberTower's request for an extension of time to comply with the substantial-service rules. FiberTower failed to demonstrate that it missed the substantial-service deadline due to circumstances beyond its control, such as lack of equipment or lack of demand for wireless backhaul service. Rather, as the Commission explained, FiberTower ran into financial difficulties – which under the FCC's rules do not justify an extension of a construction deadline.

4. Finally, FiberTower failed to demonstrate that the Commission applied its waiver and extension policies inconsistently. The extensions upon which FiberTower relies were granted by the FCC's staff, but a party cannot challenge a Commission order based on its alleged inconsistency with staff-level decisions. *See Comcast v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). In all events, the Commission reasonably explained that FiberTower was not similarly situated with the licensees that received staff-level extensions. Those decisions extended construction deadlines where all licensees in a spectrum band faced the choice of deploying antiquated equipment or deploying nothing at all. That was not the case here, where FiberTower had hundreds of commercial-grade 24 GHz systems sitting in its warehouse, and

FiberTower (along with several other licensees) had successfully demonstrated substantial service in the 39 GHz band.

STANDARDS OF REVIEW

FiberTower bears a heavy burden to establish that the *Order* on appeal is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, this Court presumes the validity of agency action. *E.g.*, *Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court's application of the arbitrary-and-capricious standard is particularly deferential when reviewing an agency decision declining to waive a generally applicable rule. "[R]eview of an agency's denial of a waiver" may result in reversal "only when 'the agency's reasons are so insubstantial as to render that denial an abuse of discretion.'" *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009) (quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181-82 (D.C. Cir. 2003) (citation omitted)).

Insofar as FiberTower challenges the Commission's interpretation of

section 309(j)(4)(B) – a provision of the agency's organic statute – the Court applies the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013). Under *Chevron*, the Court must first determine "whether Congress has directly spoken to the precise question at issue" and, if so, "give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. When "the statute is silent or ambiguous" on the relevant issue, however, the Court should defer to the Commission's "permissible construction of the statute." *Id*. at 843; *see Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 744 (D.C. Cir. 2001).

Similarly, this Court gives a "high level of deference" to the Commission's interpretation of its own orders and regulations. *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Court accepts the agency's interpretation "unless [it] is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1093 (D.C. Cir. 2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks, citations, and alteration omitted)).

ARGUMENT

I. THE COMMISSION REASONABLY FOUND THAT FIBERTOWER HAD NOT SATISFIED THE SUBSTANTIAL-SERVICE REQUIREMENT

FiberTower contends that the Commission erred when it interpreted its substantial-service rules to require 24 GHz and 39 GHz licensees to provide some actual service by the end of the license term. This argument, which is waived in part, lacks merit. The Commission's interpretation of substantial service reasonably balances the various objectives in section 309(j)(4)(B) of the Communications Act. It also finds support in the Commission's orders and rules. Applying this standard, the Commission correctly found that FiberTower failed to demonstrate substantial service for each of the 689 licenses at issue here.

A. FiberTower's Argument That The Commission's Substantial-Service Rules Are Inconsistent With The Communications Act Is Not Properly Raised, And Is In Any Event Meritless

For licenses awarded by auction, the Commission must promulgate "performance requirements, such as appropriate deadlines and penalties for performance failures," to serve three goals: (1) "to ensure prompt delivery of service to rural areas," (2) "to prevent stockpiling or warehousing of spectrum," and (3) "to promote investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(B). The Commission

complied with that mandate by adopting rules that require the holders of 24 GHz and 39 GHz licenses to demonstrate "substantial service" by the end of a ten-year license term. 47 C.F.R. §§ 101.17(a), 101.67 (39 GHz); 101.526, 101.527(a) (24 GHz). Under that standard, a licensee must show that it uses its license to provide a level of service "which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." 47 C.F.R. §101.527(a); *see 24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). Both the Wireless Bureau and the Commission have explained that the substantial-service standard "presumes construction of at least some facilities and some sort of actual service." *Bureau Order*, ¶ 22 (JA __); *see Order*, ¶ 39 (JA __); *Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licenses*, 26 FCC Rcd 11614, 11660-61 (¶¶ 113-14) (2011) ("*Wireless Backhaul Order*"); *id*., 27 FCC Rcd 9735, 9772-73 (¶¶ 100-104) (2012) ("*Wireless Backhaul 2nd R&O*").

1. FiberTower contends that interpreting the substantial-service requirement to mandate some construction "is at odds with Section 309(j)(4)(B)." Br. 28. FiberTower's argument is not properly before the Court because it was not raised before the Commission. It is meritless, in any event.

Before the Commission, FiberTower argued that the Wireless Bureau's interpretation of the substantial-service requirement had "a number of adverse consequences contrary to the public interest." *Order*, ¶ 38 (JA___) (citing FiberTower AFR at 20). It nowhere asserted that the interpretation was inconsistent with the statute. Because FiberTower never "mentioned" section 309(j)(4)(B), not "even in passing," the full Commission "was [not] given a reasonable 'opportunity to pass' upon the argument" for purposes of section 405(a) of the Communications Act. *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 972 (D.C. Cir. 1999); 47 U.S.C. § 405(a) (providing that the filing of a petition for reconsideration with the FCC is a "condition precedent to judicial review" of any "questions of fact or law upon which the Commission…has been afforded no opportunity to pass").

FiberTower points only to a substantial-service showing filed with the Wireless Bureau, which argued that "[i]nformation regarding a license renewal applicant's overall investment in its wireless network and service is…extremely important to determining whether the applicant has satisfied [the] substantial service requirement." Br. 29 (citations omitted). But this statement nowhere raises the "statutory argument" in FiberTower's brief, *id.*, because it does not assert that accounting for network investment is required by section 309(j)(4)(B) or any other provision of the Communications Act.

Moreover, FiberTower cannot avoid section 405(a)'s bar by presenting a claim to the Wireless Bureau and not to the Commission. As this Court has held, "raising an issue before a designated authority is not enough to preserve it for review before this Court; a party must raise the issue before the Commission as a whole." *Environmentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011); *see also Bartholdi Cable Co. Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) ("[i]t is 'the Commission' itself that must be afforded the opportunity to pass"). FiberTower's statutory argument is therefore barred by section 405(a).

2. Were the Court to reach FiberTower's argument, it would fail. The Commission "enjoys broad discretion" when balancing statutory goals. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1103 (D.C. Cir. 2009). The Commission's substantial-service standard for 24 GHz and 39 GHz licensees reasonably balances the relevant statutory objectives set forth in section 309(j)(4)(B).

To "promote investment in and rapid deployment of new technologies and services," 47 U.S.C. § 309(j)(4)(B), the Commission eschewed "specific build-out benchmarks" that would require licensees to construct "a fixed number of links" per geographic area or population served at certain

milestones during the license term – every two years, for example.[8] *39 GHz Order*, 12 FCC Rcd at 18623-24 (¶¶ 43-45); *see also 24 GHz Order*, 15 FCC Rcd at 16951 (¶ 37) ("this standard is sufficiently flexible to foster expeditious development and deployment of systems" in the 24 GHz band). The Commission instead permitted licensees to make "a showing tailored to their particular type of operation" at the time of renewal. *39 GHz Order*, 12 FCC Rcd at 18623 (¶ 42).

At the same time, "to ensure prompt delivery of service to rural areas" and "to prevent stockpiling or warehousing of spectrum by licensees," 47 U.S.C. § 309(j)(4)(B), the Commission required licensees to demonstrate that they were providing "substantial service" by the end of the license term. 47 C.F.R. §§ 101.17, 101.527. "This approach," the Commission explained, "will permit flexibility in system design and market development, while

[8] *See, e.g.*, 47 C.F.R. § 24.203(a) (providing that Personal Communication Service licensees "must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed"); 47 C.F.R. § 90.665(c) (providing that Private Land Mobile Service licensees must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA; further, each MTA licensee "must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant").

ensuring that service is being provided to the public." *39 GHz Order*, 12 FCC Rcd at 16951-52 (¶ 46).

FiberTower claims that the Commission ignored the company's "extensive research and development activities" and its "establishment of a national construction platform," which in FiberTower's view advanced the statutory objective of promoting "investment in new technologies and services." Br. 29. *See* 47 U.S.C. § 309(j)(4)(B). The statute, however, looks not only to investment, but to "deployment" as well. *Id*. It also directs the Commission to "ensure prompt delivery of service to rural areas," and to protect against "stockpiling or warehousing of spectrum by licensees." *Id*. It follows that investment which does not lead to the deployment of new technologies or the delivery of service (to rural areas and otherwise) is insufficient to further the goals set forth in the statute.

In fact, allowing licensees like FiberTower to hold their licenses indefinitely, without providing any service to the public, can have "deleterious effects on the development of mobile broadband" and other new services. *Order*, ¶ 37 (JA___); *see id.*, ¶¶ 34-35 (JA___-___); *Reconsideration Order*, ¶ 26 (JA___); *Bureau Order*, ¶¶ 32, 34 (JA___,___). Likewise, ignoring FiberTower's decade-long failure to provide service would be inconsistent with section 309(j)(4)(B)'s directive that licensees meet

specified "performance requirements," including "appropriate deadlines," and face "penalties for performance failures." 47 U.S.C. § 309(j)(4)(B).

FiberTower contends that the Commission disregarded "investment in and rapid deployment of new technologies and services." Br. 28-29. It did not. Even if the Commission made that objective subordinate to other section 309(j)(4)(B) objectives, however, that would be entirely permissible under this Court's precedent. "When an agency must balance a number of potentially conflicting objectives…judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular." *Fresno Mobile Radio*, 165 F.3d at 971; *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 234 (D.C. Cir. 2000) ("The Commission reasonably can treat fairness and integrity as 'essential' goals and yet…choose to sacrifice some degree of fairness or integrity in order to gain other important objectives."). Conversely, the Commission was not required to exalt investment in new technologies and services over other statutory objectives, as FiberTower contends it must.

B. The Commission Reasonably Interpreted Its Substantial-Service Rules To Require Construction Of Facilities And Provision Of Service To The Public

In addition to its statutory argument, FiberTower also claims that "the Commission's construction-only application of th[e] [substantial-service]

standard to FiberTower's renewal request is irreconcilable with the rule as promulgated." Br. 30. In FiberTower's view, the "flexibility" provided by the substantial-service standard forecloses a construction requirement. *Id.*, 37-40.

FiberTower has mischaracterized Commission precedent: the FCC's policies and rules provide licensees a great deal of flexibility in the timing and the amount of construction required to demonstrate substantial service, but those rules have never eliminated altogether the construction requirement. The Commission's reasonable interpretations of its own rules and policies are entitled to special deference. *Talk Am. Inc.*, 131 S. Ct. at 2261; *Auer*, 519 U.S. at 461.

1. In promulgating the substantial-service standard for the 39 GHz band in the *39 GHz Order*, the Commission recognized that "the types of services available from 39 GHz providers is tremendously varied." *39 GHz Order*, 12 FCC Rcd at 18623 (¶ 42). To "permit flexibility in system design and market development," *id.*, 18623, 18624 (¶¶ 42, 46), the Commission decided not to apply the then-existing general requirement to construct one link within 18 months of licensure to this band, *id.*, 18622 (¶¶ 39-40), and declined to replace it with "specific build-out benchmarks" that would require 39 GHz licensees to construct "a fixed number of links" per geographic area

or population served at certain temporal milestones during the license term, *id.*, 18623-24 (¶¶ 43-45).

However, waiving interim benchmarks is not the same as waiving a construction mandate altogether –and the Commission expressly declined to adopt the latter approach in the *39 GHz Order*, 12 FCC Rcd 18626 (¶ 50) ("We are not persuaded by the arguments of some commenters that a build-out requirement should not be imposed because potential users of the 39 GHz band, such as broadband [Personal Communications Service] licensees, are subject to other construction requirements."). Thus, while licensees are not required to satisfy pre-determined construction benchmarks, *39 GHz Order*, 12 FCC Rcd at 18623-24 (¶¶ 43-45), they are required to demonstrate some construction "with a showing tailored to their particular type of operation," at the time of license renewal. *Id.*,18623 (¶ 42). The Commission then "review[s] licensees' showings on a case-by-case basis," *24 GHz Order*, 15 FCC Rcd at 16952 (¶ 38), to determine whether the licensee has satisfied the substantial-service standard given the "particular type of service offered." *39 GHz Order*, 12 FCC Rcd at 18624-25 (¶ 46). That is precisely what occurred in FiberTower's case. *See Bureau Order*, ¶¶ 19-22 (JA___-___); *Order*, ¶¶ 38-40 (JA___-___).

The Commission's view of substantial service is firmly grounded in the text of the FCC's substantial-service rules for 24 GHz and 39 GHz licensees. *See* 47 C.F.R. §§ 101.17; 101.527. Rule 101.527, which is entitled "Construction Requirements for 24 GHz Operations," provides that "[e]ach licensee must, at a minimum file…[a] report, maps, and other supporting documents describing its current service in terms of geographic coverage and population served," 47 C.F.R. § 101.527(b) (emphasis added). That rule also makes clear that the failure to demonstrate that "substantial *service* is being provided" will result in forfeiture of the license, 47 C.F.R. § 101.527(c) (emphasis added). Similarly, in demonstrating "substantial *service*," 39 GHz licensees are required to provide, for each license, a "description of [its] current *service* in terms of geographic coverage," a "description of [its] current *service* in terms of population served," and a "description of [its] investments in its system(s)," including the "type of facilities constructed and their operational status." 47 C.F.R. § 101.17 (emphasis added).

In both bands, the Commission has suggested that a "substantial service showing…might consist of four links per million population within a service area." *39 GHz Order*, 12 FCC Rcd at 18625 (¶ 46); *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). With respect to 24 GHz licenses, the Commission also "consider[s] factors" such as whether there is "service" to (1) "niche

markets or focus on serving populations outside of areas serviced by other licensees," (2) "populations with limited access to telecommunications services," and (3) "a significant portion of the population or land of the licensed area." *24 GHz Order*, 15 FCC Rcd at 16951 (¶ 38). The fact that the list – which focuses on the licensee's provision of "service" – may not be "exhaustive," *id*., does not, however, demonstrate that the "substantial service" requirement can be satisfied by activities that result in no service at all.

Nor is the Commission's view inconsistent with the performance requirements that apply to other spectrum bands. The rules cited on pages 33-34 of FiberTower's brief merely list "substantial service" as an alternative to the specific build-out benchmarks described in each rule. *See*, *e.g.*, 47 C.F.R. § 24.203(a) ("Licensees…must serve…at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed" or "in the alternative, provide substantial service to their licensed area within the appropriate five- and ten-year benchmarks."). In other words, "substantial service," as used in those rules, does not waive construction of facilities or provision of service, it simply accords greater flexibility in the amount of construction and service required to satisfy the rules. *See*, *e.g.*, *Scott D.*

Reiter, 25 FCC Rcd 3974, 3979 (¶ 16) (2010) (for purposes of Rule 24.203(a), "demonstration of a level of coverage below the construction requirement benchmark *when coupled with the provision of actual service* can lend some support to a demonstration of substantial service") (emphasis added).[9]

2. FiberTower further claims that the Commission's substantial-service requirement is incompatible with the fact that "the vast majority of investment necessary to establish a nationwide backhaul network is required far in advance of the customer order and associated specific link builds." Br. 36. But the substantial-service requirement "takes these practicalities into account." *39 GHz Order*, 12 FCC Rcd at 18625 (¶ 48).

In promulgating the substantial-service requirement, the Commission "recognize[d] that licensees must have sufficient time…to develop market plans, secure necessary financing, develop and incorporate new technology in

[9] For similar reasons, FiberTower's complaint that the Commission took no account of "'just-finalized' leases" and its "'spectrum-in-a-box' programs" misses the mark. Br. 43. FiberTower does not assert that the leases had resulted in service to the public, only that they "would" do so in the future. *Id*. Likewise, FiberTower represents only that its "'spectrum-in-a-box' programs" furnish "a platform capable of rapid expansion and deployment as demand materialized." *Id*. The substantial-service standard requires a licensee to show that the spectrum covered by its license is actually being used to provide service to the public. Absent that demonstration, the activities described in FiberTower's brief are not "evidence" of *service*.

their systems, accommodate equipment manufacturers' production schedules, and build a customer base," *i.e.*, the same types of activities described in FiberTower's brief. *Compare 39 GHz Order*, 12 FCC Rcd at 18625 (¶ 48) *with* Br. 35-36. To give licensees "a sufficient opportunity to construct their systems," which must be completed "far in advance of the customer order," Br. 36, the Commission "combine[d] the showing[s] traditionally required for build-out and…renewal…into one showing at the time of renewal." *39 GHz Report*, 12 FCC Rcd at 18625 (¶ 47). In other words, rather than insisting on interim benchmarks, *see* n.8, above, the Commission accommodated 24 GHz and 39 GHz licensees' investment and customer acquisition timelines by providing the full term of the license (a period of ten years) to complete the construction required to demonstrate substantial service.

3. FiberTower asserts that the Commission "changed course" when it affirmed the Wireless Bureau's holding that substantial service requires the construction of some transmission links. Br. 37; *see id*., 39. That argument is baseless. In 2008, the Wireless Bureau expressly warned FiberTower that the "non-license-specific" activities it repeatedly describes in its brief "cannot support a finding of substantial service in the absence of any actual operation of [its] stations." *FiberTower MO&O*, 23 FCC Rcd at 14123-24 (¶¶ 14-15). Later, the Commission "explicitly approved" the Wireless Bureau's view,

Order, ¶ 39 (JA___), and declined to "modify [its] substantial service rules and policies" to consider the standard satisfied by "preparatory activities…where there is no actual service being provided to the public." *Wireless Backhaul Order*, 26 FCC Rcd at 11660-61 (¶¶ 113-14); *see Wireless Backhaul 2nd R&O*, 27 FCC Rcd at 9772-73 (¶¶ 100-104). Unsurprisingly then, FiberTower has not identified a single instance where a licensee in the 24 GHz and 39 GHz bands that provided no actual service was found to have satisfied the substantial-service requirement. *Order*, ¶ 39 (JA____) (quoting *Bureau Order*, ¶ 22) (JA____).[10]

* * * * *

The Commission's rules for the 24 GHz and 39 GHz spectrum bands require substantial *service* to the public, not substantial *investment* by the licensee. FiberTower and its predecessors were given more than a decade to provide service to the public. FiberTower failed to provide any service whatsoever, so the Commission reasonably concluded that FiberTower's

[10] FiberTower further argues that it was "left to guess what [it] must do to ensure renewal of its licenses" because the substantial-service standard is "circular." Br. 41-42. This claim is not credible given that the Commission repeatedly informed licensees in the 24 GHz and 39 GHz bands, including FiberTower, that a successful substantial-service demonstration requires the provision of some service to the public. *See also* 47 C.F.R. §§ 101.17, 101.527.

investment – no matter how extensive – was by itself insufficient to satisfy the substantial-service requirement.

C. FiberTower's Contention That It Constructed Links For 42 Of Its 689 Licenses Has Been Waived And In Any Event Does Not Demonstrate Substantial Service

Independent of its complaints about the Commission's interpretation of the substantial-service standard, FiberTower contends that the *Order* is based on the "material factual mistake" that "FiberTower had not engaged in any construction or any actual service." Br. 22. This argument is waived and lacks merit in any event.

1. FiberTower claims that the Commission erred in finding that the company failed to provide substantial service for 42 of its 689 24 GHz and 39 GHz licenses. Br. 7 n.3 & 43. In making this assertion, FiberTower relies on the "separate substantial-service showing" it filed for each of its licenses, which (the company contends) demonstrated that it "had links built and operating for at least 28 of the 24 GHz licenses and at least 14 of the 39 GHz licenses at issue." *Id*., 43; *see id*., 7 n.3.

FiberTower asserts that the Commission "entirely overlooked that evidence." *Id*., 43. But to call the Commission's attention to those showings – and to preserve this issue for appeal – FiberTower had to present this argument in its application for review to the Commission. *Environmentel*,

661 F.3d at 84; 47 C.F.R. § 1.115(k). It did not. As the Commission explained, FiberTower's application for review "d[id] not identify the specific license areas that the Bureau's order improperly terminated nor detail the facilities that FiberTower had constructed in them." *Order*, n.133 (JA___). Instead, FiberTower merely asserted generally that:

> The Bureau erred as a matter of fact when it found that no facilities have been built-out in FiberTower's licensed areas. The record demonstrates that, as of June 1, 2012, a significant amount of construction had occurred in many of FiberTower's license areas that the Bureau identified for termination.

FiberTower Application for Review at 23 (filed Dec. 7, 2012) (JA___).

It is well settled that the Commission "need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner." *Bartholdi Cable*, 114 F.3d at 279.[11] And section 1.115(b)(1) of the FCC's rules quite clearly provides that "[t]he application for review shall concisely and plainly state the questions presented for review." 47 C.F.R. § 1.115(b)(1). FiberTower's generic and ambiguous reference to "a significant amount of construction," without any identification as to which licenses this applied, did not provide the Commission a sufficient "opportunity to pass" on the argument FiberTower now presses before this

[11] FiberTower filed 689 exhibits (*i.e.*,one for each license). Each exhibit was approximately 20 pages in length.

Court. *Environmentel*, 661 F.3d at 84; *Qwest Corp. v. FCC*, 482 F.3d 471, 478 (D.C. Cir. 2007).

"Confronted only with" the "broad claim" that the company had engaged in some (unidentified) construction with regard to some of its (unspecified) licenses, "the Commission had no notice of" FiberTower's "specific objections" regarding the 42 licenses identified in its brief. *U.S. Airwaves*, 232 F.3d at 236. Litigants "'may not sandbag agencies by withholding legal arguments…until they reach the courts of appeal,'" *Id.* (quoting *USAir, Inc. v. Dept. of Transp.*, 969 F.2d 1256, 1260 (D.C. Cir. 1992)). FiberTower should therefore be held to have waived its argument that the Commission erred in rejecting the company's substantial-service showings for those 42 licenses.

2. Were the Court to reach the merits, FiberTower's argument would still fail. As the Commission explained in the *Order*, "substantial service must be demonstrated on a license-by-license basis," so "the relevant test is whether there was any service using the spectrum included in the license, rather than a general expenditure for network infrastructure in a license area." *Order*, ¶ 39 n.155 (JA___). FiberTower did not pass that test, because in both its substantial-service filings and its application for review, it claimed only that it had constructed facilities in the areas served by the 42 licenses, without

further demonstrating the extent of those facilities or that those facilities served customers or provided internal service.[12] But that was its burden. *See* 47 C.F.R. §§ 101.17, 101.527.

II. THE COMMISSION REASONABLY DENIED FIBERTOWER'S REQUEST FOR A WAIVER OF THE SUBSTANTIAL-SERVICE RULES

FiberTower claims that even if it was not providing service, it was entitled to a waiver of the substantial-service requirement. The Commission's decision to deny FiberTower's waiver is entitled to great deference, *Morris Commc'ns, Inc.*, 566 F.3d at 188, and FiberTower has failed to demonstrate that the Commission abused its substantial discretion.

A. The Commission Reasonably Held That Granting FiberTower's Waiver Request Would Discourage Compliance With The Agency's Construction Requirements

To obtain a waiver of the performance requirements in sections 101.17 and 101.527 of the Commission's rules, FiberTower was required to demonstrate that: "(i) "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a

[12] *See, e.g.*, Application for Review at 23 ("The record demonstrates that, as of June 1, 2012, a significant amount of construction had occurred in many of FiberTower's license areas that the Bureau identified for termination.") (JA___); Construction Notification for License WMF846 (filed May 31, 2012), Attachment A at 8 ("As of the date of this filing, FiberTower currently has one link built and operating at a seminary in the St. Louis, Missouri, metropolitan area, the geographic area of this license.") (JA___).

grant of the requested waiver would be in the public interest," or (ii) "[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." 47 C.F.R. § 1.925(b)(3). FiberTower failed both prongs of this test, and the Commission reasonably denied its waiver request.

1. When FiberTower filed its waiver request, the company had already received extensions of time (until June 1, 2012) to demonstrate substantial service for its 24 GHz and 39 GHz licenses. Those extensions were based on the Wireless Bureau's belief that wireless broadband services in newly licensed and auctioned spectrum bands would increase demand for FiberTower's wireless backhaul services. *See FiberTower MO&O*, 23 FCC Rcd at 14125-26 (¶¶ 20-21). The Wireless Bureau's prediction materialized: Commission data showed "considerable deployment of wireless broadband" following the grant of the earlier extensions. *Bureau Order*, ¶ 32 (JA___). Yet FiberTower still had not built out the vast majority of its 24 GHz and 39 GHz licenses; instead, with the June 1, 2012 deadline approaching, it sought another extension or waiver of the substantial-service requirement. Given that FiberTower declined to construct facilities even though market conditions were favorable, *Order*, ¶¶ 22, 36 (JA___, ___), the Commission had little

assurance that FiberTower would construct facilities if provided additional relief. The Commission thus reasonably found that waiving the substantial-service rules in FiberTower's case "would be inconsistent with the underlying purpose of the substantial-service requirement," which is to "provide a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public." *Order*, ¶ 34 (JA___) (internal quotation marks omitted); *see Bureau Order*, ¶ 32 (JA___).

The Commission also upheld the Wireless Bureau's conclusion that FiberTower failed to satisfy the second prong of the waiver standard. *Order*, ¶ 35 (JA___). Notwithstanding "the investment and activities it had undertaken," FiberTower (unlike other licensees) made "the [business] decision not to build out its licenses" when the time came to demonstrate substantial service. *Order*, ¶ 35 (JA___); *see id.*, ¶ 23 (JA___); *Bureau Order*, ¶ 33 (JA___); *Reconsideration Order*, ¶ 29 (JA___). The Commission found "nothing inequitable or unduly burdensome" in requiring FiberTower to "buil[d] out those licenses if it wanted to keep them." *Order*, ¶ 35 (JA___). The Commission's determination was especially reasonable given that the amount required to construct facilities capable of demonstrating substantial service (which FiberTower estimated to be $10-$12 million) "[wa]s a fraction

of the approximately $300 million" FiberTower claimed to have already spent on the licenses. *Bureau Order*, ¶ 33 (JA___); *see Order*, ¶ 35 (JA___).

2. FiberTower claims the Commission "ignored evidence" that "FiberTower was the licensee in the best position to build out a robust, nationwide wireless backhaul network capable of supporting mobile broadband operations," Br. 47; *id.*, 48-49, and "dismissed the benefits to the public interest from these activities," *id.*, 52-53. But FiberTower "cannot satisfy the public interest requirement…merely by 'equat[ing] its own business interest with the public interest.'" *Omnipoint Corp. v. FCC*, 213 F.3d 720, 724 (D.C. Cir. 2000) (quoting *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999)). Irrespective of its professed expertise and investment, FiberTower failed to provide any service – much less substantial service – prior to the June 1, 2012 deadline, even though that deadline was itself the result of a lengthy prior extension. The Commission reasonably concluded that FiberTower's latest promise to build out its licenses was "insufficient" and too "speculative" to justify a waiver. *Order*, ¶ 37 (JA___); *see Reconsideration Order*, ¶¶ 26-27 (JA___-___).

As important, the Commission found that any public interest benefits resulting from FiberTower's latest promise to provide service were outweighed by the "disincentives to timely buildout" created by granting a

waiver request that lacked "adequate justification." *Order*, ¶ 37 (JA___). "Here,…FiberTower had 11-15 years to demonstrate substantial service" yet "it chose not to build for financial reasons." *Reconsideration Order* ¶ 29 (JA___). If the Commission were to credit FiberTower's "after-the-fact promise[]" to construct facilities, FiberTower and other licensees "would no longer have any incentive to meet the original buildout deadline because they could obtain an extension by promising to build a system in the near future." *Reconsideration Order*, ¶ 26 (JA____); *see Order*, ¶ 34 (JA___); *Bureau Order*, ¶ 34 (JA___). This would "delay…service to carriers and the public," which the Commission found is "not in the public interest." *Reconsideration Order*, ¶ 26 (JA___).

According to FiberTower, the Commission's "concern" that grant of a waiver would undermine the agency's build-out requirements "misses the mark," because it allegedly "conflates what a licensee *claims* with what a licensee *proves* about market conditions and its ability to build." Br. 50. Before the agency, however, FiberTower failed to prove that "market conditions," or any other factor, hindered its ability to demonstrate substantial service for the subject licenses. *Order*, ¶ 22 (JA___). Instead, the Commission found that FiberTower's failure to construct its licenses was

attributable to "financial reasons," specifically, its "inability to raise capital." *Id.*, ¶ 23 (JA___).

FiberTower further asserts that the Commission erred in considering its "voluntary business decisions" in denying a waiver. Br. 50-51. But this Court has specifically found that "[t]he FCC rightly refuses to grant waivers when [a licensee's] action is 'the sort [its] rules are intended to deter.'" *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 903 (D.C. Cir. 2004) (quoting *BDPCS*, 351 F.3d at 1182). That is certainly the case here, where granting a waiver to a licensee that "ma[de] the voluntary business decision not to build out a license before the applicable construction deadline" would "eviscerate the Commission's construction requirements." *Bureau Order*, ¶ 34 (JA____); *see Order*, ¶¶ 34, 37 (JA____, ____).

Nor was there any basis to credit FiberTower's "self-imposed hard deadline" as evidence of its "readiness to fulfill any substantial-service obligation." Br. 50. Having twice failed to comply with the deadline in the Commission's rules, the agency was not persuaded that FiberTower would

meet its own deadline if given a third opportunity to demonstrate substantial service. *See Bureau Order*, ¶ 34 (JA___); *Order*, ¶¶ 34-37 (JA__-___).[13]

FiberTower argues that the reasoning behind the Commission's denial of its waiver request eliminates the possibility of waiver in every case. Br. 45-47. Not so. As this Court has recognized, an agency's "refusal to grant" any specific waiver "does not necessarily mean that the Commission has created a 'no-waiver' policy." *BellSouth*, 162 F.3d at 1225; *see also Delta Radio*, 387 F.3d at 901 (FCC's denial of appellant's waiver request did not "'trump[]' the possibility of granting waivers altogether"). Both the Commission and the Wireless Bureau denied FiberTower's waiver request based on the specific facts of its situation – in particular, FiberTower's failure to provide substantial service despite prior extensions and its "business decision" to service its debt rather than build out its licenses. *See Order*, ¶ 37 (JA___); *id.*, ¶¶ 30-37 (JA___-___); *Bureau Order*, ¶¶ 31-34 (JA___-___); *Reconsideration Order*, ¶¶ 26, 29 (JA____, ____). Had circumstances been different, FiberTower might have been eligible for a waiver. Indeed, the Wireless Bureau had previously granted FiberTower additional time to construct its 39 GHz and 24

[13] Notwithstanding FiberTower's asserted expertise with wireless backhaul, Br. 48-50, there was "no guarantee that FiberTower would be able to provide service" when the company emerged from bankruptcy because its debt holders made no "commitment to provide funding for FiberTower's proposed small cell network." *Reconsideration Order*, ¶ 26 (JA____).

GHz licenses in 2008 and 2010, respectively, based on a different set of facts then present. *See FiberTower MO&O*, 23 FCC Rcd at 14125-26 (¶¶ 20-21); *Bureau Order* ¶ 4 (JA___).

Finally, the Commission did not "ignore[] its 'obligation…to minimize conflict between its policies…and the bankruptcy statutes.'" Br. 51 (quoting *In the Matter of Martin W. Hoffman*, 12 FCC Rcd 5224, 5229 & n.9 (1997)). The Bankruptcy Code does not require the Commission "to act in a manner that would 'unduly interfere' with the Commission's mandate to ensure that licenses are 'used and transferred consistently with the Communications Act.'" *Bureau Order* ¶ 36 (JA___) (quoting *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974)). It follows that the Commission was not obligated to provide FiberTower "an additional extension of time" in this case, where the grant of relief would have interfered with the agency's "duty to provide a 'clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.'" *Bureau Order* ¶ 36 (JA___) (quoting *Wireless Backhaul 2nd R&O*, 27 FCC Rcd at 9773-74 (¶ 104)).

For the same reason, the Commission did not "dismantl[e]" FiberTower. Br. 51. FiberTower suffered a self-inflicted wound by making its "Chapter 11 reorganization plan…contingent upon…maintaining its 24 and 39 GHz licenses." *Order* ¶ 10 (JA___). That voluntary business decision

forced FiberTower to cease operations after the Wireless Bureau denied its waiver and extension requests. *Order* ¶ 33 (JA___). The Commission reasonably found that it should not be required to "abandon the important policy interests behind [its] buildout requirements" simply "to accommodate FiberTower's financial choices." *Id.* (JA___).

B. The Commission Did Not Treat FiberTower Differently Than Similarly Situated Licensees

FiberTower contends that the Commission's denial of its waiver was inconsistent with the agency's treatment of similarly situated licensees. Br. 54-59. This argument is baseless.

Before the agency, and again in this Court, FiberTower relies almost exclusively on staff-level decisions granting waivers and extensions of the Commission's build-out requirements. *Id.* However, it is well established that "an agency is not bound by the actions of its staff if the agency has not endorsed those actions." *Comcast*, 526 F.3d at 769 (internal quotation marks and citations omitted); *see Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 554 (D.C. Cir. 2009). A litigant must point to conflicting *Commission-level* decisions to establish a claim of discriminatory treatment by the agency.

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

The staff-level decisions discussed on pages 54-55 and 60 of FiberTower's brief[14] involved extensions of construction deadlines where "the choice all licensees faced was to either deploy stop-gap equipment or build nothing." *Order* ¶ 36 & n.142 (JA___); *see Bureau Order* ¶ 28 & n.83 (JA___). That was not the case in the 24 GHz and 39 GHz bands, where the record showed that FiberTower and other licensees had successfully built out licenses. FiberTower, for example, "had constructed facilities as early as 2008." *Order* ¶ 36 (JA___); *see id.*, ¶ 21 (JA___). It also "had a customer base, experience providing wireless backhaul services, and access to equipment." *Order* ¶ 36 (JA___). Furthermore, the Commission's records

[14] In *Consolidated Request for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd 14134, 14139-40 (¶ 10) (WTB 2006), "participation by almost all of the licensees in the [Wireless Communications Service] industry in th[e] proceeding" demonstrated "that the technical and equipment challenges in this band [were] widespread," which justified an extension of the applicable construction deadline for all licensees. Likewise, in *Warren C. Havens*, 19 FCC Rcd 12994, 13000-01 (¶ 15) (WTB 2004), an extension was warranted because "[t]he two companies that originally manufactured…equipment" for the 220 MHz band "no longer d[id] so," which "frustrated licensees' efforts to meet the [Commission's] construction requirements." Finally, in *FCI 900, Inc.*, 16 FCC Rcd 11072, 11077 (¶ 7) (WTB 2001), the Wireless Bureau extended the applicable construction deadline for all 900 MHz Major Trading Area licensees by 16 months because "digital voice equipment w[ould] not be commercially available in sufficient quantities in time to meet the five-year construction deadline" in the Commission's rules.

showed that "[s]ystems utilizing many other 39 GHz band licenses ha[d] been successfully constructed." *Id*.

FiberTower complains that the Commission should not have relied on the construction of other 39 GHz systems, because there was no evidence "that those systems were anything other than save-builds," rather than "commercially viable links." Br. 55. But in reaching its conclusion, the Commission relied in part on "FiberTower's own actions and admissions" – specifically, that "FiberTower met the substantial service requirements for a number of its 39 GHz systems as early as 2008," *Reconsideration Order* ¶ 15 (JA___); *see Order* ¶ 36 (JA___), and had "built commercial grade systems at 24 GHz." *Reconsideration Order* ¶ 15 & n.49 (JA___).

Moreover, FiberTower failed to show that the systems deployed by other 39 GHz licensees were actually inferior "save-builds." Br. 55. Before the Commission, FiberTower's "evidence" largely consisted of a single substantial-service filing made by another 39 GHz licensee (IDT) in 2011, which FiberTower submitted with its petition for administrative reconsideration of the *Order*. *See* FiberTower Petition for Reconsideration at 5-6, Exs. A-B (filed June 6, 2013) (JA___, ____). After finding that FiberTower "could have provided this or comparable data earlier in the proceeding," the Commission held that FiberTower's evidence concerning

IDT was barred from consideration under the agency's procedural rules. *Reconsideration Order* ¶ 17 (JA___); 47 C.F.R. § 1.106(b)(2).[15]

Considering FiberTower's submission on the merits, the Commission found it "so vague" that it left the agency "unable to reach any conclusion about the sufficiency of IDT's buildout." *Reconsideration Order* ¶ 16 (JA___). The Commission could only surmise that "IDT constructed facilities prior to the [substantial-service] deadline, and FiberTower did not." *Id*. IDT's substantial-service showing also "sa[id] nothing" about whether IDT built its systems by choice or out of necessity. *Id*. Only the latter could justify a waiver under the staff-level precedent cited in FiberTower's brief, however. *See* p.49, above.

The Commission's treatment of Wireless Communications Service ("WCS") licensees also is distinguishable. Br. 57-58. WCS licensees received an extension of time to construct their licenses because "there were broader

[15] Section 1.106(b)(2) of the FCC's Rules provides: "[w]here the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present: (i) [t]he petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or (ii) [t]he petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity." 47 C.F.R. § 1.106(b)(2).

issues with the service rules that delayed or prevented deployment in those bands." *Order* ¶ 25 (JA___); *see Reconsideration Order* ¶ 21 (JA___). Specifically, "certain technical specifications…may have inadvertently hindered the ability of licensees to deploy mobile broadband services." *Reconsideration Order* ¶ 21 (JA___). After the Commission made adjustments to accommodate mobile broadband deployment, it "restart[ed] the construction period…to give [WCS] licensees time to develop equipment under the revised technical rules." *Id.* A similar flaw is not present in the service rules for the 24 GHz and 39 GHz bands. *See id.*; *Order* ¶ 25 (JA___). Because extension requests were granted WCS licensees and denied FiberTower on entirely different grounds, the fact that WCS licensees held their licenses longer than FiberTower is wholly irrelevant. Br. 58-59.

III. THE COMMISSION REASONABLY DENIED FIBERTOWER'S REQUEST FOR AN EXTENSION OF THE DEADLINE TO DEMONSTRATE SUBSTANTIAL SERVICE

As an alternative to its request for a waiver, FiberTower asked for a three-year extension of the substantial-service deadline for its 24 GHz and 39 GHz licenses, which the company later purported to reduce to 18 months. The Commission affirmed the Wireless Bureau's denial of that request, finding that FiberTower had not shown that its failure to meet the deadline was "due to involuntary loss of site or other causes beyond its control," as

required by the Commission's rules. *Order* ¶ 18 (JA___) (citing 47 C.F.R. § 1.946(e)(1)). Based on evidence that "the use of microwave for wireless backhaul was increasing," FiberTower "was an active provider of wireless backhaul services," and "that there had been considerable deployment of wireless broadband since FiberTower received its last extension in 2008," *Order* ¶ 19 (JA___), the Commission reasonably affirmed the Wireless Bureau's "conclu[sion] that the state of the wireless backhaul market was not a valid reason to grant an extension." *Id.*, ¶ 22 (JA___).

FiberTower claims that just because "the need for wireless backhaul generally has grown significantly since 2008," it "does not follow" that "there was a viable market for wireless backhaul in the 24 and 39 GHz bands *everywhere* in the Nation." Br. 60-61. If that was the case, FiberTower should have identified the specific markets where demand lagged. It did not. Moreover, FiberTower failed to build out its 24 GHz and 39 GHz licenses even in "markets where [it] had existing customers and demand for its services" using its 11, 18, and 23 GHz licenses, which "demonstrate[d]" to the Commission "that FiberTower's failure to build…was in fact a voluntary

business decision," not the result of lackluster demand for wireless backhaul service. *Order* ¶ 19 (JA___); *see Bureau Order* ¶ 25 (JA___).[16]

FiberTower's reliance on the Wireless Bureau's grant of an extension of the substantial-service deadline to 2 Lightspeed LP is equally misplaced. Br. 61-63. As set forth above, p. 48, FiberTower cannot rely on staff-level decisions to set forth a claim of discrimination. *See Comcast*, 526 F.3d at 769. And even if that decision could be relevant to a discrimination claim, both the Wireless Bureau and the Commission explained why FiberTower was not similarly situated to the licensee that received an extension in that case. *See Bureau Order* ¶ 29 (JA___); *Order* ¶ 26 (JA___). 2 Lightspeed had "built out the majority of its licenses" but was "impeded" from meeting the substantial-service deadline "when one of the two key partners in the venture was medically incapacitated." *Order* ¶ 29 (JA___). In requesting an extension, 2 Lightspeed explained how "the partner's medical incapacity played a role in [its] ability to build out all of its licenses." *Bureau Order* ¶ 29 & n.90 (JA___). Contrast that with FiberTower, which "made no attempt to construct

[16] FiberTower contends that "[a]ny pre-2006 inactivity…should not be attributed to [it]" because it "had not acquired any of the licenses at issue until 2006." Br. 57. But the Commission's rules expressly provide that "[e]xtension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control." 47 C.F.R. § 1.946(e)(3).

the vast majority of its licenses prior to the June 1, 2012 [substantial-service] deadline" and did not even mention the departure of its Senior Vice President of Network Operations and its Chief Financial Officer in its April 30, 2012, extension request. *Order* ¶ 26 (JA___). FiberTower first raised that issue in a September 20, 2012 supplement, which still "provided no information about the circumstances under which those employees left" nor explained "how the departure of those employees affected its ability to meet its substantial-service requirements." *Id.*; *see Bureau Order* ¶ 29 (JA___).

FiberTower's assertion that these distinctions are immaterial strains credulity. Br. 62. FiberTower claims that it constructed "a far great number of licenses overall" and "proposed an extension schedule that was far more aggressive than 2 Lightspeed's." *Id.* A far greater number of FiberTower's licenses (more than 600) also remained unconstructed (versus four for 2 Lightspeed). *Bureau Order* (¶ 29) (JA___). Granting an extension to FiberTower thus would have created a more serious conflict with the Commission's goal of "ensur[ing] that service is being provided to the public" than granting an extension to 2 Lightspeed. *Order* ¶ 34 (JA___). Further, while 2 Lightspeed explained that the departure of its principal stymied construction because of the company's relatively small size, FiberTower simply made the conclusory statement that "[t]hese

departures…had a significant, negative impact on FiberTower's ability to meet its substantial service-deadline." Supplement 4 at 8 (JA___). Without more, this explanation, like "FiberTower's other explanations[,] d[id] not withstand scrutiny" and "c[ould not] form the basis for justifying an extension." *Order* ¶ 23 (JA___).

CONCLUSION

For the reasons set forth herein, the appeal should be dismissed in part and otherwise denied on the merits.

Respectfully submitted,

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
ACTING DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

/s/ Maureen K. Flood

MAUREEN K. FLOOD
COUNSEL

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

October 14, 2014

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

FIBERTOWER SPECTRUM HOLDINGS, LLC, APPELLANT, v. FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.	NO. 14-1039

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 11,791 words.

/s/ Maureen K. Flood
Maureen K. Flood
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

October 14, 2014

STATUTORY AND REGULATORY APPENDIX

5 U.S.C. § 706
47 U.S.C. § 301
47 U.S.C. § 303
47 U.S.C. § 309
47 U.S.C. § 402
47 U.S.C. § 405
47 C.F.R. § 1.106
47 C.F.R. § 1.115
47 C.F.R. § 1.925
47 C.F.R. § 1.946
47 C.F.R. § 24.203
47 C.F.R. § 90.665
47 C.F.R. § 101.3
47 C.F.R. § 101.17
47 U.S.C. § 101.67
47 C.F.R. § 101.526
47 C.F.R. § 101.527

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. § 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. § 303

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.

(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding section 301 of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee--

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted--

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

(t) Notwithstanding the provisions of section 301(e) of this title, have authority, in any case in which an aircraft registered in the United States is operated (pursuant to a lease, charter, or similar arrangement) by an aircraft operator who is subject to regulation by the government of a foreign nation, to enter into an agreement with such government under which the Commission shall recognize and accept any radio station licenses and radio operator licenses issued by such government with respect to such aircraft.

(u) Require that, if technically feasible--

(1) apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size--

(A) be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming;

(B) have the capability to decode and make available the transmission and delivery of video description services as required by regulations reinstated and modified pursuant to section 613(f) of this title; and

(C) have the capability to decode and make available emergency information (as that term is defined in section 79.2 of the Commission's regulations (47 CFR 79.2)) in a manner that is accessible to individuals who are blind or visually impaired; and

(2) notwithstanding paragraph (1) of this subsection--

(A) apparatus described in such paragraph that use a picture screen that is less than 13 inches in size meet the requirements of subparagraph (A), (B), or (C) of such paragraph only if the requirements of such subparagraphs are achievable (as defined in section 617 of this title);

(B) any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements of such paragraph; and

(C) the Commission shall have the authority, on its own motion or in response to a petition by a manufacturer, to waive the requirements of this subsection for any apparatus or class of apparatus--

(i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or

(ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.

(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term “direct-to-home satellite services” means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

(w) Omitted.

(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4) of this title.

(y) Have authority to allocate electromagnetic spectrum so as to provide flexibility of use, if--

(1) such use is consistent with international agreements to which the United States is a party; and

(2) the Commission finds, after notice and an opportunity for public comment, that--

(A) such an allocation would be in the public interest;

(B) such use would not deter investment in communications services and systems, or technology development; and

(C) such use would not result in harmful interference among users.

(z) Require that--

(1) if achievable (as defined in section 617 of this title), apparatus designed to record video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States, enable the rendering or the pass through of closed captions, video description signals, and emergency information (as that term is defined in section 79.2 of title 47, Code of Federal Regulations) such that viewers are able to activate and de-activate the closed captions and video description as the video programming is played back on a picture screen of any size; and

(2) interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions and to make encoded video description and emergency information audible.

(aa) Require--

(1) if achievable (as defined in section 617 of this title) that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

(2) that if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the functions of the apparatus described in paragraph (1), such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time;

(3) that for such apparatus equipped with the functions described in paragraphs (1) and (2) built in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features; and

(4) that in applying this subsection the term “apparatus” does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules (47 CFR 76.1200).

(bb) Require--

(1) if achievable (as defined in section 617 of this title), that the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real- time upon request by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

(2) for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features; and

(3) that, with respect to navigation device features and functions--

(A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software; and

(B) delivered in hardware, the requirements set forth in this subsection shall apply to the manufacturer of such hardware.

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. § 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.

47 C.F.R. § 1.106

(a)(1) Except as provided in paragraphs (b)(3) and (p) of this section, petitions requesting reconsideration of a final Commission action in non-rulemaking proceedings will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rulemaking proceedings, see § 1.429. This § 1.106 does not govern reconsideration of such actions.)

(2) Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held. If the presiding officer finds that there is substantial doubt, on established policy and undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a statement to that effect. No appeal may be filed from an order denying such a request. See also, §§ 1.229 and 1.251.

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

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

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

(ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

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

(c) In the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

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

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

(d)(1) A petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed. The petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests.

(2) A petition for reconsideration of a decision that sets forth formal findings of fact and conclusions of law shall also cite the findings and/or conclusions which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and/or conclusions should be changed. The petition may request that additional findings of fact and/or conclusions of law be made.

(e) Where a petition for reconsideration is based upon a claim of electrical interference, under appropriate rules in this chapter, to an existing station or a station for which a construction permit is outstanding, such petition, in addition to meeting the other requirements of this section, must be accompanied by an affidavit of a qualified radio engineer. Such affidavit shall show, either by following the procedures set forth in this chapter for determining interference in the absence of measurements, or by actual measurements made in accordance with the methods prescribed in this chapter, that electrical interference will be caused to the station within its normally protected contour.

(f) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules, and shall be served upon parties to the proceeding. The petition for reconsideration shall not exceed 25 double spaced typewritten pages. No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.

(g) Oppositions to a petition for reconsideration shall be filed within 10 days after the petition is filed, and shall be served upon petitioner and parties to the proceeding. Oppositions shall not exceed 25 double spaced typewritten pages.

(h) Petitioner may reply to oppositions within seven days after the last day for filing oppositions, and any such reply shall be served upon parties to the proceeding. Replies shall not exceed 10 double spaced typewritten pages, and shall be limited to matters raised in the opposition.

(i) Petitions for reconsideration, 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, by mail, by commercial courier, by hand, or by electronic submission through the Commission's Electronic Comment Filing System or other electronic filing system (such as ULS). Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed. Parties filing in electronic form need only submit one copy.

(j) The Commission or designated authority may grant the petition for reconsideration in whole or in part or may deny or dismiss the petition. Its order will contain a concise statement of the reasons for the action taken. Where the petition for reconsideration relates to an instrument of authorization granted without hearing, the Commission or designated authority will take such action within 90 days after the petition is filed.

(k)(1) If the Commission or the designated authority grants the petition for reconsideration in whole or in part, it may, in its decision:

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

(ii) Remand the matter to a bureau or other Commission personnel for such further proceedings, including rehearing, as may be appropriate; or

(iii) Order such other proceedings as may be necessary or appropriate.

(2) If the Commission or designated authority initiates further proceedings, a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings, including rehearing, as may be appropriate.

(3) Any order disposing of a petition for reconsideration which reverses or modifies the original order is subject to the same provisions with respect to reconsideration as the original order. In no event, however, shall a ruling which denies a petition for reconsideration be considered a modification of the original order. A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.

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.

(l) 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 the designated authority believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(m) The filing of a petition for reconsideration is not a condition precedent to judicial review of any action taken by the Commission or by the designated authority, except where the person seeking such review was not a party to the proceeding resulting in the action, or relies on questions of fact or law upon which the Commission or designated authority has been afforded no opportunity to pass. (See § 1.115(c).) Persons in those categories who meet the requirements of this section may qualify to seek judicial review by filing a petition for reconsideration.

(n) Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown, the Commission will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration. (This paragraph applies only to actions of the Commission en banc. For provisions applicable to actions under delegated authority, see § 1.102.)

(o) Petitions for reconsideration of licensing actions, as well as oppositions and replies thereto, that are filed with respect to the Wireless Radio Services, may be filed electronically via ULS.

(p) Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that:

(1) Fail to identify any material error, omission, or reason warranting reconsideration;

(2) Rely on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(2), (b)(3), or (c) of this section;

(3) Rely on arguments that have been fully considered and rejected by the Commission within the same proceeding;

(4) Fail to state with particularity the respects in which petitioner believes the action taken should be changed as required by paragraph (d) of this section;

(5) Relate to matters outside the scope of the order for which reconsideration is sought;

(6) Omit information required by these rules to be included with a petition for reconsideration, such as the affidavit required by paragraph (e) of this section (relating to electrical interference);

(7) Fail to comply with the procedural requirements set forth in paragraphs (f) and (i) of this section;

(8) relate to an order for which reconsideration has been previously denied on similar grounds, except for petitions which could be granted under paragraph (c) of this section; or

(9) Are untimely.

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. § 1.925

(a) Waiver requests generally. The Commission may waive specific requirements of the rules on its own motion or upon request. The fees for such waiver requests are set forth in § 1.1102 of this part.

(b) Procedure and format for filing waiver requests.

(1) Requests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605.

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

(4) Applicants requiring expedited processing of their request for waiver shall clearly caption their request for waiver with the words “WAIVER--EXPEDITED ACTION REQUESTED.”

(c) Action on Waiver Requests.

(i) The Commission, in its discretion, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.

(ii) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 1.946

(a) Construction and commencement of service requirements. For each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service. For purposes of this section, the period between the date of grant of an authorization and the date of required commencement of service or operations is referred to as the construction period.

(b) Coverage and substantial service requirements. In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service. For purposes of this section, the period between the date of grant of an authorization and the date that a particular degree of coverage or substantial service is required is referred to as the coverage period.

(c) Termination of authorizations. If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically (in whole or in part as set forth in the service rules), without specific Commission action, on the date the construction or coverage period expires.

(d) Licensee notification of compliance. A licensee who commences service or operations within the construction period or meets its coverage or substantial services obligations within the coverage period must notify the Commission by filing FCC Form 601. The notification must be filed within 15 days of the expiration of the applicable construction or coverage period. Where the authorization is site-specific, if service or operations have begun using some, but not all, of the authorized transmitters, the notification must show to which specific transmitters it applies.

(e) Requests for extension of time. Licensees may request to extend a construction period or coverage period by filing FCC Form 601. The request must be filed before the expiration of the construction or coverage period.

(1) An extension request may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control.

(2) Extension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner. If the licensee orders equipment within 90 days of its initial license grant, a presumption of diligence is established.

(3) Extension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.

(4) The filing of an extension request does not automatically extend the construction or coverage period unless the request is based on involuntary loss of site or other circumstances beyond the licensee's control, in which case the construction period is automatically extended pending disposition of the extension request.

(5) A request for extension of time to construct a particular transmitter or other facility does not extend the construction period for other transmitters and facilities under the same authorization.

47 C.F.R. § 24.203

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. Licensees may, in the alternative, provide substantial service to their licensed area within the appropriate five- and ten-year benchmarks. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

(b) Licensees of 10 MHz blocks except for the 1910–1915 MHz and 1990–1995 MHz, including 10 MHz C block licenses reconfigured pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97–82, Sixth Report and Order, FCC 00–313, and 15 MHz blocks resulting from the disaggregation option as provided in the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket 97–82, 12 FCC Rcd 16436 (1997), as modified by Order on Reconsideration of the Second Report and Order, WT Docket 97–82, 13 FCC Rcd 8345 (1998), must serve with a signal level sufficient to provide adequate service to at least one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in their licensed area within five years of being licensed. Population is defined as the 1990 population census. Licensees may elect to use the 2000 population census to determine the five-year construction requirement. Failure by any licensee to meet these requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

(c) Licensees must file maps and other supporting documents showing compliance with the respective construction requirements within the appropriate five- and ten-year benchmarks of the date of their initial licenses.

(d) Licensees in the paired 1910–1915 MHz and 1990–1995 MHz bands must make a showing of "substantial service" in their license area within ten years of the date of initial license issuance or renewal. "Substantial service" is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

47 C.F.R. § 90.665

(a) MTA licenses in the 896–901/935–940 MHz band will be issued for a term not to exceed ten years.

(b) MTA licensees in the 896–901/935–940 MHz band will be permitted five years to construct their stations. This five-year period will commence with the issuance of the MTA-wide authorization and will apply to all of the licensee's stations within the MTA spectrum block, including any stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization.

(c) Each MTA licensee in the 896–901/935–940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA; further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant. Alternatively, an MTA licensee must demonstrate, through a showing to the Commission five years from the date of license grant, that it is providing substantial service. An MTA licensee must, three years from license grant, either show that the 1/3 population coverage standard has been satisfied, or provide written notification that it has elected to show substantial service to the MTA five years from license grant. In addition, as part of the election to provide a substantial service showing, each MTA licensee must, three years from license grant, indicate how it expects to demonstrate substantial service at five years. The MTA licensee must meet the population coverage benchmarks regardless of the extent to which incumbent licensees are present within the MTA block.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their license term, or to make a convincing showing of substantial service, will forfeit the portion of the MTA license that exceeds licensed facilities constructed and operating on the date of the MTA license grant.

47 C.F.R. § 101.3

As used in this part:

24 GHz Service. A fixed point-to-point, point-to-multipoint, and multipoint-to-multipoint radio system in the 24.25–24.45 GHz band and in the 25.05–25.25 GHz band consisting of a fixed main (nodal) station and a number of fixed user terminals. This service may encompass any digital fixed service.

Antenna power gain. The ratio of the maximum radiation intensity to that of an isotropic (omnidirectional) radiator in the far field of its main (forward direction) lobe.

Antenna power input. The radio frequency peak or RMS power, as the case may be, supplied to the antenna from the antenna transmission line and its associated impedance matching network.

Antenna structure. The antenna, its supporting structure and anything attached to it.

Assigned frequency. The center of the frequency band assigned to a station.

Assigned frequency bandwidth. The frequency band within which the emission of a station is authorized; the width of the band equals the necessary bandwidth plus twice the absolute value of the frequency tolerance.

Authorized bandwidth. The maximum bandwidth authorized to be used by a station as specified in the station license. (See § 2.202 of this chapter)

Authorized frequency. The frequency, or frequency range, assigned to a station by the Commission and specified in the instrument of authorization.

Authorized power. The maximum power a station is permitted to use. This power is specified by the Commission in the station's authorization.

Automatic Transmitter Power Control (ATPC). ATPC is a feature of a digital microwave radio system that adjusts the transmitter output power. ATPC allows the transmitter to operate at less than maximum power for most of the time. In a radio employing ATPC, the transmit power is reduced during normal operation conditions. When the receiver detects a reduction in signal level, a control signal is sent to the far end transmitter, instructing it to increase the power output to

compensate for the signal reduction. The power output is limited to the licensed (maximum) transmit power. Guidelines for use of ATPC are set forth in the TIA Telecommunications Systems Bulletin TSB 10, "Interference Criteria for Microwave Systems (TSB 10)."

Bandwidth occupied by an emission. The band of frequencies comprising 99 percent of the total radiated power extended to include any discrete frequency on which the power is at least 0.25 percent of the total radiated power.

Bit rate. The rate of transmission of information in binary (two state) form in bits per unit time.

Carrier. In a frequency stabilized system, the sinusoidal component of a modulated wave whose frequency is independent of the modulating wave; or the output of a transmitter when the modulating wave is made zero; or a wave generated at a point in the transmitting system and subsequently modulated by the signal; or a wave generated locally at the receiving terminal which when combined with the side bands in a suitable detector, produces the modulating wave.

Carrier frequency. The output of a transmitter when the modulating wave is made zero.

Central office. A landline termination center used for switching and interconnection of public message communication circuits.

Common carrier fixed point-to-point microwave service. A common carrier public radio service rendered on microwave frequencies by fixed and temporary fixed stations between points that lie within the United States or between points to its possessions or to points in Canada or Mexico.

Communication common carrier. Any person engaged in rendering communication service for hire to the public.

Control point. An operating position at which an operator responsible for the operation of the transmitter is stationed and which is under the control and supervision of the licensee.

Control station. A fixed station, the transmissions of which are used to control automatically the emissions or operations of a radio station, or a remote base station transmitter.

Coordination area. The area associated with a station outside of which another station sharing the same or adjacent frequency band neither causes nor is subject to interfering emissions greater than a permissible level.

Coordination contour. The line enclosing the coordination area.

Coordination distance. The distance on a given azimuth from a station beyond which another station neither causes nor is subject to interfering emissions greater than a permissible level.

Digital Electronic Message Nodal Station. A fixed point-to-multipoint radio station in a Digital Electronic Message Service providing two-way communication with Digital Electronic Message User Stations.

Digital Electronic Message Service. A two-way end-to-end fixed radio service utilizing digital termination systems for the exchange of digital information in the frequency bands 10,550–10,680 MHz, 18,820–18,920 MHz, and 19,160–19,260 MHz. This service may also make use of point-to-point microwave facilities, satellite facilities or other communications media to interconnect digital termination systems to comprise a network.

Digital Electronic Message User Station. Any one of the fixed microwave radio stations located at users' premises, lying within the coverage area of a Digital Electronic Message Nodal Station, and providing two-way digital communications with the Digital Electronic Message Nodal Station.

Digital modulation. The process by which some characteristic (frequency, phase, amplitude or combinations thereof) of a carrier frequency is varied in accordance with a digital signal, e.g., one consisting of coded pulses or states.

Drop point. A term used in the point-to-point microwave radio service to designate a terminal point where service is rendered to a subscriber.

Earth station. A station located either on the Earth's surface or within the major portion of Earth's atmosphere and intended for communication:

(1) With one or more space stations; or

(2) With one or more stations of the same kind by means of one or more reflecting satellites or other objects in space.

Effective Radiated Power (ERP). The product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction.

Equivalent Isotropically Radiated Power (EIRP). The product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna.

Exchange. A unit of a communication company or companies for the administration of communication service in a specified area, which usually embraces a city, town, or village and its environs, and consisting of one or more central offices, together with the associated plant, used in furnishing communication service in that area.

Exchange area. The geographic area included within the boundaries of an exchange.

Fixed satellite earth station. An earth station intended to be used at a specified fixed point.

Fixed relay station. A fixed station associated with one or more stations, established to receive radio signals directed to it and to retransmit them automatically on a fixed service frequency.

Fixed service. A radio communications service between specified fixed points.

Fixed station. A station in the fixed service.

Frequency tolerance. The maximum permissible departure by the center frequency of the frequency band occupied by an emission from the assigned frequency or, by the characteristic frequency of an emission from the reference frequency.

Note: The frequency tolerance is expressed as a percentage or in Hertzs.

General communication. Two-way voice communication, through a base station, between:

(1) A common carrier land mobile or airborne station and a landline telephone station connected to a public message landline telephone system;

(2) Two common carrier land mobile stations;

(3) Two common carrier airborne stations;

(4) A common carrier land mobile station and a common carrier airborne station.

Harmful interference. Interference that endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with these regulations.

Internodal link. A point-to-point communications link used to provide communications between nodal stations or to interconnect nodal stations to other communications media.

Landing area. A landing area means any locality, either of land or water, including airports and intermediate landing fields, which is used, or approved for use for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

Local Multipoint Distribution Service Backbone Link. A point-to-point radio service link in a Local Multipoint Distribution Service System that is used to interconnect Local Multipoint Distribution Service Hub Stations with each other or with the public switched telephone network.

Local Multipoint Distribution Service Hub Station. A fixed point-to-point or point-to-multipoint radio station in a Local Multipoint Distribution Service System that provides one-way or two-way communication with Local Multipoint Distribution Service Subscriber Stations.

Local Multipoint Distribution Service Subscriber Station. Any one of the fixed microwave radio stations located at users' premises, lying within the coverage area of a Local Multipoint Distribution Service Hub Station, capable of receiving one-way communications from or providing two-way communications with the Local Multipoint Distribution Service Hub Station.

Local Multipoint Distribution Service System. A fixed point-to-point or point-to-multipoint radio system consisting of Local Multipoint Distribution Service Hub Stations and their associated Local Multipoint Distribution Service Subscriber Stations.

Local television transmission service. A public radio communication service for the transmission of television material and related communications.

Long haul system. A microwave system licensed under this part in which the longest radio circuit of tandem radio paths exceeds 402 kilometers.

Master station. A station in a multiple address radio system that controls, activates or interrogates four or more remote stations. Master stations performing such functions may also receive transmissions from remote stations.

Message center. The point at which messages from members of the public are accepted by the carrier for transmission to the addressee.

Microwave frequencies. As used in this part, this term refers to frequencies of 890 MHz and above.

Microwave link. A link is defined as a simplex communications circuit between two points utilizing a single frequency/polarization assignment. A duplex communications circuit would require two links, one link in each direction.

Miscellaneous common carriers. Communications common carriers that are not engaged in the business of providing either a public landline message telephone service or public message telegraph service.

Mobile earth station. An earth station intended to be used while in motion or during halts at unspecified points.

Mobile service. A radio communication service between mobile and land stations or between mobile stations.

Mobile station. A station in the mobile service intended to be used while in motion or during halts at unspecified points.

Multichannel Video Distribution and Data Service (MVDDS). A fixed microwave service licensed in the 12.2–12.7 GHz band that provides various wireless services. Mobile and aeronautical operations are prohibited.

Multiple address system (MAS). A point-to-multipoint or point-to-point radio communications system used for either one-way or two-way transmissions that operates in the 928/952/956 MHz, the 928/959 MHz or the 932/941 MHz bands in accordance with § 101.147.

National Spatial Reference System. The National Spatial Reference System (NSRS) is the name given to all Geodetic Control information contained in the National Geodetic Survey (NGS) Data Base. This includes: A, B, First, Second, and Third Order horizontal and vertical control observed by NGS as well as data submitted by other agencies (i.e., USGS, BLM, States, Counties, Cities, and private surveying organizations).

Necessary bandwidth. For a given class of emission, the width of the frequency band that is just sufficient to ensure the transmission of information at the rate and with the quality required under specified conditions. The necessary bandwidth may be calculated using the formulas in § 2.202 of this chapter.

Nodal station. The central or controlling stations in a microwave radio system operating on point-to-multipoint or multipoint-to-multipoint frequencies with one or more user stations or internodal links.

Occupied bandwidth. The width of a frequency bandwidth such that, below the lower and above the upper frequency limits, the mean powers emitted are each equal to a specified percentage, B/2 of the total mean power of a given emission. Unless otherwise specified by the CCIR for the appropriate class of emission, the value of B/2 should be taken as 0.5%.

Note: The percentage of the total power outside the occupied bandwidth is represented by B.

Operational fixed station. A private fixed station not open to public correspondence.

Passive repeater. A re-radiation device associated with a transmitting/receiving antenna system that re-directs intercepted radiofrequency energy. For example, it may consist of reflector(s) or back-to-back parabolic or horn antennas.

Path length. The total distance of a path from the transmit to the receive antenna, inclusive of all passive repeaters, if any.

Payload Capacity. The bit rate available for transmission of data over a radiocommunication system, excluding overhead data generated by the system.

Periscope antenna system. An antenna system which involves the use of a passive reflector to deflect radiation from or to a directional transmitting or receiving antenna which is oriented vertically or near vertically.

Prior coordination. A bilateral process conducted prior to filing applications which includes the distribution of the technical parameters of a proposed radio system to potentially affected parties for their evaluation and timely response.

Private carrier. An entity licensed in the private service and authorized to provide communications service to other private service eligibles on a commercial basis.

Private line service. A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time.

Private operational fixed point-to-point microwave service. A private radio service rendered by fixed and temporary fixed stations on microwave frequencies for the exclusive use or availability for use of the licensee or other eligible entities for communication between two or more designated points. Service may be provided between points within the United States, points within United States possessions, or between the United States and points in Canada or Mexico.

Public correspondence. Any telecommunication which the offices and stations must, by reason of their being at the disposal of the public, accept for transmission.

Public message service. A service whereby facilities are offered to the public for communication between all points served by a carrier or by interconnected carriers on a non-exclusive message by message basis, contemplating a separate connection for each occasion of use.

Radio station. A separate transmitter or a group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radiocommunication service.

Radiocommunication. Telecommunication by means of radio waves.

Rated power output. The maximum radio frequency power output capability (peak or average power) of a transmitter, under optimum conditions of adjustment and operation, specified by its manufacturer.

Record communication. Any transmission of intelligence which is reduced to visual record form at the point of reception.

Reference frequency. A frequency having a fixed and specified position with respect to the assigned frequency. The displacement of this frequency with respect to the assigned frequency has the same absolute value and sign that the displacement of the characteristic frequency has with respect to the centre of the frequency band occupied by the emission.

Relay station. A fixed station used for the reception and retransmission of the signals of another station or stations.

Remote station. A fixed station in a multiple address radio system that transmits one-way to one or more central receive sites, controls a master station, or is controlled, activated or interrogated by, and may respond to, a master station.

Repeater station. A fixed station established for the automatic retransmission of radiocommunications received from one or more mobile stations and directed to a specified location; for public mobile radio operations, a fixed station that automatically retransmits the mobile communications and/or transmitter information about the base station, along a fixed point-to-point link between the base station and the central station.

Secondary operations. Radio communications which may not cause interference to operations authorized on a primary basis and which are not protected from interference from these primary operations.

Short haul system. A microwave system licensed under this part in which the longest radio circuit of tandem radio paths does not exceed 402 kilometers.

Signal booster. A device at a fixed location which automatically receives, amplifies, and retransmits on a one-way or two-way basis, the signals received from base, fixed, mobile, and portable stations, with no change in frequency or authorized bandwidth. A signal booster may be either narrowband (Class A), in which case the booster amplifies only those discrete frequencies intended to be retransmitted, or broadband (Class B), in which case all signals within the passband of the signal booster filter are amplified.

Signaling communication. One-way communications from a base station to a mobile or fixed receiver, or to multi-point mobile or fixed receivers by audible or subaudible means, for the purpose of actuating a signaling device in the receiver(s) or communicating information to the receiver(s), whether or not the information is to be retained in record form.

Standby transmitter. A transmitter installed and maintained for use in lieu of the main transmitter only during periods when the main transmitter is out of service for maintenance or repair.

Symbol rate. Modulation rate in bauds. This rate may be higher than the transmitted bit rate as in the case of coded pulses or lower as in the case of multilevel transmission.

Telegraphy. A form of telecommunication which is concerned in any process providing transmission and reproduction at a distance of documentary matter, such as written or printed matter or fixed images, or the reproduction at a distance of any kind of information in such a form. Unless otherwise specified, telegraphy means a form of telecommunication for the transmission of written matter by the use of signal code.

Telemetering. The use of telecommunication for automatic indicating or recording measurements at a distance from the measuring instrument.

Telephony. A form of telecommunication set up for the transmission of speech, or in some cases, other sounds.

Television. A form of telecommunication for transmission of transient images of fixed or moving objects.

Temporary fixed station. A station established in a non-permanent mode (temporary) at a specified location for a short period of time, ranging up to one year. Temporary-fixed operations are itinerant in nature, and are not to be confused with mobile-type operations.

Universal Licensing System (ULS). The consolidated database, application filing system and processing system for all Wireless Telecommunications Services. The ULS offers Wireless Telecommunications Bureau (WTB) applicants and the general public electronic filing of all applications requests, and full public access to all WTB licensing data.

User or subscriber station. The station(s) in a microwave radio system operating at the users' premises on point-to-multipoint or multipoint-to-multipoint frequencies and communicating with one or more nodal stations.

Video entertainment material. The transmission of a video signal (e.g. United States Standard Monochrome or National Television Systems Committee 525–line television) and an associated audio signal which is designed primarily to amuse or entertain, such as movies and games.

47 C.F.R. § 101.17

(a) All 38.6–40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each EA or portion of an EA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

(1) A description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage;

(2) A description of the 38.6–40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term;

(3) A description of the 38.6–40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any 38.6–40.0 GHz band licensees adjudged not to be providing substantial service will not have their licenses renewed.

47 U.S.C. 101.67

Licenses for stations authorized under this part will be issued for a period not to exceed 10 years. Unless otherwise specified by the Commission, the expiration of regular licenses shall be on the date (month and day) selected by licensees in the year of expiration.

47 C.F.R. § 101.526

The license term for stations licensed under this subpart is ten years from the date of license grant or license renewal for incumbent licensees.

47 C.F.R. § 101.527

(a) Each licensee must make a showing of "substantial service" within ten years of its license grant. A "substantial service" assessment will be made at renewal pursuant to the provisions and procedures set forth in § 1.949 of this chapter. "Substantial service" is a service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal during its past license term.

(b) Each licensee must, at a minimum file:

(1) A report, maps and other supporting documents describing its current service in terms of geographic coverage and population served to the Commission. The report must also contain a description of the licensees' investments in its operations. The report must be labeled as an attachment to the renewal application; and

(2) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph (b)(2).

(c) Failure to demonstrate that substantial service is being provided in the service area will result in forfeiture of the license, and the licensee will be unable to regain it.

(d) The frequencies associated with incumbent authorizations, licensed on a SMSA basis, that have cancelled automatically or otherwise been recovered by the Commission will automatically revert to the applicable EA licensee.

14-1039

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

FIBERTOWER SPECTRUM HOLDINGS, LLC, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on October 14, 2014, 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.

Hyland Hunt
Pratik A. Shah
Akin Gump Strauss Hauer & Feld
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for: FiberTower Spectrum Holdings, LLC

Harry F. Cole
Fletcher, Heald & Hildreth
1300 N. 17th Street
Suite 1100
Arlington, VA 22209
Counsel for: Fixed Wireless Communications Coalition, Inc.

Joseph M. Sandri
Winstar Communications, Inc.
1615 L Street, N.W.
Suite 1260
Washington, D.C. 20036
Counsel for: FiberTower Spectrum Holdings, LLC

Douglas I. Brandon
McCaw Cellular Communications, Inc.
1150 Connecticut Ave. N.W.
4th Floor
Washington, D.C. 20036
Counsel for: FiberTower Spectrum Holdings, LLC

/s/ Maureen K. Flood