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

No. 15-1003

LAWRENCE BEHR

APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE

FCC OPPOSITION TO MOTION FOR SUMMARY REVERSAL

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MARCH 4, 2015

TABLE OF CONTENTS

INTRODUCTION

Appellant Behr has failed to demonstrate that this case is the rare circumstance in which summary reversal of an agency action is appropriate. The principal issue in dispute here involves the FCC's interpretation of an FCC procedural rule, 47 C.F.R. § 1.110, that allows a license applicant to demand a hearing in certain limited circumstances where the agency has partially or conditionally granted a radio license application. The FCC's determination that this rule did not apply in appellant's case because it had fully granted his application to modify his license warrants deference, is consistent with agency and judicial precedent, and is plainly reasonable. Indeed, this Court specifically endorsed the Commission's construction of this rule as not applying in very similar circumstances more than 40 years ago, in *Buckley-Jaeger Broadcasting Corp. v. FCC*, 397 F.2d 651 (D.C. Cir. 1968). Behr's attempt to distinguish this precedent in his motion is unpersuasive.

Appellant Behr also claims that the full Commission did not adequately address his petition for waiver of a rule requiring that he complete construction of his station within one year. But Behr indisputably failed to follow the established agency rules governing review of the Wireless Telecommunications Bureau's denial of his waiver petition. The Commission properly dismissed his effort to challenge the waiver denial outside those rules, finding no basis to disregard its established procedures.

Behr stresses the Commission's mistakes and delays in processing his application. Those missteps were unfortunate but, contrary to Behr's claims, are not

relevant to the issues before the Court and do not warrant reversal at all, much less summary reversal.

STATEMENT OF FACTS

A. Background

In 1993, the Commission conducted an initial lottery for licenses to provide private land mobile radio service in the 220 MHz band. More than 59,000 applications were filed to participate in the lottery, one of which was filed by Appellant Behr for a license to serve the Denver area. He won the lottery and became the "tentative selectee."[1] The Commission then requested that a number of selectees, including Behr, resubmit corrected applications with additional technical information before those applications could be granted. Behr did so in a timely manner, but the Commission misplaced the application and, believing that Behr had not responded, granted a license in Denver to the second tentative selectee from the lottery for that city.

To correct this administrative error once it became apparent, the Commission, on its own motion and, admittedly after a lengthy period, set aside the grant to the second-place lottery winner and reinstated Behr's application. *See Lawrence Behr*, 17 FCC Rcd 19025 (WTB 2002) (App. 58). Behr's application was granted on January 8, 2003.

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[1] Approximately 3800 applicants were tentatively selected. *See* Commission Announces Tentative Selectees for 220-222 MHz Private Land Mobile "Local" Channels, *Public Notice*, DA 93-71 (Jan. 26, 1993) (App. 70). (References to "App. --" are to the Appendix to this motion.)

Behr was authorized to begin construction of his station at that time. Licensees in this service are provided 12 months to construct a station once the application is granted. *See* 47 C.F.R. § 90.725(f). Indeed, the order reinstating Behr's application specifically cautioned that if the application were subsequently "granted and he does not timely construct, any authorization granted to Behr would automatically terminate and Net Radio, as the Denver geographic licensee, would have reversionary rights in those frequencies …." *Lawrence Behr*, 17 FCC Rcd at 19028 n.15 (App. 61), *citing*, 47 C.F.R. 90.763(b); *see also* 47 C.F.R. § 90.725(f).

On June 2, 2003, Behr filed an application to modify his license by updating certain information with respect to the station and changing the station's class. App. 42. Along with the application, Behr also filed a petition for waiver of the construction requirements in 47 C.F.R. § 90.725 in order to obtain more time to construct the station. App. 51. Rather than the one-year construction period applicable to his class of license, he sought a five- to ten-year period applicable to a different class of licenses. (App. 54-55). The Bureau denied the waiver petition on November 12, 2003. *See* App. 40. The ruling found that Behr had failed to provide adequate justification for waiver of the rule, noting in particular that his attempt to compare his license with different types of licensees that had been provided longer construction periods was "incorrect." App. 41. The separate license modification application was granted unconditionally in a different Bureau-level action on November 17, 2003. *See* FCC File No. 0001332167.

On December 17, 2003, Behr filed a letter, purportedly under 47 C.F.R.

§ 1.110, rejecting "the grant as made" and requesting that the Commission "vacate the original action and set the application for hearing." *See* App. 39. In a January 2007 ruling, the Bureau dismissed the hearing request, explaining that Section 1.110 applies only to instances where the Commission "grants any application in part, or with any privileges, terms, or conditions other than those requested," and that in this case Behr's modification application had been granted in full and without condition. *Letter to Donald J. Evans*, 22 FCC Rcd 1798 (WTB 2007) (App. 37). The Bureau noted that the Commission had previously rejected a hearing request filed in a similar situation as inappropriate under Commission rules, and that this Court affirmed that interpretation of Section 1.110. *Id.* at 1-2 & n.7 (citing *Buckley-Jaeger*, 397 F.2d at 656).

As for the separate denial of his waiver petition, the ruling pointed out that a petition for reconsideration or an application for Commission review of the Bureau's action are the two appropriate vehicles for challenging such a denial, and that Behr had submitted neither. *See id.* at 1799 (App. 38); *see also* 47 U.S.C. § 405 (reconsideration); 47 C.F.R. § 1.106 (same); 47 C.F.R. § 1.115 (application for review). The ruling also noted that "because Behr failed to construct [the station] by the applicable 12-month deadline, the license cancelled automatically on January 8, 2004 pursuant to [47 C.F.R. §] 90.725(f)." *Id.*

On February 13, 2007, Behr filed a petition for reconsideration of that ruling. He claimed that the Bureau erred in dismissing his Section 1.110 petition for hearing because it was the Commission's action of denying the waiver request but

granting the underlying application that "left Behr with no choice but to reject the grant and request a hearing." App. 32. The Bureau denied that petition, pointing out that in his modification application Behr had sought three specific modifications and that the application with those requests was granted independently of the distinct petition for waiver of the construction period rule, which was separately denied. *Lawrence Behr*, 24 FCC Rcd 7196, 7198 (WTB 2009) (App. 28). The order found that the initial Bureau ruling was consistent with precedent and had been correct in concluding that Section 1.110 did not apply in this situation. The Bureau explained that *Buckley-Jaeger* was on point: "*Buckley Jaeger* concerned a renewal application, which the Commission granted, with an attached request for exemption from the rules, which the Commission denied. The court expressly noted that the relief under Section 1.110 was inapplicable because the Commission granted the license renewal application in full, and denied only the request for exemption that was filed together with the application." *Id.* ¶ 6 (citing *Buckley Jaeger*, 397 F.2d at 652-53) (App. 30).

B. The Order On Appeal

Behr sought review by the full Commission of the Bureau's reconsideration order denying his request for a hearing pursuant to 47 C.F.R. § 1.110. *See* App. 20. The application for review raised two questions: (1) whether grant of his modification application while denying his separate petition for waiver constituted only a partial grant of the application, making the provisions of Section 1.110 applicable, and (2) whether, in the circumstances of this case, the Bureau should have waived

the construction permit limits of the rules applicable to his category of station, extending the time for him to construct this station to the much longer periods provided for a different category of station. *Id.*

The Commission rejected Behr's contention that the separate Bureau actions granting his modification application and denying his petition for waiver amounted to one determination only partially granting the modification application, to which Section 1.110 of the rules would apply. *Lawrence Behr Application*, 29 FCC Rcd 15924, 15932 ¶22 (2014) (*MO&O*) (App. 1, 9). The Commission agreed with the Bureau that the agency's 1967 decision in *AM-FM Program Duplication*, 8 F.C.C.2d at 2-5, affirmed by this court in *Buckley-Jaeger*, 397 F.2d at 655-56, was controlling. *MO&O* ¶¶18-19 (App. 8). Indeed, the Commission noted, Behr had abandoned "his earlier attempts to distinguish his situation from the nearly identical facts in *Buckley-Jaeger v. FCC*, making no mention of the case at all in his Application for Review." *Id.* ¶21 (App. 9).

Behr's claim that grant of his modification application coupled with denial of his waiver petition constituted a partial grant of the modification application, the Commission concluded, was both inaccurate and inconsistent with FCC and judicial precedent. *MO&O* ¶22 (App. 9). The Commission found that Behr's modification application and waiver petition in fact "contained two separate independent types of requests – one type constituted the application to correct and modify, within the parameters of the current rules, the administrative aspects of the license, while the other type sought relief apart from the specific terms of the license (*i.e.*,

to obtain a waiver of the build-out schedule set out in the Commission's rules)." *Id*. ¶24 (App. 10). These were the same circumstances, the Commission concluded, in which it had previously determined that Section 1.110 did not apply in the ruling affirmed by this Court in *Buckley-Jaeger*. *See* 397 F.2d at 655-56 (App. 83-84).

The Commission found that agency and judicial precedent cited by Behr were inapplicable since all involved either circumstances in which partial or conditional grants were clearly at issue and Section 1.110 did apply, or in which factors other than Section 1.110 had led to the result. *See MO&O* ¶¶26-35 (App. 11-13).

As for the Bureau's denial of Behr's petition for waiver of the rule governing the construction period for this station, the Commission concluded that Behr had failed to file either a petition for reconsideration or application for review of the denial ruling within the time periods provided by statute and rule and had never requested additional time for such a filing. *MO&O* ¶¶ 39-43 (App. 15-17). In addition, the Commission concluded that "this case presents no circumstances, extraordinary or otherwise, that call into question the propriety of giving force to" the deadlines for seeking further review of agency staff rulings. *Id*. ¶44 (App. 18). Finally, the Commission "observe[d] that even were we to examine the factual assertions that Behr has made to justify additional time to build – whether the ten more years that Behr requested or any smaller amount of time – we see nothing in those assertions or in the way the Wireless Bureau handled them that would have

warranted grant of the requested relief." *Id.* ¶43 (App. 17).

ARGUMENT

APPELLANT HAS NOT SATISFIED THE HIGH STANDARD FOR SUMMARY DISPOSITION OF THIS APPEAL.

Summary disposition will be granted only "where the merits of the appeal or petition for review are so clear that 'plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision.'" *Cascade Broadcasting Group, Ltd. v. FCC,* 822 F.2d 1172, 1174 (D.C.Cir.1987), *quoting, Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985); *see also Walker v. Washington,* 627 F.2d 541, 545 (D.C. Cir.), *cert. denied,* 449 U.S. 994 (1980). "Agency action," the Court has explained, "will be subject to summary review by motion only where the moving party has carried the heavy burden of demonstrating that the record and the motions papers comprise a basis adequate to allow the "fullest consideration necessary to a just determination." *Cascade Broadcasting*, 822 F.2d at 794. The Court has specifically cautioned that motions for summary reversal are "rarely granted." *See Handbook of Practice and Internal Procedures* at 36 (D.C. Cir., Nov. 12, 2013).

Behr's motion falls far short of meeting this exacting standard. The Commission order in this case clearly explains why Behr's claims are entirely without merit, including the fact that his primary argument depends on an interpretation of a Commission rule that conflicts with a prior FCC order interpreting that rule, which this Court affirmed. Summary disposition is equally inappropriate in these

circumstances because, as the Commission's order also demonstrates, Behr failed to follow established rules for challenging the denial of his petition for rule waiver, and his application for review was properly dismissed by the Commission. Behr has not demonstrated in his motion that the FCC's decision in the order on appeal is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

A. The FCC Properly Held That Section 1.110 Was Inapplicable To The Grant Of Behr's Modification Application.

Behr's appeal relies on the proposition that the denial of his waiver petition seeking additional time to construct his station, along with the separate grant in full of his modification application, amounted to a single action that resulted in a partial denial of the application. This circumstance, according to Behr, gave rise to the procedures set out in 47 C.F.R. § 1.110 that allow a party whose license application is partially or conditionally granted to reject that less-than-complete grant and demand an evidentiary hearing. *See* Mot. 2, 7-9. As the Commission explained in an extended discussion below, this is both an incorrect interpretation of the rule and a misreading of clear agency precedent.

Section 1.110 provides:

> Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will

> vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.

47 C.F.R. § 1.110 (App. 71).

As the Commission noted in the *MO&O*, Behr's modification application sought to make changes in his license "to add a contact person to his license, provide answers regarding foreign ownership, and change the licensed station class so that he could provide interconnected service." *MO&O* ¶24 (App. 10). His separate petition for waiver of the rule imposing a 12-month construction deadline for his category of license, the Commission found, "was not contingent on or otherwise related to any of these changes in the elements of Behr's license." *Id.* The Commission thus reasonably determined that there was "no basis for concluding that Behr's request to modify his license … and his request for waiver of the construction rule, constitute anything other than two independent requests, where the denial of one (the waiver request) is entirely unconnected to the consideration of the merits of the other." *Id.* at ¶22 (App. 9). Given the "high level of deference due to an agency in interpreting its own orders and regulations," *MCI Worldcom Network Services, Inc. v. FCC*, 274 F.3d 542, 548 (D.C.Cir.2001), the Commission's conclusion standing alone justifies affirmance of its order, not summary reversal.

In response to the Commission's determinations, Behr now seeks in his motion to recast the petition for waiver as a request for modification of his license. The argument is inconsistent with the language in the petition that he filed. The motion claims now, for example, that his filing was a "timeline modification pro-

posal," in which the waiver and the application were inextricably intertwined. Mot. 1-2. Yet nowhere in the application itself is there any reference to a "timeline modification" or anything similar. *See* App. 42-49.

As the Commission correctly found, the modification application sought three specific license modifications – (1) addition of a contact person for the licensee; (2) addition of answers to questions concerning alien ownership; and (3) a change in the station's class. *See MO&O* ¶¶22-24 (App. 9-10); *see also* App. 6, 29-30. It is not clear why Behr believes that these requests to modify the license were not "substantive." *See* Mot. 10 ("[T]he waiver [petition] was the sole substantive part of the application."). Behr voluntarily sought these changes in its license, and we do not understand Behr to dispute that the Bureau granted the application seeking those modifications on November 17, 2003.

Similarly, Behr's petition for waiver contains no suggestion that it was merely an appendage to a "timeline modification application" that sought to modify the terms of the license. And, in any event, the station construction period is not a term of the license that is subject to change by modifying the license. It is governed by rule – in this case by 47 C.F.R. § 90.725. Behr plainly recognized this, as he expressly sought a waiver of that rule. His petition was entitled "Petition for Waiver of Section 90.725 of the Commission's Rules." App. 51.[2]

The petition offers a detailed discussion of the development of the rule in

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[2] The motion erroneously renames the petition as "Petition for Waiver of Outdated Build-Out Timetable." Mot. 5 n.4. That is inaccurate. *See* App 51.

question and explains Behr's position that the Commission should waive the rule because it had failed to update the rule, adopted in 1990, to reflect changes in the 220 MHz Private Mobile Radio Service. *See* App. 53-54. The petition concludes by arguing that the circumstances of this case "render application *of that rule* not only burdensome but inequitable and contrary to the public interest." App. 56 (emphasis added). Contrary to Behr's claims now that the waiver petition "existed solely as an essential component of the application" (Mot. 9), the waiver petition makes no reference to seeking any modification to the terms of the license. And as noted above, waiver of the applicable rule rather than a license modification would have been the method to obtain an extension of the construction period established by the rule.

As the Commission pointed out, this issue has arisen before. In essentially identical circumstances the Commission concluded in a 1967 order that Section 1.110 did not apply when a broadcast radio station licensee sought renewal of its license accompanied by a request for exemption from a rule governing the amount of duplicative programming commonly owned AM and FM radio stations in the same community could air. The Commission granted the renewal application but denied the rule exemption request. *AM-FM Program Duplication*, 8 F.C.C.2d at 2 (App. 74). The licensee objected, claiming that this was a partial grant that amounted to a denial of the license renewal application, and demanded a hearing pursuant to 47 C.F.R. § 1.110. *Id.*

The Commission found no merit in the claim, holding that "[t]his amounts to

a contention that a licensee, by requesting waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance." *AM-FM Program Duplication*, 8 F.C.C.2d at 4-5 (App. 76-77). On appeal, this Court specifically agreed with the quoted language from the Commission's order, holding that it could "find no support in either the statute or the rules for the proposition asserted and Appellant has not cited any authority in support." *Buckley-Jaeger*, 397 F.2d at 656 (App. 84). Behr has similarly cited nothing in this case in support of his advocacy of the same approach rejected by this Court in *Buckley-Jaeger*.

The Court added with respect to the applicability of Section 1.110 that "the rule concerns situations where the applicant receives less than a full authorization. But here Appellant received the full authorization to which it was entitled under the statute and rules. In these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory." *Buckley-Jaeger*, 397 F.2d at 656 (App. 84). The same is true in the case of Behr's modification application.

Behr's effort now to distinguish the circumstances in *Buckley-Jaeger* from the circumstances of his situation is unpersuasive because it relies on the same erroneous claims about the nature of his modification application discussed above.[3] Behr asserts that unlike that case, the "build-out timetable" in this case "was a

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[3] As the Commission noted, Behr did not even mention *Buckley-Jaeger* in his application for review below (App. 20), although it had been a principal basis for the Bureau ruling for which he sought Commission review. *MO&O* ¶21 (App. 9).

stated provision of Behr's existing license for which modification was requested." Mot. 11. As we have shown above, the "build-out timetable" is contained in a rule, 47 C.F.R. § 90.725, and Behr sought a waiver of the rule to extend the time to construct his station, not a modification of his license for that purpose.

Behr's assertion (Mot. 4) that the Bureau "added a build out period to the license in May of 2003" is incorrect and misleading. His reference is to a data entry notation made in the electronic license file indicating that the construction period for his station, *established by rule*, began to run in January 2003. *See* Mot. Att. 1. This was much later than that for other licensees whose applications had been filed at the same time as Behr's initial application as a result of mistakes made by the Commission in processing that application. In 2003 the Commission began an audit of the construction status of stations in this service, and the notation was added to the file to flag Behr's special situation to make clear, as it states, that his attorney "should not respond to the audit" because his construction period began in January 2003 and extended into 2004. *Id.* That file notation was for that purpose did not add a term to his license as the motion claims.

Moreover, Behr's reliance (Mot. 7-9) on the fact that the waiver petition was physically attached to the modification application or that the agency's rules (47 C.F.R. § 1.925(b)(1)) require waiver petitions like this to be filed on a specific form is misplaced. Such procedural rules governing how the Commission processes electronic filings do not change the nature of the filings and do not undermine the conclusion that the modification application and waiver petition were

separate requests for agency action. That the Commission granted the modification application and denied the waiver petition in separate actions five days apart should have been a clear indication to Behr and his experienced communications counsel that the Commission was treating these filings as separate requests. The language of the Bureau ruling denying the waiver petition also makes that clear. *See* App. 40-41.

Behr's assertion that the Commission only partially granted his modification application and thus erred in refusing to provide a Section 1.110 hearing on that application (as well as on the denial of his petition for waiver of the construction rule) is demonstrably wrong. The motion provides no basis for summary reversal.

B. The FCC Properly Dismissed Behr's Application For Review of The Waiver Denial Because He Had Failed To Preserve His Administrative Review Rights.

Behr's suggestion (Mot. 11) that his "only avenue[] of appeal" following the denial of his waiver petition was to invoke Section 1.110 is mistaken. He could have sought reconsideration of the ruling by the Bureau or review by the Commission through the filing of an application for review. He did neither, choosing to rely exclusively on his mistaken view that Section 1.110 was applicable. Thus, the Commission properly concluded that Behr did not timely seek reconsideration of the Bureau's denial of his waiver petition or review by the full Commission, even though both avenues of administrative review were open to him. *MO&O* ¶40 (App. 16).

Even if Behr's one-paragraph December 17, 2003 letter demanding a hear-

ing pursuant to Section 1.110 (App. 39) somehow could be deemed a reconsideration petition or an application for review of the Bureau ruling denying the waiver petition – although that letter did not remotely comply with the rules for pleadings seeking such relief – it was untimely. Section 405(a) of the Communications Act, 47 U.S.C. § 405(a) and Section 1.106(f) of the agency's rules, 47 C.F.R. § 1.106(f), require a reconsideration petition to be filed within thirty days from the date of public notice of Commission action. Similarly, Section 1.115 of the rules, 47 C.F.R. § 1.115 requires that an application for Commission review of a staff action be filed within thirty days of public notice of that action. Here the denial of Behr's waiver petition occurred on November 12, 2003 (App. 40), more than thirty days from the time of the filing of its December 17, 2003 letter request. The Commission correctly concluded that Behr had failed to meet the established deadlines for filing a petition for reconsideration or application for review of the denial of his waiver petition. It also reasonably concluded that "this case presents no circumstances, extraordinary or otherwise, that call into question the propriety of giving force to these deadlines." *MO&O* ¶44 (App. 18).

C. The FCC's Delays In Processing Behr's Application Do Not Justify Grant Of The Motion.

Behr makes much of the agency's errors and delays in processing his application. *See* Mot at 2-6, 12-13. However, as the Commission correctly observed, its "errors predating the grant of Behr's license have no relevance to his subsequent failure to preserve his rights to contest the Wireless Bureau's determination that he had failed to comply with one of the most basic obligations for holding a license –

i.e., constructing the station on a timely basis." *MO&O* n.120. (App. 17). After its initial mistakes, the Commission reinstated Behr's application and then granted it in January 2003. Since that time, the record and motion do not reflect any action on his part to construct the station, notwithstanding the clear requirement of the agency's rules that construction of stations of this type be completed within 12 months of the license grant. *See* p.3 above. Moreover, when the Bureau subsequently denied his waiver petition, he failed to seek reconsideration of that order or review by the Commission. The Commission's errors and delays here are regrettable, but those factors did not cause Behr's failure to comply with the agency's rules and provide no basis for reversal of the order at all, much less summary reversal.

CONCLUSION

For the reasons set forth above, the motion should be denied.

Respectfully submitted,

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March 4, 2015

Appendix

-END-

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

In the Matter of	)	
	)	
Lawrence Behr Application	)	File No. 0001332167
For Modification of 220-222 MHz	)	
Station WPWR222	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2014 **Released: December 17, 2014**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the Application for Review filed by Lawrence Behr (Behr) on June 19, 2009,[1] regarding the Wireless Telecommunications Bureau (Wireless Bureau) Mobility Division's May 27, 2009 *Order on Reconsideration* affirming that Behr was not entitled to a hearing under Section 1.110 of the Commission's rules when he rejected the grant of a modification application for his 220-222 MHz (220 MHz) license in Denver, Colorado.[2] For the reasons discussed below, we deny Behr's Application for Review.

II. BACKGROUND

2. The history of this proceeding intersects significantly with the Commission's establishment of the 220 MHz Service. In April 1991, the Commission adopted the *220 MHz Report and Order* establishing rules for Phase I licensing of nationwide and non-nationwide channels in the 220 MHz band.[3] The Commission determined that it would grant applications on a first-come, first-served basis, while mutually exclusive applications would be resolved through random selection (lottery) procedures.[4]

3. On May 1, 1991, the Commission began accepting nationwide and non-nationwide Phase I applications for 220 MHz licenses, and on that same day Behr submitted his application seeking site-based authority to operate in Denver, Colorado.[5] On May 24, 1991, after receiving over 59,000 applications, the former Private Radio Bureau imposed a freeze on the acceptance of all applications, including initial and modification applications, for the 220 MHz Service.[6] On October 19, 1992, the

[1] Application for Review, filed by Lawrence Behr (June 19, 2009) (Application for Review).

[2] In re Application of Lawrence Behr for a Modification to Station WPWR222, *Order on Reconsideration*, 24 FCC Rcd 7196 (WTB MD 2009) (*Order on Reconsideration*).

[3] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*). Of the 140 channel pairs set aside for non-nationwide (local) service, 100 were set aside for site-based trunked operations, and trunked channels were assigned in groups of five non-contiguous channels spaced 150 kHz (30 channels) apart. *Id*. at 2356, ¶ 3 and 2358, ¶¶ 15-16.

[4] *Id*. at 2364-65, ¶¶ 59, 62.

[5] FCC File No. 0983133, Application for Private Land Mobile and General Mobile Radio Services, filed by Lawrence Behr (May 1, 1991).

[6] Acceptance of 220-222 MHz Private Land Mobile Applications, *Order*, 6 FCC Rcd 3333, 3333, ¶ 3 (Private Radio Bureau 1991).

Private Radio Bureau's Land Mobile Branch conducted a lottery to resolve mutually exclusive non-nationwide applications.[7] Behr's application, which was mutually exclusive with other applications, was selected as the initial tentative selectee for Denver. The initial tentative selectees were announced on January 26, 1993,[8] and on January 28, 1993, the Land Mobile Branch returned Behr's application with a request for additional technical information.[9] Behr resubmitted the application with the requested information on March 23, 1993, within the required 60 days of the application return date.[10] The Land Mobile Branch subsequently misplaced Behr's amended application and, as a result, did not issue a Phase I 220 MHz license to Behr for operation in Denver.

4. On July 30, 1992, before the Commission conducted its lottery of non-nationwide Phase I 220 MHz mutually exclusive applications, certain aspects of the Commission's procedures for the filing and acceptance of 220 MHz applications were appealed to the United States Court of Appeals for the District of Columbia Circuit ("court" or "court of appeals").[11] In announcing the date for the non-nationwide lottery, the Commission stated that it would condition all grants of 220 MHz licenses upon the outcome of the appeal and that during the pendency of the appeal, licensees could construct facilities at their own risk.[12] The Commission further announced that, regardless of a licensee's initial authorization date, the construction deadline for all non-nationwide 220 MHz stations would be extended after final disposition of the case.[13] The case was not settled until March 1994, well after the Commission had granted all non-nationwide 220 MHz licenses. The appeal effectively placed those authorizations in doubt for nearly two years, and the uncertainty with respect to the finality of the Commission's grant of their licenses caused many licensees to refrain from constructing their stations. Following dismissal of the case on March 18, 1994,[14] the Commission extended the deadline for licensees to construct their stations and place them in operation on five separate occasions. The first three extensions resulted in a deadline of December 31, 1995.[15]

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[7] Commission Announces Lottery for Rank Ordering of 220-222 MHz Private Land Mobile "Local" Channels, *Public Notice*, 7 FCC Rcd 6378 (Sept. 10, 1992) (*Lottery Public Notice*).

[8] Commission Announces Tentative Selectees for 220-222 MHz Private Land Mobile "Local" Channels, *Public Notice,* DA 93-71 (rel. Jan. 26, 1993). From the more than 59,000 applications filed prior to the freeze, the Commission ultimately issued authorizations to approximately 3,800 licensees to operate non-nationwide 220 MHz stations. Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 220-222 MHz, PP Docket No. 93-253, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188, 195, ¶ 5 (1995) (*220 MHz Second Memorandum Opinion and Order*).

[9] Lawrence Behr, *Application Return Notice for the Private Land Mobile Radio Services*, File No. 983133-QT (Jan. 28, 1993). In particular, the return notice explained that "[m]obiles to be operating with the system need to be shown on the application" and directed Behr to complete "items 2 thru 5, 12 and 13" on the application. *Id*. at 1.

[10] *See* Former 47 C.F.R. § 90.141 (1993) (providing that "Any application which has been returned to the applicant for correction will be processed in original order of receipt if it is resubmitted and received by the Commission's offices in Gettysburg, PA within 60 days from the date on which it was returned to the applicant. Otherwise it will be treated as a new application and will require an additional fee as set forth in Part 1, Subpart G of this chapter").

[11] *Evans v. Federal Communications Commission*, No. 92-1317 (D.C. Cir. filed July 30, 1992).

[12] *Lottery Public Notice*, 7 FCC Rcd at 6378.

[13] *Id*.

[14] *See Evans v. Federal Communications Commission*, Case No. 92-1317 (D.C. Cir. rel. Mar. 18, 1994) (*per curiam*) (granting the motion for voluntary dismissal).

[15] On March 30, 1994, the Private Radio Bureau extended the construction deadline for stations authorized on or before the release date of its order, to December 2, 1994. Amendment of Part 90 of the Commission's Rules to

(continued….)

5. Shortly after the appeal was dismissed, the Land Mobile Branch conducted the second round of processing non-nationwide applications after finding that, for various reasons unrelated to the present proceeding, the remaining initial tentative selectee applications could not be granted. On September 6, 1994, unaware of Behr's timely filed amended application, the Land Mobile Branch granted a Phase I non-nationwide license in Denver to the second tentative selectee, Gary Petrucci (Petrucci), under call sign WPFQ335.[16] On July 21, 1995, after completing the processing of all non-nationwide Phase I 220 MHz applications, the Land Mobile Branch issued its *220 MHz Disposition Order*, in which the Wireless Bureau stated that it had acted upon all Phase I non-nationwide applications submitted prior to the freeze and granted all applications for which spectrum was available.[17] The *220 MHz Disposition Order* also stated that all remaining Phase I non-nationwide applications were dismissed and would not be returned.[18] Later that year, the Wireless Bureau released another order resulting in a fourth extension of the construction deadline for Phase I non-nationwide 220 MHz licensees to February 2, 1996.[19]

6. While the Commission extended the construction deadline, it recognized that because several years had passed since 220 MHz licensees had filed their applications for which licenses were granted, many licensees found that they were unable to construct at their authorized locations. In addition, as a consequence of the freeze on filing applications, licensees wishing to relocate their authorized locations through license modification were unable to do so.[20] To address these concerns, on January 26, 1996, the Commission issued its *220 MHz Second Report and Order* adopting a one-time procedure to allow Phase I non-nationwide licensees to relocate their single base stations within defined maximum distances or to change the effective radiated power level or height above average terrain of their base station, as long as doing so did not expand the station's authorized 38 dBu service contour.[21]

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Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 9 FCC Rcd 1739 (PRB 1994). In the *CMRS Third Report and Order,* the Commission, after adopting a 12-month construction requirement for Commercial Mobile Radio Service licensees, also extended the construction deadline for non-nationwide 220 MHz licensees an additional four months to April 4, 1995, affording those licensees 12 months in which to construct their stations. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8077, ¶ 184 (1994); *see* Private Radio Bureau Extends Time to Construct Non-Nationwide 220 MHz Stations Through April 4, 1995 and Lifts Freeze for Applications to Modify Site Locations, *Public Notice*, 10 FCC Rcd 744 (PRB 1994) (granting a four-month extension from December 2, 1994, to April 4, 1995, to construct non-nationwide 220 MHz systems with original license grant dates on or before March 30, 1994). On February 17, 1995, the Wireless Bureau released an order extending the deadline to December 31, 1995. Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 10 FCC Rcd 3356 (WTB 1995).

[16] Petrucci's application was assigned File No. 0962977.

[17] In the Matter of Disposition of Non-Nationwide 220-222 MHz Applications, *Order*, 10 FCC Rcd 7747 (WTB LMB 1995) (*220 MHz Disposition Order*).

[18] *Id*.

[19] On December 15, 1995, the Wireless Bureau released an order providing for an extension of the construction deadline for non-nationwide 220 MHz licensees, contingent upon closure of the Commission as a result of any furlough of Federal Government employees that might occur. *See* Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Order*, 11 FCC Rcd 9710 (WTB 1995). The ensuing 23-day Federal furlough resulted in an extension of the construction deadline to February 2, 1996, pursuant to the formula established in the Bureau order.

[20] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 835, 836, ¶ 1 (1995).

[21] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the
(continued….)

The Commission then extended the February 2, 1996 construction deadline to give licensees sufficient time to decide whether they wanted to relocate their base stations under the newly adopted modification procedures.[22] In particular, the Commission extended the deadline from February 2, 1996, to March 11, 1996, for all non-nationwide 220 MHz licensees that elected to construct their base stations at their originally authorized locations, and to August 15, 1996, for all licensees granted authority to modify their licenses to relocate their base stations.[23]

7. On August 12, 1996, nearly 13 months after the Land Mobile Branch announced it had acted on all Phase I non-nationwide applications, Behr's counsel requested information on the status of Behr's Denver application. The Land Mobile Branch responded by letter dated October 18, 1996, indicating that Behr's application had not been resubmitted within the required 60-day period, and therefore was no longer pending.[24] The letter further stated that the *220 MHz Disposition Order* released on July 21, 1995, had notified applicants that the Private Radio Bureau had completed processing all applications received prior to the imposition of the freeze.[25] On October 25, 1996, Behr sought reconsideration of the October 18, 1996 letter, providing a date-stamped copy evidencing timely resubmission of his amended Denver application.[26]

8. On February 19, 1997, while Behr's petition seeking reconsideration of the dismissal of his Denver application remained pending, the Commission adopted the *220 MHz Third Report and Order* establishing rules for the Phase II licensing of nationwide and non-nationwide channels in the 220 MHz band on a geographic area basis.[27] In relevant part, the Commission assigned non-nationwide licenses in 175 geographic areas defined as Economic Areas (EA licenses) and Regional Economic Area Groupings (Regional licenses).[28] As codified in Section 90.767 of our rules, EA and Regional licensees must provide coverage to at least one-third of the population of their EA or Region within five years of initial authorization, and at least two-thirds of the population of their EA or Region within 10 years of initial

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Private Land Mobile Radio Services, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 11 FCC Rcd 3668 (1996) (*220 MHz Second Report and Order*), *modified*, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 14569, 14616, ¶ 97. While Phase I licensees were allowed only one base station, they were also permitted to add "fill-in" transmitters within their 38 dBu service contour without prior authorization from the Commission to fill in "dead spots" in coverage or to reconfigure their systems to increase capacity within their service area, so long as signals from the transmitters did not expand the station's 38 dBu service contour. *220 MHz Second Report and Order*, 11 FCC Rcd at 3670-71, ¶¶ 9-11. A licensee, however, was required to notify the Commission within 30 days of the completion of any changes through a minor modification of its license. These rules allowing modification are codified under Sections 90.745, 90.751, 90.753, and 90.757 of our rules. 47 C.F.R. §§ 90.745, 90.751, 90.753, 90.757.

[22] *220 MHz Second Report and Order*, 11 FCC Rcd at 3674, ¶ 21.

[23] *Id*.

[24] Letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch, to Donald J. Evans, Esq., Counsel for Lawrence Behr (Oct. 18, 1996).

[25] *Id*.

[26] Letter from Donald J. Evans, Counsel to Lawrence Behr, to Michael Regiec, Federal Communications Commission (Oct. 25, 1996).

[27] Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997) (*220 MHz Third Report and Order*). The Commission made these channels available to all eligible applicants and, given a recent statutory mandate, stated that mutually exclusive applications would be resolved through competitive bidding rather than random selection. *Id*. at 10950, ¶ 7, 11001-02, ¶ 37. *See also* 47 U.S.C. § 309(i)(5), (j).

[28] *Id*. at 10949, ¶ 7.

authorization.[29] Licensees may, in the alternative, provide substantial service to their licensed areas at the appropriate five- or 10-year benchmarks.[30]

9. On September 19, 1997, the Commission granted assignment of the Phase I non-nationwide license for Station WPFQ335 in Denver from the second tentative selectee, Petrucci, to Roamer One. On October 10, 1997, the former Commercial Wireless Division's (CWD) Licensing and Technical Analysis Branch issued a letter to Behr denying his petition for reconsideration of the dismissal of his Denver application as filed in an untimely manner.[31] The letter explained that the *220 MHz Disposition Order* released on July 21, 1995, disposed of Behr's Denver application, not the Land Mobile Branch's letter of October 18, 1996.[32] On November 10, 1997, Behr filed an Application for Review of the denial of his petition for reconsideration.[33] In late 1998, while Behr's 1997 Application for Review was pending, the Commission auctioned numerous 220 MHz EA geographic licenses in Auction 18, including the Denver EA license, on the same frequencies Behr sought in his Phase I application. Net Radio was the high bidder for the Denver market in Auction 18, and became the Phase II geographic area licensee for that channel block. On January 13, 2000, several months after the Commission held its 220 MHz Auction 18, Roamer One assigned the Phase I license for Station WPFQ335 to Net Radio.

10. Upon review of Commission records regarding the date on which Behr filed his amended Denver application, CWD determined that Behr had filed the application in a timely manner, and that it should have been processed. On September 26, 2002, after settlement negotiations with Behr failed, CWD adopted an order to correct, on its own motion, the administrative error made in misplacing Behr's application and granting Petrucci's application for Station WPFQ335.[34] In particular, the *CWD Order* set aside the grant of the authorization for Station WPFQ335 licensed, at that time, to Net Radio, and returned Behr's application to pending status to be processed.[35] Importantly, in accordance with Section 90.725(f), the *CWD Order* specifically warned Behr that if his application were granted and he did not construct the station in a timely manner, any license granted to Behr would automatically cancel and the spectrum associated with Behr's license would revert to Net Radio, the geographic area licensee.[36] Finally, having reinstated his application, the *CWD Order* dismissed Behr's 1997 Application for Review as moot.[37]

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[29] *Id*. at 11020, ¶ 163; 47 C.F.R. § 90.767(a).

[30] *Id*. The Commission also determined that failure to meet the construction benchmarks results in automatic cancellation of the licensee's entire EA or Regional license. *Id*. at 11021, ¶ 164; 47 C.F.R. § 90.767(c). We also note that the Commission permits EA and Regional licensees to operate any number of base stations anywhere within their authorized geographic areas, provided that their transmissions do not exceed a predicted field strength of 38 dBuV/m at their border, and provided that they protect the base stations of Phase I licensees in accordance with the existing co-channel separation criteria for 220 MHz stations. *220 MHz Third Report and Order*, 12 FCC Rcd at 10950, ¶ 7, 10982, ¶ 80, 11007-08, ¶ 138, and 11031, ¶ 182.

[31] Letter from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, to Donald J. Evans, Esq., Counsel to Lawrence Behr (Oct. 10, 1997).

[32] *Id*.

[33] Application for Review, filed by Lawrence Behr (Nov. 10, 1997) (1997 Application for Review).

[34] In the Matter of Lawrence Behr, Application to Operate a Phase I 220 MHz License in Denver, Colorado; Net Radio Communications Group, LLC, Authorization for 220 MHz Station Call Sign WPFQ335, Denver, Colorado, *Order,* 17 FCC Rcd 19025 (WTB CWD 2002) (*CWD Order*).

[35] *Id*. at 19027, ¶¶ 6-7. The *CWD Order* also granted Net Radio special temporary authority until the earlier of 180 days from the date of the order; or such time as Behr provided Net Radio written notification that he was ready to commence operations under an authorization granted pursuant to the order. *Id*. at 19027-28, ¶ 8.

[36] *Id*. at 19028, ¶ 8 n.15.

[37] *Id*. at 19028, ¶ 8.

11. In accordance with the *CWD Order*, Behr's application was processed and granted on January 8, 2003, under Call Sign WPWR222, and authorized 220 MHz Phase I site-based, trunked five-channel operation in Denver.[38] On June 2, 2003, Behr filed the above-captioned modification application seeking authority to make certain administrative and technical changes to the license, specifically: update the contact information for the license, provide answers regarding foreign ownership, and change the station class from FB6 (for-profit private carrier) to FB6C (for-profit interconnected service). Behr also attached a request for a waiver of the construction requirements for Phase I non-nationwide licenses, which required station construction and operation within 12 months of grant of the application, arguing that he should be afforded the full 10 years to construct his site-based station, similar to a Phase II non-nationwide geographic area licensee.[39] CWD's Technical Analysis Branch denied the waiver request on November 12, 2003,[40] and granted the modification application on November 17, 2003.

12. On December 17, 2003, Behr submitted a letter rejecting the grant of the modification application and requesting a hearing pursuant to Section 1.110 of our rules.[41] Section 1.110 of our rules provides as follows:

> Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, …, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.[42]

On January 31, 2007, the Mobility Division dismissed the hearing request as procedurally defective in a *Letter Order*.[43] In particular, citing *Buckley-Jaeger Broadcasting Corporation of California v. FCC*,[44] the *Letter Order* found that because the Wireless Bureau had granted Behr's application in full, Section 1.110 did not apply, and that Behr was effectively seeking a hearing on the denial of his waiver request.[45] The *Letter Order* further explained that either a petition for reconsideration or application for review were the appropriate vehicles for challenging denial of the waiver request, and Behr did not seek relief using either vehicle by the required filing deadline of December 12, 2003.[46]

13. On February 13, 2007, Behr filed a petition for reconsideration of the *Letter Order*[47] claiming that the Mobility Division erred in dismissing his Section 1.110 petition because it was the

[38] We note that Behr's license for Station WPWR222 authorized trunked operations on five non-contiguous channels: 220/221.0875, 220/221.2375, 220/221.3875, 220/221.5375, and 220/221.6875 MHz.

[39] Petition for Waiver of Section 90.725 of the Commission's Rules, filed as Attachment to Behr License Modification Application, FCC File No. 0001332167 (filed June 2, 2003) (Waiver Request).

[40] Letter from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Branch, Commercial Wireless Division, to Donald J. Evans, Esq., Counsel to Lawrence Behr (Nov. 12, 2003) (*Waiver Denial Letter*).

[41] Letter from Donald J. Evans, Counsel to Lawrence Behr, to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 17, 2003). Behr did not file a petition for reconsideration of the denial of his waiver request under rule Section 1.106 or seek Commission review under rule Section 1.115.

[42] 47 C.F.R. § 1.110.

[43] Donald J. Evans, Esq., *Letter*, 22 FCC Rcd 1798 (WTB MD 2007) (*Letter Order*).

[44] 397 F.2d 651 (D.C. Cir. 1968) (*Buckley-Jaeger v. FCC*).

[45] *Letter Order*, 22 FCC Rcd at 1798.

[46] *Id.* at 1799.

[47] Petition for Reconsideration, filed by Lawrence Behr (Feb. 13, 2007) (2007 Petition).

action of denying the waiver request while granting the application that "left Behr with no choice but to reject the grant and request a hearing."[48] Asserting that the "application sought no modification to the license other than the change in the build-out deadline," Behr concluded that he had to reject the grant as made, or "forfeit[] his right to contest the partial grant because he would have been deemed by operation of the rule to have accepted it."[49]

14. On May 27, 2009, the Mobility Division issued an *Order on Reconsideration* denying Behr's petition and affirming the *Letter Order*. The Mobility Division concluded that Behr's application seeking modification of his license for Station WPWR222 was filed and granted independent of Behr's waiver request.[50] The Mobility Division also found Behr's recitation of the facts to be inaccurate, specifically rejecting Behr's claim that the application sought no modification other than the change in the build-out deadline sought in the accompanying waiver request. The Mobility Division stated that in fact Behr had requested several modifications in his application, including (1) amending the contact information for the license; (2) answering questions concerning foreign ownership; and (3) changing the station class from private carrier to interconnected service.[51]

15. Reiterating that *Buckley-Jaeger v. FCC* was controlling precedent,[52] the Mobility Division concluded that "the instant matter concerns a fully-granted modification application and a separately-attached request for waiver of the Commission's construction requirements that was denied."[53] The Division further endorsed its prior determination that under *Buckley-Jaeger v. FCC*, a challenge to the denial of the waiver request must be made through the filing of a petition for reconsideration or an application for review, pursuant to either Section 1.106 or Section 1.115 of the Commission's rules, rather than through a request for a hearing under Section 1.110.[54] In response, Behr filed the Application for Review now before us.

III. DISCUSSION

16. Behr seeks review of the Mobility Division's *Order on Reconsideration*, claiming that his case involves two issues: whether the grant of Behr's modification application and denial of a request for waiver filed along with the application constitutes a "partial grant" under Section 1.110 of the Commission's rules; and whether the Wireless Bureau erred by failing to grant Behr's 2003 request for waiver of the Phase I 220 MHz non-nationwide construction rule and affording him the same five- and 10-year construction benchmarks that apply to Phase II non-nationwide geographic area licensees.[55] As discussed below, we affirm the Mobility Division's *Order on Reconsideration*, and deny Behr's pending Application for Review.

A. Section 1.110 of the Commission's Rules

17. The sole issue in this appeal with regard to Section 1.110 is whether the grant of each modification of license requested in Behr's 2003 application, coupled with the denial of an accompanying request for waiver of a Commission rule, amounts to a partial grant of the license modification application and thus implicates the requirements of Section 1.110. Behr continues to argue that his modification application and waiver request constitute one application, and that, as a result, the application was only

[48] 2007 Petition at 1.

[49] *Id.* at 1-2.

[50] *Order on Reconsideration*, 24 FCC Rcd at 7198, ¶ 5.

[51] *Id*. at 7197-98, ¶ 5.

[52] *Id*. at 7198, ¶ 6.

[53] *Id*.

[54] *Id*. at 7199, ¶ 8 (citing 47 C.F.R. §§ 1.106, 1.115).

[55] Application for Review at 1.

"partially granted" when the Mobility Division denied his waiver request and later granted his application. Behr contends that the "waiver request was an integral part of the modification application" – "the main action [Behr] was requesting," – and that if "he accepted the grant as made, he would forfeit any right under Section 1.110 to challenge the Bureau's denial" of the request to waive the Phase I construction requirements.[56] Behr concludes that "Section 1.110 therefore provided the only avenue for Behr to follow."[57]

18. We disagree. Initially, we affirm the Mobility Division's finding that *Buckley-Jaeger v. FCC* is on point. In that case, the court affirmed an order in which the Commission denied a licensee's request for hearing under Section 1.110 after the Commission had granted the licensee's renewal application but not the accompanying request for exemption from a Commission rule.[58] The owner of broadcast stations KKHI-AM and KKHI-FM submitted an application to renew its license for its AM station and included along with the application a request for exemption of the Commission's rule prohibiting 100 percent duplication of program formats on both stations so that the owner could broadcast the same programs simultaneously on the AM and FM channels.[59] Staff granted the renewal application on November 5, 1965, without prejudice to whatever action the Commission might take on the licensee's pending exemption request.[60] The Commission later concluded that the licensee's request for exemption was not warranted.[61] Within 30 days of the grant of the renewal application, but prior to the Commission acting on the request for exemption, the licensee filed a letter objecting to the grant.[62] Terming the grant made as partial, the licensee demanded a hearing under Section 1.110 of the Commission's rules.

19. The Commission, however, found no merit in the contention that the licensee – by rejecting grant of its renewal application without grant of the exemption and invoking Section 1.110 – was entitled to an evidentiary hearing on the question of whether continued duplication would serve the public interest.[63] The Commission further explained that "[it] was not necessary to consider [KKHI's exemption] request in connection with renewal."[64] The court of appeals, in affirming the Commission's decision, noted that the Commission aptly phrased its answer: "This amounts to a contention that a licensee, by requesting a waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance."[65]

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[56] *Id*. at 4-5.

[57] *Id*. at 5.

[58] In the Matter of Requests for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission's Rules (AM-FM Program Duplication), *Memorandum Opinion and Order*, 8 F.C.C.2d 1 (1967) (*Program Duplication Memorandum Opinion and Order*), *aff'd in relevant part*, *Buckley-Jaeger Broadcasting Corporation of California v. FCC*, 397 F.2d 651 (D.C. Cir. 1968).

[59] *Program Duplication Memorandum Opinion and Order*, 8 F.C.C.2d at 2, ¶ 5. Former Section 73.242 of the Commission's rules provided, in relevant part, that "[a]fter October 15, 1965, licensees of FM stations in cities of over 100,000 population … shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area." Former 47 C.F.R. § 73.242 (1967). The rule section also outlines requirements for a temporary exemption for the rule. *Id*. § 73.242(c).

[60] *Program Duplication Memorandum Opinion and Order*, 8 F.C.C.2d at 2, ¶ 5.

[61] *Id*. at 4, ¶ 9.

[62] *Id*. at 2, ¶ 5. The licensee, in its letter objecting to the grant, also claimed that isolation of the exemption request, and later denial without hearing, would deprive it of its right to a hearing under Section 309 of the Communications Act of 1934, as amended (Communications Act). *Id*.

[63] *Id*. at 4, ¶ 10.

[64] *Id*.

[65] *Buckley-Jaeger v. FCC*, 397 F.2d at 656 (citing *Program Duplication Memorandum Opinion and Order*,

(continued….)

The court agreed that "[i]t is clear that Section 1.110 of the Commission's rules has no application here," explaining further that "[t]he rule concerns situations where the applicant receives less than a full authorization," but "here Appellant received the full authorization to which it was entitled under the statute and rules."[66] The court concluded that "[i]n these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory."[67]

20. In his 2007 Petition, Behr argued that *Buckley-Jaeger v. FCC* did not apply because "the entire point of the application was to seek a modification of the build out schedule; there was *nothing else* applied for."[68] Behr continued by asserting that "[t]he Commission literally denied the entire request for relief embodied in the application, yet now pronounces the application 'granted in full.'"[69] In the instant Application for Review, however, Behr abandons his prior insistence that the request for waiver contained the *only* modification to his license that he requested. Instead, he describes the request for waiver as the "main action" that he requested,[70] and acknowledges that in fact the license application itself requested several license modifications, each of which was granted.[71]

21. Consistent with this acknowledgement, Behr also abandons his earlier attempts to distinguish his situation from the nearly identical facts in *Buckley-Jaeger v. FCC*, making no mention of the case at all in his Application for Review. Instead, Behr argues that a licensee in his position – which he continues to characterize as that of one who has received a "partial grant," notwithstanding his recognition that the Wireless Bureau granted all of the changes he requested in his license modification application[72] – has no procedural option except to reject the grant of his application under Section 1.110 and request a hearing.[73] We disagree with this reading of our rules and with Behr's characterization of the case law he cites to support his argument.

22. We first reject Behr's assertion that grant of his modification application, coupled with the denial of his waiver request, constitutes a partial grant of the modification application and thus entitles him to a Section 1.110 hearing. We reject this assertion because we see no basis for concluding that Behr's request to modify his license to change various of its factual elements – *i.e.*, the license's listed contact person, certain foreign ownership information, and the station class of the license – and his request for waiver of the construction rule, constitute anything other than two independent requests, where the denial of one (the waiver request) is entirely unconnected to the consideration of the merits of

(Continued from previous page)
8 F.C.C.2d at 4, ¶ 10)

[66] *Buckley-Jaeger v. FCC*, 397 F.2d at 656.

[67] *Id*.

[68] 2007 Petition at 3 (emphasis in original).

[69] *Id*. In elaborating on this assertion, Behr continued to overlook the terms of the license that his application had in fact requested the Commission to modify: "Looked at another way, the application as granted effected no modification whatsoever to the original license since the Commission denied the only change which had been requested. How can a modification application be deemed to be 'granted in full' if no actual modification of any kind was authorized by the grant? In other words, assuming Buckley-Jaeger remains good law, its application to the present situation is undercut by the critical distinguishing fact that Behr's application was not 'granted in full' in any logical sense. To the contrary, it was actually denied in full in every logical sense but one: the Commission granted it." *Id*.

[70] Application for Review at 5 (acknowledging that the Mobility Division granted "the portions of [his] application that added a contact representative and allowed interconnected service").

[71] *Id*. at 4.

[72] *See, e.g.*, *id*. at 6 (describing the Mobility Division's "partial denial and partial grant of [his] application").

[73] *See id*. (stating that "[b]y rejecting Behr's request to proceed under the provisions of Section 1.110, the Bureau effectively barred Behr from having any right of appeal whatsoever").

the other. Certainly, we did not need to act in any particular way on the waiver request (whether to grant or deny it, in whole or in part, or simply to defer acting on it) to consider whether to approve the requested modification of the license elements that Behr identified for change in his modification application. Nor did Behr condition the license modifications he requested on grant of a waiver of the construction rule. Indeed, we would have no logical reason to assume that action on the waiver request would have any bearing on Behr's interest in keeping his license up-to-date on the designated contact person, foreign ownership information, and the type of service he planned to offer under the license. In short, the only link between the license modification application and the waiver request was the incidental inclusion of Behr's request for waiver of the construction rule as an attachment to the license modification form. Under these circumstances, the full grant of all the modifications of license requested in the application does not constitute the partial or conditional grant of an application that would provide any hearing rights under Section 1.110, or otherwise trigger the operation of that rule, simply because the Commission did not grant a rule waiver request that the applicant associated with the application.

23. The Commission's action upheld by the court in *Buckley-Jaeger v. FCC*, reflects this approach, insofar as none of the relevant considerations for acting on the renewal application in that case depended on the Commission's consideration of or action on the applicant's request for an exemption from the program duplication rule. Grant of the renewal application simply extended for an additional period of time the terms and conditions of the authorization that the licensee had accepted when its application was initially granted. Because a determination of whether the licensee in that case was entitled to an exemption of the program duplication rule had nothing directly to do with any element of the licensee's request that its license be renewed, and because the Commission could grant a full license renewal without placing any conditions on the license or deviating from the renewed license that the licensee had requested, the Commission correctly treated the renewal grant as a full grant of the renewal application, not as a partial application grant that could entitle the licensee to a hearing on the unconnected issue of whether the licensee was entitled to an exemption from the program duplication rule.

24. In the present case, grant of Behr's modification application approved his request to make certain changes in the factual underpinnings of his license – all within the rules – by allowing him to add a contact person to his license, provide answers regarding foreign ownership, and change the licensed station class so that he could provide interconnected service, all while maintaining the other license terms and conditions he accepted upon initial grant. Whether the Commission would grant a waiver of the rules to give Behr the 10-year construction period afforded Phase II 220 MHz geographically licensed systems was not contingent on or otherwise related to any of these changes in the elements of Behr's license. As in *Buckley-Jaeger v. FCC*, Behr's filing contained two separate, independent types of request – one type constituted the application to correct and modify, within the parameters of the current rules, the administrative and technical aspects of the license, while the other type sought relief apart from the specific terms of the license (*i.e.*, to obtain waiver of the build-out schedule set out in the Commission's rules).

25. Given our rejection of Behr's argument that he received a partial grant, Behr offers no convincing explanation why he could not have filed an application for review or a petition for reconsideration of the Mobility Division's denial of his waiver request instead of, or in addition to, his Section 1.110 letter rejecting the grant of his license application. Indeed, in light of *Buckley-Jaeger v. FCC*, Behr should have realized that Section 1.110 may not apply and that he should protect his options by filing an application for review or petition for reconsideration in addition to his Section 1.110 filing. The filing of an application for review or petition for reconsideration would not impair his opportunities under Section 1.110 in the event that the Commission agreed that Section 1.110 applied to Behr's case, nor would the Section 1.110 filing undercut his application for review or petition for reconsideration if Section 1.110 proved inapplicable.

26. We also find inapposite the cases Behr cites to support his contention that his modification application was not granted in full so that Section 1.110 provided the only procedural avenue for him to follow. Citing *Murray Hill Broadcasting Company*,[74] Behr points out that the Commission noted that "an applicant may not, on the one hand, accept a Commission grant and, on the other hand, seek an administrative appeal of the authorization."[75] Behr also quotes the court in *Central Television, Inc. v. FCC*,[76] as saying that "[a]cceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance."[77] Behr further contends that "[t]o underscore the importance of this point, the court in *Mobile Communications v. FCC*,[78] held that an applicant would normally be barred from seeking judicial review of the Commission's actions if it failed to follow the mandatory administrative exhaustion requirement of rejecting the grant as made."[79] Finally, Behr asserts that the court in *Tribune Company v. FCC*[80] "insisted that, absent futility, an applicant was required to implement the procedures of Section 1.110 when the Commission granted its assignment application but denied the associated cross-ownership waiver."[81]

27. While Behr accurately quotes statements from the first two cases, *Central Television, Inc. v. FCC* and *Murray Hill Broadcasting Company*, those facts are easily distinguishable from the Behr fact pattern. Behr's modification application was granted without condition. Both *Central Television, Inc. v. FCC* and *Murray Hill Broadcasting Company*, however, involve applications that were granted contingent only on each applicant's agreement to specific conditions. In both cases, the applicants first accepted the conditional grants, and later attempted to appeal the conditions attached to the grants as made. The appeals were rejected because the applicants did not comply with the procedural requirements of Section 1.110.

28. In *Central Television, Inc. v. FCC*, the Commission granted an application to assign a broadcast construction permit subject to the condition that no settlement payments were made in excess of $100,000 called for in the assignment contract.[82] Nearly two months later, the parties completed the assignment and the assignor received the maximum compensation allowed under the grant.[83] As the court described, having secured this benefit, authorized by a Commission ruling that clearly conditioned the assignment on accepting no additional compensation, the assignor appeals "now asserting its right to additional compensation."[84] Finding this position untenable, the court dismissed the appeal for lack of jurisdiction because the parties to the assignment failed to comply with Section 1.110 of the Commission's rules for challenging a conditional grant.[85] The court further explained that it had

[74] In re Application of Murray Hill Broadcasting Company for a Construction Permit for Minor Changes in Station WQMG-FM, Greensboro, North Carolina, *Memorandum Opinion and Order*, 8 FCC Rcd 325 (1993) (*Murray Hill Broadcasting Company*).

[75] 2007 Petition at 2 (quoting *Murray Hill Broadcasting Company*, 8 FCC Rcd at 327, ¶ 19).

[76] *Central Television, Inc. and WTWV, Inc.* 834 F.2d 186, (D.C. Cir. 1987) (*Central Television, Inc. v. FCC*).

[77] 2007 Petition at 2 (quoting *Central Television, Inc. v. FCC*, 834 F.2d at 190).

[78] *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (*Mobile Communications v. FCC*).

[79] 2007 Petition at 2.

[80] *Tribune Company v. FCC*, 133 F.3d 61 (D.C. Cir. 1998).

[81] Application for Review at 6.

[82] *Central Television, Inc. v.* FCC, 834 F.2d at 189.

[83] *Id*.

[84] *Id*. at 190. The additional compensation involved consultancy payments in the amount of $475,000 that staff found violated Commission rules. *Id*. at 189.

[85] *Id*. at 191.

previously "upheld the FCC's authority to require applicants either to accept a conditional grant or reject it and make a timely request for a full hearing. Section 1.110 does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions."[86]

29. In *Murray Hill Broadcasting Company*, the licensee filed an application to relocate a short-spaced broadcast station and to increase the authorized antenna height and power limits.[87] After the application was dismissed because the proposed power level exceeded the maximum allowed, the licensee filed a petition seeking reconsideration of the dismissal, arguing that staff had erred and that, in any event, a waiver of the base station separation requirements was justified. If staff once again rejected its original proposal, the licensee proffered an amendment to its application proposing a power level that would comply with Commission rules.[88] Staff granted reconsideration to the extent it approved the licensee's amended proposal to operate at the lower power level.[89] Even though the licensee filed an application for review objecting to the conditions of the grant, it made the authorized modifications to its station, filed an application for a covering license, which was granted, and began operating at the lower power level in accordance with its amended proposal.[90]

30. The Commission denied the application for review substantively, finding the staff action granting reconsideration to the extent that it approved the licensee's amended power level proposal was proper.[91] The Commission also concluded that dismissal of the initial application was proper and that waiver of its rules to allow the power level proposed in the licensee's initial application was not justified.[92] The Commission found, as an independent procedural basis for rejecting the application for review, that the licensee failed to challenge the terms of the conditional grant of the amended application according to the procedure prescribed in Section 1.110.[93] Behr, in his 2007 Petition, asserted that *Murray Hill Broadcasting Company* "stands unequivocally for the proposition that an applicant may not follow the procedure suggested in the [*Order on Reconsideration*] (*i.e.* seeking reconsideration or filing an application for review) when an application including a waiver has been granted without the waiver."[94] The application that was granted in *Murray Hill Broadcasting Company*, however, did not require waiver of the power level requirements.

31. Again, in *Murray Hill Broadcasting Company*, grant of the amended application was contingent on whether the applicant agreed to the lower power level proposed in its amended application as an alternative to the level originally proposed in its initial application. The Commission found that Section 1.110 was triggered because the staff granted the licensee's amended proposal to operate at a lower power lever, a term to which the licensee objected. As the Mobility Division stated in its *Order on Reconsideration*, contrary to Behr's assertion, the Commission's denial of the request for waiver of the power level proposed in the licensee's initial application in *Murray Hill Broadcasting Company* had no bearing on the licensee's procedural options with regard to its amended application in that case.[95]

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[86] *Id*. at 190.

[87] *Murray Hill Broadcasting Company*, 8 FCC Rcd at 325, ¶ 4.

[88] *Id*. at 325, ¶ 6.

[89] *Id*. at 326, ¶ 7.

[90] *Id*.

[91] *Id*. at 327, ¶ 20.

[92] *Id*.

[93] *Id*. at 327, ¶ 19.

[94] 2007 Petition at 2.

[95] *Order on Reconsideration*, 24 FCC Rcd at 7199, ¶ 7.

32. Behr is apparently attempting to avoid the circumstances of these cases where the applicants clearly accepted the conditions granted and only later sought appeal of those very conditions. Unlike Behr's modification application, however, in neither of these cases could the applications have been granted absent agreement to the conditions associated with the grants. In *Central Television, Inc. v. FCC*, grant of the assignment application was allowed only upon agreement to the conditions regarding compensation under an assignment contract. In *Murray Hill Broadcasting Company*, grant of the modification application depended on acceptance of the lower power level proposed in the licensee's amended application.

33. In this case, in granting Behr's modification application without condition, Commission staff modified Behr's license to the precise extent that Behr had requested in his application as originally filed. Staff authorized the amended contact information, accepted the answers to the foreign ownership questions, and authorized interconnected service, all without conditions. Behr did not receive less than the modified license for which he had applied.

34. Finally, *Mobile Communications v. FCC*, and *Tribune Company v. FCC*, also cases that involve conditional grants of applications, address when court review is appropriate under Section 402(b) of the Communications Act. Section 402(b) permits, in relevant part, appeals from Commission orders to the court of appeals regarding an application for a construction permit or an assignment application, where the application is denied by the Commission.[96] In both cases, the initial issue was whether the court had jurisdiction where the Commission had granted the applications at issue, albeit contingent on certain "unrequested" conditions. The court decided that when the Commission grants an application subject to some condition that the applicant did not request, the application has been denied for purposes of judicial review under Section 402(b).[97]

35. The court, however, rejected Tribune Company's argument that Section 1.110 was inapplicable because, according to Tribune, even though the Commission had granted its application with conditions, its application had, in effect, been denied. The court explained that Section 1.110, unlike Section 402(b), is written to specifically deal with a conditional grant and "it could not be clearer that it covers the present case."[98] The court further stated that just because a partial grant is a denial for purposes of Section 402(b)(3) does not mean that the same reasoning applies to Section 1.110.[99] The

[96] 47 U.S.C. §§ 402(b)(1) and (3).

[97] *Tribune Company v.* FCC, 133 F.3d at 66 (citing *Mobile Communications v FCC*, 77 F.3d at 1404). In *Mobile Communications v. FCC*, Mobile Telecommunications Technologies Corp. (Mtel) sought a finder's preference license that would have been awarded without charge under then-applicable law. 77 F.3d at 1403. Before the Commission ruled on Mtel's application, Congress amended the Communications Act to require payment for licenses, so the Commission imposed a charge on Mtel's license. *Id*. The court of appeals determined that Mtel's application was properly viewed as being for a free license rather than a license subject to any condition. By awarding a license subject to a condition of payment, the court found the Commission in effect denied that application for purposes of Section 402(b)(1). *Id*. at 1404.

In *Tribune Company v. FCC*, Tribune Company sought to acquire control of a broadcast TV station license where the contour of the TV station encompassed the entire community in which the newspaper was published in violation of the Commission's daily newspaper cross-ownership rules. 133 F.3d at 64. The Commission granted the assignment application subject to a condition that Tribune divest itself of one of its media outlets within one year of the grant. *Id*. The court, in reviewing its statutory jurisdiction over the proceeding, concluded that Tribune's application was denied for purposes of Section 402(b)(3). *Id*. at 66.

[98] *Tribune Company v.* FCC, 133 F.3d at 66.

[99] *Id*. Behr's assertion in his Application for Review that *Tribune Company v. FCC* involved an assignment application where the associated request for waiver was denied, *see supra* text accompanying note 81, is an inaccurate reading of the facts of the case. The application at issue did not include a request for waiver, but was granted with conditions. Only after Tribune Company accepted the conditional grant did it seek waiver of the Commission's daily newspaper cross-ownership rules. In particular, in that case, Tribune Company, which

(continued….)

court further stated in both cases that a party whose license application has been denied by approval subject to conditions (other than ones requested by the applicant) must normally comply with Section 1.110.[100] While the court in these cases discusses review under Section 402(b) of the Communications Act and review under Section 1.110 of our rules, each case again involves an application that could be granted contingent only on the applicant's agreeing to certain conditions, *i.e.* terms to which the applicants objected.

36. Finally, Section 1.925(b) of our rules provides that "[r]equests for waiver of rules associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605."[101] Section 1.925(c)(ii) provides that "[d]enial 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."[102] Citing Section 1.925(b), Behr argues that he was required to submit his waiver request along with an application.[103] Behr also cites Section 1.925(c)(ii) of our rules to suggest that the rule "seemed to require the application to be denied – which would have permitted a straightforward appeal of the Bureau's action."[104]

37. First, Section 1.925(b) is a procedural requirement that does not relieve a filer of its obligation to meet deadlines for seeking reconsideration of an action. Moreover, we note that Section 1.925(c)(ii) addresses situations in which waiver requests have been denied, and provides that in those cases, if an "alternative proposal" has been submitted that fully complies with our rules, the underlying applications will be processed using the alternative proposal. The rule section also addresses the situation where it is necessary to consider the associated waiver request in connection with the application.[105] We

(Continued from previous page)
published newspapers in Fort Lauderdale, Florida, filed an application to acquire six television station licenses. *Tribune Company v. FCC*, 133 F.3d at 64. Because one TV station's Grade A contour encompassed the entire Fort Lauderdale community, Tribune's newspaper and the TV station were in the same primary market, and the daily newspaper cross-ownership rule prohibited their common ownership. *Id*. Upon granting the assignment application, the Commission also granted Tribune temporary waiver of the rule, which allowed Tribune to take possession of the TV station, but conditioned the grant on Tribune's divesting itself of the TV license or the newspaper within one year of the grant of the application. *Id*. After accepting the grant, Tribune sought a permanent waiver of the rule. *Id*. at 65.

[100] *Id*. at 67 (citing *Mobile Communications v. FCC*, 77 F.3d at 1404).

[101] 47 C.F.R. § 1.925(b).

[102] *Id*. § 1.925(c)(ii).

[103] Application for Review at 4.

[104] *Id*. at 4-5.

[105] *See*, *e.g.*, In the Matter of State of Florida, *Order*, 22 FCC Rcd 1782 (PSHSB 2007) (dismissing applications to operate on "offset" short-spaced channels after denying the associated request for waiver of the Commission's short-spacing rules); In the Matter of Application of City of Crystal Lake, Illinois, *Order*, 18 FCC Rcd 2498 (WTB PSPWD 2003) (dismissing an application to operate on a microwave link frequency using a bandwidth of 8 MHz after denial of the request for waiver of the rule that allows bandwidths only from 625 kHz to 2.5 MHz for that frequency); In the Matter of Midport Electronics, Inc., *Order*, 17 FCC Rcd 13778 (WTB PSPWD 2002) (dismissing an application to relocate base stations outside distances permitted after denial of a request for waiver of the rule that confines the location of base stations to within 50 miles of the geographic center of Detroit, Michigan); In the Matter of Applications for Consent to Assignment of Private Land Mobile Radio Authorizations From Lotus Development Corp. and Sequent Computer Systems, Inc. to IBM Research and Development, Inc. International Business Machines Corp., *Order*, 16 FCC Rcd 5209 (WTB PSPWD 2001) (dismissing assignment applications that require the signature of a director, officer, or authorized employee of the assignor, after denial of the request for waiver of the signature requirement to allow an employee of the assignee to sign for the assignor after the assignment has already been completed and where the assignor has become the assignee's subsidiary); In the Matter of the Application of Southwestern Public Service Company, *Order*, 15 FCC Rcd 11010 (WTB PSPWD 2000) (dismissing (continued….)

believe it would be illogical and contrary to administrative efficiency to read this rule as requiring the dismissal of an application where it is not necessary to consider the attached waiver request in connection with the application.[106]

38. Grant of Behr's modification application was not a conditional grant, nor was the denial of Behr's request for waiver contingent on or otherwise related to any change in the elements of his modification application. Rather, Behr received a fully granted modification application and a separate denial of his waiver request. Accordingly, we affirm the Mobility Division's *Order on Reconsideration*, which correctly concluded that under *Buckley-Jaeger v. FCC*, Section 1.110 does not apply in these circumstances, and properly denied Behr's reconsideration petition.

B. Behr's Request for Waiver of the Phase I 220 MHz Construction Rules

39. Behr also includes as an issue for review whether the Licensing and Technical Analysis Branch's *Waiver Denial Letter* erred substantively by not granting his request for waiver of the Phase I non-nationwide construction requirements.[107] In his waiver request, Behr asked the Commission to completely waive the Phase I non-nationwide construction requirements applicable to single-station licenses awarded through lottery. Phase I licensees were required, within one year of license grant, to construct a single base station under the authorized technical parameters (with no requirement to meet a specific population coverage benchmark) and to place the station in operation (defined as base station interaction with at least one mobile station) within that time frame.[108] To construct his single base station, Behr requested a tenfold increase in the overall time frame for buildout, to match the amount of time afforded the much wider-reaching Phase II EA licenses acquired through competitive bidding, *i.e*. Behr sought five years to cover one-third of the population of his station's service area, and 10 years to cover two-thirds of the population of the station's service area. Citing the *220 MHz Second Report and Order*, in which the Commission allowed Phase I non-nationwide licensees to relocate their base stations and to construct "fill-in" stations, Behr asserted that "the Commission decided to effectively turn Phase I non-nationwide licenses into geographic [area] licenses."[109] Behr then contended that "having brought Phase I licensees into the modern regulatory model …, the Commission neglected to revisit the now outdated and anomalous 12-month construction period which still applied to those licensees."[110] Behr concluded that "[g]rant of this waiver will put Behr on equal footing with the other similarly situated licensees."[111]

(Continued from previous page)
an application to operate on common carrier channels after denial of a request for waiver to provide private radio services on those common carrier channels); In the Matter of Greenline Partners, Inc., *Order*, 14 FCC Rcd 17369 (WTB CWD 1999) (dismissing 100 applications to construct 100 transmitters to operate on a paging frequency on a nationwide exclusive basis, after denial of a request for waiver of the rule requiring a paging system to consist of 300 or more transmitters to obtain nationwide exclusivity on that frequency).

[106] *See supra* text accompanying note 64 (where the Commission explained in the underlying case to *Buckley-Jaeger v. FCC* that it was not necessary to consider the licensee's exemption request in connection to its renewal application).

[107] Application for Review at 6.

[108] 47 C.F.R. § 90.155(a) and (c).

[109] Waiver Request at 3. Later in his Waiver Request, Behr added that "[a]s noted above, the FCC effectively and deliberately converted Phase I licenses to the same geographic footing as regional and EA 220 MHz licenses when it authorized approval-less construction of multiple sites within a Phase I licensee's defined license boundary." *Id*. at 5.

[110] *Id*. at 3-4.

[111] *Id*. at 5.

40. Behr now asks the full Commission to directly review his request for waiver. We reject this request, however, and let the Wireless Bureau's *Waiver Denial Letter*[112] stand on the ground that Behr did not submit a petition for reconsideration or an application for review of the denial of his request for waiver of the Phase I construction requirements. Section 405(a) of the Communications Act, as implemented by Section 1.106(f) of the Commission's rules, requires that a petition for reconsideration be filed within 30 days from the date of public notice of Commission action.[113] Section 1.106(f) of the Commission's rules more specifically provides that a "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)."[114] Our procedural rules under Section 1.115 also require applications for review to be filed within 30 days of public notice of the relevant action.[115]

41. The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission is without authority to extend or waive the statutory 30-day period for filing petitions for reconsideration specified in Section 405(a) of the Communications Act,[116] except where "extraordinary circumstances indicate that justice would thus be served."[117] We note the filing requirement of Section 405(a) of the Act applies even if the petition for reconsideration is filed only one day late.[118] Behr's request for waiver was denied by letter dated November 12, 2003. The deadline for filing a petition for reconsideration or application for review was December 12, 2003. Behr neither sought reconsideration by the deadline nor requested that we waive the filing deadline for seeking such reconsideration. Moreover, there is no factual basis in the record to support a finding of extraordinary circumstances that could justify deviating from the statutory deadline for filing petitions for reconsideration, and the record is similarly devoid of any basis for waiving the deadline for filing applications for review. Accordingly, in rejecting Behr's request at the current stage of this proceeding for a substantive review of his original request for a waiver of the construction deadline, we need not and do not rely on the substantive infirmities of the arguments Behr has raised to support his request for more time to meet his construction obligations.

42. With respect to the extraordinary considerations required to waive the statutory deadline for filing petitions for reconsideration, we observe that Behr has not made any showing that such circumstances are present in his case. The most we can discern on this count from his filings is the suggestion that it was reasonable to forego seeking reconsideration because of his belief that the only way he could preserve his rights was by following Section 1.110 procedures. For the reasons set forth above, it is clear that Behr, who was represented by competent communications counsel, had no reasonable basis

[112] *See supra* note 40 (citing the *Waiver Denial Letter* issued by the Wireless Bureau's Technical Analysis Branch of the Commercial Wireless Division).

[113] 47 U.S.C. § 405(a).

[114] 47 C.F.R. § 1.106(f).

[115] *See* 47 U.S.C. § 155(c)(4) (providing that "[a]ny person aggrieved by any … order, decision, report or action [under delegated authority] may file an application for review by the Commission within such time frame and in such manner as the Commission shall prescribe"); 47 C.F.R. § 1.115(d) (providing that an "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)").

[116] *See Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976).

[117] *See Reuters*, 781 F.2d at 952 (holding that express statutory limitations barred the Commission from acting on a petition for reconsideration that was filed after the due date); *Gardner*, 530 F.2d at 1091 (excepting where "extraordinary circumstances indicate that justice would thus be served").

[118] *See, e.g.*, Panola Broadcasting Co., *Memorandum Opinion and Order*, 68 F.C.C. 2d 533 (1978) (dismissing a petition for reconsideration that was filed one day after the statutorily allotted time for filing requests for reconsideration); Metromedia, Inc. *Memorandum Opinion and Order*, 56 F.C.C. 2d 909 (1975) (same).

for concluding that Section 1.110 applied to his case or that he had no other options to secure his rights to redress than the course of action he took.[119] Moreover, there is nothing else in this proceeding – extraordinary or otherwise – that would justify looking past the strict petition for reconsideration filing requirements.[120]

43. While the deadline for filing an application for review is not mandated by statute,[121] there is similarly no basis in the record that could justify waiving that deadline. Behr never filed an application for review of the November 12, 2003 *Waiver Denial Letter* that directly denied his request for waiver, and he never requested additional time for doing so.[122] Accordingly, we have no basis under the review provisions of Section 1.115 to revisit the substantive merits of Behr's underlying request for waiver of the construction rule.[123] That said, we observe that even were we to examine the factual assertions that Behr has made to justify additional time to build – whether the ten more years that Behr requested or any smaller amount of time – we see nothing in those assertions or in the way the Wireless Bureau handled them that would have warranted grant of the requested relief. For example, the determination in the *Waiver Denial Letter* that Behr had failed to show that his single site-specific license awarded through lottery was "as equally complex to construct as a Phase II license," and that "[g]eographic area licenses, therefore, are inherently more complex with regard to construction issues," was logical and well supported.[124] Nor does the record contain any underlying facts specific to Behr's case that, collectively, could conceivably have supported a decision to provide Behr with additional time to meet his

[119] *See supra* ¶¶ 17-38 (demonstrating that applicable precedent such as *Buckley-Jaeger* clearly teaches that Section 1.110 does not apply to the Wireless Bureau's denial of Behr's request for waiver of the construction deadline, that Behr could have secured his rights by filing a timely petition for reconsideration or application for review, and that, even in the event he perceived any ambiguity in the appropriate procedural vehicle for redress, he could have preserved all his options by filing a petition for reconsideration or application for review in addition to a Section 1.110 pleading).

[120] In this regard, we note that the errors predating the grant of Behr's license have no relevance to his subsequent failure to preserve his rights to contest the Wireless Bureau's determination that he had failed to comply with one of the most basic obligations for holding a license – *i.e.*, constructing the station on a timely basis.

[121] *See, e.g.*, Charles T. Crawford et al., *Order*, 17 FCC Rcd 2014, 2019 n.44 (2002) (*Crawford*) (observing that "[t]ime limitations on the filing of Applications for Review are established solely by Commission rule").

[122] Behr's attempt to resurrect his substantive arguments for waiver of the construction rule in the pending Application for Review (filed in 2009 as a culmination of Behr's challenge to the Wireless Bureau's Section 1.110-related action) constitutes, at best, an attempt – *six years* after the fact – to seek review of the 2003 *Waiver Denial Letter*.

[123] *See Crawford*, 17 FCC Rcd at 2019 n.44 (holding that "no waiver [of the deadline for filing an application for review was] warranted" because the party had "neither explained his failure to file a timely application for review nor requested a waiver of the filing deadline").

[124] *Waiver Denial Letter* at 2. In particular, the letter explained that "[s]ervice in Phase I licensed areas may be provided by a single site unlike geographic areas which cover a much larger land area," and that "geographic area licenses are assigned a larger block of frequencies and are required to build around incumbent stations." *Id.* Behr was essentially asking for the same amount of time to construct a single base station (with coverage of approximately 2,500 square miles) as an EA licensee receives for constructing a sufficient number of stations to cover an area that is on average 20,000 square miles in size. *See 220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 221, n.100. As the Commission has explained, by providing 120 km co-channel protection for Phase I non-nationwide 220 MHz stations based on the provision of 10 dB protection to the station's 38 dBuV/m field strength contour, stations operating at maximum power and antenna height would "produce a service area with a 38 dBu contour at about 45 kilometers (28 miles)." *220 MHz Second Report and Order*, 11 FCC Rcd at 3669, ¶ 5. Based on that calculation, the Commission found that Phase II EAs would, on average, be eight times larger than the service area of a Phase I non-nationwide station. *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd at 220-21, ¶ 18.

construction obligations.[125] Similarly, we reject the notion that any purported flaw in the Commission's 1996 rulemaking decision to keep in place the 12-month construction deadline for Phase I non-nationwide licensees provides a basis for modifying Behr's 12-month construction deadline.[126]

44. In sum, because Behr did not meet the respective deadlines for filing a petition for reconsideration or an application for review of the *Waiver Denial Letter* (both December 12, 2003) – and because this case presents no circumstances, extraordinary or otherwise, that call into question the propriety of giving force to these deadlines – we deny Behr's request in the present Application for Review for substantive review of the *Waiver Denial Letter* and, accordingly, we let that letter order stand.[127]

[125] We note that in waiver cases – which are handled on a case-by-case basis – the burden of proof rests with the petitioner to plead specific facts and circumstances that would make the rule inapplicable. *Tucson Radio, Incorporated (KEVT) v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971). Behr, however, failed to introduce into the record any plan for proposed operations to serve customers or any evidence of circumstances preventing him from meeting the applicable construction deadline. Nor did Behr cite any involuntary loss of site or other circumstances beyond his control that might have justified an extension of time, *see, e.g.*, 47 C.F.R. §§ 1.946(e), 90.155(g), even for a more targeted period (*e.g.* a two-year extension of time to construct), and while Behr argued that other 220 MHz non-nationwide licensees received extensions of their construction deadlines, Waiver Request at 2, he provided no specific facts to explain why ten years is necessary to construct a single station license. Rather, Behr equated his situation to the Phase II geographic area licensees solely on the basis that the Commission had adopted new rules for such licensees operating in the same 220 MHz band he was licensed to operate in, notwithstanding that his license authorized much more limited operations and required much less buildout. *See 220 MHz Third Report and Order*, 12 FCC Rcd at 11008, ¶ 139 (distinguishing between the Phase I and Phase II licensing regimes, stating that "Phase I non-nationwide licensees are not authorized to operate within a particular geographic area, but instead are authorized to construct a single land mobile base station for base/mobile operations"). Thus, Behr's assertions that the Commission had effectively converted the Phase I licensees into comparable geographic licensees is patently erroneous.

[126] We note that in attempting to discredit the rationality of the Commission's rulemaking decision to keep the12-month construction deadline in place for Phase I licensees, Behr asserted that the Commission "neglected to revisit the now outdated and anomalous 12-month construction period which still applied to [Phase I] licensees." Waiver Request at 3-4. In fact, the Commission made a considered decision to retain this construction period in modifying Section 90.725(f) to allow more flexibility in defining whether a licensee has placed its station in operation. *See 220 MHz Second Report and Order*, 11 FCC Rcd at 3676, ¶¶ 30-31; *see also* 47 C.F.R. § 90.757(a) (providing that "a Phase I non-nationwide licensee that is granted modification of its authorization to relocate its base station must construct its base station and place it in operation, or commence service, on all authorized channels on or before August 15, 1996, or within 12 months of initial grant date, whichever is later").

[127] Thus, we reject on procedural grounds Behr's attempt in the present Application for Review to revisit the merits of his request for waiver of his construction obligations; Behr's failure to seek reconsideration or review of the Wireless Bureau's *Waiver Denial Letter* constitutes a fatal procedural infirmity that has cut off any right of review of these underlying merits, and our rejection of his current request for such review is independent of any discussion herein of the merits. *See BDPCS, Inc. v FCC*, 351 F.3d 1177, 1182-84 (D.C. Cir. 2003) (explaining that a court must affirm an agency decision properly dismissing a suit on procedural grounds regardless of the agency's consideration of the substantive merits).

IV. ORDERING CLAUSE

45. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 5(c) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and 405(a), and Sections 1.106 and 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106 and 1.115, that the Application for Review filed by Lawrence Behr on June 19, 2009 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Before the
Federal Communications Commission
Washington, DC 20554

In re Application of	)	
	)	
LAWRENCE BEHR	)	File No. 0001332167
For Modification to Station WPWR222	)	

APPLICATION FOR REVIEW

Lawrence Behr, by his attorneys, hereby applies to the full Commission for review of the Wireless Bureau's May 27, 2009 Order on Reconsideration (DA 09-1167) (the "*Bureau Order*") for the reasons set forth below. Full Commission review of this matter is warranted for the following reasons cited by Section 1.115 of the rules:

1. The Bureau's action conflicts with prior Commission policy and judicial precedent;

2. The Bureau's action relied on an erroneous finding of fact; and

3. The Bureau's action constitutes a prejudicial procedural error.

In addition, because the Bureau adopts a curious interpretation of Section 1.110 of the rules which seems to conflict with the terms of the rule on their face, guidance from the full Commission is necessary so that both the Bureau and the public will know with certainty under what circumstances Section 1.110 applies.

QUESTIONS PRESENTED

1. When the Bureau grants part of an application but denies the substantive modification requested by the application, does that constitute a "partial grant" of the application such that the provisions of Section 1.110 of the rules are triggered?

2. Given the unique circumstances of this license (the application was misplaced by the Commission for more than 10 years before being granted, leaving the licensee as the sole remaining unbuilt Phase 1 220 MHz licensee in the universe), should the Bureau have granted the licensee's request for an extended build-out period equal to those later granted to all other 220 MHz licensees?

ARGUMENT

I. Introduction. Old-timers will, to the extent they retain their memories at all, remember a character in the old "Li'l Abner" comic strip. The character was a hapless creature known as "Joe Btfsplk" who walked around with a perpetual rain cloud over his head, attracting accidents, miscues, and disasters of all kinds wherever he went. If there was a lightning bolt anywhere in the vicinity, it would strike Btfsplk. Mud puddle and passing car? – Btfsplk. Bird perched above a park bench? – Btfsplk. The license at issue here seems to be the heir to that pitiable character, since each handling of the application associated with it inevitably produces a new error.

II. Background

A. Historical Developments. Briefly, the original application for Station WPWR222, Denver, CO, was filed in May, 1991. The application was selected as the winner in the lottery held that year, and the applicant, Mr. Behr, duly and timely filed a perfecting amendment. The Commission thereupon misplaced the application for about eleven years. Only when Behr noticed that the Commission had apparently granted an application to someone else on his frequencies did he realize that the Commission had lost the application. When the matter was brought to the staff's attention, they corrected the error and eventually granted the Behr application in 2003 – 12 years after it was filed.

By that time, of course, all other so-called "Phase I" non-nation-wide 220 MHz applications had long since been granted and either constructed or forfeited. In the intervening decade, the Commission decided to give licensees until August 15, 1996 (more than four years) to construct their systems, rather than the original 8 months (later extended to 12 months). *Second Report and Order in PR Docket 89-552*, 11 FCC Rcd. 3668 (1996). However, because

Behr's application was in limbo during that period, his license, when granted, specified only the original 12 month build-out period.

While Behr's application was in limbo, the Commission also adopted a geographic area-based licensing model for this service whereby station transmitter sites could be located anywhere within the station's original contour, so long as the signals did not extend beyond that contour. *Use of 220 MHz Band by the Private Radio Service, Report and Order on Reconsideration*, 12 CR 193, 218-19 (1998). This latter ruling effectively made Phase I licensees geographic licensees (in accordance with the more modern paradigm) rather than site-based licensees, as they had originally been conceived.

In addition, in 1997 the Commission had created a "Phase II" category of non-nationwide 220 MHz licenses. These licensees were granted build-out timetables of five and ten years to serve one-third and two-thirds, respectively, of their service areas. This ten-year phased build-out approach is consistent with the more contemporary standard which the Commission has been applying to new licenses in this decade. The Commission in this order did not expressly apply the new build-out standards to Phase I non-nationwide licensees *because it had no need to* – all other Phase I licensees but Behr's had either already been constructed or had passed their build-out deadline and forfeited their licenses. Since Behr's license was still lost at that point, he was not in a position to comment on the situation. Since the Phase I licenses had been converted to geographic licenses by the 1998 Order, it made sense that later-granted Phase I licenses should qualify for the same build-out treatment as geographic area Phase II licenses.

B. Procedural Developments. Based on the above developments, Behr timely filed an application to modify his license to reflect what appeared to be what the Commission would

have done if it had known that there were any unconstructed Phase I applications still extant. Behr essentially argued that since the 220 MHz service had evolved significantly in the years that his application was lost, it made more sense to apply the new and improved rules and timetables to his license rather than the rules which had long been abandoned. To accomplish this, Behr filed the application at issue here. Because the extension of the construction schedule was inconsistent with the archaic Phase I rules that remained on the books, Behr included a waiver request in the application. The rules, of course, expressly require that waiver requests "associated with licenses or applications in the Wireless Radio Services must be filed on FCC Form 601, 603, or 605." Section 1.925(b). The waiver request was an integral part of the modification application. What Behr was requesting was a change in the build-out date which had been added to his license by a correction in late May, 2003,[1] and the application was the procedural vehicle to accomplish that purpose.

In late 2003, the Bureau granted the portions of the application that added a contact representative and allowed interconnected service, but denied the portion that sought an extension of the build-out period. The partial denial is reflected in the "transaction" elements for the application in the ULS database. What is especially odd is that Section 1.925(c)(ii) of the rules provides that "[d]enial of a rule waiver request associated with an application renders that application defective unless it contains an alternative request that fully complies with the rules." Behr's application contained no alternative request since the extension of the build-out deadline

[1] In early 2003, the Bureau had sent Behr a note auditing his build-out status. Upon inquiry, the staff acknowledged that the audit was erroneous and would be removed from the database. The staff also indicated that a build-out deadline would be added to the license at that time. See the "Comments" in Attachment A, printed from the ULS system for WPWR222.

was essential to his plans for the license. The rule therefore seemed to require the application to be denied – which would have permitted a straightforward appeal of the Bureau's action. Instead, the Bureau granted it.

The Bureau's action left Behr in a procedural quandary. If he accepted the grant as made, he would forfeit any right under Section 1.110 to challenge the Bureau's denial of the requested modification to the build-out date. On the other hand, the Commission has made it quite clear that an applicant may not accept the "good" parts of a grant and appeal the bad parts.[2] Certainly, an applicant may not appeal the *grant* of its own application. Section 1.110 therefore provided the only avenue for Behr to follow: he had to reject the partial grant as made and request a hearing. Behr timely did exactly what the rule required.

About three years later, the Bureau rejected Behr's hearing request, indicating that it had actually granted Behr's application *in full*, and therefore the provisions of Section 1.110 did not apply. Clearly, the application was not granted in full since the main action it was requesting – modification of the build-out deadline – was denied. The Bureau also indicated that if everybody who got a partial grant followed the procedures of Section 1.110, the Commission would be overwhelmed with hearings. Behr gave it one more try at the Bureau level, pointing out that several cases expressly require an applicant in his position to proceed under the aegis of Section 1.110 (or its historical predecessors). *Murray Hill Broadcasting Company*, 71 RR2d 1335 (1993); *Mobile Communications Corp. of America v. FCC,* 77 F. 3d 1399 (D.C. Cir. 1996). In the *Bureau Order*, the Bureau again rejected that claim, insisting that the denial of the waiver portion of the application was somehow not a denial of part of the application.

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[2] "[A]n applicant may not, on the one hand, accept a Commission grant *and*, on the other hand, seek an administrative appeal of the authorization." *Murray Hill, infra*, at 1337.

III. Argument

This case involves two very distinct issues: did the Bureau violate the procedural rules by not adhering to the procedures outlined in Section 1.110, and did the Bureau err by failing to grant Behr the substantive relief he requested in 2003?

This case comes to the Commission in a very peculiar procedural posture. Section 1.110 of the rules, on its face and by its express terms, permits Behr only a single procedural path to challenge the Bureau's partial denial and partial grant of the application at issue here – to request a hearing and have an ALJ resolve the issue. This ancient and little invoked rule seems totally inappropriate for the issues raised here, which are not fact-based but simply seek the equitable application of the current licensing paradigm to a licensee who, through no fault of his, fell through the Commission's cracks for more than a decade. Unfortunately, Behr had no other path available since, as we have noted, (i) an applicant may not appeal the *grant* of his own application, (ii) an applicant may not accept the parts of a grant that he likes and appeal the rest, and (iii) if an applicant does not reject the partial grant, it is deemed an acceptance of the action. *Central Television, Inc. v. FCC*, 834 F. 2d 186, 190-191 (D.C. Cir 1987). Section 1.110 of the rules is therefore the only vehicle for seeking review of a partial grant. See *Tribune Co. v. FCC*, 133 F. 3d 61 (D.C. Cir. 1998), where the Court insisted that, absent futility, an applicant was required to implement the procedures of Section 1.110 when the Commission granted its assignment application but denied the associated cross-ownership waiver. By rejecting Behr's request to proceed under the provisions of Section 1.110, the Bureau effectively barred Behr from having any right of appeal whatsoever. This is obviously not only a fundamental violation of due process, but contrary to the Administrative Procedure Act and the Commission's own

rules. At a minimum, therefore, Behr has a right to the hearing provided in Section 1.110 of the rules.

The Commission could simply designate this matter for hearing, as the rule requires. What seems to make more sense for all concerned, however, would be for the Commission *itself* to address the matter raised in Behr's 2003 modification application. There are several reasons supporting such an approach. First, the original application for this license was filed in 1991, close to two decades ago. It was the staff's own fault that the application fell into administrative limbo for ten years. Designating the matter for hearing would not only be a waste of the resources of the ALJ and the hearing staff (not to mention Mr. Behr), but would leave a policy and equity decision in the hands of an ALJ, who is not normally charged with making such determinations. While Behr is confident that the ALJ would ultimately grant the relief requested, the process would undoubtedly consume at least another year and then might require further appeals simply to get back to the point in the appellate process that it is now. Administrative fairness and administrative efficiency both argue for a short-circuiting of a process that has already been unconscionably delayed.

Behr's 2003 application requested only that he be afforded the same 5 and 10 year construction schedules which apply to Phase II applicants. The Commission has long since abandoned the abbreviated 8 month construction schedule which it applied in antiquity to new licensees such as Behr's. There is no reason whatsoever to continue to apply an obsolete rule which was abolished for all other services to an applicant who, through no fault of his own, finds himself in a different regulatory era than that which existed when his application was originally filed. Behr therefore respectfully suggests that the Bureau's 2003 partial denial of Behr's

application be reversed and his licenses be modified to specify that he has 5 years to build out one-third of his system and ten years to build out two-thirds.

Respectfully submitted,

LAWRENCE BEHR

By: _____
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June 19, 2009

His Attorney

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

In re Application of	)	
	)	
LAWRENCE BEHR	)	File No. 0001332167
For a Modification to Station WPWR222	)	

ORDER ON RECONSIDERATION

Adopted: May 27, 2009 **Released: May 27, 2009**

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction*. In this *Order on Reconsideration*, we address a petition (Petition)[1] filed on February 13, 2007 by Lawrence Behr (Behr), seeking reconsideration of a January 31, 2007 letter order[2] of the Mobility Division (Division), which dismissed Behr's request for a hearing pursuant to Section 1.110 of the Commission's Rules.[3] For the reasons stated below, we deny the Petition.

2. *Background*. In 1993, the Commission conducted a lottery for a Phase I 220 MHz license in Denver,[4] and Behr was the tentative selectee. However, the Commission subsequently requested that Behr resubmit a corrected application with additional technical information.[5] Behr did so in a timely manner, but the Commission misplaced the application and, believing that Behr had not responded, granted a Phase I 220 MHz license in Denver to the second tentative selectee. To correct this administrative error, the Commission, on its own motion, set aside the grant, and reinstated Behr's application, which was granted on January 8, 2003 under Call Sign WPWR222.[6] On June 2, 2003, Behr filed an application to modify the license by updating the contact information for the license and changing the station class from FB6 to FB6C.[7] Along with the application, Behr filed a request for a waiver of the construction requirements in Rule 90.725.[8] The Commission denied the waiver request on November 12,

[1] Petition for Reconsideration (filed February 13, 2007) (Petition).

[2] Letter dated January 31, 2007, from Lloyd W. Coward, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Lawrence V. Behr, 22 FCC Rcd 1798 (WTB MD 2007) *(Division Order*).

[3] 47 C.F.R. § 1.110 (requiring the Commission, in case of a partial grant of an application or grant with terms or conditions other than those requested, to vacate its original action and set the application for a hearing, if the applicant files within 30 days a written request rejecting the grant as made).

[4] *See* Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, *Public Notice,* 58 Fed. Reg. 26322 (May 3, 1993).

[5] *See* Application Return Notice for the Private Land Mobile Radio Services, dated January 28, 1993. *See also* former rule section 90. 141, 47 C.F.R. § 90.141 (1993) (applicant must supply requested information within sixty days of application return notice date in order to retain place in application processing line).

[6] *See* Lawrence Behr, Net Radio Communications Group, LLC, *Order,* 17 FCC Rcd 19025 (WTB CWD 2002).

[7] *See* FCC File No. 0001332167.

[8] *See id.,* attached Waiver Request; *see also* 47 C.F.R. § 90.725.

2003,[9] but granted the underlying modification application on November 17, 2003.[10]

3. On December 17, 2003, Behr filed a petition, pursuant to Section 1.110 of the Commission's Rules,[11] rejecting the grant of the application, and requesting a hearing.[12] The Mobility Division dismissed the hearing request, stating that Section 1.110 applies only to instances where the Commission "grants any application in part or with privileges, terms, or conditions other than those requested."[13] The Division explained that a petition for reconsideration and/or application for review were the two appropriate vehicles for challenging its denial of the waiver request.[14]

4. On February 13, 2007, Behr filed the instant Petition. Behr claims that the Division erred in dismissing his Section 1.110 petition because it was the Commission's action of denying the waiver request but granting the underlying application that "left Behr with no choice but to reject the grant and request a hearing."[15] Behr states that had the Commission denied the application, he would have sought reconsideration of that denial or filed an application for review.[16] Because the application was granted, Behr asserts that, in order to exercise his right to contest the denial of the waiver request, he had to reject the grant, as required by Section 1.110, otherwise he would have been deemed to have forfeited that right.[17]

5. *Discussion*. We find Behr's request for reconsideration without merit.[18] At the outset, we find Behr's recitation of the facts in this case to be factually inaccurate. Behr's argument is based entirely on his contention that "[t]he application sought no modification to the license other than the change in the build-out deadline" encompassed in the waiver request attached to the application.[19] Behr states that "the application as granted effected no modification whatsoever to the original license since the Commision denied the only change which has been requested."[20] A review of the Commission's publicly available Universal Licensing System database reflects that the Commission granted in full Behr's application seeking authority to modify call sign WPWR222 to change the contact information and add interconnected service. Specifically, the transaction log for File No. 0001332167 in ULS shows that on June 2, 2003, the licensee requested the following modification to his license for Station WPWR222: (1) adding Donald J. Evans, Esq. of the law firm Fletcher, Heald & Hildreth in Arlington, Virginia, as a contact person for the licensee; (2) adding answers to questions concerning alien ownership; and (3)

[9] Letter dated November 12, 2003 from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, Wireless Telecommunications Bureau, to Donald J. Evans, Esq., Counsel to Lawrence V. Behr.

[10] *See* FCC File No. 0001332167.

[11] 47 C.F.R. § 1.110.

[12] Letter dated December 17, 2003, from Lawrence V. Behr, to Marlene H. Dortch, Secretary, Federal Communications Commission.

[13] *Division Order*, 22 FCC Rcd at 1798 (quoting Section 1.110).

[14] *See id.* at 1799.

[15] Petition at 1.

[16] *Id.*

[17] *Id.* at 1-2.

[18] We note that Behr states that he "would not object to the Bureau revisiting its 2003 action on the application at issue" and that he "requests that the Bureau simply grant the relief requested by Behr in the application." Petition at 4. However, Behr presents no arguments in support of his request, including arguments that the Bureau erred in its 2003 denial of Behr's waiver request.

[19] *Id.* at 1, 3.

[20] *Id.* at 3.

changing the station class for Location 1, Antenna 1, Frequencies 220.0875, 220.2375, 220.3875, 220.5375, and 220.6875 MHz from FB6 to FB6C (the code for interconnection).[21] ULS procedures require applicants filing modification application to use a password in association with that licensee's FRN. Behr does not argue or provide evidence that the referenced modification was requested in error by the licensee or counsel; rather, Behr argues that no such modification was requested. Contrary to Behr's assertion, we find that the record reflects that an application seeking modification of call sign WPRW222, independent of Behr's attached request for waiver of construction requirements, was filed and was granted.

6. Given the facts presented, we agree that the Division correctly concluded that the United States Court of the District of Columbia Circuit case of *Buckley-Jaeger Broadcasting Corporation of California v. FCC* is on point.[22] *Buckley-Jaeger* concerned a renewal application, which the Commission granted, with an attached request for exemption from the rules, which the Commission denied.[23] The court expressly noted that the relief under Section 1.110 was inapplicable because the Commission granted the license renewal application in full, and denied only the request for exemption that was filed together with the application.[24] Similarly, the instant matter concerns a fully-granted modification application and a separately-attached request for a waiver of the Commission's construction requirements that was denied. Accordingly, the Division correctly concluded that Section 1.110 does not apply, and properly dismissed Behr's reconsideration petition.

7. We also disagree with Behr's contention that the Commission's 1993 decision in the *Murray Hill Order*[25] stands for the proposition that a licensee may not seek remedy through a petition for reconsideration or application for review when the Commission grants the licensee's application, but denies an accompanying waiver request,[26] as such an interpretation would be inconsistent with *Buckley-Jaeger*. Rather, we find that the *Murray Hill Order* clarifies the procedural limitations on an applicant seeking alternative relief. In the *Murray Hill Order*, the Commission dismissed a licensee's application to relocate the antenna of a broadcast station because it would violate then-applicable power limit restrictions.[27] The licensee filed a petition for reconsideration of the dismissal, claiming that the application was in compliance with the technical rules, or that a waiver of that requirement would be justified.[28] The licensee also filed a contingent amendment to its application that complied with the power limit.[29] Commission staff then rejected the originally filed application, but granted the alternative

[21] *See* FCC File No. 0001332167. The November 17, 2003 entries in the transaction logs were added by the Commission staff to indicate that a temporary condition (entry "T") in the form of text (entry "80") stating that 'the associated waiver was denied" was added to the license.

[22] *Buckley-Jaeger Broadcasting Corporation of California v. FCC*, 397 F.2d 651 (D.C. Cir. 1968); *see also Decision*, 22 FCC Rcd at 1799.

[23] *See Buckley-Jaeger,* 397 F.2d at 652-3.

[24] *Id.* at 656 ("It is also clear that section 1.110 of the Commission's rules has no application here. The rule concerns situations where the applicant receives less than a full authorization. But here Appellant received the full authorization to which it was entitled under the statute and rules. In these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory.").

[25] Murray Hill Broadcasting Company, *Memorandum Opinion and Order,* 8 FCC Rcd 325 (1993) ("*Murray Hill Order"*).

[26] *See* Petition at 2.

[27] *See Murray Hill Order,* 8 FCC Rcd at 325; *see also* 47 C.F.R. § 73.213(a) (1987).

[28] *See Murray Hill Order,* 8 FCC Rcd at 325.

[29] *See id.*

application, as amended.[30] The licensee filed an application for review of that staff action (rejecting the initial application, and granting the amended application), but actually made the authorized modifications while its application for review was pending and was operating pursuant to the granted parameters during the pendency of that appeal.[31] The Commission denied the application for review substantively, finding that the staff's interpretation of the technical rules to be correct and agreeing that a waiver was not warranted, and found, as an independent procedural basis for rejecting the application for review, that the licensee had failed to challenge the terms of the grant according to Section 1.110.[32] The Commission found that Section 1.110 was triggered because the staff granted the licensee's application with terms to which the licensee objects by granting its amended proposal, rather than its initial proposal, and that the licensee failed to challenge the terms of the grant according to the Section 1.110 procedures.[33] The Commission also found that the licensee effectively accepted the grant when it subsequently modified its license as authorized.[34] The Commission stated that "an applicant may not, on the one hand, accept a [C]ommission grant and, on the other hand seek an administrative appeal of the authorization."[35] Contrary to Behr's assertion, the Commission's denial of the accompanying waiver request in *Murray Hill* had no bearing on the licensee's procedural options.

8. In contrast, Behr's request for waiver of the construction requirements was separate from his application that was granted with the requested modifications (*i.e.*, change of contact information, update of answers to alien ownership questions, and change of the station class from FB6 to FB6C). Unlike the facts in the *Murray Hill Order*, Behr filed no application or amendment seeking relief in the alternative that was granted and which required Section 1.110 action. As Behr's underlying modification application was granted in full and not on terms with which Behr disagreed, the only substantive denial was the request for waiver. Under *Buckley-Jaeger*, a challenge to the denial of the waiver request must be made through the filing of a petition for reconsideration and/or application for review, pursuant to Sections 1.106 and 1.115 of the Commission's Rules, rather than through the request of a hearing under Section 1.110.[36] Therefore, we agree with the Division's decision in this matter.

9. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 0.131, 0.331, and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, and 1.106, that the Petition for Reconsideration filed by Lawrence V. Behr on February 13, 2007 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel, Chief
Mobility Division
Wireless Telecommunications Bureau

[30] *See id.* at 326.

[31] *See id.*

[32] *See id.*

[33] *Id.* at 327.

[34] *Id.*

[35] *Id.*

[36] 47 C.F.R. §§ 1.106, 1.115.

February 2007

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of	)	
	)	
Lawrence Behr for a	)	File No. 0001332167
Modification to	)	
Station WPWR222	)	

To: Chief, Mobility Division

PETITION FOR RECONSIDERATION

Lawrence Behr ("Behr"), by his attorneys, hereby petitions the Commission to reconsider its January 31, 2007 Letter Order dismissing Behr's request for a hearing pursuant to Section 1.110 of the rules. For the reasons set forth below, Behr believes the Commission's action was erroneous since the peculiar procedural posture of this application left Behr with no choice but to reject the grant and request a hearing.

It will be recalled that Behr's application for Station WPWR222 was granted in 2003 after having been lost by the processing line for more than a decade. Because the regulatory structure of the 220 MHz service had been revised markedly in the intervening decade to go to a non-site-based, geographic licensing scheme with five and ten year construction benchmarks, Behr requested that the Commission apply the more contemporary licensing scheme to his license as well. To accomplish that, he filed the instant application requesting a modification of the terms of his license, including an appropriate exhibit justifying a waiver of the outdated 12 month construction requirement (which by that time applied only to Behr and no other licensee in the world). *The application sought no modification to the license other than the change in the build-out deadline.*

Had the Commission granted that application, all would have been well. Had the Commission denied that application, Behr could have followed the more typical review path of seeking reconsideration or filing an application for review. Instead, the Commission took the unusual step of granting the application but denying the requested waiver. The Commission's rules are quite clear that an applicant may not accept the good parts of an application as granted while appealing the bad parts: it must either accept the grant in toto or reject the grant and request a hearing. There is no other option under the rules. Section 1.110 specifically provides that

> [w]hen the Commission without a hearing grants any application in part, or with any privileges,

> terms or conditions other than those requested ..., the action of the Commission shall be considered as a grant of such application unless the applicant shall ... file with the Commission a written request rejecting the grant as made.

Had Behr *not* rejected the grant as made, he would have forfeited his right to contest the partial grant because he would have been deemed by operation of the rule to have accepted it.

This was precisely the situation addressed by the full Commission in *Murray Hill Broadcasting Company*, 71 RR2d 1335, 1337 (1993). There an applicant had submitted a modification application which sought a waiver of the rule to permit short-spacing of its FM station. In the alternative, as permitted by the rules, the applicant had included a non-short-spaced proposal. The Commission granted the non-short-spaced proposal while denying the waiver request. The applicant thereupon built the modified station in accordance with the granted application but at the same time filed an application for review of the denial of the short-spacing request. The full Commission stated:

> [T]he staff, by delegated authority, granted Murray's application with terms to which Murray objects. That is, the staff granted Murray's amended proposal rather than its initial proposal. However, Murray failed to challenge the terms of grant according the procedure specified by Section 1.110 ... [A]n applicant may not, on the one hand, accept a Commission grant *and*, on the other hand, seek an administrative appeal of the authorization ... Consequently, having effectively accepted the grant as made *and* having failed to challenge the staff's action as required, Murray has foreclosed its opportunity to contest the terms of the construction permit." (Emph. in orig.)

Murray Hill therefore stands unequivocally for the proposition that an applicant may not follow the procedure suggested in the Letter Order (*i.e.*, seeking reconsideration or filing an application for review) when an application including a waiver has been granted without the waiver.

The Commission in *Murray Hill* relied on *Central Television, Inc. v. FCC*, 834 F. 2d 186, 190-191 (D.C. Cir. 1987), which itself relied on a host of D.C. Circuit cases dating back to the 1930s, all holding that an application partially granted, or granted with unasked for conditions, will be presumed to be accepted in full if it is not expressly rejected by the applicant. "Acceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance." To underscore the importance of this point, the Court in *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), cert. denied, 519 U.S. 823 (1996) held that an applicant would normally be barred from seeking judicial review of the Commission's action if it failed to follow the mandatory administrative exhaustion requirement of rejecting the grant as made.

The upshot of all of these cases is that Behr was left with only two options by the Commission's "grant" of his application without granting the construction modification requested: he could do nothing, which would have

been deemed an acceptance of the grant in full and foreclosed any opportunity to appeal the denial of the waiver, or he could reject the grant and request a hearing. These were not Behr's preferences – they were the only avenues permitted by the Commission's rules, as consistently upheld and enforced by the D.C. Circuit. The request for a hearing was therefore entirely appropriate under the circumstances presented.

The Letter Order makes two observations which must also be addressed here. First, the Letter Order indicates that the Bureau "granted Behr's application in full," presumably to bring the case within the ambit of *Buckley-Jaeger v. FCC*, 397 F.2d 651 (D.C. Cir. 1968). In *Buckley-Jaeger*, the applicant had its license renewal application granted but without the program duplication waiver which it had requested. The Commission and the Court might felt that grant of the license renewal was the grant of the "full authorization" to which the applicant was entitled under the statute and the rules, and they therefore saw no need to apply the provisions of Section 1.110. *Id.* at 656. Here, however, the entire point of the application was to seek a modification of the build out schedule; there was *nothing else* applied for. The Commission literally denied the entire request for relief embodied in the application, yet now pronounces the application "granted in full." That is like giving a kid an ice cream cone -- only without the ice cream and without the cone. Looked at another way, the application as granted effected no modification whatsoever to the original license since the Commission denied the only change which had been requested. How can a modification application be deemed to be "granted in full" if no actual modification of any kind was authorized by the grant? In other words, assuming *Buckley-Jaeger* remains good law, its application to the present situation is undercut by the critical distinguishing fact that Behr's application was not "granted in full" in any logical sense. To the contrary, it was actually *denied* in full in every logical sense but one: the Commission granted it. That is how Section 1.110 came reluctantly into play.

Secondly, the Letter Order raises the specter of hearings being demanded *ad nauseam* whenever a waiver request "happen[s] to be attached to an application." We first note in this regard that Behr's waiver request did not "happen to be attached to an application" – it was part and parcel of the application. Section 1.925 of the rules requires waiver requests associated with wireless licenses to be filed in an application form, and since Behr was requesting a change in the terms of his license itself, the waiver *had* to be embodied in an application. This was not some clever maneuver devised by Behr to get the opportunity for a hearing.

More importantly, Section 1.110 of the rules (and its predecessor incarnation) has been on the books for

decades without spawning the spate of hearings feared by the Letter Order. Partial grant situations are rare, and most often an applicant is happy, or at least willing, to accept a partial or conditional grant rather than no grant at all and the prospect of a hearing. In addition, it is most common where the Commission is denying the entirety of the relief requested by an applicant to simply deny the application, which permits the normal appellate avenues through the Commission and the courts, rather than to grant the empty shell of an application as occurred here. For those unusual situations where the Commission does make a partial or conditional grant, Section 1.110 remains a perfectly valid avenue of relief. If the Commission does not want hearings to occur in those situations, Section 1.110 should be removed from the books. As it is, because non-compliance with Section 1.110 would stand as an absolute bar to Behr's right to review of the Commission's denial of his waiver request, he was compelled to comply with its procedures. No one faults applicants for filing applications for review when their applications are denied, although these filings probably bother the full Commission which has more important things to do. Similarly, Behr should not be faulted for exercising a right of review provided for, and here mandated by, the Commission's rules.

All that said, Behr would just as soon avoid the expense, delay and trouble to all concerned of having a hearing. Given the unique circumstances presented here – both the unusual twelve-year delay in processing Behr's initial application and the unusual "grant" of an application while denying all portions of it – Behr would not object to the Bureau revisiting its 2003 action on the application at issue. It appears that the Bureau did not recognize that granting the application but denying all relief requested in the application would create the present procedural quandary. Behr renews its request that the Bureau simply grant the relief requested by Behr in the application. If it does not grant the requested modification, however, it should simply deny the application. Either action would put the application back on a normal track without having to involve an ALJ and the full panoply of hearing procedures.

Respectfully submitted,

LAWRENCE BEHR

_____/s/_____
Donald J. Evans

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0400

His Attorney

February ___, 2007

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, SW
Washington, DC 20554

DA No. 07-434

January 31, 2007

Donald J. Evans, Esq.
Fletcher, Heald & Hildreth
1300 N. 17th Street
Arlington, VA 22209

Re: File No. 0001332167, Call Sign WPWR222

Dear Mr. Evans:

For the reasons stated below, the Mobility Division hereby dismisses, as procedurally defective, the petition of Lawrence V. Behr (Behr) for a hearing, pursuant to Section 1.110 of the Commission's rules.[1] In his Section 1.110 Petition,[2] Behr requests that we vacate the grant of the above-referenced application to modify his Phase I 220 MHz license and set for hearing the denial of Behr's Petition for Waiver—filed with the application—of Section 90.725(f),[3] which requires construction of Behr's Phase I 220 MHz license, Call Sign WPWR222, in 12 months.[4]

Section 1.110, by its terms only applies when "the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested" by the applicant.[5] The Wireless Telecommunications Bureau granted Behr's application in full; as such, Behr is effectively seeking a hearing regarding the denial of his Petition for Waiver. We find that Behr is not entitled to a Section 1.110 hearing. As the Commission stated in an analogous context:

> This amounts to a contention that a licensee, by requesting waiver of any Commission rule in his [ ] application, can obtain an evidentiary hearing [under Section 1.110] on whether it should apply to him. Such an argument is clearly without substance.[6]

---

[1] 47 C.F.R. § 1.110.
[2] Letter dated December 17, 2003, from Donald J. Evans, counsel to Laurence V. Behr, to Marlene H. Dortch, Secretary, FCC (Section 1.110 Petition).
[3] 47 C.F.R. § 90.725(f).
[4] *See* Letter dated November 12, 2003, from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, to Donald J. Evans, counsel to Laurence V. Behr (denying waiver request).
[5] Section 1.110 provides further that "the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing . . . ."
[6] *See* Requests for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission's Rules, *Memorandum Opinion and Order*, 8 FCC2d 1, 4 (1967), *aff'd*, Buckley-Jaeger v. FCC, 397 F.2d 651 (D.C Cir. 1968).

If Behr's interpretation of Section 1.110 were correct, then the denial of any request for relief, provided such request happened to be attached to an application, would entitle the requestor to an evidentiary hearing under Section 1.110.[7] The public interest would be ill served if the Commission were required to devote its limited resources to conducting Section 1.110 hearings *ad nausem*. The Commission's rules, moreover, provide two well-established vehicles for challenging the denial of relief on delegated authority—petitions for reconsideration and applications for review.[8] We note that Behr did not seek relief via either vehicle by the applicable filing deadline of December 12, 2003 (30 days from the denial of his Petition for Wavier).

We also note that because Behr failed to construct WPWR222 by the applicable 12-month deadline, the license cancelled automatically on January 8, 2004 pursuant to Section 90.725(f).[9]

Accordingly, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the Section 1.1110 request filed by Lawrence V. Behr on December 17, 2003, IS DISMISSED.

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

FEDERAL COMMUNCATIONS COMMISSION

Lloyd W. Coward
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

[7] *See* Buckley-Jaeger v. FCC, 397 F.2d at 656 ("It is also clear that section 1.110 of the Commission's rules has no application here. The rule concerns situations where the applicant receives less than a full authorization. But here Appellant received the full authorization to which it was entitled under the statute and rules. In these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory.").

[8] *See* 47 C.F.R. §§ 1.106, 1.115.

[9] 47 C.F.R. § 90.725(f) ("systems not constructed and placed in operation, or having commenced service, within twelve months from the date of initial license grant cancel automatically").

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December 17, 2003

RECEIVED

DEC 17 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20054

Re: File No. 0001332167
Lawrence Behr

Dear Ms. Dortch:

On November 17, 2003, the Wireless Bureau granted the above application but denied the waiver request contained in the application. Under the provisions of Section 1.110 of the Commission's rules, Mr. Behr hereby rejects the grant as made. Please vacate the original action and set the application for hearing as required by the rule.

Respectfully submitted,

LAWRENCE V. BEHR

By _____
Donald J. Evans
His Attorney

DJE:deb

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

NOV 12 2003

In Reply Refer To:
7110-18

Donald J. Evans, Esquire
Fletcher, Heald & Hildreth
1300 N. 17th St.
Arlington, VA 22209

Dear Mr. Evans:

This letter responds to the Petition for Waiver of Rule 90.725 that was filed on June 2, 2003 along with the application with FCC file number 0001332167. The application and waiver are filed on behalf of your client Lawrence Behr (Behr). The request seeks to waive the construction requirements for Behr's Phase I 220 MHz license with call sign WPWR222. Specifically, Behr is requesting a 5 year 1/3 population coverage/ 10 year 2/3 population coverage construction schedule identical to the one used for economic area licensees under Rule 90.767. For the reasons stated below, Behr's waiver request is denied.

Behr filed an application for authorization in the 220-222 MHz band on May 1, 1991. The application was misplaced and was not granted until January 8, 2003[1] - long after all other 220 MHz phase I licenses were issued. Behr argues that the underlying purpose of the Phase I non-nationwide construction rule would not be served by its application in this particular case because the 220 MHz service "...has moved to a different regulatory paradigm" created by the Commission's Third Report and Order, 6 CR 1169 (1997) (3rd R&O) and its Report and Order on Reconsideration, 12 CR 193, 218-19 (1998) (Recon).

Behr presumes that the Commission did not make the construction requirements for Phase I non-nationwide licensees equivalent to the construction requirements for phase II non-nationwide licensees in the 3rd R&O or Recon because it assumed that all phase I non-nationwide licenses were constructed[2]. We disagree. In the Recon at paragraphs 150 and 151, the Commission specifically addressed Phase I versus Phase II construction requirements in the nationwide context and clarified that the Phase II nationwide construction requirements apply only to Phase II nationwide licensees. Accordingly, Phase I nationwide are required to construct their licenses pursuant to their original construction deadlines. Although the Recon does not specifically address construction requirements for non-nationwide licensees, the Commission's differing treatment of construction requirements of Phase I and Phase II nationwide licensees shows that there is no presumption that Phase II licensing would create an inherent need to change the

[1] See Order, DA 02-2429, released September 30, 2002.
[2] See waiver at top of page 4.

construction requirement for Phase I licensees (nationwide or non-nationwide) in order create regulatory parity.

The reason the Commission moved to provide flexibility for Phase I licensees to relocate is because it recognized that licensed sites may become unusable for a variety of reasons[3] - not because, as Behr suggests, it was trying to apply regulatory parity between "similarly situated" Phase I and Phase II licensees[4]. Behr's argument that the license for its station is complex and similarly situated with geographic area licenses is incorrect.

First there is the matter of coverage area. Even though phase I licensees were given the flexibility to combine sites into a single geographic area for administrative convenience[5], phase I licensee service areas were not changed by the new regulations. Service in these areas may be provided by a single site unlike geographic areas which cover a much larger land area. Also, geographic area licenses are assigned a larger block of frequencies and are required to build around incumbent stations. Geographic area licenses, therefore, are inherently more complex with regard to construction issues. Behr does not show that its single site specific license is as equally complex to construct as a phase II license because of the regulatory changes that occurred while its application was pending. While indicating that he is evaluating sophisticated mobile data and internet access applications, Behr does not support his request for waiver with any evidence of how these applications would be deployed even during an extended Phase II type construction buildout. Further Behr does not show that its single site specific license warrants a construction schedule similar to geographic area licensees.

For the above reasons and since Behr has not provided sufficient justification for its waiver request, it does not meet either prong of the waiver test in Rule 1.925 and its request for waiver of Rule 90.725 is hereby denied.

Sincerely,

Ronald B. Fuhrman

Ronald B. Fuhrman
Deputy Chief, Technical Analysis Section
Commercial Wireless Division

[3] i.e. deconstruction of a tower site, refusal of a site lessor to extend a lease, or introduction of incurable interference at a site. See Recon at paragraphs 95-106.
[4] If anything, the Commission was trying to give the phase I licensees a flexibility similar to what they would have enjoyed if there were no regulatory changes.
[5] It is important to note that combining such stations requires that the stations be constructed. See Recon at paragraph 103.

Submitted: 06/02/2003 at 14:00:10
File Number: 0001332167

FCC 601
Main Form

FCC Application for Wireless Telecommunications Bureau Radio Service Authorization

Approved by OMB
3060 - 0798
See instructions for public burden estimate

1) Radio Service Code: **QT**	1a) Existing Radio Service Code:

General Information

2) (Select only one) **(MD)**

NE - New **RO** - Renewal Only **AU** - Administrative Update **NT** - Required Notifications
MD - Modification **RM** - Renewal/Modification **WD** - Withdrawal of Application **EX** - Requests for Extension of Time
AM - Amendment **CA** - Cancellation of License **DU** - Duplicate License **RL** – Registered Location/Link

3a) If this application is for a **D**evelopmental License, De**m**onstration License, or a **S**pecial Temporary Authorization (STA), enter the code and attach the required exhibit as described in the instructions. Otherwise enter '**N**' (Not Applicable).	(**N**)**D M S N**/A
3b) If this application is for Special Temporary Authority due to an emergency situation, enter 'Y'; otherwise enter 'N'. Refer to Rule 1.915 for an explanation of situations considered to be an emergency.	( )**Y**es **N**o
4) If this application is for an Amendment or Withdrawal, enter the file number of the pending application currently on file with the FCC.	File Number
5) If this application is for a Modification, Renewal Only, Renewal/Modification, Cancellation of License, Duplicate License, or Administrative Update, enter the call sign of the existing FCC license. If this is a request for Registered Location/Link, enter the FCC call sign assigned to the geographic license.	Call Sign **WPWR222**
6) If this application is for a New, Amendment, Renewal Only, or Renewal/Modification, enter the requested authorization expiration date (this item is optional).	MM DD _____/_____
7) Is this application "major" as defined in §1.929 of the Commission's rules when read in conjunction with the applicable radio service rules found in Parts 22 and 90 of the Commission's rules? (NOTE: This question only applies to certain site-specific applications. See the instructions for applicability and full text of §1.929).	(**N**)**Y**es **N**o
8) Are attachments being filed with this application?	(**Y**)**Y**es **N**o

Fees, Waivers, and Exemptions

9) Is the applicant exempt from FCC application fees?	(**N**)**Y**es **N**o
10) Is the applicant exempt from FCC regulatory fees?	(**N**)**Y**es **N**o
11a) Does this application include a request for a Waiver of the Commission's rule(s)? If 'Yes', attach an exhibit providing rule number(s) and explaining circumstances.	(**Y**)**Y**es **N**o
11b) If 11a is 'Y', enter the number of rule section(s) being waived.	Number of Rule Section(s): **1**
12) Are the frequencies or parameters requested in this filing covered by grandfathered privileges, previously approved by waiver, or functionally integrated with an existing station?	(**Y**)**Y**es **N**o

Applicant Information

13) FCC Registration Number (FRN):
0003215548

14) Applicant/Licensee legal entity type: (Select One)
[X] Individual [ ] Corporation [ ] Unincorporated Association [ ] Trust [ ] Government Entity
[ ] Consortium [ ] General Partnership [ ] Limited Liability Company [ ] Limited Liability Partnership
[ ] Limited Partnership [ ] Other (Description of Legal Entity) _____

15) If the licensee name is being updated, is the update a result from the sale (or transfer of control) of the license(s) to another party and for which proper Commission approval has not been received or proper notification not provided? ( )Yes No

16) First Name (if individual):	MI:	Last Name:	Suffix:
LAWRENCE		**BEHR**	

17) Legal Entity Name (if other than individual):

18) Attention To:

19) P.O. Box:	And/Or	20) Street Address:
		3400 TUPPER DR

21) City:	22) State:	23) Zip Code:
GREENVILLE	**NC**	**27834**

24) Telephone Number:	25) FAX:
(919)757-0279	

26) E-Mail Address:

27) **Demographics (Optional)**:

Race:	**Ethnicity:**	**Gender:**
[ ] American Indian or Alaska Native	[ ] Hispanic or Latino	[ ] Male
[ ] Asian	[ ] Not Hispanic or Latino	[ ] Female
[ ] Black or African-American		
[ ] Native Hawaiian or Other Pacific Islander		
[ ] White		

Real Party in Interest

28) Name of Real Party in Interest of Applicant (If different from applicant):	29) FCC Registration Number (FRN) of Real Party in Interest:

Contact Information (If different from the applicant)

30) First Name:	MI:	Last Name:	Suffix:
Donald	**J**	**Evans**	

31) Company Name:
Fletcher, Heald & Hildreth

32) Attention To:

33) P.O. Box:	And /Or	34) Street Address:
		1300 N. 17th St.

35) City:	36) State:	37) Zip Code:
Arlington	**VA**	**22209**

38) Telephone Number:	39) FAX:
(703)812-0430	**(703)812-0486**

40) E-Mail Address:
evans@fhhlaw.com

Regulatory Status

41) This filing is for authorization to provide or use the following type(s) of radio service offering (enter all that apply):

(X)Common Carrier ( )Non-Common Carrier ( )Private, internal communications ( )Broadcast Services ( )Band Manager

Type of Radio Service

42) This filing is for authorization to provide the following type(s) of radio service (enter all that apply):

( )Fixed (X)Mobile ( )Radiolocation ( )Satellite (sound) ( )Broadcast Services

43) Interconnected Service? (Y)Yes No

Alien Ownership Questions

44) Is the applicant a foreign government or the representative of any foreign government? (N)Yes No

45) Is the applicant an alien or the representative of an alien? (N)Yes No

46) Is the applicant a corporation organized under the laws of any foreign government? (N)Yes No

47) Is the applicant a corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country? (N)Yes No

48a) Is the applicant directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? (N)Yes No

48b) If the answer to the above question is 'Y', has the applicant received a ruling(s) under Section 310(b)(4) of the Communications Act with respect to the same radio service involved in this application? ( )Yes No

If the answer to 48b is 'N', attach to this application a date-stamped copy of a request for a foreign ownership ruling pursuant to Section 310(b)(4) of the Communications Act.

Basic Qualification Questions

49) Has the applicant or any party to this application had any FCC station authorization, license or construction permit revoked or had any application for an initial, modification or renewal of FCC station authorization, license, or construction permit denied by the Commission? (N)Yes No

50) Has the applicant or any party to this application, or any party directly or indirectly controlling the applicant, ever been convicted of a felony by any state or federal court? (N)Yes No

51) Has any court finally adjudged the applicant or any party directly or indirectly controlling the applicant guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communication, directly or indirectly, through control of manufacture or sale of radio apparatus, exclusive traffic arrangement, or any other means or unfair methods of competition? (N)Yes No

Aeronautical Advisory Station (Unicom) Certification

52) ( ) I certify that the station will be located on property of the airport to be served, and, in cases where the airport does not have a control tower, RCO, or FAA flight service station, that I have notified the owner of the airport and all aviation service organizations located at the airport within ten days prior to application.

Broadband Radio Service and Educational Broadband Service Cable Cross-Ownership

53a) Will the requested facilities be used to provide multichannel video programming service? ( )Yes No

53b) If the answer to question 53a is yes, does applicant operate, control or have an attributable interest (as defined in Section 27.1202 of the Commission's Rules) in a cable television system whose franchise area is located within the geographic service area of the requested facilities? ( )Yes No

Note: If the answer to question 53b is 'Y', attach an exhibit explaining how the applicant complies with Section 27.1202 of the Commission's Rules or justifying a waiver of that rule. If a waiver of the Commission Rule(s) is being requested, Item 11a must be answered 'Y'.

Broadband Radio Service and Educational Broadband Service (Part 27)

54) (For EBS only) Does the applicant comply with the programming requirements contained in Section 27.1203 of the Commission's Rules? ( )Yes No

Note: If the answer to item 54 is 'N', attach an exhibit explaining how the applicant complies with Section 27.1203 of the Commission's Rules or justifying a waiver of that rule. If a waiver of the Commission Rule(s) is being requested, Item 11a must be answered 'Y'.

55) (For BRS and EBS) Does the applicant comply with Sections 27.50, 27.55, and 27.1221 of the Commission's Rules? ( )Yes No

Note: If the answer to item 55 is 'N', attach an exhibit justifying a waiver of that rule(s). If a waiver of the Commission Rule(s) is being requested, Item 11a must be answered 'Y'.

General Certification Statements

1)	The applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application.
2)	The applicant certifies that grant of this application would not cause the applicant to be in violation of any pertinent cross-ownership or attribution rules.* *If the applicant has sought a waiver of any such rule in connection with this application, it may make this certification subject to the outcome of the waiver request.
3)	The applicant certifies that all statements made in this application and in the exhibits, attachments, or documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith.
4)	The applicant certifies that neither the applicant nor any other party to the application is subject to a denial of Federal benefits pursuant to §5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862, because of a conviction for possession or distribution of a controlled substance. This certification does not apply to applications filed in services exempted under §1.2002(c) of the rules, 47 CFR § 1.2002(c). See §1.2002(b) of the rules, 47 CFR § 1.2002(b), for the definition of "party to the application" as used in this certification.
5)	The applicant certifies that it either (1) has current required ownership data on file with the Commission, (2) is filing updated ownership data simultaneously with this application, or (3) is not required to file ownership data under the Commission's rules.
6)	The applicant certifies that the facilities, operations, and transmitters for which this authorization is hereby requested are either: (1) categorically excluded from routine environmental evaluation for RF exposure as set forth in 47 C.F.R. 1.1307(b); or, (2) have been found not to cause human exposure to levels of radiofrequency radiation in excess of the limits specified in 47 C.F.R. 1.1310 and 2.1093; or, (3) are the subject of one or more Environmental Assessments filed with the Commission.
7)	The applicant certifies that it has reviewed the appropriate Commission rules defining eligibility to hold the requested license(s), and is eligible to hold the requested license(s).
8)	The applicant certifies that it is not in default on any payment for Commission licenses and that it is not delinquent on any non-tax debt owed to any federal agency.

Signature

56) Typed or Printed Name of Party Authorized to Sign

First Name:	MI:	Last Name:	Suffix:
Lawrence	**V**	**Behr**	

57) Title:

Sole Proprietor

Signature:	58) Date:
Lawrence V Behr	**06/02/2003**

FAILURE TO SIGN THIS APPLICATION MAY RESULT IN DISMISSAL OF THE APPLICATION AND FORFEITURE OF ANY FEES PAID.

Upon grant of this license application, the licensee may be subject to certain construction or coverage requirements. Failure to meet the construction or coverage requirements will result in termination of the license. Consult appropriate FCC regulations to determine the construction or coverage requirements that apply to the type of license requested in this application.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, §1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, §312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, §503).

FCC 601
Schedule D

Wireless Telecommunications Bureau Schedule for Station Locations and Antenna Structures

Approved by OMB
3060 - 0798
See 601 Main Form Instructions for public burden estimate

1) Action Requested: ( ) **A**dd **M**od **D**el		2) Location Number**:**	
3) Location Description**:**	4) Area of Operation Code**:**	5) Location Name**:**	
6) FCC Antenna Structure Registration # or N/A (FAA Notification not Required): **N/A**			
7) Latitude (DD-MM-SS.S): **NAD83** ( ) N or S		8) Longitude (DDD-MM-SS.S)**:** **NAD83** ( ) E or W	
9) Street Address, Name of Landing Area, or Other Location Description:			
10) City:	11) State**:**	12) County/Borough/Parish:	
13) Elevation of Site AMSL (meters) ('a' in antenna structure example)**:**	14) Overall Ht AGL Without Appurtenances (meters) ('b' in antenna structure example)**:**	15) Overall Ht AGL With Appurtenances (meters) ('c' in antenna structure example)**:**	
16) Support Structure Type:			
17) Location Number: (only for Area of Operation Code 'A')	18) Radius (km):	19) Airport Identifier:	20) Site Status:
21) Maximum Latitude (DD-MM-SS.S): **NAD83** **Use for rectangle only (Northwest corner)** ( ) N or S		22) Maximum Longitude (DDD-MM-SS.S)**:** **NAD83** **Use for rectangle only (Northwest corner)** ( ) E or W	
23) Do you propose to operate in an area that requires frequency coordination with Canada? ( ) **Y**es **N**o			
24) Description: (only for Area of Operation Code 'O')			
25) Number of Units: ____Hand Held ____Mobile ____Temporary Fixed ___Aircraft ___Itinerant			
26) Would a Commission grant of Authorization for this location be an action which may have a significant environmental effect? See Section 1.1307 of 47 CFR. If 'Yes', submit an environmental assessment as required by 47 CFR, Sections 1.1308 and 1.1311. ( ) **Y**es **N**o			
27a) If the site is located in one of the Quiet Zones listed in Item 27b of the Instructions, provide the date (mm/dd/yyyy) that the proper Quiet Zone entity was notified: _____			
27b) Has the applicant obtained prior written consent from the proper Quiet Zone entity for the same technical parameters that are specified in this application? ( ) **Y**es **N**o			
28) Do you propose to operate in an area that requires frequency coordination with Mexico? ( ) **Y**es **N**o			

FCC 601
Schedule H

Technical Data Schedule for the Private Land Mobile and Land Mobile Broadcast Auxiliary Radio Services (Parts 90 and 74)

Approved by OMB
3060 - 0798
See 601 Main Form instructions for public burden estimate

Eligibility

1) Rule Section:	2) Describe Activity:
90.703C	**APPLICANT PROPOSES TO PROVIDE ON A COMMERCIAL BASIS MOBILE RELAY STATIONS FOR USE OF ELIGIBLES UNDER SUBPARTS B C D AND E OF PART 90**

Frequency Coordinator Information (if not self-coordinated)

3) Frequency Coordination Number	4) Name of Frequency Coordinator	5) Telephone Number	6) Coordination Date

7) Has this application been successfully coordinated? ( )**Y**es/**N**o

Extended Implementation (Slow Growth)

8) Are you requesting a new or modified extended implementation plan? ( )**Y**es/**N**o
If 'Yes', attach an exhibit with a justification and a proposed station construction schedule.

Associated Call Signs (Attach additional sheets if required)

9)				

Broadcast Auxiliary Only

If there is an associated Parent Station, complete Items 10-12.	10) Facility Id of Parent Station:	11) Radio Service of Parent Station:	12) City and State of Parent Station Principal Community:

13) If there is no associated parent station, this applicant is a: ( ) **B**roadcast Network Entity Television **C**able Operator **M**otion Picture Producer **T**elevision Producer	14) State of Primary Operation:

Control Point(s) (Other than at the transmitter) (Attach additional sheets if required)

15) Action A/M/D	16) Control Point Number	17) Location Street Address, City or Town, County/Borough/Parish, State	18) Telephone Number

Antenna Information

19) Action ( ) A/M/D	20) Location Number	21) Antenna Number	22) AAT (meters)	23) Antenna Ht. (meters)	24) Azimuth (degrees)	25) Beamwidth (degrees)	26) Polarization	27) Gain (dB)

Frequency Information

28) Action ( ) A/M/D	29) Location Number	30) Antenna Number	31) Frequency (MHz)		32) Station Class	33) No. of Units	34) No. of Paging Receivers	35) Output Power (watts)	36) ERP (watts)	37) Emission Designators
M	**1**	**1**	Existing (if Mod) **000220.08750000**	New	**FB6C**	**5**		**100.000**	**500.000**	**4K00J3E**
M	**1**	**1**	Existing (if Mod) **000220.23750000**	New	**FB6C**	**5**		**100.000**	**500.000**	**4K00J3E**
M	**1**	**1**	Existing (if Mod) **000220.38750000**	New	**FB6C**	**5**		**100.000**	**500.000**	**4K00J3E**
M	**1**	**1**	Existing (if Mod) **000220.53750000**	New	**FB6C**	**5**		**100.000**	**500.000**	**4K00J3E**
M	**1**	**1**	Existing (if Mod) **000220.68750000**	New	**FB6C**	**5**		**100.000**	**500.000**	**4K00J3E**

Attachment(s):

Type	Description	Date Entered
O	Memorandum Opinion and Order FCC 14-207	12/18/2014
P	Application for Review	06/19/2009
O	Order on Reconsideration	05/27/2009
P	Petition for Reconsideration of Action on Application	02/13/2007
L	Denial of Petition for Hearing	01/31/2007
O	Petition for Hearing	12/17/2003
L	Waiver Denial Letter	11/12/2003
O	Petition for Waiver of Outdated Build-out Timetable	05/23/2003

PETITION FOR WAIVER OF
SECTION 90.725 OF THE COMMISSION=S RULES

Lawrence Behr (ABehr@), by his attorneys, hereby petitions the Commission to waive construction requirements set forth in Section 90.725 of the rules for Phase I 220 MHz licensees. As will be set forth below, Behr=s 220 MHz license is in the unique position of having been mislaid by the Commission and then granted some twelve years after it was originally filed. The waiver request set forth below is intended to place the Behr license on an equal footing with other current 220 MHz licensees, taking into account the evolution of the Commission=s rules which occurred while the Behr application was in a state of suspended animation.

I. BACKGROUND

Behr originally filed his application for station WPWR222 during the initial filing window for non-nationwide 220 MHz applications in May of 1991. His application was selected in the lottery and he timely filed a perfecting amendment. His application apparently was lost by the Commission and was deemed to have been dismissed, although no order specifically taking such action was ever issued. The Commission ultimately discovered and corrected the mistake by an Order issued September 30, 2002. *Lawrence Behr*, DA 02-2429, rel. Sept. 30, 2002. In due course the staff processed the application and granted it on January 8, 2003. We assume that

all other original Phase I applications were either constructed or abandoned many years ago. Hence there are no other 220 MHz licensees in Behr=s situation now, and there will never be any again.

Under the rules applicable to Phase I licensees, Behr now has 12 months in which to complete construction of the Denver station. This rule was adopted in 1990.[1] In the intervening years, however, the 220 MHz service went through a long process of evolution. First, the original 220 MHz applicants were actually given until August 15, 1996, to construct their systems. See Section 90.757(a) of the Commission=s rules and *Second Report and Order in PR Docket 89-552*, rel. Jan. 26, 1996. While this extended construction period was a product of myriad complications in the 220 MHz licensing process, the fact remains that the original licensees in Behr=s position were given more than four years to complete their initial build-out. Only the bizarre circumstance of Behr =s application having been lost prevented him from sharing this generous construction schedule.

Second, the Commission created a Phase II category of 220 MHz licensees in 1997. *220 MHz Band Use by Private Land Mobile Radio Service (Third Report and Order)*, 6 CR 1169 (1997). In that order the Commission decided to apply to new 220 MHz non-nationwide licensees the same five- and ten-year build out benchmarks which it had been applying to all other fixed and mobile service licensees. These benchmarks require Phase II non-nationwide licensees to be serving one-third of the population of their service area within five years of their grant date, and two-thirds of that population within ten years. See also Section 90.767 of the Commission=s rules. This approach to system construction was specifically modeled on the 900

MHz SMR regulatory scheme, but in fact over the last decade this has been the Commission=s policy with respect to all geographically-defined licenses.

Indeed, the Commission distinguished its proposed treatment of Phase II 220 MHz licensees from Phase I licensees on the grounds that the latter were Aauthorized to operate on single base station at a single site.@ *Use of the 220 MHz Band by the Private Mobile Radio Service*, 11 FCC Rcd 188, 234 (1995). In 1995, that actually was a distinguishing factor: Phase I non-nationwide licenses authorized operation only at one specific site with specific technical parameters, while Phase II non-nationwide licenses were granted on an Economic Area (EA) or Regional basis which permitted operation at multiple sites within the boundaries of their authorized territories.

In 1998, that distinction disappeared. In *Use of 220 MHz Band by the Private Radio Service, Report and Order on Reconsideration*, 12 CR 193, 218-19 (1998), the Commission decided to effectively turn Phase I non-nationwide licenses into geographic licenses. Under new rule 90.745, Phase I licensees may construct as many base stations as they wish within the confines of their original 38 dBu contour and may relocate their base stations without prior approval from the Commission. This was done to provide parity between Phase I licensees on the one hand, and Phase II and all other commercial Part 90 incumbents on the other. This important step forward gave Phase I licensees the flexibility to construct facilities in the locations best designed to serve their customers= needs without having to undergo a long, cumbersome, and unnecessary application and approval process at the Commission. However, having brought Phase I licensees into the modern regulatory model for this purpose, the Commission neglected to revisit the now outdated and anomalous 12-month construction period

which still applied to those licensees. Indeed, it is probable that by that time (1998), there were no longer any Phase I non-nationwide licensees extant who had not completed their initial build-outs. Hence, there was no need to Afix@ the construction period for a category of licensee who no one thought would even exist.

Comes 2003, and Behr awakens like Rip Van Winkle to find himself in a 21st century regulatory scheme for all purposes except the now totally antiquated and anomalous build-out period. To eliminate this unique anomaly, Behr requests that the same construction requirements which apply to non-nationwide Phase II 220 MHz licensees (*i.e.*, ' 90.767) be applied to him.

II. APPROPRIATE STANDARD FOR WAIVER

The standard for granting a waiver of the Commission=s rules is well-established. The Commission=s waiver rules require a waiver proponent to demonstrate either (a) that the underlying purpose of the rule would not be served, or would be frustrated by its application in this particular case, or (b) that the unique facts and circumstances of this particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or that the proponent has no reasonable alternative. 47 C.F.R. 1. 925. Behr=s request meets both tests.

First, it is obvious that the license for station WPWR222 is a curious throwback to the 1990/1991 era when the 220 MHz service was first being conceived. As a result of a unique sequence of events, Behr finds himself with a Phase I build-out period in a world that has long since moved to a different regulatory paradigm. The modern construction scheme envisions maximal flexibility for licensees to build out their system on a schedule and at locations which

will best meet their customers= needs. This broad flexibility is bounded only by the now

customary five-year and ten-year benchmarks necessary to ensure that the spectrum does not lie fallow for extended periods of time. As noted above, the FCC effectively and deliberately converted Phase I licenses to the same geographic footing as regional and EA 220 MHz licenses when it authorized Aapproval-less@ construction of multiple sites within a Phase I licensee=s defined license boundary. Grant of this waiver will put Behr on equal footing with the other similarly situated licensees not only in the 220 MHz service but in virtually all other commercial services regulated by the Commission. Once Phase I licensees became untethered from the single-site/single base station model, the twelve-month construction period applicable to that model no longer made sense.[2] Yet Behr is constrained by pressure to build out in accordance with an outmoded regulatory constraint which has otherwise been abandoned for similarly situated licensees.

A useful comparison here is certain cellular radio license applications which were acted on by the Wireless Bureau in 2000. Three applications which had originally been filed in 1988 and 1989, after following a twisted path from dismissal to court appeals to reinstatement by Congressional fiat, were eventually processed by the Commission in early 2000. Technically, these applications were required to include the financial qualification demonstration which was a component of pre-1990 cellular applications but which had long since been abandoned for later cellular filings. The Commission recognized that there was no purpose in applying an outmoded rule to applications which, by happenstance, had re-emerged as survivors of that earlier regulatory regime. It accordingly and summarily waived the rule that required financial commitments to be submitted as part of the cellular long-form application.[3] This

practical common sense approach to dealing with decade-old applications should apply here as well.

In the months since his license was granted, Behr has been exploring the 220 MHz marketplace in Denver. It is far different than anything he envisioned in 1991, when conventional mobile voice usage was expected to be the primary application. He is now evaluating sophisticated mobile data and internet access applications, both of which will require development by equipment manufacturers. In addition, the electromagnetic environment in Denver is obviously more complicated than it was in 1991, with entrenched incumbents to deal with. Moreover, siting issues in recent years have become more difficult than they once were. Thus, while Behr obviously hopes and plans to put Station WPWR222 to work as soon as possible, he cannot be blind to the realities which can delay development in 2003. The grant of the waiver will afford him the same flexibility to work through deployment issues that all other contemporary licensees now enjoy.

III. CONCLUSION

Based on the foregoing, it is apparent that the underlying purpose of the 12-month build-out period prescribed by Section 90.725 would not be served here, but, rather, that the truly unique facts and circumstances of this particular case render application of that rule not only burdensome but inequitable and contrary to the public interest. The Commission should allow

Behr the same latitude that it gives all other current 220 MHz licensees to build out their systems in a flexible manner.

[1]The original rules specified an eight-month construction period. This was later extended to twelve months.

[2]Of course, Behr was not in a position to raise these issues in 1995 or 1998 since the Commission was still years away from acknowledging that his application even existed.

[3]See Application of Great Western Cellular Partners, LLC; Monroe Telephone Services, LLC,and FutureWave Partners, LLC, File Nos. 10269CLP88, 10625CLP89, 10810CLP89.

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

In the Matter of	)	
	)	
LAWRENCE BEHR	)	
Application to Operate a	)	
Phase I 220 MHz License in	)	File No. 983133
Denver, Colorado	)	
	)	
NET RADIO COMMUNICATIONS GROUP, LLC	)	
Authorization for 220 MHz Station	)	
Call Sign WPFQ335	)	
Denver, Colorado	)	

ORDER

Adopted: September 26, 2002 **Released: September 30, 2002**

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this order, we correct, on our own motion, an administrative error and reinstate the above-captioned application filed by Lawrence Behr (Behr) for a Phase I 220 MHz license in Denver, Colorado. We also set aside a subsequent conflicting license issued to Net Radio Communications Group, LLC (Net Radio) for site-by-site operation in Denver, and we dismiss a related Application for Review filed by Behr as moot.[1]

II. BACKGROUND

2. In April 1991, the Commission established the 220-222 MHz radio service (220 MHz Service) with the adoption of the *220 MHz Report and Order*.[2] The Commission began accepting site-specific Phase I applications for 220 MHz licenses on May 1, 1991.[3] On May 24, 1991, after receiving

[1] A 1995 Public Notice indicated that all Non-Nationwide 220 MHz Phase I licenses for which frequencies were available had been granted, and that all other pending Non-Nationwide 220 MHz Phase I applications were dismissed. *See* In the Matter of Disposition of Non-Nationwide 220-222 MHz Applications, Order, 10 FCC Rcd 7747 (1995). On October 25, 1996, Behr sought reconsideration of the dismissal of the above-captioned application. On October 10, 1997, the Licensing and Technical Analysis Branch (LTAB) of the Commercial Wireless Division dismissed Behr's Petition as untimely filed. On November 10, 1997, Behr filed an Application for Review of LTAB's dismissal of Behr's Petition.

[2] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*).

[3] *See* FCC Adopts New Rules for Use of 220-222 MHz Band by Private Mobile Licensees, *Public Notice*, Mimeo No. 2186 (March 14, 1991).

over 59,000 applications, the Commission instituted a freeze on the filing of any further initial 220 MHz license applications.[4]

3. On May 1, 1991, Behr submitted his application for a Phase I 220 MHz license in Denver.[5] Because Behr's application was mutually exclusive with other applications, the Land Mobile Branch of the former Private Radio Bureau (Branch) conducted a lottery, in which Behr was selected as a tentative selectee for Denver.[6] On January 28, 1993, the Branch returned Behr's application with a request for additional technical information, and Behr timely resubmitted the corrected application on March 23, 1993.[7] The Branch subsequently misplaced Behr's amendment, and improperly failed to issue Behr a Phase I 220 MHz authorization. On September 6, 1994, the Branch, unaware of Behr's timely refiled application, granted a Phase I 220 MHz license to the second tentative selectee in Denver, Gary Petrucci (Petrucci), under call sign WPFQ335.[8]

4. In 1998, the Commission auctioned numerous 220 MHz Economic Area (EA) geographic licenses in Auction No. 18, including the Denver EA on the same frequencies Behr sought in his Phase I application. Net Radio was the high bidder for the Denver market in Auction 18, and became the geographic area license for this channel block.

III. DISCUSSION

5. Commission records reflect that Behr timely refiled his amended Phase I 220 MHz application. As the initial tentative selectee in Denver, Behr's application should have been timely processed. We find that the administrative error in misplacing Behr's application resulted in both the improper dismissal of his application and the grant of call sign WPFQ335 to the second tentative selectee in Denver. We will correct this inadvertent ministerial error by reinstating, on our own motion, Behr's referenced application for further processing.

6. It is well settled that an agency has the authority to correct inadvertent ministerial errors, even after the agency has taken final action.[9] The Commission recently addressed this issue and upheld a

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[4] In the Matter of Acceptance of 220-222 MHz Private Land Mobile Applications, *Order*, 6 FCC Rcd 3333 (1991) (*Freeze Order*). From among those applications filed prior to the freeze, the Commission granted licenses to non-mutually exclusive applicants on a first-come, first-served basis, while mutually exclusive applications were resolved through a lottery. In 1997, Congress terminated the Commission's authority to award licenses via random selection in most circumstances and required resolution of mutually exclusive applications via competitive bidding. *See* 47 U.S.C. § 309 (i) (5) and 47 U.S.C. § 309 (j).

[5] FCC File No. 983133.

[6] *See* Commission Announces Tentative Selectees for 220-222 MHz Nationwide Commercial Private Land Mobile Channels, *Public Notice*, DA 93-376 (rel. Apr. 1, 1993), 58 Fed. Reg. 26322 (May 3, 1993) (*Lottery Public Notice*).

[7] *See* Application Return Notice for the Private Land Mobile Radio Services, dated January 28, 1993. *See also* former rule section 90.141, 47 C.F.R. § 90.141 (1993) (applicant must supply requested information within sixty days of application return notice date in order to retain place in application processing line).

[8] On September 19, 1997, while Behr's Petition remained pending, LTAB approved the assignment of call sign WPFQ335 in Denver from Petrucci to Roamer One (Roamer). On January 13, 2000, while Behr's Application for Review remained pending, LTAB approved the assignment of call sign WPFQ335 from Roamer to the current licensee, Net Radio.

[9] *See American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145-146 (1958); *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5th Cir. 1990). In *American Trucking*, the court acknowledged an agency's ability to

decision of the Policy and Rules Branch of the Commercial Wireless Division to reinstate, on its own motion, a cancelled license, stating that "[t]he Commission, upon learning of an inadvertent ministerial processing error may correct its error, even beyond the reconsideration period."[10] The Commission has noted, however, that the authority to revisit final actions is limited.[11] In *San Mateo,* the Commission explained that this authority extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action.[12] Moreover, as the Court stated in *American Trucking*, "the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies." We find that the Branch's inadvertent, ministerial error in misplacing a properly filed application is within our authority to correct, and that to correct this error is not to reverse a prior decision regarding the merits of Behr's application. Accordingly, we will return Behr's application to pending status, and will process the application in accordance with the rules in effect at the time the application amendment was filed.

7. We also find that the administrative error concerning the handling of Behr's amended application directly resulted in the improper issuance of a Phase I authorization to the second tentative selectee in Denver. Had the Branch not misplaced Behr's amendment, Behr's application would have been processed first because of Behr's status as the initial tentative selectee in Denver, and therefore the second tentative selectee's application would not have been granted. Accordingly, we hereby set aside the improper grant of call sign WPFQ335, currently licensed to Net Radio in Denver.[13]

8. Net Radio, as the geographic licensee for the Denver EA on the relevant channel block, will be required to afford interference protection to Behr's facility pursuant to our rules, provided Behr timely constructs its facilities.[14] However, to avoid unnecessary disruption of Net Radio's current service in the Denver market, we grant Net Radio special temporary authority to operate under the parameters of the authorization set aside in this order, call sign WPFQ335. The special temporary authority is granted for the earlier of: 1) 180 days from the date of this order; or 2) until such time as Behr provides Net Radio

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correct administrative errors, stating that "[t]o hold otherwise would be to say that once an error has been done the agency is powerless to take remedial steps."

[10] *See* In the Matter of Mobile UHF, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 22,945 (2001). In *Mobile UHF,* LTAB cancelled a license for failure to timely construct, erroneously believing that the license was one of a group of licensees that had sought and been denied construction extensions in connection with the "Goodman/Chan" proceeding. After the applicable finality period, Mobile UHF's license was reinstated after it informed the Commission that it had not sought an extension and provided evidence that the station had been timely constructed.

[11] *See* In the Matter of Applications of County of San Mateo, California, *Memorandum Opinion and Order*, 16 FCC Rcd 16501 (2001).

[12] *Id.* at 16503 ¶ 8.

[13] We note that Behr's pending Application for Review, which we dismiss as moot, was included on the Commission's Due Diligence Public Notice for Auction 18 (including the specific frequencies and market). Net Radio therefore had notice of Behr's claim to the Denver market when it: 1) bid on and won the 220 MHz auction for the Denver market; and 2) received assignment from Roamer, on January 13, 2000, of the Phase I Denver authorization under call sign WPFQ335.

[14] *See* 47 C.F.R. § 90.763 (b).

written notification that it is ready to commence operations under an authorization granted pursuant to this order.[15] Finally, because we correct, on our own motion, an administrative error by reinstating Behr's application for further processing and setting aside the grant of call sign WPFQ335, we dismiss Behr's Application for Review as moot.

IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R §§ 0.131, 0.331, the application filed by Lawrence Behr on May 1, 1991, under File Number 983133 for a Phase I 220 MHz license in Denver, Colorado, IS HEREBY REINSTATED TO PENDING STATUS for further processing by the Licensing and Technical Analysis Branch of the Commercial Wireless Division, consistent with Commission rules and regulations in effect as of March 23, 1993.

10. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R §§ 0.131, 0.331, Call Sign WPFQ335, a 220 MHz Phase I station licensed to Net Radio Communications Group LLC in Denver, Colorado, is hereby SET ASIDE.

11. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and section 1.931 of the Commission's rules, 47 C.F.R. § 1.931, Net Radio Communications Group, LLC is granted special temporary authority to continue 220 MHz operations in Denver, Colorado in accordance with paragraph 8 above.

12. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R § 0.331, the Application for Review filed by Lawrence Behr on November 10, 1997, is hereby DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau

[15] In the event Behr's application is granted and he does not timely construct, any authorization granted to Behr would automatically terminate and Net Radio, as the Denver geographic licensee, would have reversionary rights in those frequencies, subject to providing adequate interference protection to other incumbent licensees in the Denver EA. *See* Commission rule 90.763 (b), 47 C.F.R. § 90.763 (b).

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

OCT 1 0 1997

In Reply Refer To:
7110-18

Donald J. Evans, Esquire
Evans & Sill, P.C.
1627 Eye Street, N.W.
Washington, DC 20006

Dear Mr. Evans:

This letter replies to the October 25, 1996 "Request for Reconsideration" of our October 18, 1996 letter. Specifically, you request that the application submitted by your client, Lawrence Behr (Behr) with FCC file number 983133 be returned to pending status for processing. Behr's application was disposed of by the Commission's Order released July 21, 1995 which we enclosed with our October 18, 1996 letter.

Behr's request for reconsideration of our October 18, 1996 letter is moot since the letter had no affect on Behr's application, file number 983133. It was the Commission's Order released on July 21, 1995 which disposed of Behr's application. Since Behr's August 12, 1996 and October 25, 1996 letters regarding this issue are not timely[1], and since the proposed frequencies are no longer available at the proposed location, Behr's request for reconsideration is hereby DENIED.

Sincerely,

Terry L. Fishel
Deputy Chief, Licensing and Technical Analysis Branch
Commercial Wireless Division

Post-It® Fax Note 7671	Date 11-21-97	# of pages ▶ 1
To Scott M.	From Gary Dunn	
Co./Dept. FCC/WTB	Co. FCC/Gettysburg	
Phone # (202) 418-7552	Phone # (717) 338-2618	
Fax # 202 418 7447	Fax #	

[1] Behr's request for reconsideration is received more than one year after the Order which disposed of its application was released. Timely filings are to be submitted within 30 days of the date of the Commission's action.

EVANS & SILL, P.C.
ATTORNEYS AT LAW
1627 EYE STREET, N.W.
SUITE 810
WASHINGTON, D.C. 20006
TELEPHONE (202) 293-0700
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DONALD J. EVANS
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ROBERT M. WINTERINGHAM*
JILL M. CANFIELD**

+OF COUNSEL

ALSO ADMITTED:
MD., PA.

*ADMITTED VA. ONLY
**ADMITTED N.Y. ONLY

October 25, 1996

Mr. Michael Regiec
Federal Communications Commission
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245

Attention: Mr. Gary Devlin

In re: Application of Lawrence Behr
File No. 983133

Dear Mike:

Thank you for your letter of October 18, 1996 (copy attached) regarding a 220 MHz application of Lawrence Behr. The reason we are perplexed is that the application was not "returned for additional information on March 23, 1993." It was returned on January 28, 1993. (See attachment). The application with the requested information was then re-submitted on March 23, 1993 -- well within the 60 day period established by Rule 90.141. See FCC Date Stamp on page 2 of the application). Mr. Behr never received any indication that his application had been re-returned or not accepted or dismissed. Rather, it appeared to be in the exact same category as two other applications which he re-submitted and which were duly granted.

When an authorization was not received by late last year, we attempted to check through the FCC's data bases and through inquiries to the FCC staff as to what might have become of the application. It was the unsuccessful exhaustion of these efforts which led me to write to you last August.

It appears that Mr. Behr's application was timely and properly re-submitted to the Commission within the procedures established by the Commission. so far as we can tell, the Commission has never acted on the application. Perhaps it has

somehow fallen through a crack. But Mr. Behr should not have to forfeit a valuable license because the application seems to have gotten lost.

It is not entirely clear what the appropriate procedure is here since the Commission has never acted on Mr. Behr's re-submitted application, yet you appear to believe that it is no longer pending. To the extent your letter indicates that Mr. Behr's application is no longer pending, Mr. Behr requests reconsideration of that decision. Please call me when you have received this and perhaps we can figure out a way to resolve this matter.

Yours very truly,

Donald J. Evans

DJE/sls
Enclosures

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

In Reply Refer To:
7110-18

OCT 18 1996

Donald J. Evans, Esquire
Evans & Sill, P.C.
1627 Eye Street, N.W.
Washington, DC 20006

Dear Mr. Evans:

This letter replies to your August 12, 1996 request for information concerning an application for a new 220-222 MHz station in the QT radio service which was assigned FCC file number 983133 . The application was submitted by your client, Lawrence Behr (Behr) on May 1, 1991 and returned for additional information on March 23, 1993.

Rule 90.141 provides applicants 60 days to resubmit an application which is returned and have it considered in its original place in the processing line. Otherwise, the application is treated as a new request for the purpose of processing. According to Commission records, Behr's application was never resubmitted. Consequently, Behr's application, file number 983133, is no longer pending. Further, due to the freeze[1] on filing applications for new stations in the 220 MHz band, Behr's application can not now be considered as a new filing.

Please be advised that applicants were alerted to the completion of processing for applications in the 220-222 MHz band by a Commission Order released July 21, 1995. The Order (copy enclosed) which announced the Disposition of Non-Nationwide 220-222 MHz Applications indicated that the Commission acted upon all applications received from May 1 through May 23, 1991.

I trust this replies fully to your inquiry. If, however, you have additional questions regarding this matter, you may contact Mr. Gary Devlin, a Land Mobile Branch engineer at (717) 338-2618.

Sincerely,

Michael J. Regiec
Deputy Chief, Land Mobile Branch

Enclosures

[1] See enclosed copy of Order DA 91-647 adopted May 24, 1991 and released May 24, 1991.

FEDERAL COMMUNICATIONS COMMISSION
1270 FAIRFIELD ROAD
GETTYSBURG, PA 17325-7245

APPLICATION RETURN NOTICE FOR THE PRIVATE LAND MOBILE RADIO SERVICES

Lawrence Behr
210 W. 4th St.
Greenville, NC 27835

DATE January 28, 1993

FILE NO. 983133-QT les

INSTRUCTIONS: Your application for station authorization is returned for the reason(s) checked below. Complete or correct your application, re-sign and date your application in the space provided on the reverse side. Return this and all enclosures to the above address. See "NOTICE TO APPLICANT" on the reverse of this form.

☐ Your eligibility is unclear. Please provide a more detailed description of your activities and how radio will be used in connection with them.

☐ If you are requesting authority to acquire a station presently licensed to another person or entity, you should check "Assignment of Authorization" in item 32. Complete the application giving all information pertaining to the new licensee (including eligibility showing) and include a completed FCC Form 1046, Assignment of Authorization, or a similar declaration signed by the present licensee, with your application.

☐ Please advise if the Control you show in item 18 is a Control Station or Control Point. For Control Stations, complete items 1 through 11 (except 7), 14 through 17, and 26 through 29. If the Control Station complies with the 20 ft. criterion as defined in Rule Section 90.119(a)(2)(ii), complete only items 1 through 5. Evidence of frequency coordination is required for stations not meeting the 20 ft. rule.

☐ You MUST resubmit this application through your frequency coordinator if you are requesting the licensing of a new station, modifying an existing licensed station, or if you are making ANY CHANGE to information in items 1 through 25 which has previously been coordinated. See Rule Sections 90.135 and 90.175. FAILURE TO DO SO COULD RESULT IN DISMISSAL OF YOUR APPLICATION AND FORFEITURE OF ANY FEE(S) PAID. Failure to resubmit your application in a timely manner as explained on the reverse of this form will also result in loss of any previously paid fee(s).

☐ Your application is being returned because it did not include frequency coordination as required by Rule Section 90.175. It is recommended that you contact the frequency coordinator in advance to determine if payment of a coordination fee is necessary. Such fees are separate and distinct from any fee charged by the Commission. Please include this Return Notice with your submission to the frequency coordinator to indicate that any necessary Commission fees have been paid. Failure to resubmit your application in a timely manner as explained on the reverse of this form will result in loss of any previously paid fee(s).

☐ Item(s) _____ should be completed or corrected.

☒ OTHER:

Mobiles to be operating with the system need to be shown on the application. Complete items 2 thru 5, 12 and 13.

SEE REVERSE

FCC 1034G
JANUARY 1991

...AND MOBILE AND GENERAL MOBILE RADIO SERVICES

...ANT NOTICE: ALL applicants MUST include ...llation and MUST FILE those ...itions at the PROPER LOCATION. Refer to the ..., Federal Communications Commission Gen...

COMMISSION USE ONLY: 0988030 | Page No. ... of

1. Frequencies (MHz)	2. Station Class	3. No. of Units	4. Emission Designator	5. Output Power	6. E.R.P.	7. A.A.T.	8. Ground Elevation	Ant. Hgt. To Tip	10. Antenna Latitude	11. Antenna Longitude
220.0875	FB8	5	4K0J3E	100	500	110'	5350'	110'	39-44-07 N	104-57-42 W
220.2375	MO	400	4K0J3E	50						
220.3875										
220.5375										
220.6875										

FCC/MELLON MAY 01 1991

12. Number of Mobiles By Category:
Vehicular 300
Portable 100
Aircraft
Marine
Pagers

13. Area of Operation for Mobiles, Temporary, or Itinerant Stations
is 35 miles radius of station A,
or is N/A miles radius of coordinates:
Lat.
Long.
County
State
If not, please check ONE:
☐ Countywide
☐ Statewide
☐ Nationwide
☐ Other

Station Address or Geographic Location: 200 VINE STREET
15. City: DENVER
16. County: DENVER
17. St.: CO

...ation of Primary Control point (include telephone number) and location of all Radio Control ...ions with antenna under 20 ft. GMRS ONLY: List small control station locations and "FBA" ...wed by small base locations with antennas under 20 ft. (See Instructions.)

210 W.4TH STREET
GREENVILLE, NC 27835

(919) 757-0279

19. Freq. Advisory Comm. No: N/A
20. Radio Service: QT
21. Applicant/Licensee Name *(See Instructions)*:
LAWRENCE BEHR
22. Mailing Address *(Number & Street, P.O. Box or Rt. No.)*:
ATTN:
ADDRESS: 210 W.4TH STREET
23. City: GREENVILLE
24. State: NC
25. ZIP Code: 27835

Will antenna be mounted on a structure with an existing antenna? If yes, give call sign and radio service of existing licensee.

27. Provide description of the structure on which your antenna is mounted and the height above ground to the top of the structure. (See antenna figures 1 - 3 on reverse for samples.)

28. Give the name of the nearest aircraft landing area, and the distance and direction to the nearest runway.

...es	Call Sign	Radio Service		Structure Type	Structure Height Above Ground	Aircraft Landing Area Name	Distance (Miles)	Direction
			A	BUILDING	110'	STABLETON	10	NE
			B					
			C					
			D					
			E					
			F					

Has notice of construction or alteration been filed with the FAA? If yes, give the date filed, the name under which filed, and the FAA office where filed.

...es	Date Filed	Name Under Which Filed	FAA Office Where Filed
	SUPPORT STRUCTURE HEIGHT NOT INCREASED; HENCE NO FAA APPROVAL AND NO 7460-1 REQUIRED		

30. Applicant Classification: X Individual ☐ Partnership ☐ Association ☐ Corporation ☐ Govt. Entity

31. Eligibility *(Describe Activity)*:
APPLICANT PROPOSES TO PROVIDE ON A COMMERCIAL BASIS MOBILE RELAY STATIONS FOR USE OF ELIGIBLES UNDER SUBPARTS B, C, D AND E OF PART 90

Give Rule Section: 90.703(c)

...cation is for (check one): X New Station ☐ ...cation ☐ Assignment ☐ Reinstatement ☐ Renewal

33. Does application include the complete system? X Yes ☐ No

...a commission grant of your application be an action which may significant environmental effect as defined by Section 1.1307 of the ...ission's Rules? If you answer yes, submit the statement as required ...tions 1.1308 and 1.1311.
☐ Yes X No

...ification of item(s) modified, if applicable:
N/A

...r than new station, list call sign(s) of existing station(s) to be ...ed, combined or reinstated.
N/A

...dual completing this application form(s):
KEITH TAYLOR
...e No. (202) 293-0700

34. Supplemental Information for Trunked and Conventional Systems 806-824/851-869 MHz and 896-901/935-940 MHz frequency bands

Indicate Type of Applicant:
☐ a) Independent ☐ b) Commercial (SMRS entrepreneur)
☐ c) Community Repeater (Owner)
☐ d) SMRS user (Show SMRS licensee name and call sign and allocate your mobile loading)

Type of system; (Check One)
☐ a) Conventional. Specify the number of mobile units to be placed in operation at the time of grant:
☐ b) Trunked. Specify the number of trunked channels requested:

Frequency Band Requested: (Check One) ☐ a) 851-869 MHz ☐ b) 935-940 MHz

FOR COORDINATOR USE ONLY:

CERTIFICATION, READ CAREFULLY BEFORE SIGNING

1) If application is for a Land Mobile Service license, applicant certifies that a current copy of the requested radio service's rules will be obtained. Contact the United States Government Printing Office, Washington, DC 20402 (202) 783-3238.
2) Applicant waives any claim to the use of any particular frequency regardless of prior use by license or otherwise.
3) Applicant will have unlimited access to the radio equipment and will control access to exclude unauthorized persons.
4) Neither applicant nor any member thereof is a foreign government or representative thereof.
5) Applicant certifies that all statements made in this application and attachments are true, complete, correct and made in good faith.
6) Applicant certifies that the signature is that of the individual, or partner, or officer or duly authorized employee of a corporation, or officer who is a member of an unincorporated association, or appropriate elected or appointed official on behalf of a governmental entity.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT. U.S. CODE TITLE 18, SECTION 1001.

Typed/Printed Name: LAWRENCE BEHR
Telephone No: 919 757-0279
Signature: "MUST BE ORIGINAL"
Date: 04/26/91

(MSM)

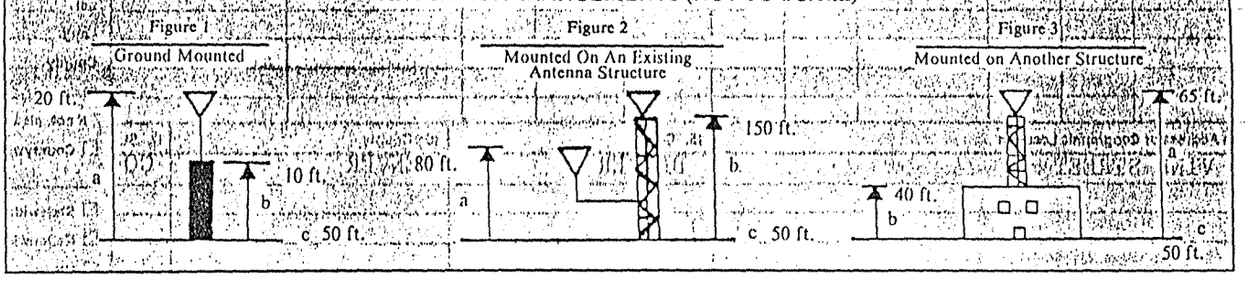
AND THE PAPERWORK REDUCTION ACT OF 1980

Sections 301, 303, and 308 of the Communications Act of 1934, as amended (licensing powers) authorize the FCC to request the information on this application. The purpose of the information is to determine your eligibility for a license. The information will be used by FCC staff to evaluate the application, to determine station location, to provide information for enforcement and rulemaking proceedings and to maintain a current inventory of licensees. No license can be granted unless all information requested is provided. Your reponse is required to obtain this authorization.

Public reporting burden for this collection of information is estimated to range from fifteen minutes to six hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Federal Communications Commission, Office of Managing Director, Washington, DC 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-0128), Washington, DC 20503.

USE THE SAMPLE INFORMATION SHOWN BELOW TO ASSIST YOU WITH ANSWERING ITEMS 8, 9, AND 27 ON REVERSE SIDE.

ANTENNA ARRANGEMENTS (NOT TO SCALE)



▽ = antenna
a = height above ground to tip of proposed antenna (item 9)
b = height above ground to top of supporting structure (item 27)
c = ground elevation above mean sea level (item 8)

For these figures, items 8, 9 and 27 would be completed as follows (See samples below):

	Item 8	Item 9	Item 27	
	Ground Elevation	Antenna Height To Tip	Structure Type	Structure Height Above Ground
Figure #1	50	20	Pole	10
Figure #2	50	80	Tower	150
Figure #3	50	65	Building	40

Use this space for additional information or remarks:

FOR AGENCY USE ONLY

GPO: 1990 O - 275-696

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

In the Matter of

Disposition of Non-Nationwide
220-222 MHz Applications

ORDER

Adopted: July 10, 1995; **Released: July 21, 1995**

By the Chief, Land Mobile Branch, Licensing Division:

The Wireless Telecommunications Bureau has acted upon all applications for frequencies in the 220-222 MHz Band filed pursuant to PR Docket 89-552. The Bureau acted upon all applications submitted from Day 1 through Day 23 and granted all applications for which spectrum was available. The granted licenses are contained in the Commission's database. License records are available for review at the Wireless Telecommunications Bureau's Office of Operations - Gettysburg or this information may be obtained from International Transcription Service, the Commission's copy contractor. On-line public access to the database can also be obtained through Interactive Systems, Inc., the Commission's database contractor. Inasmuch as no spectrum was available for the remainder of the applications, those applications are hereby **Dismissed** and will not be returned.

FEDERAL COMMUNICATIONS COMMISSION

Terry L. Fishel
Chief, Land Mobile Branch

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 93-71

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

January 26, 1993

COMMISSION ANNOUNCES TENTATIVE SELECTEES FOR 220-222 MHZ PRIVATE LAND MOBILE "LOCAL" CHANNELS

On October 19, 1992, the Commission conducted a lottery for the purpose of rank ordering the applications for "local" 220-222 MHz private land mobile channels that were received on the first day such applications were accepted for filing, i.e., May 1, 1991.

In accordance with the Commission's rules dealing with random selection procedures, 47 C.F.R. § 1.972, this Public Notice is issued to announce the tentative selectees for these channels.

As indicated in 47 C.F.R. § 1.972(d), the Commission will grant the applications of those tentative selectees that are determined to be qualified to receive licenses under 47 C.F.R. Part 90 of the rules.

The attached listing contains the tentative selectees for local licenses in the 220-222 MHz band:

- FCC -

File#	Tentative Selectee
968767	ATCHISON TOPEKA AND SANTA FE RAILWAY COM
942392	ATELOG PARTNERS
964572	ATKIN, LOMAN E
972841	ATTAR, LYNN P
977576	ATTAR, MARZ
976508	ATTAR, MARZ
986088	AU, FRANCES K O
953903	AUNGST, JAMES
974538	AVEDOVECH, MYER
968513	AXE, BRIAN L
931452	B J I PARTNERSHIP
931253	B J I PARTNERSHIP
931266	B J I PARTNERSHIP
931251	B J I PARTNERSHIP
931250	B J I PARTNERSHIP
931775	B J I PARTNERSHIP
931267	B J I PARTNERSHIP
931275	B J I PARTNERSHIP
931260	B J I PARTNERSHIP
930830	B J I PARTNERSHIP
931271	B J I PARTNERSHIP
931276	B J I PARTNERSHIP
931773	B J I PARTNERSHIP
931774	B J I PARTNERSHIP
931771	B J I PARTNERSHIP
931272	B J I PARTNERSHIP
930831	B J I PARTNERSHIP
931259	B J I PARTNERSHIP
931776	B J I PARTNERSHIP
931274	B J I PARTNERSHIP
931257	B J I PARTNERSHIP
931770	B J I PARTNERSHIP
933682	BADE, ROBERT
938589	BAGLEY, BRETT
938568	BAGLEY, ELIZABETH F
934676	BAGLEY, NANCY R
930289	BAGLEY, NICOLE L
968364	BAHNER, SPENCER L
968366	BAHNER, SPENCER L
978693	BALTIMORE GAS AND ELECTRIC COMPANY
986390	BALTIMORE GAS AND ELECTRIC COMPANY
983983	BALTZ, DAVID C
935336	BANAS, EDWARD J
984077	BANKER, CAROL
966685	BARR, DAVID H
966648	BARR, DAVID H
975173	BARTELL, CHARLES B
985039	BARTELL, CHARLES B
985096	BARTELL, CHARLES B
932250	BARTOW, ROY
960573	BASSETT, JERRY
982252	BASTO, CHRISTOPHER B
982287	BASTO, CHRISTOPHER B
972468	BASTO, CHRISTOPHER B
972473	BASTO, CHRISTOPHER B
972469	BASTO, CHRISTOPHER B
982245	BASTO, CHRISTOPHER B
982244	BASTO, CHRISTOPHER B
972474	BASTO, CHRISTOPHER B
982249	BASTO, CHRISTOPHER B
964501	BATTISTINI, KEITH
951647	BAY VENTURES
986944	BAY VENTURES
954594	BAY VENTURES
951637	BAY VENTURES
987667	BAY VENTURES
951699	BAY VENTURES
987668	BAY VENTURES
986986	BAY VENTURES
954598	BAY VENTURES
987664	BAY VENTURES
987669	BAY VENTURES
951658	BAY VENTURES
987582	BAY VENTURES
951686	BAY VENTURES
951655	BAY VENTURES
951687	BAY VENTURES
952189	BAY VENTURES
951633	BAY VENTURES
954592	BAY VENTURES
987575	BAY VENTURES
954585	BAY VENTURES
987540	BAY VENTURES
987673	BAY VENTURES
954589	BAY VENTURES
951683	BAY VENTURES
954587	BAY VENTURES
987541	BAY VENTURES
987574	BAY VENTURES
952187	BAY VENTURES
954586	BAY VENTURES
952401	BAY VENTURES
986439	BAY VENTURES
987538	BAY VENTURES
952186	BAY VENTURES
987550	BAY VENTURES
987535	BAY VENTURES
987665	BAY VENTURES
987539	BAY VENTURES
951977	BAY VENTURES
987544	BAY VENTURES
987625	BAY VENTURES
987573	BAY VENTURES
987618	BAY VENTURES
954588	BAY VENTURES
951976	BAY VENTURES
987533	BAY VENTURES
987527	BAY VENTURES
951979	BAY VENTURES
954004	BAY VENTURES
952066	BAY VENTURES
952188	BAY VENTURES
986943	BAY VENTURES
987531	BAY VENTURES
987547	BAY VENTURES
987671	BAY VENTURES
971418	BDA PARTNERSHIP
951521	BDA PARTNERSHIP
982136	BDA PARTNERSHIP
982143	BDA PARTNERSHIP
951485	BDA PARTNERSHIP
971411	BDA PARTNERSHIP
971408	BDA PARTNERSHIP
949015	BEAUCHEMIN, RAY
964271	BEAUCHEMIN, RAY
932238	BEAVER, K L
949517	BECKETT, NORMA
966225	BECKETT, NORMA
965997	BECKETT, NORMA
946600	BECKWITH JR, C G
983133	BEHR, LAWRENCE
978374	BEHR, LAWRENCE
983134	BEHR, LAWRENCE
930683	BELLA, JAMES R
972962	BENNINGFIELD, LEONA J
972959	BENNINGFIELD, LEONA J
973352	BERGHS, STEVEN
982831	BERMAN, LOUIS H
957256	BERMAN, LOUIS H
982829	BERMAN, LOUIS H
968535	BERNSTEIN, TAMARA C
972282	BERRIER, CHARLOTTE
972277	BERRIER, CHARLOTTE
981611	BERRIER, CHARLOTTE
982910	BERRIER, CHARLOTTE
981610	BERRIER, CHARLOTTE
981556	BERRIER, CHARLOTTE
981603	BERRIER, CHARLOTTE

47 C.F.R. § 1.110 Partial grants; rejection and designation for hearing.

Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.

FCC 67–509

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR EXEMPTION FROM OR WAIVER OF THE PROVISIONS OF SECTION 73.242 OF THE COMMISSION'S RULES (AM–FM PROGRAM DUPLICATION)

MEMORANDUM OPINION AND ORDER

(Adopted April 26, 1967)

BY THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONER COX DISSENTING TO ACTION ON KBEY AND KPOJ–FM.

1. The Commission has before it for consideration various requests for further exemption from the provisions of section 73.242(a) of its rules, which limits to 50 percent of the average broadcast week the amount of time FM stations in cities of 100,000 or more may devote to duplicating the programs of commonly owned stations in the same local area. This memorandum opinion and order deals with eight requests for longer periods, filed by: (1) Two stations in San Juan, P.R., given exemption until February 1, 1967, by our action of March 1966, and later until May 1, 1967, by staff under delegated authority; and (2) six stations which, in our March 1966 action, were given an exemption until April 1, 1967, because of the economic circumstances of their individual situations. These also have been given exemption until May 1. Also covered is a temporary request by station KIXI–FM, Seattle.

2. *Stations in San Juan, P.R.*—Stations WKAQ–FM and WFQM, San Juan, were given an exemption until the end of their then current license period, February 1, 1967, because of the need for use of the FM signal to transmit programs for rebroadcast by commonly owned stations on the other side of the island during a substantial part of the broadcast day. This reason no longer obtains, since the stations have constructed and put into operation a joint microwave relay system for this purpose. Further exemption is requested: (1) By WKAQ–FM, until December 31, 1967, to complete construction of a new studio building, which was begun promptly early in 1966 but will not be completed until this coming October (exemption until the end of the year is asked to be on the safe side); (2) by WFQM, because of the pendency of a revocation proceeding against it (docket No. 15140). It is urged that if required to comply WFQM would need to incur substantial expenses, both in improvement of facilities (which probably the Commission would not permit while the proceeding is pending) and cost of operation, and it wishes to maintain

the status quo while the continued existence of the station's license is uncertain. Exemption until 6 months after a decision in docket No. 15140 is requested.

3. It appears that in both cases good cause for exemption is shown. In the case of WKAQ–FM, we are granting exemption for about 6 months, or until November 1, 1967; further exemption if necessary (up to 3 months) may be granted under delegated authority. As to WFQM, exemption is granted until 3 months after decision in docket No. 15140; additional time, if the decision is in the licensee's favor and more time is needed, can be granted by delegation. This exemption is without prejudice to whatever decision may be reached in that proceeding, and is not a finding that continued operation of WFQM is or would be in the public interest.

4. *Station KKHI, San Francisco.*—Station KKHI–FM, San Francisco, was granted an exemption in our March 1966 action because of its particular economic circumstances. However, this was not the main ground on which exemption had been sought, which is discussed below, and KKHI has not submitted the 1966 economic showing which we stated at that time FCC 66–242, par. 3(d)) would be required by February 15 if exemption on this basis is to be continued (see 2 FCC 2d 833, 835). Rather, other grounds are urged.

5. KKHI filed its exemption request in February 1965, based on various arguments and emphasizing its desired and allegedly unique classical music programing. In August 1965, it filed its renewal application containing a similar showing and requesting exemption, and by letter of October 20, 1965, it submitted a further showing in this respect as an amendment to the renewal application. Renewal was granted on November 5, 1965, "without prejudice to whatever action the Commission may take on your pending request for waiver" of the 50-percent nonduplication rule. By letter of November 30, 1965, KKHI objected to the grant on this basis, claiming that it amounted to a denial of the renewal application as filed. It claimed that isolation of the exemption request, and later denial without hearing, would deprive it of its right to a hearing provided by section 309 of the Communications Act, terming the grant made as "partial, it demanded a hearing under section 1.110[1] of the Commission's rules, concerning partial grants." In our March 1966 memorandum opinion and order (pars. 3(d) and 43(d)) and the appendix thereto (par. 4) we granted exemption to KKHI and 11 other stations until April 1, 1967, on the basis of the individual economic circumstances of each case. It was specifically stated that the other contentions urged by these parties were not being ruled on. (See 2 FCC 2d 852.) In the pleading now under consideration (filed January 27, 1967) KKHI again urges that it is entitled to exemption for its current license period (to Decem-

[1] Sec. 1.110 reads as follows: "Partial grants; rejection and designation for hearing. Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing."

ber 1, 1968) on the basis of the showings made, reasserts its right to a hearing under section 1.110, and alleges that the Commission has no authority to impose a judgment as to the manner in which a broadcaster may program its joint AM–FM operation.

6. Station KKHI–FM in each pleading relies on audience surveys which it urges support the licensee's judgment that KKHI–FM's classical music programing is "unique" and highly desirable to its "indivisible" audience, with the ultimate conclusion that the public interest would be served by an exemption for the entire license period. The surveys were conducted in May and September 1964, September 1965, and May and December 1966. The earlier surveys were generally similar, both in form and response, to the December 1966 survey, which involved a questionnaire sent to 2,000 listeners picked at random from station mail received in November. Some 1,400 replies were received; 895 respondents reported listening to both the AM and FM station rather than one exclusively; over 1,000 listened both at home and away from home; 1,302 answered "yes" to a question as to whether they would prefer simultaneous programing so they could receive it whether listening to AM or FM (compared to 53 "no" answers); all but minute percentages said they would not prefer the FM station to present other types of programs at least 50 percent of the time (rock and roll, show tunes, country and western, all-talk); 694 compared to 178 would not prefer the FM station to present classical but different programs 50 percent of the time. Comments were added by 976 listeners; of about 85 submitted with the last pleading all praised KKHI's music, a number said it was unique, and several mentioned the desirability of being able to get the programs on both AM and FM.[2] KKHI submits data as to the makup of the respondents, describing its audience as "educated, adult, affluent."

7. Aside from the legal arguments concerning its "partial grant" rights which are discussed below, KKHI makes arguments generally similar to those considered in our March 1966 memorandum opinion and order (2 FCC 2d 833) and December 1966 decision on reconsideration of denial of certain requests (3 FCC 2d 167, FCC 66–1194, adopted Dec. 21, 1966). These include the quality and alleged uniqueness of its programing; its desirability to its audience (as the surveys show) and the need for "continuity" of FM–AM listening by that audience (which is not "divisible"); the highly numerous and diverse number of aural services available, so that separate programing would add nothing; presentation of extensive live music (San Francisco and Oakland Symphonies and other groups); extensive costs (estimated $23,000 for added studio space, and $67,000 or more a year for additional staff); adverse economic effects of increasing the number of competing stations (both in this market and generally); that the rule is an unwarranted and illegal intrusion on the licensee's programing judgment (at least here, where the stations are programed in light of overwhelming audience response), and others.[3]

---

[2] KKHI's letter sent with the questionnaire urged listeners to support continued duplication so they could continue to get "Music of the Classics" no matter where they are, at home or in a car, or what kind of set they are using.

[3] KKHI's general arguments are similar to those noted in the March 1966 decision for station WDRC, Hartford (essentially the same licensee). (See 2 FCC 2d 854–855.)

8. Therefore, KKHI requests exemption for the remainder of its license terms. Alternatively, it insists on a right, under section 1.110 quoted above, to reject its renewal grant without grant of the exemption—which it states that it does—and to an evidentiary hearing on the question of whether continued duplication would serve the public interest. It states that it can prove the latter through testimony of listeners and representatives of prominent civic, educational, and other groups.

9. As to the merits of the exemption request, we have carefully considered the facts and arguments presented and conclude that exemption is not warranted. The reasons for our decision have been set forth at length previously in the documents cited above, and need not be elaborated here. We have mentioned the waste involved in using two broadcast frequencies to bring exactly the same intelligence to the same receiver locations; [4] and our judgment that, in large markets where FM set circulation is now relatively high, the time has come to require the FM medium to operate to this degree as a separate service and end the waste. As we have pointed out, the licensee has a high degree of latitude in complying with the rule, presenting similar though different programs and selections or adopting a different format, duplicating 50 percent of the time when it appears to be significant to do so (for example, perhaps, during "drive time"), and using delayed-broadcast techniques for significant programs. As we pointed out in considering the request for reconsideration filed by WTOP, Washington, D.C., the audience may well benefit from having significant musical and other programs available twice, once on AM and once on FM. Listener choice is increased. We have rejected the general economic arguments advanced (see March 1966 memorandum opinion and order, pars. 33–39, 2 FCC 2d 846–849); the AM–FM financial data released since that decision (FCC No. 90562, October 1966) shows an improving FM picture. We recognize what appears to be the high quality of KKHI's musical programing and that it is liked by its listeners, but there appears no reason why it cannot continue to be available on both services when the stations comply with the rule. We point out that our action here is similar to that taken with respect to other "good music" operations, such as WGMS, Washington, and WQXR, New York City.[5]

10. Nor do we find merit in the contention that KKHI—by rejecting grant of its renewal application without grant of exemption and invoking section 1.110—is entitled to an evidentiary hearing on the question of whether continued duplication would serve the public interest. This amounts to a contention that a licensee, by requesting waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance. As we have repeatedly said,

[4] Unlike many petitioners for exemption, KKHI does not make a substantial claim of coverage differences. As to the argument as to "continuity" of listening, this was considered and rejected in the March 1966 memorandum opinion and order; see par. 32, 2 FCC 2d 845–846.

[5] We note KKHI's assertions as to the "uniqueness" of its programing and assume it is of distinctive character. However, one other San Francisco station which petitioned for exemption (and received it because the associated AM station is daytime only), KDFC, advanced a classical format as one reason for its claim. There are other good-music stations in San Francisco. This illustrates the problem with granting exemption on the ground of "unique" programing; see 2 FCC 2d 840.

not every request for waiver warrants a hearing. The rule here requires a certain amount of nonduplication unless we conclude that a substantial showing is made that the public interest would be better served by duplication entirely or to a greater extent. KKHI made a showing in this regard prior to its renewal application, and repeated the showing when it filed the latter. It was not necessary to consider its request in connection with renewal, nor, in view of the particular economic circumstances then obtaining, was it necessary to consider it shortly thereafter in connection with the other exemption requests, since an exemption for the economic reason was warranted. KKHI has chosen not to make an economic claim for further exemption. We have now, therefore, carefully examined its showings in the other respects—made at several times, as noted above—and find that they do not constitute the "substantial showing" specified in section 73.242(c). A hearing is neither required nor appropriate. KKHI's request for continued exemption or, alternatively, for a hearing on its request is denied. We are herein giving 3 months—or until August 1—for the station to come into compliance; additional time if necessary may be granted by staff action.

11. *WEVD–FM, New York City.*—Like KKHI, WEVD–FM, New York City, received an exemption on individual economic grounds, but now urges largely other arguments, including programing (the only station presenting a substantial amount of programing in Yiddish and a number of other foreign languages), the licensee's basic cultural purposes and coverage differences, the FM outserving the AM both day and night. It also calls attention to another aspect of its operation: WEVD (AM) is a share-time station, sharing time on the frequency with two other stations, and thus cannot operate during substantial portions of most days of the week (late afternoon and early evening). The FM station operates during these hours, which total 21 weekly (the joint operation is 101 hours). Exemption is, therefore, claimed on the same principle as that applied to daytime-only and limited-time stations in the March 1966 memorandum opinion and order (pars. 24 and 25, 2 FCC 2d 842–843).

12. It may be that exemption would be appropriate aside from the latter fact, on the same combination of unique programing and substantial daytime and nighttime coverage differences that were found to justify exemption for station WHOM, New York City (see 2 FCC 2d 840, 858–859). When the matter of limited AM hours, and thus substantial separate FM operation, is taken into account, we find that exemption is warranted. However, exemption is granted only on condition that the FM station operate during those hours when the AM station is not operating (except between midnight and sign-on in the morning).

13. *KTNT–FM (Tacoma, Wash.), KBEY (Kansas City, Mo.), KPOJ–FM (Portland, Oreg.), and WNUS–FM (Chicago, Ill.).*—These four stations also request a continuation of their exemption because of particular economic circumstances. Review of their showings indicates that further exemption is warranted. It is granted on the same basis as before, until April 1, 1968, and will be extended only if the stations file their annual financial reports (FCC form 324) for

1967 by February 15, 1968, and review thereof indicates that further exemption is appropriate.

14. *KIXI–FM, Seattle.*—This station, whose long-term exemption request was denied in the March 1966 action (see 2 FCC 2d 863), again requested a long extension and last December it was given an extension until April 1, 1967. It has requested an additional 3 months, until July 1, 1967, which was granted by the Chief, Broadcast Bureau, under delegated authority. Its request is based largely on the great differences in coverage between its 1-kw directional AM operation and its FM station (79 kw effective radiated power). It asks exemption, essentially, until it can file for and obtain an increase in AM facilities to reduce these differences; earlier applications for KIXI (AM) have had to be returned because they did not meet the protection requirements of the rules (the last was returned March 3, 1967). In support of its request it urges these differences: Its FM signal reaching large populations unable to receive the AM station; [6] and its valuable service, shown by rating reports indicating it to be among the top stations in the area, with a very substantial proportion of its listening being FM.

15. The basic facts and contentions involved here have been considered before and rejected. We see no reason to change our decision. Compliance by August 1 should be feasible and it is so ordered.

16. In view of the foregoing, *It is ordered*, That exemption from the provisions of section 73.242 of the Commission's rules *Is granted*, to the stations listed below, to the date indicated.

(*a*) August 1, 1967: KKHI–FM, San Francisco, Calif.; KIXI–FM, Seattle, Wash.

(*b*) November 1, 1967: WKAQ–FM, San Juan, P.R.

(*c*) April 1, 1968: KTNT–FM, Tacoma, Wash.; WNUS–FM, Chicago, Ill.; KBEY, Kansas City, Mo.; KPOJ–FM, Portland, Oreg.

(*d*) June 1, 1969: WEVD–FM, New York, N.Y.

(*e*) 90 days after the effective date specified in the final Commission decision in docket No. 15140, unless such final decision specifies an earlier date for termination of the station's operation: WFQM, San Juan, P.R.

17. *It is further ordered*, That the requests filed by the stations listed above, for further exemption from the provisions of section 73.242(a) of the Commission's rules, *Are granted*, to the extent indicated in paragraph 16, and in all other respects *Are denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[6] Population within the FM 1-mv/m contour, 1,580,636; within the AM 0.5-contour (and receiving primary AM service), 965,103; within the AM 2-mv/m contour, 890,805.

BUCKLEY–JAEGER BROADCASTING CORPORATION OF CALIFORNIA, Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee.

BUCKLEY–JAEGER BROADCASTING CORPORATION OF CALIFORNIA, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, United States of America, Respondents.

Nos. 21017, 21018.

United States Court of Appeals
District of Columbia Circuit.

Argued Nov. 9, 1967.

Decided May 3, 1968.

Petition was filed by radio broadcasting company for review of orders of the Federal Communications Commission. The Court of Appeals, Burger, Circuit Judge, held that evidence sustained finding of the Commission that radio broadcasting company, which desired to broadcast same classical music programs simultaneously on AM and FM channels, was not entitled to further exemption under Commission Rule providing that licenses of FM stations in cities of over 100,000 population shall operate so as to devote to no more than 50% of the average FM broadcast week to programs duplicated from AM station owned by same licensee in same local area, but authorizing an exemption in order to better serve the public interest.

Affirmed.

1. Telecommunications ⇐437

Evidence sustained finding of Federal Communications Commission that radio broadcasting company, which desired to broadcast same classical music programs simultaneously on AM and FM channels, was not entitled to further exemption under Commission Rule providing that licensees of FM stations in cities of over 100,000 population shall operate so as to devote no more than 50% of the average FM broadcast week to programs duplicated from AM station owned by same licensee in same local area, but authorizing a temporary exemption in order to better serve the public interest. Communications Act of 1934, § 326, 47 U.S.C.A. § 326; U.S.C.A.Const. Amend. 1.

2. Telecommunications ⇐437

Federal Communications Commission acted within its discretion in refusing to grant a hearing to radio broadcasting company which sought exemption under Commission Rule providing that licensees of FM stations in cities of over 100,000 population shall operate so as to devote no more than 50% of average FM broadcast week to programs duplicated from AM station owned by same licensee in same local area but that temporary exemption may be granted in order to better serve the public interest, where each of the contentions raised by company had been considered by Commission. Communications Act of 1934, §§ 309(e), 326, 47 U.S.C.A. §§ 309(e), 326.

3. Telecommunications ⇐387

Adoption of a rule by Federal Communications Commission in proper proceeding with respect to radio broadcasting company results in incorporation of rule automatically into subsequent license renewals unless Commission determines otherwise.

Mr. Ben C. Fisher, Washington, D. C., with whom Mr. Peter Sevareid, Washington, D. C., was on the brief, for appellant in No. 21,017 and petitioner in No. 21,018.

Mr. William L. Fishman, Counsel, Federal Communications Commission, with whom Mr. Donald F. Turner, Asst. Atty. Gen., Mr. Henry Geller, General Counsel,

and Mr. John H. Conlin, Associate Gen. Counsel, Federal Communications Commission, were on the brief, for appellee in No. 21,017 and respondents in No. 21,-018. Mrs. Lenore G. Ehrig, Counsel, Federal Communications Commission, also entered an appearance for appellee in No. 21,017 and respondent Federal Communications Commission in No. 21,-018. Mr. Howard E. Shapiro, Atty. Department of Justice, also entered an appearance for respondent United States of America in No. 21,018.

Before BAZELON, Chief Judge, PRETTYMAN, Senior Circuit Judge, and BURGER, Circuit Judge.

BURGER, Circuit Judge:

This is an appeal from the action of the Federal Communications Commission denying Appellant's request for exemption from the requirements of a Commission rule, 47 C.F.R. § 73.242 (1967). Appellant operates stations KKHI–AM and KKHI–FM in San Francisco, both of which program classical music exclusively. As owner of both stations, Appellant sought waiver of the Commission rule prohibiting 100 per cent duplication of program formats on both stations so that it could broadcast the same program simultaneously on the AM and FM channels.

The Commission rule, 47 C.F.R. § 73.-242 (1967), promulgated after extensive consideration,[1] provides in part:

> After October 15, 1965, licensees of FM stations in cities of over 100,000 population * * * shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area. For the purposes of this paragraph, duplication is defined to mean simultaneous broadcasting of a particular program over both the AM and FM station or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station.

The rule also contemplates an exemption:

> Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of [the rule].

47 C.F.R. § 73.242(c) (1967).

Appellant filed a request for exemption from the rule pursuant to the above provision from the effective date of the rule, August 1, 1965, through the term of its existing license, December 1, 1965. Appellant requested a further waiver of the rule for the full three year term of its license commencing December 1, 1965, coupling the request with its renewal application and seeking a hearing if the Commission did not grant the exemption on the pleadings. In support of its request Appellant marshalled impressive evidence that (1) its AM/FM duplication of classical music was the only fulltime operation of this character in the Bay area; (2) surveys demonstrated that the listening audience did not wish modification of the present duplication; (3) the listening audience was not "divisible" because listeners turned to AM or FM depending on their location (*i. e.*, home or car); (4) the introduction of a non-classical format would be wasteful and disruptive; (5) the cost of independent programming would be prohibitive; and (6) the Commission had no authority to compel nonduplication since the selection of programming was within the exclusive judgment of the licensee.

The Commission granted Appellant's renewal application "without prejudice" to a later ruling on the exemption re-

1. The history is set forth in Notice of Proposed Rule Making in Docket No. 15084, 25 PIKE & FISCHER, R.R. 1615 (1963). The adoption of the rule and its rational is found in AM Station Assignment Standards, 29 Fed.Reg. 9492 (1964).

quest. Appellant protested the renewal in this form. It argued that, under 47 U.S.C. § 309(e) (1964) and 47 C.F.R. § 1.110 (1967), concerning partial grants, the action of the Commission constituted a denial of the renewal application as filed, thus entitling Appellant to a hearing.

Subsequently the Commission disposed of some 115 requests for exemption which were pending, including that of Appellant. Without ruling on Appellant's other contentions, the Commission found that Appellant had made a sufficient economic showing to justify further exemption until April, 1967. In the Matter of Requests for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission's Rules, 2 F.C.C.2d 833 (1966).

Pursuant to this Order and prior to its termination date, Appellant renewed its request for further exemption for the period of its license grant, alleging the same factors it previously presented. Appellant also requested a hearing if the Commission was not persuaded to grant the waiver. The Commission, after consideration of the facts and arguments presented, concluded that further exemption was not warranted. In the Matter of Requests for Exemption From or Waiver of the Provisions of Section 73.242 of the Commission's Rules, 8 F.C.C. 2d 1, 2–5 (1967). The Commission also denied Appellant's request for a hearing. *Ibid.* It is from these rulings that Appellant appeals. The Commission's denial rested for the most part on general considerations previously discussed in the earlier proceeding wherein Appellant received a temporary economic waiver.

In the earlier proceeding, twelve requests, including that of Appellant, were granted for economic reasons. Twenty-seven exemptions were granted on a long-term basis to FM stations which were associated with AM stations wherein the latter were daytime only operations. Three other exemptions on a long-term basis were granted. One was to WHOM–FM, New York City, because of daytime coverage difference and programming of a unique, all foreign language, format. The other two exemptions were to stations in Puerto Rico because of the need for use of the FM signal to transmit to stations on the other side of the island for rebroadcast. 2 F.C.C.2d at 834–835.

The Commission also made several general observations concerning the rule. It noted, for example, that the rule still permits duplication of fifty percent of the average annual number of broadcast hours, that licensees retained a very great degree of flexibility for compliance with the rule, and that technical daytime coverage differences were factors meriting exemption. Moreover, on the subject of programming the Commission made the following observations:

> We do not here grant any exemptions on programming grounds alone. To do so would require a searching inquiry into and evaluation of the character, merit, popularity, and "uniqueness" of the station's programming—a task we believe difficult and perhaps impossible, and in any event undesirable. It would be difficult, if not impossible, to arrive at any significant standards on which to base such a decision, since every station differs to some degree from every other station. Moreover, as mentioned before, the rule requires only 50 percent non-duplication—thus permitting the simultaneous presentation of a large amount of programming if the broadcaster deems it particularly significant to the audience or the station—and the broadcaster retains complete flexibility in his approach to the nonduplication requirement. If he wishes, he may present on both stations programming of substantially the same character such as classical music, or he may change the format of one to something of a different type. However, we do take into account highly distinctive programming where it is present along with other factors as indicated above.

2 F.C.C.2d at 840. On this basis the Commission denied Appellant's renewed request for exemption. It recognized the quality of Appellant's programming but found no reason why such format could not be available on both stations after compliance with the rule. 8 F.C.C.2d at 4. In a footnote the Commission observed:

> We note KKHI's assertions as to the "uniqueness" of its programming and assume it is of distinctive character. However, one other San Francisco station which petitioned for exemption (and received it because the associated AM station is daytime only), KDFC, advanced a classical format as one reason for its claim. There are other good-music stations in San Francisco. This illustrates the problem with granting exemption on the ground of "unique" programming; see 2 F.C.C.2d 840.

8 F.C.C.2d at 4 n. 5.

Appellant makes two claims on appeal. It first argues that, as a matter of law it was entitled to exemption from the non-duplication rule because AF–FM duplication is a reasonable exercise of licensee programming responsibility protected by 47 U.S.C. § 326 (1964), and the First Amendment. It is also argued that, while the rule is not invalid on these grounds because it provides for an exemption, Appellant's presentation clearly entitled it to the exemption. This showing consisted in the main, as we have noted, of evidence supporting Appellant's contention that its program format was truly unique, fully supported by KKHI's listening audience, and thereby met the public interest requisites of the exemption provision. Since the Commission thought otherwise our review is narrow; to determine whether the record reveals substantial evidence to support the Commission's finding.

The major premise on which the rule was postulated—wasteful frequency usage and loss of spectrum space—was clearly the kind of judgment entrusted by Congress to the Commission. It is true that the nonduplication rule requires that fifty percent of the FM format be programmed independently of the AM station. But we cannot agree that such a rule infringes on the licensee's choice of program format. For example, the same program could be taped and delayed for rebroadcast at a later time on the other station.

The economic arguments advanced by Appellant seem to have been considered by the Commission. Those which pertained to general economic problems necessitated by the rule had, of course, previously been rejected by the Commission. Those which directly involved Appellant had persuaded the Commission to grant a temporary exemption but Appellant did not submit the necessary financial statements required by the Commission to justify further economic exemption, and in passing on Appellant's request the Commission noted the continued improving FM financial picture.

Appellant's principal basis for waiver boils down to its alleged "unique" programming format and the wishes of its listening audience. But the Commission made it very clear in the first proceeding that it would not grant exemptions on programming grounds alone because of the difficulty and even impossibility of making an inquiry into and evaluation of a station's program format. The Commission's conclusion is based on reason and is within the scope of the authority vested in it.

Appellant contends that the Commission, while disavowing an inquiry into programming, had in fact made such an inquiry and granted an exemption to two stations on the basis of their unique programming. In one case, however, WHOM, the exemption was granted on dual grounds—the unique programming of WHOM because it was an all foreign language station *and* because substantial daytime and nighttime coverage differences were present. In the case of WEVD–FM, New York City, exemption was granted because of the unique pro-

gramming—foreign language, particularly Yiddish, *and* the fact that WEVD is a share-time station, sharing time on the frequency with two other stations which prevents it from operating during substantial portions of each day. In both of these cases it is clear that the exemption was based on the combination of unique programming and substantial technical problems. Indeed, the Commission in the earlier proceeding expressly stated that it would consider distinctive programming where it was presented along with the other important factors, *i. e.*, technical difficulties, 2 F.C.C.2d at 840. We think these cases are sufficiently distinguishable from Appellant's situation to warrant a different treatment. Moreover, where applicants sought exemption on only unique programming grounds, as Appellant did, the Commission has consistently refused to grant the exemption; it did so in cases regarding two other good music stations, WGMS–FM, Washington, D. C., and WQXR–FM, New York City, whose posture was similar if not identical to that of the Appellant.

[1] Implicit in Appellant's contentions is an argument that if the rule was intended to cover exemptions only for economic considerations or technical difficulties, and programming could be considered only in conjunction with these two factors, the rule should so state rather than utilize the vague term, "public interest." Although it may well be that the rule could have been more precise, it is adequate and the Commission has given it a consistent interpretation. We are unable to perceive a basis for holding that the rule was improperly applied in Appellant's case.

[2] Appellant's second contention is that it was entitled to a hearing on its exemption request, and that the Commission acted arbitrarily and capriciously in denying the hearing. We note that the exemption provision in the rule does not expressly contemplate hearings for waiver of the rule and none have thus far been granted. Here there had been a general rule-making proceeding followed by requests for waiver of the Commission's rule. The Commission found that Appellant had not made the substantial showing required to justify waiver of the rule and had not renewed its economic argument in support of a further extension of its existing waiver. In these circumstances we hold that the Commission acted within its discretion in refusing to grant a hearing. We think the doctrine articulated in United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S. Ct. 763, 100 L.Ed. 1081 (1956), and its progeny,[2] is applicable here. In *Storer* the Court said:

> As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing.

Id. at 205, 76 S.Ct. at 771.

Measured against this standard, we conclude the Commission could reasonably deny the request for a hearing. Each of the contentions raised by Appellant had been considered, either in the general proceeding in which Appellant received its temporary economic exemption or in the final proceeding. In short, the Commission determined that Appellant had not met the requisite showing and denied the request without hearing.

[3] Appellant also contends that it had a statutory right to a hearing on the

2. *E. g.*, Federal Power Commission v. Texaco, Inc., 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964); Pacific FM, Inc. v. FCC, 123 U.S.App.D.C. 352, 359 F.2d 1018 (1966); American Airlines, Inc. v. C. A. B., 123 U.S.App.D.C. 310, 359 F.2d 624 (1966), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1967).

exemption request which it coupled with its license renewal. The Commission aptly phrased its answer:

> This amounts to a contention that a licensee, by requesting waiver of any Commission rule is his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance.

8 F.C.C.2d at 4. Appellant relies upon 47 U.S.C. § 309(e) and 47 C.F.R. § 1.110 (1967). We find no support in either the statute or the rule for the proposition asserted and Appellant has not cited any authority in support. It is well-settled that the adoption of a rule in a proper proceeding results in its incorporation automatically into subsequent license renewals unless the Commission determines otherwise. Beloit Broadcasters, Inc. v. F. C. C., 125 U.S.App.D.C. 29, 365 F.2d 962 (1966). This principle is equally applicable to the situation here. Appellant received its renewal on the basis that continued duplication would serve the public interest, deferring for later consideration whether the rule should apply. Such action was clearly within the Commission's power and in no way violates the statutory right to a hearing.

It is also clear that section 1.110 of the Commission's rules has no application here. The rule concerns situations where the applicant receives less than a full authorization. But here Appellant received the full authorization to which it was entitled under the statute and rules. In these circumstances we do not believe the rule can reasonably be interpreted as making a hearing mandatory.

There are appealing arguments when we are confronted with a Commission action which seems to discourage a broadcaster who seeks to provide high quality programs which are unfortunately all too rare. But the choice is not ours if the decision is within the range of those entrusted by Congress to the Commission.

Affirmed.

COMMISSIONER OF PATENTS, Appellant,

v.

DEUTSCHE GOLD-UND-SILBER-SCHEIDEANSTALT VORMALS ROESSLER, Appellee.

No. 20182.

United States Court of Appeals
District of Columbia Circuit.

Argued Feb. 3, 1967.

Decided May 8, 1968.

Civil action by assignee of patent application against Commissioner of Patents for an adjudication that assignee was entitled to receive patent for invention specified in certain claims of application. The United States District Court for the District of Columbia, Joseph R. Jackson, J., 251 F.Supp. 624, entered a judgment for the assignee and the Commissioner appealed. The Court of Appeals, Burger, Circuit Judge, held, inter alia, that assignee of patent application entitled "Thiophenylpyridyl Amine, Chlorothiophenylpyridyl Amine, Their Salts and Preparation" was entitled to receive patent for inventions specified in generic claims consisting of ammonia-derivative compound selected from a group of compounds described by a general formula and a claim for a specific ammonia derivative of the other claim.

Affirmed.

Bazelon, Chief Judge, dissented.

1. Patents ⇦18, 37, 46

Three statutory conditions of patentability are novelty, utility and nonobviousness. 35 U.S.C.A. §§ 101–103.

2. Patents ⇦18

Statutory criterion of nonobviousness precludes grant of patent if differences between subject matter sought to be patent and prior art are such that subject matter as a whole would have been obvious at time invention was made to person having ordinary skill in art to which subject matter pertains.

No. 15-1003

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

LAWRENCE BEHR,
APPELLANT,
v.
FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on March 4, 2015, I electronically filed the foregoing FCC Opposition To Motion For Summary Reversal with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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