BRIEF FOR RESPONDENTS

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

NOS. 14-1229 & 14-1230

BEACH TV PROPERTIES, INC., F/K/A THE ATLANTA CHANNEL, INC.,
APPELLANT,
V.
FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

BEACH TV PROPERTIES, INC., F/K/A THE ATLANTA CHANNEL, INC.,
PETITIONER,
V.
FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

ON APPEAL FROM AND PETITION FOR REVIEW OF
ORDERS OF THE FEDERAL COMMUNICATIONS
COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

In addition to the parties identified in the Atlanta Channel's brief, the Atlanta Channel has named the United States of America as a respondent in case number 14-1230. There are no other parties, intervenors, or amici.

2. Rulings under review.

The ruling at issue is *Atlanta Channel, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 14541 (A-177) (2012), *pet. for recon. dismissed or in the alternative denied*, Order on Reconsideration, 29 FCC Rcd 11848 (A-225) (Media Bur. 2014).

3. Related cases.

The ruling at issue has not previously been before this Court. Counsel is not aware of any related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

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

GLOSSARY

Protection Act	Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, § 5008, 113 Stat. 1501 (codified at 47 U.S.C. § 336(f))

STATEMENT OF THE ISSUES PRESENTED

In the Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, § 5008, 113 Stat. 1501 (codified at 47 U.S.C. § 336(f)) (Protection Act), Congress directed the Federal Communications Commission to allow low-power television stations that certified they met specified requirements to apply for "Class A" status, which would confer new protection from interference. The statute prescribed a narrow window of time for stations to declare their intent to seek that protection: They were to "submit to the Commission a certification of eligibility" stating their "qualification requirements" not later than "60 days" from the statute's enactment, 47 U.S.C. § 336(f)(1)(B), or by January 28, 2000. A certification's "material deficiency" was grounds for the FCC to deny it. *Id.*

In a timely filed but incomplete certification, the Atlanta Channel neglected to assert compliance with the statutory qualification requirements. The FCC therefore dismissed the station's submission as materially deficient. The agency later declined to accept an amended filing that the station submitted five months past the statutory deadline.

This case presents the following questions:

(1) When the Atlanta Channel argues here, for the first time, that the FCC adopted and retroactively applied rules of general applicability in

violation of the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), does the Court lack jurisdiction to consider those arguments?

(2) When, during the last stage of the Atlanta Channel's administrative appeals, the station raised new arguments that it could have raised sooner, did the FCC correctly dismiss those arguments as untimely under 47 C.F.R. § 1.106?

(3) If the Court reaches the merits of the Atlanta Channel's arguments, should it reject them?

JURISDICTION

The Atlanta Channel invokes this court's jurisdiction under 47 U.S.C. § 402(b), or in the alternative under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Br. 2. Because the FCC ruling under review is an adjudicatory decision "affecting licensing," the appropriate basis for jurisdiction is § 402(b), and this Court should therefore dismiss the petition for review filed under § 402(a). *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (emphasis omitted). In any event, the issue is not dispositive, because both the notice of appeal and petition for review were filed within 30 days after the FCC denied reconsideration of its ruling. *E.g.*, *Cellco P'ship v. FCC*, 700 F.3d 534, 541 (D.C. Cir. 2012); *see*

Sw. Bell Tel. Co. v. FCC, 116 F.3d 593, 596–97 (D.C. Cir. 1997).[1] As explained below, however, the Court lacks jurisdiction to consider certain arguments on which the FCC had no opportunity to pass in the administrative proceeding. *See* 47 U.S.C. § 405(a); *see infra* Part I.A.

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. History of the Low-Power Television Service

The FCC created the low-power television service in 1982. *E.g.*, *Establishment of a Class A Television Service*, Order and Notice of Proposed Rulemaking, 15 FCC Rcd 1173, 1174 ¶ 3 (A-6) (2000) (*NPRM*). As "a secondary spectrum priority service," low-power television stations "must yield to . . . full service stations where interference occurs." *Id.* (internal quotation marks omitted). Because low-power television stations "operate at reduced power levels" as compared to full-service stations, *id.*, they offer "a relatively inexpensive and flexible means of delivering programming tailored to the interests of viewers in small[,] localized areas." 145 Cong. Rec.

[1] Although the order denying reconsideration was issued by one of the FCC's subordinate bureaus, *see Atlanta Channel, Inc.*, Order on Reconsideration, 29 FCC Rcd 11848 (A-225) (Media Bur. 2014) (*2014 Order*), the bureau acted with delegated authority on behalf of the full Commission, *see* 47 C.F.R. § 1.106(p).

S14696, S14724 (daily ed. Nov. 17, 1999) (section-by-section analysis). In addition, low-power stations have served to "increase[] the diversity of broadcast station ownership." *NPRM* ¶ 4 (A-7).

B. Community Broadcasters Protection Act of 1999

In the late 1990s, Congress grew concerned that the secondary regulatory status of low-power television stations was affecting their ability to raise capital, and that the stations' "uncertain future" was "further complicate[d]" by FCC efforts then underway to transition full-service stations from analog to digital format. *NPRM* ¶ 5 (A-7).[2] In the Protection Act, Congress sought to "ensure that," in "many communities," "free, over-the-air low-power television . . . stations" would survive the transition to digital television. 145 Cong. Rec. at S14724.

The Protection Act required the FCC, "[w]ithin 120 days after November 29, 1999," to "prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations." 47 U.S.C. § 336(f)(1)(A). Class A licensees would "be

[2] "To facilitate the transition from analog to digital television," the FCC provided full-service television stations with "a second channel" to use "for digital broadcasting during the period of conversion to an all-digital broadcast service." *NPRM* ¶ 5 (A-7). To do so, the FCC was "compelled to establish [digital television] allotments that [would] displace a number of [low-power television] stations." *Id.*

accorded primary status as . . . television broadcaster[s]" (i.e., would enjoy protection from interference from newer broadcast facilities) so long as they continued, going forward, to satisfy the requirements that initially qualified them for Class A status. *Id.* § 336(f)(1)(A)(ii).

A low-power television station could qualify for Class A status in one of two ways. First, it could qualify if, "during the 90 days preceding November 29, 1999," it "broadcast a minimum of 18 hours per day," "broadcast an average of at least 3 hours per week of [specified local] programming," and "was in compliance with the Commission's requirements applicable to low-power television stations." 47 U.S.C. § 336(f)(2)(A)(i). Alternatively, a station could qualify for Class A status if the FCC "determine[d] that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station . . . , or for other reasons determined by the Commission." *Id.* § 336(f)(2)(B). Regardless of the standard under which a low-power television station sought to qualify for Class A status, the statute required the station, "[w]ithin 60 days after November 29, 1999," to "submit to the Commission a certification of eligibility based on the qualification requirements" the station claimed to satisfy. *Id.* § 336(f)(1)(B).

The Protection Act specified related requirements for the FCC. "Within 30 days after November 29, 1999," the agency was required to "send a notice to the licensees of all low-power television licenses that describe[d] the requirements for class A designation." 47 U.S.C. § 336(f)(1)(B). The statute further required the FCC to "grant" a station's "certification of eligibility to apply for class A status" unless the agency found "a material deficiency." *Id.*

A station whose certification of eligibility was granted, however, was not guaranteed to obtain Class A status. For example, a station's subsequent application for Class A status "could be denied" if representations in its certification, though facially sufficient, "were later determined to be incorrect." *NPRM* ¶ 12 (A-10). Thus, the Protection Act "establishe[d] a two-part certification and application procedure for [low-power television] stations seeking Class A status." *Id.* ¶ 7 (A-8).

C. Implementation of the Protection Act

1. Notice of Eligibility Requirements

On December 13, 1999, the FCC's Media Bureau[3] released a public notice that described the two alternative sets of Class A eligibility criteria for low-power television stations. *See Mass Media Bureau Implements*

[3] What is now the Media Bureau was formerly called the "Mass Media Bureau." For ease of reference, this brief uses "Media Bureau" throughout. Similarly, references to the Media Bureau's "Video Division" encompass the former "Video Services Division."

Community Broadcasters Protection Act of 1999, Public Notice, 1999 WL 1138462 (A-1) (Mass Media Bur. Dec. 13, 1999). The notice further explained that the FCC would send "every low power television licensee" a certification form, which any licensee wishing "to convert to Class A status" would be required to "complete." *Id.* In addition, the notice specified that completed forms were due to the FCC "no later than Friday, January 28, 2000," *id.*, as required under the Protection Act.

The certification form that the FCC distributed to low-power television stations—with approval from the Office of Management and Budget—was a one-page document with five parts. *See* Statement of Eligibility for the Atlanta Channel, Inc. (A-3) (Atlanta Channel Certification) (reproduced for the Court's convenience at page 10, *infra*). Parts 1 and 2 of the form requested basic contact and station-identification information. *See id.* Part 3 of the form required the station to check "yes" or "no" as to whether it met each of the three eligibility criteria set forth in 47 U.S.C. § 336(f)(2)(A)(i). *See id.* Part 3 made clear that "[i]f the answers to" the three questions concerning those criteria all were "YES," the station's licensee could "submit this statement"—i.e., the certification form—"to obtain a certificate of eligibility for Class A . . . status." *Id.* If, on the other hand, the answer to any of those questions was "NO," Part 3 of the certification form invited the

station to check a box stating that the station was instead "submit[ting] an Exhibit" that set forth why "issuance of a certificate of eligibility would serve the public interest." *Id.* Part 4 of the certification form asked whether the station was "subject to a denial of federal benefits" pursuant to an anti-drug abuse statute. *Id.* Finally, Part 5 required a signatory for the station to "certify"—on penalty of civil and criminal sanctions—that he or she had "examined" the certification form "and that, to the best of [the signatory's] knowledge and belief, all representations in" the form were "true, correct, and complete." *Id.*

2. Rulemaking to Establish the Class A License

On January 13, 2000 (roughly two weeks before the statutory deadline for filing certifications of eligibility), the FCC initiated a rulemaking to "prescribe regulations to establish a class A television license." 47 U.S.C. § 336(f)(1)(A); *see NPRM* ¶ 1 (A-5). In doing so, the FCC described the existing statutory requirement that licensees intending to seek Class A status "submit a certification of eligibility within 60 days after the . . . enactment of the [Protection] Act." *Id.* ¶ 9 (A-8). The *NPRM* also referenced what the FCC would consider an "acceptable certification of eligibility": "a certification that is complete and that, on its face, indicates eligibility for Class A status." *Id.* ¶ 12 (A-10). As required under the Protection Act, the FCC adopted rules

establishing a Class A license on March 28, 2000. *See Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd 6355 (A-39) (2000) (*Class A Order*).

D. The Atlanta Channel's Certification

The Atlanta Channel submitted its certification of eligibility—one of approximately 1,700 such certifications that the FCC received in the statutory window, *see Class A Order* ¶ 41 & n.82 (A-56); Br. 30 n.9—on December 29, 1999. *See* Letter from Counsel for the Atlanta Channel to FCC Secretary at 1 (A-2) (Dec. 29, 1999). The station's filing included the basic contact and station-identification information called for in Parts 1 and 2, as well as the signature of the station's president in Part 5. *See* Atlanta Channel Certification (A-3) (reproduced on the next page for the Court's convenience). By contrast, all substantive questions on the certification form remained blank. *See id.* For example, no box was checked to indicate that the station claimed eligibility under the programming and operational criteria of 47 U.S.C. § 336(f)(2)(A)(i). *See id.* Nor did the station assert that it sought to show eligibility under the alternative "public interest" standard, and the station's submission included no exhibit to support eligibility on that basis. *See id.*

Federal Communications Commission
Washington, D. C. 20554

STATEMENT OF ELIGIBILITY
FOR
CLASS A LOW POWER TELEVISION STATION STATUS

Approved by OMB
3060-0908

1. Legal Name of LPTV Licensee: THE ATLANTA CHANNEL, INC.
Mailing Address: P.O. BOX 9556
City: PANAMA CITY | State or Country (if foreign address): FL | ZIP Code: 32417
Telephone Number (include area code): 850.234.2773 | E-Mail Address (if available): JUD@TOURIST.NET

LPTV Station: Facility ID Number: 65409 | Call Sign: WATC-LP*

Community of License: City: ATLANTA | State: GA

2. Contact Representative (if other than Licensee): Jud Colley | Company or Firm Name: The Atlanta Channel, Inc.
Telephone Number (include area code): 850/234-2773 | E-Mail Address (if available): N/A

3. **For the 90-day period ending November 28, 1999,** has the low power television licensee:

a. broadcast a minimum of 18 hours per day? ☐ Yes ☐ No

b. broadcast an average of 3 hours or more per week of programming produced within the market area served by the station or by commonly-controlled stations? ☐ Yes ☐ No

c. operated its station in full compliance with 47 Code of Federal Regulations Section 74.701 et seq., the Commission's regulations applicable to low power televisions stations? ☐ Yes ☐ No

If the answers to Questions 3(a), (b), and (c) is YES, the LPTV licensee may submit this statement to obtain a certificate of eligibility for Class A LPTV station status.

If the answer to Question 3(a), (b), or (c) is NO, the LPTV licensee may submit an Exhibit, setting forth fully the extent to which its station does not meet the above eligibility criteria and the reasons nevertheless that warrant a Commission determination that issuance of a certificate of eligibility would serve the public interest, convenience and necessity. Exhibit No.

4. Does the LPTV licensee certify that neither the licensee nor any party to the licensee, as defined in 47 Code of Federal Regulations Section 1.2002(b), is subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862? ☐ Yes ☐ No

5. **Certification.** I certify that I have examined this Statement and that, to the best of my knowledge and belief, all representations in this Statement are true, correct and complete.

Typed or Printed Name of Person Signing	Typed or Printed Title of Person Signing
JUD COLLEY	President
Signature	Date
	December 28, 1999

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

* Formerly W42BQ

A-3

E. Initial FCC Orders

On June 9, 2000, the Media Bureau dismissed the Atlanta Channel's certification form (and those of various other stations) as "materially

deficient." *Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Status*, Public Notice, 15 FCC Rcd 9761, 9762 (A-146) (Media Bur. 2000) (*Dismissal Order*); *see also id.* at 9768 (A-152) (listing the Atlanta Channel). In doing so, the Bureau explained that the Atlanta Channel had "not certified full compliance with the . . . statutory programming standards" of 47 U.S.C. § 336(f)(2)(A)(i). *Id.* at 9761 (A-145). Nor had the Atlanta Channel made any showing, the Bureau held, "that the public interest would . . . be served by affording [the station] Class A status." *Id.* at 9762 (A-146).

The Atlanta Channel sought reconsideration of the *Dismissal Order* on June 22, 2000. *See* First Petition for Reconsideration 1 (A-157). In its petition for reconsideration, the station acknowledged that it had failed to "answer, either affirmatively or negatively, . . . any of the certifications of compliance" called for in the certification form. *Id.* at 2 (A-158); *accord id.* at 4 (A-160). The station maintained, however, that leaving the certification form blank had been "unintentional," *id.* at 3 (A-159)—a mere "clerical oversight," *id.* at 4 (A-160); *accord id.* at 2 (A-158). According to the petition—as well as to an "amended" certification of eligibility the station submitted as an attachment—the Atlanta Channel had, during the relevant time period, satisfied "each and every eligibility requirement stipulated in the [Protection

Act].” *Id.* at 3 (A-159); *see id.* at Exh. A (A-163). The station therefore urged the FCC to accept its amended certification of eligibility “*nunc pro tunc*,” *id.* at 2 (A-158), and to excuse as “harmless” the “obvious” omissions of the original certification, *id.* at 5 (A-161).

The station raised three arguments in support of its request. First, it argued that FCC radio broadcasting precedents required the agency “to return defective or incomplete . . . applications at the time of tender to give applicants an opportunity for correction and resubmission,” as well as to allow “minor curative amendment[s] within 30 days” of the original filing. First Petition for Reconsideration 2 (A-158). Second, the station claimed the FCC was statutorily authorized to accept its amended certification of eligibility because doing so “would serve the public interest,” consistent with 47 U.S.C. § 336(f)(2)(A)(ii). *Id.* at 3–4 (A-159–A-160). Third, the station asserted that reconsideration of the *Dismissal Order* and acceptance of the amended certification would not harm other parties. *Id.* at 4 (A-160).

In a decision issued November 20, 2000, the Media Bureau’s Video Division denied the Atlanta Channel’s petition. *See Atlanta Channel, Inc.*, Letter Decision, 1800E3-JLB, at 2 (A-168) (Media Bur. Video Servs. Div. Nov. 20, 2000) (*Letter Decision*). The Division explained that radio broadcasting precedents “do not apply to the processing of” Class A

eligibility certifications, *id.*, and that, in any event, they would not permit an applicant to cure a "patently defective" application after the originally scheduled "cut-off date" for filing, *id.* (internal quotation marks omitted). The Division also held that because the "certification deadline [is] statutory," the FCC lacks authority to waive or extend it "absent extraordinary circumstances"—something the Atlanta Channel had not shown. *Id.* Finally, the Division observed that accepting the Atlanta Channel's late certification might harm certain Atlanta-area digital television channels. *See id.* at 2 n.3 (A-168).

F. Ruling under Review

1. *2012 Order*

The Atlanta Channel sought Commission-level review of the Video Division's *Letter Decision*. *See* Application for Review 1 (A-170). The station contended, first, that the Protection Act "does not provide a deadline for the correction of clerical errors" on certifications of eligibility, because the only way a certification can have a "material deficiency" within the meaning of the statute is if "the licensee *cannot* certify full compliance with the eligibility criteria." *Id.* at 3 (A-172) (internal quotation marks omitted). Second, the station argued that the Video Division had "acted arbitrarily and capriciously" in "relying on" the so-called "cut-off rule" from the radio

broadcasting policy guidelines. *Id.* at 6 (A-175); *see id.* at 4–6 (A-173–A-175). Third, while on the one hand characterizing those guidelines as "patently irrelevant," *id.* at 6 (A-175), the station also argued that the guidelines support relief because they recognize the dismissal of timely applications with minor defects as an unduly harsh sanction, *see id.* In that connection, the station argued it would suffer "irreparable injury" if not permitted to correct its "clerical error," *id.*, and that equity requires the FCC to accept the station's amended certification, *see id.* at 6–7 (A-175–A-176).

The Commission unanimously denied the Atlanta Channel's application for review. *See Atlanta Channel, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 14541, 14541 ¶ 1 (A-177) (2012) (*2012 Order*).[4] On the meaning of "material deficiency," the Commission explained that because "Congress did not define the term," the question was whether the Video Division had reasonably construed it "to include the complete omission of the required certifications, regardless of whether the licensee actually met the statutory qualifications at the time of filing." *2012 Order* ¶ 8 (A-180). The Commission agreed with the Division. *See id.* As the Commission explained,

[4] Two commissioners issued individual concurring statements in which they criticized the Commission's 12-year delay in ruling on the application for review. *See 2012 Order* at 14547 (A-183) (Statement of Commissioner McDowell); *id.* at 14548 (A-184) (Statement of Commissioner Pai). That delay is undeniably regrettable but does not affect the substance of this case.

"Congress chose a specific mechanism for establishing eligibility"—"a *certification* of eligibility based on the qualification requirements of [the Protection Act]." *Id.* (quoting 47 U.S.C. § 336(f)(1)(B) (emphasis added)). In the Commission's view, the Atlanta Channel's "overly restrictive interpretation of the term 'material deficiency' . . . would read the word 'certification' out of the statute completely." *Id.* Moreover, the Commission observed, "[u]nder [the Atlanta Channel's] interpretation, the Commission would be required to grant Statements of Eligibility that lack any evidence whatsoever of [a] station's qualifications." *Id.* The Commission deemed that result inconsistent "with the purpose and history of the statute." *Id.*

The Commission likewise affirmed the Video Division's refusal to accept the Atlanta Channel's amended certification of eligibility "five months after the statutory deadline," *2012 Order* ¶ 9 (A-180), because "[t]he deadline established in the [Protection Act] is nondiscretionary," *id.*; *see id.* (quoting the statutory language that "*[w]ithin 60 days after November 29, 1999*, licensees intending to seek class A designation *shall submit* to the Commission a certification of eligibility"). As the Commission explained: "Courts have held that, absent compelling circumstances, the Commission lacks discretion to accept late-filed petitions for reconsideration, which are

subject to a similarly mandatory statutory deadline [under 47 U.S.C. § 405(a)].” *Id.* ¶ 9 (A-181).

The Commission found no such compelling circumstances here. The Atlanta Channel blamed “clerical error” for the deficiency of its certification of eligibility, *2012 Order* ¶ 9 (A-181), but the station “had ample time to review [its] filing and take the necessary corrective action” between when it filed its certification form on December 29, 1999, and the expiration of the statutory deadline on January 28, 2000, *id.* It “offer[ed] no reason for [failing] to do so.” *Id.* As to the Atlanta Channel’s contention that dismissing its certification was “unduly harsh,” the Commission explained that although “[d]eadlines often have harsh consequences for those who fail to meet them,” the agency “lack[ed] discretion to excuse [the station’s] belated attempt to cure the material defects in its original [certification]” when the station had “not shown . . . extraordinary circumstances” that would warrant such relief. *Id.* ¶ 9 (A-181–A-182).[5]

2. *2014 Order*

The Atlanta Channel sought reconsideration of the Commission’s decision. *See* Second Petition for Reconsideration 1 (A-189). Much of the

[5] “In reaching this conclusion,” the Commission made clear that it was not relying on the agency’s policy concerning radio broadcasting construction permits, nor had the Video Division done so. *2012 Order* ¶ 9 n.32 (A-182).

petition for reconsideration repeated the station's earlier arguments, including that the agency had abused its discretion in refusing to permit the station to amend its certification form after the statutory deadline and that the agency had misconstrued the term "material deficiency" to concern the sufficiency of the certification form. *See id.* at 6–11 (A-194–A-199). At this late stage of the administrative proceeding, the station also raised several new arguments. *See id.* at 12–21 (A-200–A-209). One of those was that the station "had no notice that an incorrect or incomplete [certification of eligibility] could not be amended in the future or that the FCC would absolutely refuse to determine if the public interest, convenience and necessity would be served by the station." *Id.* at 19 (A-207). Also new was a claim that dismissal of the Atlanta Channel's certification was inconsistent with how the FCC had addressed incomplete or inaccurate certifications from other licensees, including the licensee of WDWO-LP, Detroit, Michigan. *See id.* at 17–19 (A-205–A-207).

The Media Bureau, on behalf of the full Commission,[6] rejected the Atlanta Channel's challenges to the *2012 Order*. *See 2014 Order* ¶ 13 (A-

[6] FCC rules provide that a bureau may dismiss or deny a petition for reconsideration of a Commission decision that affirms a prior decision of that bureau if the petition "plainly do[es] not warrant consideration by the Commission." 47 C.F.R. § 1.106(p). That is the case, for example, when a petition "[r]el[ies] on facts or arguments" that were "not previously . . . presented to the Commission," but could have been, *id.* § 1.106(p)(2); *see*

233). It dismissed as repetitious those arguments that the Commission had previously "considered and rejected." *Id.* ¶ 7 (A-229); *see also id.* ¶ 5 (A-227–A-228) (summarizing the Commission's earlier analysis). Regarding the Atlanta Channel's new arguments on notice and disparate treatment, the Media Bureau observed that the station had "not offered any reason for its failure to have raised these arguments earlier in the proceeding." *Id.* ¶ 12 (A-230). The Bureau therefore dismissed them as procedurally barred. *See id.* ¶ 12 & n.40 (A-231) (citing 47 C.F.R. § 1.106(b)(2), (p)(2)).

"Alternatively and independently," the Media Bureau "consider[ed] and reject[ed]" the Atlanta Channel's new theories "on the merits." *2014 Order* ¶ 12 (A-231). Regarding the allegedly inadequate notice, the Bureau explained: "[T]he Public Notice announcing the process for seeking eligibility unambiguously stated that [low-power television] licensees wishing to convert to Class A status 'must *complete*' the Statement of Eligibility and submit it by the statutory deadline." *Id.* ¶ 12 (A-232). Moreover, the Bureau reasoned, "[u]nlike the forms at issue in the so-called 'letter perfect' cases" that the Atlanta Channel invoked, "the one-page form at issue here was simple and straightforward, and [the station] could have

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id. § 1.106(b)(2), or when a petition "[r]el[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding," *id.* § 1.106(p)(3); *accord id.* § 1.106(b)(3).

readily ascertained for itself that its submitted form was defective." *Id.* As to the Atlanta Channel's "claim of disparate treatment," the Bureau held that "[e]ach of the cases [the station] cite[d] in support of its claim . . . involved timely filed Statements of Eligibility that provided all information necessary for the Bureau to grant eligibility either on the basis of the statutory programming and operational criteria or based on the Commission's alternative public interest standard." *Id.* ¶ 12 (A-231) (citation omitted). The certification forms submitted in those cases were thus readily distinguishable from the Atlanta Channel's, which "lacked any information supporting eligibility" whatsoever. *Id.*; *accord id.* ¶ 7 (A-229).

SUMMARY OF ARGUMENT

Under the Protection Act, a low-power television station intending to apply for Class A status had to "submit to the Commission a certification of eligibility" asserting its "qualification requirements," and do so "[w]ithin 60 days after November 29, 1999." 47 U.S.C. § 336(f)(1)(B). The FCC is authorized to reject a station's certification upon finding "a material deficiency." *Id.* Here, the FCC reasonably determined that the Atlanta Channel did not qualify to apply for Class A status when it failed to offer any substantive representation of compliance with the Class A qualification requirements until five months past the statutory deadline.

The Atlanta Channel rests its current challenge on five arguments that are procedurally barred. Three of those arguments share the flawed premise that, in dismissing the station's certification of eligibility, the FCC adopted and applied retroactively rules of general applicability in violation of the Administrative Procedure Act's requirements for rulemakings. But the Atlanta Channel never presented those arguments to the FCC and thus gave the agency no opportunity to consider them. As a result, this Court lacks jurisdiction to address those arguments here. *See* 47 U.S.C. § 405(a). The Atlanta Channel's two other arguments—that the station lacked actual notice of the need to timely complete its certification of eligibility, and that the FCC enforced the Protection Act's filing deadline inconsistently—were untimely under 47 C.F.R. § 1.106(b)(2) and (p)(2); the FCC properly dismissed them.

The Atlanta Channel's arguments also fail on the merits. As an informal adjudication, the ruling under review was inherently retroactive and was not subject to the requirements of Federal Register publication or notice and comment under the Administrative Procedure Act. In addition, the Atlanta Channel had actual notice of the need to complete its certification of eligibility by the statutory deadline. Finally, the station has not shown that the FCC enforced the statutory deadline inconsistently.

STANDARD OF REVIEW

The Court must uphold the FCC's ruling in this case unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The "arbitrary [and] capricious" standard of review is "highly deferential." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). The Court "presume[s] the validity of the Commission's action" and will "not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 8 (D.C. Cir. 2006) (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.2d 291, 300 (D.C. Cir. 2003)).

ARGUMENT

The Protection Act provides that the FCC may reject a low-power television station's "certification of eligibility" for Class A status when the agency finds "a material deficiency." 47 U.S.C. § 336(f)(1)(B). In addition, the statute specifies a narrow window of time—"[w]ithin 60 days of November 29, 1999"—during which a station "intending to seek class A" status must "submit to the Commission a certification of eligibility." *Id.* Applying both of those provisions, the FCC in the ruling under review reached two central determinations: first, that the Atlanta Channel's certification of eligibility—which left blank all substantive sections of an

uncomplicated, one-page form—reflected a "material deficiency" within the meaning of the statute, *e.g.*, *2012 Order* ¶¶ 7–8 (A-179–A-180); and, second, that the station was not entitled to amend its certification five months past the statutory filing deadline, *see id.* ¶ 9 (A-180–A-182). The Atlanta Channel's administrative appeals hinged on the reasonableness of the FCC's statutory analysis on those points. *See supra* pp. 12, 13–14, 16–17. Here, however, the station no longer pursues that line of argument. *See* Br. 24–25.[7]

Nor could it persuasively do so. As explained in the *2012 Order*, to hold that the term "material deficiency" cannot encompass "the complete

[7] The Atlanta Channel does make a passing assertion that the FCC erred in holding the station could not amend its certification of eligibility after the statutory deadline, characterizing the deadline as "directory," not "jurisdictional." Br. 36 n.11. The cases cited for that proposition are inapposite; rather than filing deadlines for private parties, they concern statutory directives for *public officials* to take action by a specified time. *See Dolan v. United States*, 560 U.S. 605, 607–08 (2010) (federal district court); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 152 (2003) (Commissioner of Social Security); *Brock v. Pierce County*, 476 U.S. 253, 254–55 (1986) (Secretary of Labor); *see also Dolan*, 560 U.S. at 611 (observing that this line of cases involves "judge[s] or other public official[s]"); *Brock*, 476 U.S. at 261 (distinguishing between deadlines for private plaintiffs and deadlines for action by public officials). More pertinent here, as the Commission correctly explained, are multiple cases involving "late-filed petitions for reconsideration" in which this Court has recognized that the FCC lacks discretion to waive a "mandatory statutory deadline" absent extraordinary circumstances. *2012 Order* ¶ 9 (A-181); *see also id.* ¶ 9 nn. 26, 28 (A-181) (citing cases such as *Reuters, Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986) and *V.I. Tel. Corp. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993), which the Atlanta Channel makes no attempt to distinguish).

omission of [Congress's] required certifications" would in effect "read the word 'certification' out of the statute completely," and would not comport "with the purpose and history of the statute, which indicate that Congress sought to confer Class A status only on those licensees that could show they met specific qualifications." *2012 Order* ¶ 8 (A-180). The Atlanta Channel complains that the FCC's decision had a "severe" consequence. Second Petition for Reconsideration 19 (A-207). But as the Supreme Court has observed, although "[f]iling deadlines, like statutes of limitations, necessarily operate harshly . . . with respect to individuals who fall . . . on the other side of them, . . . if the concept of a filing deadline is to have any content, the deadline must be enforced." *2012 Order* ¶ 9 n.30 (A-182) (quoting *United States v. Locke*, 471 U.S. 84, 101 (1985)).[8]

[8] This Court has repeatedly drawn the same conclusion. *See, e.g.*, *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125–28 (D.C. Cir. 2008) (recognizing that "the nature of a strict deadline" is that "many meritorious claims are not considered," and deeming it unreasonable for the FCC to have permitted a party that timely filed a formal administrative complaint, but submitted an insufficient filing fee, to cure that "easily avoidable" error after the statutory filing deadline); *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199–200 (D.C. Cir. 2003) (noting that "[t]he court has discouraged the Commission from accepting late petitions [for reconsideration] in the absence of extremely unusual circumstances," and upholding the FCC's decision not to address a constitutional claim raised in a late-filed supplement to a timely petition for reconsideration).

I. ALL OF THE ARGUMENTS ON WHICH THE ATLANTA CHANNEL NOW RELIES ARE PROCEDURALLY BARRED.

Having now abandoned the line of argument on which it focused before the FCC, the Atlanta Channel relies on five newly developed theories, *see* Br. 24–25, 26–29, all of which the Court should reject on procedural grounds. Under 47 U.S.C. § 405(a)(2), the Court lacks jurisdiction to reach the Atlanta Channel's three principal arguments. *See infra* Part I.A. And consistent with this Court's decision in *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003), the Court should deny the Atlanta Channel's remaining two arguments, which the FCC correctly dismissed as untimely under 47 C.F.R. § 1.106. *See infra* Part I.B.

A. The Court Lacks Jurisdiction to Consider the Atlanta Channel's Arguments That the FCC Improperly Adopted and Retroactively Applied Rules of General Applicability.

The Atlanta Channel raises three arguments premised on a theory that, when the FCC dismissed the station's blank certification of eligibility as materially deficient and refused to accept the station's untimely amendments, the agency adopted rules of general applicability. *See* Br. 25–26, 29–35. First, invoking 5 U.S.C. § 552(a)(1)(C) and (D), the station argues that the FCC was required to publish those "rules" in the Federal Register. *See id.* at 25–26, 29–32. Second, the station asserts that the supposed rules were subject to

notice and comment requirements under 5 U.S.C. § 553 prior to their adoption. *See id.* at 32–34. Third, the station contends that the FCC impermissibly applied the supposed rules retroactively. *Id.* at 34–35.

Nowhere in any of the Atlanta Channel's administrative pleadings did the station claim the FCC had improperly adopted or applied new rules. *See generally* Second Petition for Reconsideration (A-185–A-214); Application for Review (A-169–A-176); First Petition for Reconsideration (A-156–A-163). More specifically, the station never invoked the Federal Register requirement of 5 U.S.C. § 552, claimed that the FCC had violated procedures for notice and comment under 5 U.S.C. § 553, or mentioned considerations of retroactivity. *See generally id.*

As this Court has held: "Section 405 of the Communications Act precludes judicial review of 'questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.'" *BDPCS*, 351 F.3d at 1182 (quoting 47 U.S.C. § 405(a)(2)). And when, as here, a party "complains of only a technical or procedural mistake," *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998), the Court should give particularly "rigid adherence" to § 405, so that the agency may "correct any error . . . prior to judicial review," *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009). The

Court thus lacks jurisdiction to consider the Atlanta Channel's arguments that the FCC improperly adopted or applied new rules.

B. The FCC Correctly Dismissed the Atlanta Channel's Untimely Actual Notice and Disparate Treatment Arguments.

The Atlanta Channel also raises two arguments that the Court should deny because the FCC correctly dismissed them as untimely under 47 C.F.R. § 1.106. First, the station appears to contend it lacked actual notice of the need to submit a completed certification of eligibility by the statutory deadline. *See* Br. 26–29. Second, citing the example of low-power television station WDWO-LP, Detroit, Michigan, the Atlanta Channel argues that the FCC enforced the Protection Act's filing deadline inconsistently. *See id.* at 36–37.

The station first raised these arguments in the last stage of the administrative proceeding, *see* Second Petition for Reconsideration 17–18 & n.58 (A-205–A-206), 19–20 (A-207–A-208), when it petitioned for reconsideration of the Commission's *2012 Order*, *see 2014 Order* ¶ 8 & nn.28 & 33 (A-229). Under FCC rules, when "the Commission has denied an application for review," as it did in the *2012 Order*, "a petition for reconsideration will be entertained only if" the petitioner raises "facts or arguments" that could not have been raised sooner. 47 C.F.R. § 1.106(b)(2);

accord id. § 1.106(p)(2). Here, the Atlanta Channel's petition for reconsideration offered no reason for the station's "failure to have raised [its notice and disparate treatment] arguments earlier in the proceeding." *2014 Order* ¶ 12 (A-230). The FCC therefore dismissed those arguments as procedurally barred. *See id.* ¶ 12 & n.40 (A-230–A-231) (citing 47 C.F.R. § 1.106(b)(2), (p)(2)).

The Atlanta Channel has not challenged the FCC's procedural holdings, *see* Br. 26–29, 36–37, nor could it reasonably do so. As this Court explained in a similarly "open-and-shut case" concerning arguments raised too late in an administrative appeal, "[t]he Commission abuses its discretion when it arbitrarily violates its own rules, not when it follows them." *BDPCS*, 351 F.3d at 1184. In dismissing as untimely the Atlanta Channel's actual notice and disparate treatment arguments, the FCC reasonably adhered to its procedural rule, and the Court should therefore affirm the agency's action. *See id.*

II. EVEN IF PROPERLY PRESENTED, THE ATLANTA CHANNEL'S ARGUMENTS FAIL ON THE MERITS.

Although the Court need not look beyond the procedural considerations discussed above, the Atlanta Channel's arguments also fail on the merits.

A. Dismissal of the Atlanta Channel's Certification of Eligibility Was an Adjudicatory Ruling.

In claiming that the FCC adopted rules of general applicability and applied them retroactively in violation of the Administrative Procedure Act, *see supra* pp. 24–25, the Atlanta Channel fundamentally misapprehends the nature of the agency action at issue. The FCC did not adopt "rules" at all; it interpreted and applied the pre-existing standards of the Protection Act in an informal adjudication—an approach that was well within the agency's "broad discretion." *Conference Group, LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013); *accord NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974).

The Protection Act provides that "[w]ithin 60 days after November 29, 1999," any low-power television station intending to seek Class A status must "submit to the Commission a certification of eligibility" addressing its "qualification requirements." 47 U.S.C. § 336(f)(1)(B). The statute also provides that the FCC need not grant a certification containing "a material deficiency." *Id.* In the ruling under review, the FCC applied those statutory provisions to the particular characteristics of the Atlanta Channel's certification of eligibility and determined that the certification should be dismissed. *E.g.*, *2012 Order* ¶¶ 3–4, 7–9 (A-178–A-182). That decision bears "none of the hallmarks of legislative rulemaking that this court has identified,

such as amending a prior legislative rule or explicitly invoking the Commission's general legislative authority." *Conference Group*, 720 F.3d at 965 (citing *Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) and *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991)). To the contrary, this is "a classic case of agency adjudication"—one "that involves decisionmaking concerning [a] specific person[], based on a determination of particular facts and the application of general principles to those facts." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1093 n.11 (D.C. Cir. 1979); *see also United States v. Fl. E. Coast Ry. Co.*, 410 U.S. 224, 245 (1973) (recognizing the "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other").

Informal adjudications "must satisfy only minimal procedural requirements." *Sw. Airlines Co. v. TSA*, 650 F.3d 752, 757 (D.C. Cir. 2011) (internal quotation marks omitted). Those requirements are "derived mainly from [5 U.S.C.] § 555 . . . and the Due Process Clause." *Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *accord Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655–56 (1990). They do not obligate an agency to publish notice of its decision in the Federal Register or to solicit

notice and comment. It is sufficient for the agency to furnish the interested party with "a 'brief statement of the grounds for denial' of the party's request," *Butte County*, 613 F.3d at 194 (quoting 5 U.S.C. § 555(e)), and to "articulate a satisfactory explanation for its action," *id.* (internal quotation marks omitted). The FCC did so here. The Court should therefore reject the Atlanta Channel's rulemaking-related arguments that invoke 5 U.S.C. §§ 552(a)(1) and 553. *See* Br. 25–26, 29–34.[9]

The adjudicatory nature of the FCC's ruling likewise defeats the Atlanta Channel's claim that the agency should not have applied its decision retroactively. *See* Br. 34–35. "[I]t is black-letter administrative law that adjudications are inherently retroactive." *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 (D.C. Cir. 2013); *see also id.* at 922

[9] The Atlanta Channel's arguments under 5 U.S.C. § 552(a)(1) fail for the additional reason that—as set forth below in Part II.B—the station had "actual and timely notice" that it needed to complete its certification of eligibility by the statutory deadline. 5 U.S.C. § 552(a)(1). Moreover, even if the FCC had adopted "rules" in the context of this proceeding (which it did not), those rules would at most be "interpretive"—not "substantive" or "legislative" as the Atlanta Channel contends, Br. 25 n.7, 32–33—and thus would not require notice and comment. *See, e.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014) (explaining that "[a]n agency action that merely interprets a prior statute . . . , and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule" that does not require notice and comment).

(observing that "an adjudication *must* have retroactive effect, or else it would be considered a rulemaking").

B. The FCC Expressly Advised the Atlanta Channel to Complete Its Certification of Eligibility by the Statutory Deadline.

The Atlanta Channel also incorrectly contends it lacked actual notice that the FCC would require the station to complete its certification of eligibility by the statutory deadline, without subsequent opportunity for amendment. *See* Br. 26–29. As the *2014 Order* explains, "the Public Notice announcing the process for seeking eligibility unambiguously stated that [low-power television] licensees wishing to convert to Class A status 'must *complete*' the Statement of Eligibility and submit it by the statutory deadline." *2014 Order* ¶ 12 (A-232). There was nothing "cryptic" about that notice, Br. 29, which the Atlanta Channel does not deny having received, *see id.* at 12, 26. The notice was amply clear to advise the station that leaving all of the certification form's substantive questions blank would lead the FCC to dismiss the station's submission. Indeed, the language of the notice essentially repeated Congress's express statutory directive in 47 U.S.C. § 336(f)(1)(B) and was consistent with multiple statements in the FCC's January 13, 2000, *NPRM* in the Class A rulemaking. *See NPRM* ¶ 9 (A-8) (citing the statutory directive); *id.* ¶ 12 (A-10) (characterizing an "acceptable

certification of eligibility" as one "that is complete and that, on its face, indicates eligibility for Class A status"); *accord 2014 Order* ¶ 12 & n.46 (A-232).

And the FCC did not stop there. It provided the Atlanta Channel (and other low-power television stations) with a simple, one-page form to complete, *see* Atlanta Channel Certification (A-3) (reproduced at page 10, *supra*), underscoring in the form's instructions that whoever prepared a station's submission should "examine[]" the certifications it contained before submitting it, *id.* Notably, the same person who prepared the Atlanta Channel's incomplete certification of eligibility timely and successfully completed certifications for several other low-power television stations of the same licensee. *See* Br. 13; *accord* Second Petition for Reconsideration 2 (A-190).

On this record, dismissal of the Atlanta Channel's certification of eligibility in no way resembles the agency action disapproved in *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985). *See* Br. 26–29. In *Salzer*, the FCC issued an order that this Court determined was "vague with respect to when" certain filings from applicants for low-power television licenses "were required and what form they had to take." 778 F.2d at 875. On the basis of that ambiguity and because the form that the FCC expected applicants to file

was not yet publicly available, the Court held it was unreasonable of the agency to dismiss a station's license application for having failed to provide the requested information. *See id.* Here, by contrast, the FCC provided "patently clear" notice of what information low-power television stations were required to submit, *id.* at 877, including by sending them a straightforward, one-page form to complete, *e.g.*, Br. 12. The FCC was therefore "entirely justified in enforcing strict compliance with its . . . requirements . . . to expedite [its] processing of" the great volume of certifications (approximately 1,700 in total, *e.g.*, Br. 30 n.9) it received. *Salzer*, 778 F.2d at 877.

C. The Atlanta Channel Did Not Receive Disparate Treatment.

Finally, the Atlanta Channel is wrong that the FCC allowed the licensee of another low-power television station, WDWO-LP, Detroit, Michigan, to amend its certification of eligibility after the statutory deadline. *See* Br. 18–20, 36–37.

The Detroit station submitted a timely certification of eligibility for Class A status in which it mistakenly indicated in Part 3 that it intended to rely on the programming and operational qualification criteria of 47 U.S.C. § 336(f)(2)(A)(i). *See* Statement of Eligibility for WDWO-LP (A-34). But according to an exhibit that the station attached to its submission, a recent

interference problem had prevented the station from meeting those criteria, and the station instead sought to rely on the alternative public interest standard of 47 U.S.C. § 336(f)(2)(B). *See id.* at Exh. A (A-36). The FCC initially dismissed the Detroit station's certification as "materially deficient" in the same public notice as it dismissed the Atlanta Channel's certification. *Dismissal Order*, 15 FCC Rcd at 9762 (A-146); *see id.* at 9768 (A-151). Shortly thereafter, however, the Media Bureau's Video Division issued a letter indicating that the Detroit station had been listed in that public notice "[i]nadvertently." Letter from Chief of the Video Services Division to Counsel for WDWO-LP at 1 (A-164). Accordingly, the Division "rescinded" the dismissal of the Detroit station's certification, stating that the FCC would "address the alternative eligibility showing submitted" with that certification in a "subsequent letter." *Id.* On August 11, 2000, the Video Division issued an order in which it granted the Detroit station's certification of eligibility. *See* Letter from Chief of the Video Services Division to Counsel for WDWO-LP at 1–2 (A-165–A-166) (*WDWO-LP Staff Letter*).

The Atlanta Channel appears to contend that, in granting the Detroit station's certification of eligibility, the FCC improperly relied on a supplemental filing submitted for the station on June 19, 2000—past the statutory filing deadline. *See* Br. 18–20, 36–37; Letter from Counsel for

WDWO-LP to FCC Secretary at 1–3 (A-153–A-155). But as the *2014 Order* explains, the *WDWO-LP Staff Letter* granted eligibility "based on information provided in the [Detroit station's] timely filed Statement of Eligibility," not on anything in the station's supplemental filing. *2014 Order* ¶ 12 n.44 (A-231); *see also WDWO-LP Staff Letter* at 1–2 (A-165–A-166) (describing representations in Exhibit A to the station's original filing, and finding "that the public interest would be served" by designating the Detroit station eligible "[b]ased upon the representations set forth in [the station's] statement of eligibility"). Contrary to the Atlanta Channel's suggestion, *see* Br. 36–37, the *WDWO-LP Staff Letter*'s mere acknowledgment that, after the statutory filing deadline, the Detroit station's license was assigned to TCT of Michigan, Inc., *see WDWO-LP Staff Letter* at 2 (A-166), in no way suggests the FCC relied on the Detroit station's untimely supplemental filing when granting the station's certification of eligibility. The Atlanta Channel has shown no disparate treatment.[10]

[10] Moreover, the *WDWO-LP Staff Letter* was never appealed to the full Commission, and "an agency is not bound by unchallenged staff decisions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

CONCLUSION

The Court should dismiss in part and deny in part the notice of appeal filed under 47 U.S.C. § 402(b). The Court should dismiss the petition for review filed under 47 U.S.C. § 402(a).

Respectfully submitted,

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March 19, 2015

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

BEACH TV PROPERTIES, INC., F/K/A
THE ATLANTA CHANNEL, INC.,
APPELLANT,

V.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

BEACH TV PROPERTIES, INC., F/K/A
THE ATLANTA CHANNEL, INC.,
PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

NOS. 14-1229 & 14-1230

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 7,720 words.

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March 19, 2015

STATUTORY ADDENDUM

5 U.S.C. § 552(a)(1)(C), (D)

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

* * * * * *

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

* * * * * *

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

* * * * * *

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 555

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or

data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 706

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

28 U.S.C. § 2342

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

47 U.S.C. § 336(f)

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 336. Broadcast spectrum flexibility

* * * * *

(f) Preservation of low-power community television broadcasting

(1) Creation of class A licenses

(A) Rulemaking required

Within 120 days after November 29, 1999, the Commission shall prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations. Such regulations shall provide that--

(i) the license shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection; and

(ii) each such class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station in paragraph (2).

(B) Notice to and certification by licensees

Within 30 days after November 29, 1999, the Commission shall send a notice to the licensees of all low-power television licenses that describes the requirements for class A designation. Within 60 days after November 29, 1999, licensees intending to seek class A designation shall submit to the Commission a certification of eligibility based on the qualification requirements of this subsection. Absent a material deficiency, the Commission shall grant certification of eligibility to apply for class A status.

(C) Application for and award of licenses

Consistent with the requirements set forth in paragraph (2)(A) of this subsection, a licensee may submit an application for class A designation under this paragraph within 30 days after final regulations are adopted under subparagraph (A) of this paragraph. Except as provided in paragraphs (6) and (7), the Commission shall, within 30 days after receipt of an application of a licensee of a qualifying low-power television station that is acceptable for filing, award such a class A television station license to such licensee.

(D) Resolution of technical problems

The Commission shall act to preserve the service areas of low-power television licensees pending the final resolution of a class A application. If, after granting certification of eligibility for a class A license, technical problems arise requiring an engineering solution to a full-power station's allotted parameters or channel assignment in the digital television Table of Allotments, the Commission shall make such modifications as necessary--

(i) to ensure replication of the full-power digital television applicant's service area, as provided for in sections 73.622 and 73.623 of the Commission's regulations (47 CFR 73.622, 73.623); and

(ii) to permit maximization of a full-power digital television applicant's service area consistent with such sections 73.622 and 73.623,

if such applicant has filed an application for maximization or a notice of its intent to seek such maximization by December 31, 1999, and filed a bona fide application for maximization by May 1, 2000. Any such applicant shall comply with all applicable Commission rules regarding the construction of digital television facilities.

(E) Change applications

If a station that is awarded a construction permit to maximize or significantly enhance its digital television service area, later files a change application to reduce its digital television service area, the protected contour of that station shall be reduced in accordance with such change modification.

(2) Qualifying low-power television stations

For purposes of this subsection, a station is a qualifying low-power television station if--

(A)(i) during the 90 days preceding November 29, 1999--

(I) such station broadcast a minimum of 18 hours per day;

(II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and

(III) such station was in compliance with the Commission's requirements applicable to low-power television stations; and

(ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or

(B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.

(3) Common ownership

No low-power television station authorized as of November 29, 1999, shall be disqualified for a class A license based on common ownership with any other medium of mass communication.

(4) Issuance of licenses for advanced television services to television translator stations and qualifying low-power television stations

The Commission is not required to issue any additional license for advanced television services to the licensee of a class A television station under this subsection, or to any licensee of any television translator station, but shall accept a license application for such services proposing facilities that will not cause interference to the service area of any other broadcast facility applied for, protected, permitted, or authorized on the date of filing of the advanced television application. Such new license or the original license of the applicant shall be

forfeited after the end of the digital television service transition period, as determined by the Commission. A licensee of a low-power television station or television translator station may, at the option of licensee, elect to convert to the provision of advanced television services on its analog channel, but shall not be required to convert to digital operation until the end of such transition period.

(5) No preemption of section 337

Nothing in this subsection preempts or otherwise affects section 337 of this title.

(6) Interim qualification

(A) Stations operating within certain bandwidth

The Commission may not grant a class A license to a low-power television station for operation between 698 and 806 megahertz, but the Commission shall provide to low-power television stations assigned to and temporarily operating in that bandwidth the opportunity to meet the qualification requirements for a class A license. If such a qualified applicant for a class A license is assigned a channel within the core spectrum (as such term is defined in MM Docket No. 87-286, February 17, 1998), the Commission shall issue a class A license simultaneously with the assignment of such channel.

(B) Certain channels off-limits

The Commission may not grant under this subsection a class A license to a low-power television station operating on a channel within the core spectrum that includes any of the 175 additional channels referenced in paragraph 45 of its February 23, 1998, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order (MM Docket No. 87-268). Within 18 months after November 29, 1999, the Commission shall identify by channel, location, and applicable technical parameters those 175 channels.

(7) No interference requirement

The Commission may not grant a class A license, nor approve a modification of a class A license, unless the applicant or licensee shows that the class A station for which the license or modification is sought will not cause--

(A) interference within--

(i) the predicted Grade B contour (as of the date of the enactment of the Community Broadcasters Protection Act of 1999 [November 29, 1999], or November 1, 1999, whichever is later, or as proposed in a change application filed on or before such date) of any television station transmitting in analog format; or

(ii)(I) the digital television service areas provided in the DTV Table of Allotments; (II) the areas protected in the Commission's digital television regulations (47 CFR 73.622(e) and (f)); (III) the digital television service areas of stations subsequently granted by the Commission prior to the filing of a class A application; and (IV) stations seeking to maximize power under the Commission's rules, if such station has complied with the notification requirements in paragraph (1)(D);

(B) interference within the protected contour of any low-power television station or low-power television translator station that--

(i) was licensed prior to the date on which the application for a class A license, or for the modification of such a license, was filed;

(ii) was authorized by construction permit prior to such date; or

(iii) had a pending application that was submitted prior to such date; or

(C) interference within the protected contour of 80 miles from the geographic center of the areas listed in section 22.625(b)(1) or 90.303 of the Commission's regulations (47 CFR 22.625(b)(1) and 90.303) for frequencies in--

(i) the 470-512 megahertz band identified in section 22.621 or 90.303 of such regulations; or

(ii) the 482-488 megahertz band in New York.

(8) Priority for displaced low-power stations

Low-power stations that are displaced by an application filed under this section shall have priority over other low-power stations in the assignment of available channels.

* * * * *

47 U.S.C. § 402(a), (b)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

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

(b) Right to appeal

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

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

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

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

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

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

(6) By any other person who is aggrieved or whose interests are adversely

affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

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

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

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

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

* * * * *

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

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

Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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

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

47 C.F.R. § 1.106

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
RECONSIDERATION AND REVIEW OF ACTIONS TAKEN BY THE COMMISSION AND PURSUANT TO DELEGATED AUTHORITY; EFFECTIVE DATES AND FINALITY DATES OF ACTIONS

§ 1.106 Petitions for reconsideration in non-rulemaking proceedings.

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

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

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

person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

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

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

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

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

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

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

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

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

(2) A petition for reconsideration of a decision that sets forth formal findings of fact and conclusions of law shall also cite the findings and/or conclusions which

petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and/or conclusions should be changed. The petition may request that additional findings of fact and/or conclusions of law be made.

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

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

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

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

(i) Petitions for reconsideration, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52 and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554, by mail, by commercial courier, by hand, or by electronic submission through the Commission's Electronic Comment Filing System or other electronic filing system (such as ULS). Petitions submitted only by electronic mail and petitions submitted

directly to staff without submission to the Secretary shall not be considered to have been properly filed. Parties filing in electronic form need only submit one copy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) Are untimely.

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

BEACH TV PROPERTIES, INC., F/KA THE ATLANTA CHANNEL, INC., Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee.	No. 14-1229
BEACH TV PROPERTIES, INC., F/KA THE ATLANTA CHANNEL, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, And UNITED STATES OF AMERICA, Respondents.	No. 14-1230

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on March 19, 2015, I electronically filed the Brief for Respondents 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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