Oral Argument Not Yet Scheduled

No. 15-1003

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

LAWRENCE BEHR

APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE

ON APPEAL FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

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

STATEMENT AS TO PARTIES, RULINGS AND RELATED CASES

1. ***Parties***

All parties appearing in this Court are listed in petitioners' briefs.

2. ***Ruling Under Review***

In the Matter of Lawrence Behr Application For Modification of 220-222 MHz Station WPWR222, 29 FCC Rcd 15924 (2014) (JA 1)

3. ***Related Cases***

The order on review has not previously been before this Court or any other court, except on a motion for summary reversal that was denied on May 4, 2015. We are not aware of any related cases pending before this Court or any other court.

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GLOSSARY

FCC	Federal Communications Commission
Order	*In the Matter of Lawrence Behr Application For Modification of 220-222 MHz Station WPWR222*, 29 FCC Rcd 15924 (2014) (JA 1)
ULS	Universal Licensing System

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INTRODUCTION

This appeal arises from an order of the Federal Communications Commission affirming a decision of its Wireless Telecommunications Bureau that denied appellant Behr's request for a hearing and for a waiver of an agency rule that establishes the time period within which to complete construction of a private land mobile radio station.

Appellant Behr challenges only the FCC's interpretation of an agency procedural rule, 47 C.F.R. § 1.110, that allows a license applicant to demand a hearing in certain limited circumstances where the agency has partially or conditionally

granted a radio license application. The FCC determined that this rule did not apply in Behr's case because the agency had fully granted his application to modify his license. Contrary to Behr's contention, that decision was reasonable in light of the facts. It was also consistent with this Court's endorsement of the Commission's construction of this rule as not applying in very similar circumstances in *Buckley-Jaeger Broadcasting Corp. v. FCC*, 397 F.2d 651 (D.C. Cir. 1968).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the FCC reasonably determined that its rule governing partial or conditional grants of license modifications did not apply to a situation in which a license modification application was granted in full, but an associated rule waiver request was denied.

JURISDICTION

The notice of appeal was filed pursuant to 47 U.S.C. § 402(b)(1), which gives this Court exclusive jurisdiction to hear appeals from "decisions and orders" of the FCC related to radio station applications. The Commission's order on appeal was released on December 17, 2014. The notice of appeal was timely filed on January 8, 2015 within 30 days of the applicable date established by 47 U.S.C. § 402(c) and 47 C.F.R. § 1.4(b)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

A. Background

In 1993, the Commission conducted an initial lottery for licenses to provide private land mobile radio service in the 220-222 MHz band. More than 59,000 applications were filed to participate in the lottery, one of which was filed by appellant Behr for a license to serve the Denver area. He won the lottery and became the "tentative selectee."[1] The Commission then requested that a number of selectees, including Behr, resubmit corrected applications with additional technical information before those applications could be granted. Behr did so in a timely manner on March 28, 1993. *See* JA 63. Unfortunately, the Commission misplaced the application and, believing that Behr had not responded, granted a license in Denver to the second tentative selectee from the lottery for that city. The Commission announced on July 21, 1995 that it had acted on all applications in Behr's category of licenses. JA 69. Behr, however, did not inquire about the status of his application until over a year later, in August 1996. *See* JA 65.

After learning of its administrative error, the Commission, on its own motion and, admittedly after a lengthy period of time, set aside the grant to the second-place lottery winner and reinstated Behr's application. *See Lawrence Behr*, 17 FCC

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

Rcd 19025 (WTB 2002) (JA 58). Behr's application was granted on January 8, 2003.

When it established the 220-222 MHz service, the Commission provided for both nationwide and non-nationwide licenses. Behr's application that was eventually granted was to provide non-nationwide service in the Denver area. Such licensees generally were authorized to provide service from a single base station location and were allowed 12 months to construct a station once the application was granted. *See* 47 C.F.R. § 90.725(f).[2] As the order reinstating Behr's application specifically cautioned, if the application were subsequently "granted and he does not timely construct, any authorization granted to Behr would automatically terminate and Net Radio, as the Denver geographic licensee, would have reversionary rights in those frequencies …." *Lawrence Behr*, 17 FCC Rcd at 19028 n.15, citing, 47 C.F.R. § 90.763(b) (JA 61); *see also* 47 C.F.R. § 90.725(f).

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[2] Initially, the Commission provided only eight months for construction of non-nationwide stations but subsequently increased the time to 12 months to conform to construction periods in related services. *See Order* n.15 (JA 3). Licensees like Behr obtained licenses by lottery, and compliance with Commission rules typically involved constructing a base station to transmit from a single authorized location. Subsequently, the Commission established rules for 220-222 MHz band Phase II licensing through competitive bidding, rather than lottery, authorizing non-nationwide licensees to provide service to larger geographic areas. Phase II licensees were required to cover 33 percent of the population of the geographic area within five years of the license grant, and to cover 66 percent of the population of the geographic area within 10 years of the license grant, potentially requiring construction of multiple stations in the licensed areas. *See Order* ¶8 (JA 4). Behr was never part of the Phase II competitive bidding licensing process.

On June 2, 2003, Behr filed an application to modify his license by updating certain information with respect to the station and changing the station's class from for-profit private carrier to for-profit interconnected service. JA 42.[3] With the application, Behr attached a petition for waiver of the construction requirements in 47 C.F.R. § 90.725 in order to obtain more time to construct the station. JA 51. Rather than the one-year construction period applicable to his class of license, Behr sought a five- to ten-year period applicable to a different class of licenses. JA 54-56. *See* n. 2 above.

The Bureau denied the waiver petition on November 12, 2003. *See* JA 40. The ruling found that Behr had failed to provide adequate justification for waiver of the rule, noting in particular that his attempt to compare his license with different types of licensees that had been provided longer construction periods was "incorrect" and that he had failed to provide "any evidence" to show that his "single site specific license warrants a construction schedule similar to geographic area licenses." JA 41 . Behr's application to modify his license was granted unconditionally in a different Bureau-level action on November 17, 2003. *See Lawrence Behr*,

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[3] As a private carrier, licensees like Behr could provide commercial data or voice radio service to individuals, businesses or government agencies. The service could be used, for example, by a fleet of delivery trucks or plumbing company vehicles, for internal truck-to-truck or truck-to-headquarters communications. Changing the station class of the facility on the license to add "interconnection" permitted that service also to connect to the public switched telephone network in addition to internal truck-to-truck or truck-to-headquarters communications.

24 FCC Rcd 7196, 7197 ¶5 (WTB 2009) (JA 29).

On December 17, 2003, Behr filed a letter, purportedly pursuant to 47 C.F.R. § 1.110, rejecting "the grant as made" and requesting that the Commission "vacate the original action and set the application for hearing." *See* JA 39. In a January 2007 ruling, the Bureau dismissed the hearing request, explaining that Section 1.110 applies only to instances where the Commission "grants any application in part, or with any privileges, terms, or conditions other than those requested," and that in this case Behr's modification application had been granted in full and without condition. *Letter to Donald J. Evans*, 22 FCC Rcd 1798 (WTB 2007) (JA 37). The Bureau noted that the Commission had previously rejected a hearing request filed in a similar situation as inappropriate under Commission rules, and that this Court had affirmed that interpretation of Section 1.110. *Id.* at 1798-99 & n.7 (citing *Buckley-Jaeger*, 397 F.2d at 656) (JA 37-38).

As for the separate denial of his waiver petition, the ruling pointed out that a petition for reconsideration or an application for Commission review of the Bureau's action are the two appropriate vehicles for challenging such a denial, and that Behr had submitted neither. *See* 22 FCC Rcd at 1799 (JA 38); *see also* 47 U.S.C. § 405 (reconsideration); 47 C.F.R. § 1.106 (same); 47 C.F.R. § 1.115 (application for review). The ruling also noted that "because Behr failed to construct [the station] by the applicable 12-month deadline, the license cancelled automatically on January 8, 2004 pursuant to [47 C.F.R. §] 90.725(f)." 22 FCC Rcd at 1799

(JA 38).

On February 13, 2007, Behr filed a petition for reconsideration. JA 32. He claimed that the Bureau erred in dismissing his Section 1.110 petition for hearing because it was the Commission's action of denying the waiver request but granting the underlying application that "left Behr with no choice but to reject the grant and request a hearing." *Id.* The Bureau denied that petition, pointing out that in his modification application Behr had sought three specific modifications and that the application with those requests was granted independently of the distinct petition for waiver of the construction period rule, which was separately denied. *Lawrence Behr*, 24 FCC Rcd at 7197-98 ¶5 (JA 29). The order found that the initial Bureau ruling was consistent with precedent and had been correct in concluding that Section 1.110 did not apply in this situation. The Bureau explained that *Buckley-Jaeger* was on point: "*Buckley Jaeger* concerned a renewal application, which the Commission granted, with an attached request for exemption from the rules, which the Commission denied. The court expressly noted that the relief under Section 1.110 was inapplicable because the Commission granted the license renewal application in full, and denied only the request for exemption that was filed together with the application." *Id.* ¶6 (citing *Buckley Jaeger*, 397 F.2d at 652-53) (JA 30).

B. The Order On Appeal

Behr sought review by the full Commission of the Bureau's reconsideration order denying his request for a hearing pursuant to 47 C.F.R. § 1.110. *See* JA 20.

The application for review raised two questions: (1) whether grant of his modification application while denying his separate petition for waiver constituted only a partial grant of the application, making the provisions of Section 1.110 applicable, and (2) whether, in the circumstances of this case, the Bureau should have waived the construction permit limits of the rule applicable to his category of station, extending the time for him to construct this station to the much longer periods provided for a different category of station. *Id.*

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

Behr's claim that grant of his modification application along with the denial of his waiver petition constituted a partial grant of the modification application, the Commission concluded, was both inaccurate and inconsistent with FCC and judicial precedent. *Order* ¶22 (JA 9). The Commission found that Behr's modification

application and waiver petition in fact "contained two separate independent types of requests – one type constituted the application to correct and modify, within the parameters of the current rules, the administrative and technical aspects of the license, while the other type sought relief apart from the specific terms of the license (*i.e.*, to obtain a waiver of the build-out schedule set out in the Commission's rules)." *Id.* ¶24 (JA 10). These were the same circumstances, the Commission concluded, in which it had previously determined that Section 1.110 did not apply in the ruling affirmed by this Court in *Buckley-Jaeger*. *See* 397 F.2d at 655-56.

As for the Bureau's denial of Behr's petition for waiver of the rule governing the construction period for this station, the Commission concluded that Behr had failed to file either a petition for reconsideration or application for review of the denial ruling within the time periods provided by statute and rule and had never requested additional time for such a filing. *Order* ¶¶39-43 (JA 15-17). In addition, the Commission concluded that "this case presents no circumstances, extraordinary or otherwise, that call into question the propriety of giving force to" the deadlines for seeking further review of agency staff rulings. *Id*. ¶44 (JA 18).

Finally, the Commission "observe[d] that even were we to examine the factual assertions that Behr has made to justify additional time to build – whether the ten more years that Behr requested or any smaller amount of time – we see nothing in those assertions or in the way the Wireless Bureau handled them that would have warranted grant of the requested relief." *Id*. ¶43 (JA 17). The Commission

found that the Bureau's waiver denial letter "was logical and well supported" and that it found nothing in the record that "could conceivably have supported a decision to provide Behr with additional time to meet his construction obligations." *Id.*[4]

SUMMARY OF ARGUMENT

Behr's claim that he was entitled to a hearing under Section 1.110 of the Commission's rules because the agency only partially granted his application to modify his license is based on a mistaken view of the Commission's action. The Commission granted his application and denied his separate waiver request in two separate actions that occurred five days apart. Behr's separate waiver request, on its face, did not seek a modification of his license but a waiver of the rule which imposed the twelve-month construction deadline for which he sought a waiver and extension. The Commission construction of its own rules is entitled to substantial judicial deference, particularly where, as here, it is based on a more reasonable ap-

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[4] On appeal, Behr focuses solely on his contention that he was entitled to a hearing under Section 1.110. He has accordingly abandoned any challenge to the Commission's denial of his waiver request, which was in any event a reasonable exercise of the agency's broad discretion. *See*, *e.g.*, *Blanca Tel. Co.*, 743 F.3d 860, 864 (D.C, Cir, 2014) ("We will vacate the denial of a waiver 'only when the agency's reasons are so insubstantial as to render that denial an abuse of discretion.'"), quoting *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181 (D.C.Cir.2003). Behr's claim in his prayer for relief at the end of his brief that the Court should direct the Commission "to give effect to the extended build-out modification that was requested in" his modification application (Br. 18), apparently a reference to his rule waiver petition, is not a substitute for an argument that the Commission unlawfully denied that petition.

plication of the facts than Behr's attempt to demonstrate that his rule waiver request was actually a request for modification of his license. In addition, the Commission's application of Section 1.110 is consistent with it approach in the very similar factual setting of the *Buckley-Jaeger* case that this Court affirmed in language specifically approving the Commission's application of the rule.

Throughout his brief, Behr refers to the agency's mistakes and delays in processing his application. However, as the Commission correctly observed, its "errors predating the grant of Behr's license have no relevance to his subsequent failure to preserve his rights to contest the Wireless Bureau's determination that he had failed to comply with one of the most basic obligations for holding a license – *i.e.*, constructing the station on a timely basis." *Order* n.120. (JA 17).

After its initial mistakes, the Commission reinstated Behr's application and then granted it in January 2003. Even if the Commission's responses to Behr's many subsequent pleadings may have been tardy, beginning in January 2003 Behr possessed exactly the authorization he sought prior to the Commission's initial errors processing his application. Yet the record does not reflect any action on his part to construct the station since that time, notwithstanding the clear requirement of the agency's rules that construction of stations of this type be completed within 12 months of the license grant and despite the Commission's explicit reference to that deadline when it granted his application. *See* p. 4 above; *see also Lawrence Behr*, 17 FCC Rcd at 19028 n.15, citing, 47 C.F.R. § 90.763(b) (JA 61).

Moreover, when the Bureau subsequently denied his waiver petition, he failed to seek either reconsideration of that Bureau ruling (JA 40) or review by the Commission. The Commission's delays here are regrettable, but those delays were not the cause of Behr's failure to comply with the agency's rules.

STANDARD OF REVIEW

This Court reviews FCC orders "under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). "Under this 'highly deferential' standard of review, the court presumes the validity of agency action … and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

ARGUMENT

THE FCC REASONABLY HELD THAT SECTION 1.110 WAS INAPPLICABLE TO THE GRANT OF BEHR'S MODIFICATION APPLICATION.

Behr's appeal relies on the premise that the denial of his petition for waiver of an agency rule in order to receive additional time to construct his station, along with the separate grant in full of his modification application, amounted to a single action that resulted in a partial denial of the application for modification of his license. From that premise, Behr contends that the procedures set out in Section

1.110 of the Commission's rules, 47 C.F.R. § 1.110, which allows a party whose license application is partially or conditionally granted to reject that less-than-complete grant and demand an evidentiary hearing, governed his challenge to the Bureau's order. But as the Commission explained Behr's premise is false and the rule does not apply to his case. *See Order* ¶¶17-38 (JA 7-15).

Section 1.110 provides:

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

47 C.F.R. § 1.110.

As the Commission noted in the *Order*, Behr's modification application sought to make changes in his license "to add a contact person to his license, provide answers regarding foreign ownership, and change the licensed station class so that he could provide interconnected service." *Order* ¶24 (JA 10). His separate petition for waiver of the rule imposing a 12-month construction deadline for his category of license, the Commission found, "was not contingent on or otherwise related to any of these changes in the elements of Behr's license." *Id.* The Commission thus reasonably determined that there was "no basis for concluding that

Behr's request to modify his license … and his request for waiver of the construction rule, constitute anything other than two independent requests, where the denial of one (the waiver request) is entirely unconnected to the consideration of the merits of the other." *Id.* at ¶22 (JA 9). Given the "high level of deference due to an agency in interpreting its own orders and regulations," *MCI Worldcom Network Services, Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001), the Commission's conclusion, standing alone, justifies affirmance of its order.

Behr contends (Br. 9) that his waiver request was part of his application to modify his license, and when that request was denied, the Commission effectively granted his license modification application in part and denied it in part, thereby triggering Rule 1.110. The Commission reasonably disagreed.

Behr's application sought three specific license modifications – (1) addition of a contact person for the licensee; (2) addition of answers to questions concerning alien ownership; and (3) a change in the station's class. *See Order* ¶¶22-24 (JA 9-10); *see also* JA 6, 29-30. It is undisputed that the Bureau granted the application seeking those modifications on November 17, 2003. *See* JA 29.

By contrast, the station construction period which Behr sought to waive is not a term of the license that is subject to change by modifying the license. It is governed by rule – in this case by 47 C.F.R. § 90.725. To extend that period, Behr sought a waiver of that rule. See JA 51 ("Petition for Waiver of Section 90.725 of the Commission's Rules.").

Behr's petition for rule waiver offers a detailed discussion of the development of the rule in question and explains Behr's position that the Commission should waive the rule because it had failed to update the rule, adopted in 1990, to reflect changes in the 220 MHz Private Mobile Radio Service. *See* JA 52-53. The petition concludes by arguing that the circumstances of this case "render application *of that rule* not only burdensome but inequitable and contrary to the public interest." JA 56 (emphasis added). Contrary to Behr's claim now that the waiver petition "existed solely as an essential component of the application" (Br. at 13), the waiver petition makes no reference to seeking any modification to the terms of the license.

If Behr ever had a basis for contesting the independence of his waiver request and license modification applications, Commission precedent, affirmed by this Court, has long since dispelled it.

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

The Commission found no merit in the claim, holding that "[t]his amounts to a contention that a licensee, by requesting waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance." *AM-FM Program Duplication*, 8 F.C.C.2d at 4-5. On appeal, this Court specifically agreed with the quoted language from the Commission's order, holding that it could "find no support in either the statute or the rule for the proposition asserted and Appellant has not cited any authority in support." *Buckley-Jaeger*, 397 F.2d at 656.

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

Behr's claims that unlike in *Buckley-Jaeger*, the "build-out timetable" here "was an expressly stated provision of Behr's existing license for which modification was requested." Br. at 15. But as we have shown, the "build-out timetable" applicable to Behr's license was contained in a rule, 47 C.F.R. § 90.725, and Behr sought a waiver of the rule to extend the time to construct his station, not a modification of his license for that purpose.

Behr also claims that *Buckley-Jaeger* was different because the waiver

sought there would have provided "an exemption from application of a rule applicable to all broadcasters." Br. at 15. But that is exactly what Behr's "Petition for Waiver of Section 90.725 of the Commission's Rules" (JA 51) sought – exemption of his license from the rule's twelve-month construction period applicable to all other stations of his class.[5]

Behr's assertion (Br. at 3) that the Bureau "added a new build out period to the license in May of 2003" and that the application "request[ed] modification of the build-out period denoted on the license" (Br. at 1) is incorrect and misleading. His reference is to a data entry notation made in the electronic license file indicating that the construction period for his station, *established by rule*, began to run in January 2003. *See* JA 71. This was much later than that for other licensees whose applications had been filed at the same time as Behr's initial application, since it resulted from the Commission's delays in processing that application. In 2003 the Commission began an audit of the construction status of stations in this service, and the notation was added to the file to flag Behr's special situation to make clear,

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[5] Behr's assertion that he "filed an application to modify a term of his license *that prescribed a very abbreviated period* to build out the facilities specified in the license" (Br. at 8 (emphasis added)) is inaccurate. Behr received the same period to construct his station after grant of his license – twelve months – as prescribed by the applicable Commission rule and as was applied to other licensees of the same class of station. (Special circumstances when the Commission initiated this service led it to extend the construction period for all non-nationwide 220 MHz licenses on several occasions. *See Order* ¶¶4-6 (JA 2-3)).

as it states, that his attorney "should not respond to the audit" because his construction period, unlike that of other similar licensees, began in January 2003 and extended into 2004. *Id.* That file notation was for that purpose and did not thereby add a requirement to his license in addition to that which already applied by rule. The construction deadline for his license continued to be governed by 47 C.F.R. § 90.725.[6]

Relying on *Murray Hill Broadcasting Co.*, 8 FCC Rcd 325 (1993) and *Central Television, Inc. v FCC*, 834 F.2d 186 (D.C. Cir. 1987), Behr claims "that Section 1.110 'does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions.'" Br. at 15. No one disputes that general proposition. But, unlike here, both of those cases involved "applications that were granted contingent only on each applicant's agreement to specific conditions. In both cases, the applicants first accepted the conditional grants, and later attempted to appeal the conditions attached to the grants as made." *Order* ¶27 (JA 11). The appeals were accordingly "rejected because the applicants did not comply with the procedural requirements of Section 1.110." *Id.*

In addition, the Commission explained, "in neither of these cases could the applications have been granted absent agreement to the conditions associated with

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[6] As noted above, when the Commission reinstated Behr's application in 2002, it specifically cautioned that if he failed to construct the station within the period required by the rule, his authorization would "automatically terminate." *See* p. 4 above, citing *Lawrence Behr*, 17 FCC Rcd at 19028 n.15 (JA 61).

the grant." *Order* ¶32 (JA 13). In this case, by contrast, the Commission staff granted "Behr's modification application without condition … to the precise extent that Behr had requested in his application …. Behr did not receive less than the modified license for which he had applied." *Id.* ¶33 (JA 13).

Behr attempts to make much of the fact that the waiver petition was filed as an attachment to his modification application, and that the agency's rules (47 C.F.R. § 1.925(b)(1)) require waiver petitions like his to be filed on the same form used for license modifications. Such procedural rules, however, do not change the nature of the filings and do not undermine the Commission's reasonable conclusion that the modification application and waiver petition were separate requests for agency action.

Section 1.925(b), 47 C.F.R. § 1.925(b), was adopted in 1998 when the Commission transitioned to electronic application filing, known as the Universal Licensing System (ULS), in wireless telecommunications services such as the 220-222 MHz service involved here. *See In The Matter Of Biennial Regulatory Review-Report and Order*, 13 FCC Rcd 21027, 21039-44 ¶¶20-26 (1998). The purpose of the rule's requirement that waiver requests be associated with a particular application form was simply an administrative choice relating to the Commission's implementation of electronic filing and was unrelated to whether grant of a particular waiver request would constitute a license modification. *See id.* (citing benefits of "mandatory electronic filing" for a wide range of wireless applications, "including

transfer and assignment applications, renewals, license modifications, waiver requests, and notifications ….” (*id.* ¶22)); *see also In The Matter Of Biennial Regulatory Review-NPRM*, 13 FCC Rcd 9672 ¶27 (1998) (“In conjunction with the enhanced electronic filing capability provided by ULS, we propose to modify our Part I rules to allow electronic filing of pleadings regarding wireless radio service applications. With the advent of ULS, we also have the ability to allow pleadings and informal requests for Commission actions associated with applications or licenses in the wireless radio services to be filed electronically. … ULS allows waiver requests to be filed electronically on the FCC Form 601 or in connection with requests submitted on other ULS forms.”). Prior to the adoption of Section 1.925(b) in 1998, waiver requests in wireless telecommunications services like this were filed by paper and there was no requirement that they be associated with an application form. *See* 47 C.F.R. § 22.119 (1997).

As the Commission noted (*Order* ¶37 (JA 15)), there was nothing in the nature of Behr’s rule waiver petition to suggest that it was necessary to consider that petition in connection with the modification request. And the fact that the Commission granted the modification application and denied the rule waiver petition in separate actions five days apart should have been a clear indication to Behr and his experienced communications counsel that the Commission was treating these filings as separate requests.

In sum, Behr’s assertion that the Commission only partially granted his

modification application because it denied his petition for waiver of the construction rule and thus erred in refusing to provide a Section 1.110 hearing on that application is demonstrably wrong and was reasonably rejected by the Commission.

CONCLUSION

For the foregoing reasons, the Court should affirm the Commission's *Memorandum Opinion and Order.*

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
Fax (202) 418-2819

August 6, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying "Brief for Respondents" was prepared using a proportionally spaced 14 point typeface and contains **5133** words as measured by the word count function of Microsoft Office Word 2013.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

August 6, 2015

STATUTORY ADDENDUM

47 C.F.R. § 1.110

Partial grants; rejection and designation for hearing.

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

47 C.F.R. § 1.115

Application for review of action taken pursuant to delegated authority.

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

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

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

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

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

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

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

(v) Prejudicial procedural error.

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

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

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

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

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

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

(2) The failure to file an application for review of an interlocutory ruling made by

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

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

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

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

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review will be entertained only if one or more of the following circumstances is present:

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

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

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

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

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

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

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

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

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission

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

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

47 C.F.R. § 1.925

Waivers.

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

(b) Procedure and format for filing waiver requests.

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

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

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

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

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

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

(c) Action on Waiver Requests.

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

(ii) Denial of a rule waiver request associated with an application renders that

application defective unless it contains an alternative proposal that fully complies with the rules, in which event, the application will be processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

47 C.F.R. § 90.725

Construction requirements for Phase I licensees

(a) Licensees granted commercial nationwide authorizations will be required to construct base stations and placed those base stations in operation as follows:

(1) In at least 10 percent of the geographic areas designated in the application within two years of initial license grant, including base stations in at least seven urban areas listed in § 90.741 of this part;

(2) In at least 40 percent of the geographic areas designated in the application within four years of initial license grant, including base stations in at least 28 urban areas listed in § 90.741 of this part;

(3) In at least 70 percent of the geographic areas designated in the application within six years of initial license grant, including base stations in at least 28 urban areas listed in § 90.741 of this part;

(4) In all geographic areas designated in the application within ten years of initial license grant, including base stations in at least 28 urban areas listed in § 90.741 of this part.

(b) Licensees not meeting the two and four year criteria shall lose the entire authorization, but will be permitted a six month period to convert the system to non-nationwide channels, if such channels are available.

(c) Licensees not meeting the six and ten year criteria shall lose the authorizations for the facilities not constructed, but will retain exclusivity for constructed facilities.

(d) Each commercial nationwide licensee must file a system progress report on or before the anniversary date of the grant of its license after 2, 4, 6 and 10 years, demonstrating compliance with the relevant construction benchmark criteria.

(1) An overall status report of the system, that must include, but need not be limited to:

(i) A list of all sites at which base stations have been constructed, with antenna heights and effective radiated power specified for each site;

(ii) A list of all other known base station sites at which construction has not been completed; and

(iii) A construction and operational schedule for the next five-year period, including any known changes to the plan for construction and operation submitted with the licensee's original application for the system.

(2) An analysis of the system's compliance with the requirements of paragraph (a) of this section, with documentation to support representations of completed construction, including, but not limited to:

(i) Equipment purchase orders and contracts;

(ii) Lease or purchase contracts relating to antenna site arrangements;

(iii) Equipment and antenna identification (serial) numbers; and

(iv) Service agreements and visits.

(e) Beginning with its second license term, each nationwide licensee must file a progress report once every five years on the anniversary date of the grant of the first renewal of its authorization, including the information required by paragraph (d)(1) of this section.

(f) Licensees authorized Phase I non-nationwide systems, or authorized on Channels 161 through 170 or Channels 181 through 185, must construct their systems (i.e., have all specified base stations constructed with all channels) and place their systems in operation, or commence service in accordance with the provisions of § 90.167, within twelve months of the initial license grant date. Authorizations for systems not constructed and placed in operation, or having commenced service, within twelve months from the date of initial license grant cancel automatically.

(g) A licensee that loses authorization for some or all of its channels due to failure to meet construction deadlines or benchmarks may not reapply for nationwide channels in the same category or for non-nationwide channels in the same geographic area for one year from the date the Commission takes final action affirming that those channels have been cancelled.

* * *

47 C.F.R. § 90.763

EA, Regional and Nationwide system operations.

(a) A nationwide licensee authorized pursuant to § 90.717(a) may construct and operate any number of land mobile or paging base stations, or fixed stations, anywhere in the Nation, and transmit on any of its authorized channels, provided that the licensee complies with the requirements of § 90.733(i).

(b) An EA or Regional licensee authorized pursuant to § 90.761 may construct and operate any number of land mobile or paging base stations, or fixed stations, anywhere within its authorized EA or REAG, and transmit on any of its authorized channels, provided that:

(1) The licensee affords protection to all authorized co-channel Phase I non-nationwide base stations as follows:

(i) The EA or Regional licensee must locate its land mobile or paging base stations, or fixed stations transmitting on base station transmit frequencies, at least 120 km from the land mobile or paging base stations, or fixed stations transmitting on base station transmit frequencies, of co-channel Phase I licensees, except that separations of less than 120 km shall be considered on a case-by-case basis upon submission by the EA or Regional licensee of:

(A) A technical analysis demonstrating at least 10 dB protection to the predicted 38 dBu service contour of the co-channel Phase I licensee, i.e., demonstrating that the predicted 28 dBu interfering contour of the EA or Regional licensee's base station or fixed station does not overlap the predicted 38 dBu service contour of the co-channel Phase I licensee's base station or fixed station; or

(B) A written letter from the co-channel Phase I licensee consenting to a separation of less than 120 km, or to less than 10 dB protection to the predicted 38 dBu service contour of the licensee's base station or fixed station.

(ii) The Phase I licensee's predicted 38 dBu service contour referred to in paragraph (a)(1)(i) of this section is calculated using the F(50,50) field strength chart for Channels 7–13 in § 73.699 (Fig. 10) of this chapter, with a 9 dB correction factor for antenna height differential, and is based on the licensee's authorized effective radiated power and antenna height-above-average-terrain. The EA or Regional licensee's predicted 28 dBu interfering contour referred to in paragraph (a)(1)(i) of this section is calculated using the F(50,10) field strength chart for Channels 7–13 in § 73.699 (Fig. 10a) of this chapter, with a 9 dB correction factor for antenna height differential.

(2) The licensee complies with the requirements of § 90.733(i).

(3) The licensee limits the field strength of its base stations, or fixed stations operating on base station transmit frequencies, in accordance with the provisions of § 90.771.

(4) Upon request by a licensee or the Commission, an EA or regional licensee shall furnish the technical parameters, location and coordinates of the completion of the

addition, removal, relocation or modification of any of its facilities within the EA or region. The EA or regional licensee must provide such information within ten (10) days of receiving written notification.

(c) In the event that the authorization for a co-channel Phase I base station, or fixed station transmitting on base station transmit frequencies, within an EA or Regional licensee's border is terminated or revoked, the EA or Regional licensee's channel obligations to such stations will cease upon deletion of the facility from the Commission's official licensing records, and the EA or Regional licensee then will be able to construct and operate without regard to the previous authorization.

47 C.F.R. § 22.119 (1997)

Requests for rule waivers.

The FCC may waive the requirements of rules in this part on its own motion or upon written request.

(a) Requests for waiver of rules must contain a complete explanation as to why the waiver is desired. The FCC may grant a request for waiver if it is shown that:

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

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

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

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

No. 15-1003

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

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

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on August 6, 2015, I electronically filed the foregoing Brief for the Federal Communications Commission 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.

Donald J. Evans
Fletcher, Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Arlington, VA 22209
Counsel for: Lawrence Behr

/s/ C. Grey Pash, Jr.
C. Grey Pash, Jr.
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1751 (Telephone)
(202) 418-2819 (Fax)