No. 15-1584

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BARRY P. LUNDERVILLE,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

INTRODUCTION

Petitioner Barry P. Lunderville bid $422,000 for an FM broadcast license for Groveton, NH, making him the highest bidder for that license, but then withdrew his bid in a later round of the auction. Under longstanding FCC rules, a bidder who withdraws a standing high bid is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount that the license is ultimately sold for. *See* 47 C.F.R. § 1.2104(g)(1). The Groveton license was re-auctioned and ultimately sold for $178,000. Under the FCC's rules, Lunderville was therefore assessed a final bid withdrawal payment of $244,000. Lunderville now

argues that his withdrawal payment is excessive and should be reduced because, in his view, he is similarly situated to another bidder whose withdrawal payment was waived by staff in the FCC's Wireless Telecommunications Bureau in a 2007 decision that was never reviewed or approved by the Commission itself.

As a threshold matter, the merits of this dispute are not properly before the Court because the Court lacks jurisdiction here. Lunderville's petition for review designated only the Commission's 2015 order denying reconsideration of its 2013 ruling on the merits, not the 2013 ruling itself, and thus failed timely to invoke jurisdiction over that underlying merits order. Nor can the Court exercise jurisdiction over the order denying reconsideration, because the Supreme Court has held that an agency's denial of a petition for reconsideration that argues only manifest error, without pointing to new evidence or changed circumstances, is unreviewable.

Even if the Court had jurisdiction here, however, the Commission permissibly disavowed the staff decision that Lunderville relies on and instead ruled that a withdrawal payment may not be waived or reduced simply because the bidder contends that the amount owed is excessive. Lunderville offers no support for his position that the Commission was bound to follow a Bureau decision that was never previously reviewed or approved by the Commission, and it is well established that the Commission is not bound by unapproved staff-level decisions. In any event, Lunderville would not be entitled to relief even if that staff decision were still valid, because he is not in fact similarly situated to the bidder in that case.

Accordingly, Lunderville's petition for review should be dismissed for lack of jurisdiction or, alternatively, should be denied.

JURISDICTIONAL STATEMENT

On August 13, 2015, this Court issued an order to show cause directing Lunderville to show why this case should not be dismissed for lack of jurisdiction. *See* 8/13/15 Order. Lunderville then filed a two-page response stating that the 2015 order denying reconsideration is reviewable because it constitutes final agency action. On July 18, 2016, the Court entered an order making no determination as to jurisdiction and directing the parties to address jurisdiction in their merits briefs. As explained below, the Court lacks jurisdiction over this case. *See infra* Part I.

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction in this case, even though **(a)** the petition for review failed to properly invoke jurisdiction over the *Commission Order* and **(b)** the *Reconsideration Denial Order* is unreviewable.

2. Whether Lunderville was entitled to a waiver of his withdrawal payment, as he claims is required by a prior staff-level decision that was never reviewed or approved by the Commission and by equal-protection principles, even though **(a)** the Commission was not bound by, and reasonably disavowed, that staff decision; **(b)** Lunderville is not similarly situated to the bidder in that case; and **(c)** Lunderville has not made the exceptional showing necessary to support a waiver of the Commission's rules.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Under Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), the Federal Communications Commission awards commercial broadcast licenses through competitive bidding. To implement Section 309(j), the Commission has adopted a comprehensive set of rules prescribing competitive bidding methods and auction procedures. *See, e.g.*, Second Report & Order, *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd. 2348 (1994) (*1994 Competitive Bidding Order*). A central goal of the FCC's auction rules is to "award licenses to the parties who will provide service and use spectrum most efficiently." *Id.* at 2349 ¶ 4.

Among other things, the *1994 Competitive Bidding Order* adopted a rule to address situations where a bidder who placed the high bid for a given license wishes to withdraw its bid during a later round of the auction. Under that rule, "A bidder that withdraws a [high] bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s)." 47 C.F.R. § 1.2104(g)(1).

This rule carefully balances several competing concerns. *See 1994 Competitive Bidding Order*, 9 FCC Rcd. at 2373–74 ¶¶ 146–153. On the one hand, "[a]llowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding." *Id.* at 2373 ¶ 147. "For example," the Commission explained, "a strategic

bidder might attempt to deter a rival from acquiring * * * licenses (or from entering altogether) by bidding up the price of key licenses and then withdrawing." *Ibid.* And even when not strategically motivated, "[i]nsincere bidding * * * distorts the price information generated by the auction process and reduces its efficiency." *Ibid.* On the other hand, the Commission has recognized, there may be situations (particularly in simultaneous auctions) where "[a]n excessive bid withdrawal penalty"—or refusing to allow withdrawals at all—"would tend to discourage the efficient aggregation of licenses." *Id.* ¶ 148. And if the withdrawal penalty were too high, then rather than withdraw bids for licenses they no longer want, "winning bidders who realize that they bid too much w[ould] generally pay for the license and resell it in the after-market," which could impair the efficient allocation of licenses by increasing transaction costs. *Id.* ¶ 149.

The Commission thus concluded that setting the withdrawal penalty to be equal to the difference between the amount of the withdrawn bid and the amount that the license is ultimately sold for "provides bidders with appropriate incentives to avoid withdrawing bids" and thereby "compels bidders to consider the costs imposed on the auction process along with the benefits they expect to receive from withdrawal." *Id.* at 2373–74 ¶ 151. In addition, the Commission reasoned, this calculation "precisely protects the government from loss of revenue associated with bid withdrawal." *Id.* at 2374 ¶ 152.

In 2000, the Commission amended Section 1.2104(g)(1) to also require an interim payment, in an amount equal to three percent of the withdrawn bid, when the license remains unsold at the close of the auction and must be put up for re-auction at a later date. 47 C.F.R. § 1.2104(g)(1) (2004); *see* Order on Recon., *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, 15 FCC Rcd. 15293, 15302 ¶ 15 (2000) (*2000 Competitive Bidding Order*).[1]

B. Factual Background

This case arises from the auction of an FM broadcast license for Groveton, NH, which was initially put up for auction in 2004 as part of Auction No. 37. Before the auction began, the FCC's Wireless Telecommunications Bureau (WTB or Bureau) and its Media Bureau jointly issued a Public Notice announcing the procedures that would govern the auction. *See* Public Notice, *Auction of FM Broadcast Construction Permits Scheduled for November 3, 3004*, 19 FCC Rcd. 10570 (WTB/MB 2004) (*Auction 37 Procedures Notice*) (App. 12–49).[2]

As relevant here, the *Auction 37 Procedures Notice* stated that a bidder who has submitted the high bid for a given license may withdraw its bid during a later round of the auction, but "[a] high bidder that withdraws its standing high bid * * * is subject to

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[1] The text of Section 1.2104(g)(1) at the time of the auction here is set forth in the addendum to this brief. The Commission amended Section 1.2104(g)(1) in 2006 to allow the interim payment percentage to be set individually for each auction; that amendment is not material here.

[2] "App." refers to the Respondents' Appendix, which is being filed contemporaneously with this brief.

the bid withdrawal payments specified in 47 C.F.R. § 1.2104(g)." *Id.* at 34 (App. 45); *accord ibid.* ("Withdrawals during the auction will be subject to the bid withdrawal payments specified in 47 C.F.R. § 1.2104(g)."). It further explained, tracking Section 1.2104(g)(1), that "[i]f a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the high bid in the same or subsequent auction(s)." *Ibid.* And it noted that if the license remains unsold at the close of the auction and must be put up for re-auction, "the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the withdrawn bid[]." *Id.* at 35 (App. 46).

Petitioner Barry P. Lunderville is an experienced owner and operator of multiple broadcast radio stations.[3] Lunderville submitted a bid of $422,000 for the Groveton license, making him the highest bidder, but then withdrew his bid during a later round of the auction. *See Commission Order* ¶¶ 6–7 & app'x (App. 108–09, 121); *Auction 37 Withdrawal/Payment Report* (App. 59). After Lunderville withdrew his bid, the

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[3] As of August 2004, Lunderville owned or operated four radio stations. App. 7, 9. According to the FCC's Consolidated Database System, Lunderville now owns seven licensed radio stations: WMOU in Berlin, NH (Facility ID No. 48404); WLTN in Littleton, NH, and Lisbon, NH (Facility ID No. 53636), WXXS in Lancaster, NH (Facility ID No. 77920), WKDR in Berlin, NH (Facility ID No. 160163), WOTX in Lunenburg, VT (Facility ID No. 166090), WOXX in Colebrook, NH (Facility ID No. 170980), and WSSH in Lisbon, NH (Facility ID No. 176846). *See* CDBS Public Access, http://licensing.fcc.gov/prod/cdbs/pubacc/prod/cdbs_pa.htm (last visited Nov. 14, 2016).

Groveton license remained unsold at the close of the auction. Pursuant to 47 C.F.R. § 1.2104(g)(1) and the *Auction 37 Procedures Notice*, the FCC assessed an interim bid withdrawal payment of $12,660 (three percent of the withdrawn bid) and subsequently re-actioned the Groveton license in 2006 as part of Auction No. 62. *Ibid.*

In Auction No. 62, the winning bid for the Groveton license was $178,000. Pursuant to 47 C.F.R. § 1.2104(g)(1) and the *Auction 37 Procedures Notice*, Commission staff notified Lunderville in October 2006 that his final bid withdrawal payment obligation was $244,000, which is the difference between his withdrawn high bid and the amount the license was ultimately sold for. *See* Letter from Rita Cookmeyer, WTB, to Barry P. Lunderville, 21 FCC Rcd. 12621 (WTB 2006) (*Notice of Withdrawal Payment*) (App. 61–64).

C. Proceedings Below

Lunderville and four other Auction 37 bidders filed a joint request for reduction of their withdrawal payments, App. 65–75, which was consolidated with two similar requests and construed as a request for waiver of Section 1.2104(g)(1), *see* 47 C.F.R. § 1.3 ("Any provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). As relevant here, Lunderville and the other bidders argued that the amounts of their withdrawal payments were excessive and that they were entitled to relief under the Wireless Telecommunication Bureau's ruling in *In re Advance Acquisition, Inc.*, 22 FCC Rcd. 18846 (WTB 2007).

In *Advance Acquisition*, the Bureau found that "special circumstances warrant[ed]" partial waiver of Section 1.2104(g)(1) because the withdrawal payment assessed there was "exceptionally high in comparison with previous bid withdrawal payments[,] in that it is the only bid withdrawal payment ever assessed that both exceeds $4 million and represents more than 200 percent of the ultimate winning bid for the permit or license[.]" *Id.* at 18850 ¶ 7, 18853 ¶ 16; *see also id.* at 18851 ¶ 9 ("Advance's final bid withdrawal payment would [have been] the highest bid * * * ever imposed in the history of the auctions program."). The *Advance Acquisition* order was issued by Bureau staff, acting on delegated authority, and was never reviewed or approved by the Commission.[4]

The *Bureau Order*. Acting on delegated authority, the Bureau here denied Lunderville's request for a reduction of his withdrawal payment. *See* Order, *In re Lunderville*, 23 FCC Rcd. 10390 (WTB 2008) (*Bureau Order*) (App. 76–95), *aff'd on other grounds*, 28 FCC Rcd. 665 (2013). Although Lunderville argued that he was entitled to a waiver under *Advance Acquisition*, the Bureau found that the facts here do not qualify for relief under that decision. Whereas *Advance Acquisition* found a

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[4] Under 47 U.S.C. § 155(c) and 47 C.F.R. § 0.201, the Commission may delegate initial decisionmaking authority to bureau chiefs or other members of the Commission's staff. *See, e.g.*, 47 C.F.R. §§ 0.331, 0.332 (delegating certain authority to the Chief of the Wireless Telecommunications Bureau). Actions taken on delegated authority are then subject to review by the Commission upon application for review, *see* 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115, or on the Commission's own motion, *see* 47 C.F.R. § 1.117.

withdrawal payment to be unnecessarily high because it both exceeded $4 million and was more than 200 percent of the amount the license eventually sold for, neither condition (much less both) is present here. *See id.* ¶¶ 23–24 (App. 86). As the Bureau observed, the fact that Lunderville's withdrawal payment exceeds $200,000 (rather than $4 million) is "not necessarily out of line with the purpose of the bid withdrawal payment rule." *Id.* ¶ 24 (App. 86). Similarly, the ratio of Lunderville's bid withdrawal payment to the amount the license ultimately sold for is below the threshold set in *Advance Acquisition*, and there are "no exceptional circumstances here," *id.* ¶ 26 (App. 87).

The *Commission Order*. Lunderville and two of his co-filers filed a petition for reconsideration, App. 96–105, which was consolidated with an overlapping application for review by the Commission. In January 2013, the Commission denied Lunderville's request for relief and affirmed the Bureau's ruling on alternative grounds. *See* Mem. Order & Op., *In re Lunderville*, 28 FCC Rcd. 665 (2013) (App. 106–21) (*Commission Order*).

In response to Lunderville's argument that he should have been treated the same as the bidder in *Advance Acquisition*, the Commission found that "the Bureau's decision in *Advance* was inconsistent with our precedent allowing waivers of the bid withdrawal payment requirement only in narrow circumstances and was not sufficiently tailored to the policy of our auction rules," and the Commission "therefore overrule[d] the Bureau's analysis set forth in" that case. *Id.* ¶ 10 (App. 111); *accord*

id. ¶ 18 (App. 114). Instead, the Commission held, "the mere size of the bid withdrawal payment cannot [supply] the kind of special circumstances that warrant" a waiver, and granting any waiver on that basis "would not be in the public interest, because it would substantially undermine the efficient operation of the auction mechanism in accomplishing the statutory objectives." *Id.* ¶ 14 (App. 112); *see also id.* ¶ 17 (App. 114) ("[T]he rules are intended to * * * compel bidders to consider carefully the costs imposed on the auction process of withdrawing bids after a round has been completed.").

As the Commission explained, "[n]othing in [the Commission's] auction rules includes any policy to avoid 'excessively high' bid withdrawal payments[] based upon the size of the payment" alone, absent a showing that enforcing the rule would "'discourage the efficient aggregation of licenses.'" *Id.* ¶ 15 (App. 113). On the contrary, "any waiver policy based simply on the size of the payment would unduly encourage bidders * * * to either engage in strategic behavior to 'game' the system or otherwise fail to 'consider the costs imposed on the auction process'" caused by insincere or improvident bids. *Id.* ¶ 16 (App. 113). This result "would be at odds with the purposes of the rule to promote accurate information in the bidding process about the value of the licenses at auction, maximize opportunities for others to adjust their strategies in light of the bidding process, and thereby lead to a valuation of licenses that promotes their most efficient uses." *Ibid.*

Having overruled *Advance Acquisition*, the Commission ruled that Lunderville has not demonstrated any grounds for a reduction or waiver of his withdrawal payment and affirmed the Bureau's denial of relief, without disturbing the Bureau's holding that Lunderville would not have qualified for a waiver or reduction of his withdrawal payment even under *Advance Acquisition*. *See Commission Order* ¶¶ 1, 31 (App. 106, 119).

The *Reconsideration Denial Order*. Lunderville alone petitioned for reconsideration. App. 122–31. In April 2015, the Commission dismissed Lunderville's arguments as repetitious and, in the alternative, denied them. Order on Recon., *In re Lunderville*, 30 FCC Rcd. 4146 (2015) (App. 132–38) (*Recon. Denial Order*). As the Commission observed, "Lunderville's arguments based on *Advance* largely repeat those previously rejected by the Commission in this proceeding," and, under the Commission's rules, "[a] petition that simply reiterates arguments previously considered and rejected will be dismissed." *Id.* ¶ 11 (App. 136); *see* 47 C.F.R. § 1.106(b)(2)–(3) ("Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if" the petition relies on facts or arguments that were previously unavailable to the petitioner, and "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.").

D. Prior Proceedings In This Court

Lunderville filed a petition for review in this Court in May 2015 seeking review of "the Order of [t]he Federal Communications Commission FCC 15-48, dated April 17, 2015[,] [which] denie[d] a Petition for Reconsideration filed by Lunderville/ Petitioner"—*i.e.*, the *Reconsideration Denial Order*. Neither the petition for review nor any contemporaneous filing designated for review the January 2013 *Commission Order*. *Cf.* Fed. R. App. P. 15(a)(2)(C) ("The petition must * * * specify the order or part thereof to be reviewed."); 28 U.S.C. § 2344 ("The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency.").

On August 13, 2015, the Court issued a *sua sponte* order directing Lunderville "either to move for voluntary dismissal of this appeal pursuant to Fed. R. App. P. 42(b), or to show cause, in writing, why this appeal should not be dismissed for lack of jurisdiction." 8/13/15 Order at 2. The Court observed that "the petition for review does not expressly seek review of" the *Commission Order* and, "[a]ccordingly, this court may * * * lack jurisdiction to review" that order. *Id.* at 1. The Court also observed that "this court may lack jurisdiction to review" the *Reconsideration Order*, because "[w]hen 'a party petitions an agency for reconsideration on the ground of material error, *i.e.*, on the same record that was before the agency when it rendered its original decision, an order which merely denies rehearing of * * * [the prior] order is not itself reviewable.'" *Ibid.* (quoting *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 280 (1987)).

In response, Lunderville asserted, incorrectly, that "[t]he FCC order of 2015 was the one and only—and therefore *final*—decision or order issued by the Full Commission in the matter."[5] On July 18, 2016, the Court entered an order making no determination as to jurisdiction and directing the parties to address the Court's jurisdiction in their merits briefs.

STANDARD OF REVIEW

Whether the Court has jurisdiction in this case is a question of law that the Court must determine *de novo*. *See, e.g.*, *U.S. Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 23 (1st Cir. 2007). On the merits, the FCC's denial of a request for waiver of its rules is reviewed only for abuse of discretion. *Mountain Sols., Ltd. v. FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999). "[A]n applicant for a waiver bears the heavy burden on appeal to show that 'the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion.'" *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999). When reviewing the FCC's decision to grant or deny a waiver, the Commission's "interpretation of its own orders and rules is entitled to substantial deference." *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006).

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[5] Contrary to Lunderville's assertion, the January 2013 *Commission Order* was clearly designated as an order of the Commission, and therefore separately eligible for judicial review. *See, e.g.*, *Commission Order* ¶ 8 (App. 110) (explaining that, because one party filed an application for Commission review while two others filed petitions for reconsideration with the Bureau, "the Bureau * * * referred the latter two for [the Commission's] consideration, and [the Commission] address[es] all three on a consolidated basis").

SUMMARY OF THE ARGUMENT

As a threshold matter, the petition for review should be dismissed because the Court lacks jurisdiction in this case. Lunderville has failed to timely invoke the Court's jurisdiction over the *Commission Order* because his petition for review designated only the *Reconsideration Denial Order*, not the underlying *Commission Order*. And the Court likewise lacks jurisdiction over the *Reconsideration Denial Order* because the Supreme Court has squarely held that an agency's denial of a petition for review that argues only manifest error, without pointing to new evidence or changed circumstances, is unreviewable.

If the Court nevertheless finds that it has jurisdiction, Lunderville's petition for review should be denied on the merits. Lunderville's contention that the Commission should have been required to apply (rather than overrule) the Bureau staff decision in *Advance Acquisition* is incorrect, because the Commission is not bound by staff-level decisions that have never previously been reviewed or approved by the Commission. Even if the Commission had not repudiated *Advance Acquisition*, moreover, Lunderville still would not be entitled to relief because he is not similarly situated to the bidder in that case. In all events, the agency did not abuse its discretion in finding that Lunderville has not made the exceptional showing required to support a waiver of the Commission's withdrawal-payment rule.

ARGUMENT

I. THE COURT LACKS JURISDICTION IN THIS CASE.

This case fails on threshold jurisdictional grounds because Lunderville has failed to properly invoke jurisdiction over the *Commission Order* and because the *Reconsideration Denial Order* is jurisdictionally unreviewable. The Court should therefore dismiss the petition for review for lack of jurisdiction.

A. Lunderville Has Failed To Invoke Jurisdiction Over The *Commission Order* Because His Petition For Review Designated Only The *Reconsideration Denial Order*.

Under Federal Rule of Appellate Procedure 15(a), a petition for review of an agency order "must * * * specify the order or part thereof to be reviewed," and under 28 U.S.C. § 2344 the petitioner must "attach to the petition, as exhibits, copies of the order, report, or decision of the agency." Lunderville's petition here designated for review only the *Reconsideration Denial Order*, not the *Commission Order*; the attachments to the petition likewise included only the *Reconsideration Denial Order*, not the *Commission Order*; and no other contemporaneous filing (or any other filing "within 60 days after [the] entry" of the final order below, *see* 28 U.S.C. § 2344) stated that Lunderville was seeking review of the *Commission Order*.

Lunderville thus failed to properly invoke jurisdiction over the *Commission Order*. The requirement that a petition for review designate any order to be reviewed is jurisdictional, *Londonderry Neighborhood Coal. v. FERC*, 273 F.3d 416, 422 n.2 (1st Cir. 2000); *Gottesman v. INS*, 33 F.3d 383, 388 (4th Cir. 1994), and it is well

established that "[f]ailure to specify the correct order can result in dismissal of the petition," *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 312 (D.C. Cir. 2000). Here, "[b]y failing to designate the [*Commission Order*] in his petition, [Lunderville] has deprived this court of any jurisdiction which it may have had to review that order." *Gottesman*, 33 F.3d at 388; *see*, *e.g.*, *Entravision*, 202 F.3d at 313–14; *Sw. Bell Tel. Co. v. FCC*, 180 F.3d 307, 313–14 (D.C. Cir. 1999).

Lunderville's petition for reconsideration of the *Commission Order* did have the effect of tolling the time for filing a petition for review of that order until after reconsideration was denied. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 279, 284–85 (1987) (*Locomotive Eng'rs*); *Sw. Bell*, 180 F.3d at 313. But to invoke the court's jurisdiction to review the *Commission Order*, the petition for review still must designate *that order* for review; it does not suffice to designate a *different* order—such as the *Reconsideration Denial Order*—that merely denies reconsideration and does not reopen the proceeding. *Sw. Bell*, 180 F.3d at 312–13; *see also John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988) ("[A] petition for review designating one order in a proceeding [does not] suffice[] to obtain review of any other order that is part of the same administrative record.").

Some courts have held that this requirement may be satisfied if the proper order is identified in another contemporaneous filing. *See*, *e.g.*, *Damsky v. FCC*, 199 F.3d 527, 532–33 (D.C. Cir. 2000). Lunderville, however, did not state that he was seeking judicial review of the *Commission Order* until his September 2015 response to the

Court's order to show cause, months after he filed his petition for review and long after the time for seeking review of the *Commission Order* had expired. It does not suffice to say that the Commission can now infer that Lunderville wishes to challenge the *Commission Order* by examining the arguments later presented in his merits brief. *See LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 739 (D.C. Cir. 2006) ("The [petitioner's] late attempt to raise this issue in its merits brief was well past the [time] allowed for seeking review in this Court."). Nor does it suffice that the Commission potentially could have deduced that Lunderville wished to challenge the *Commission Order* from the fact that the *Reconsideration Denial Order* is itself unreviewable under *Locomotive Engineers*. *See Sw. Bell*, 180 F.3d at 313–14 ("[W]e will not impose upon the respondent agency the obligation to determine when a party seeking review must have meant to name a different order in its petition for review because the order actually named in that petition is unreviewable."). Rule 15(a) specifically requires the party seeking review of any agency order to "specify the order to be reviewed." Fed. R. App. P. 15(a)(2)(C); *see also* 28 U.S.C. § 2344.

To be sure, the consequences of this rule may sometimes appear harsh. But the requirement that a petition for review designate the order to be reviewed is a jurisdictional requirement, and jurisdictional rules must be clear and straightforward, even if this results in harsh consequences. *See, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("administrative simplicity is a major virtue in a jurisdictional statute"). Such jurisdictional rules "may not be waived, even though courts are encouraged to

construe the rules liberally." *Gottesman*, 33 F.3d at 388. And jurisdictional requirements must be enforced even if the jurisdictional defect did not prejudice any other party; "lack of prejudice is * * * not a sufficient[] condition for excusing a petitioner's mistake in naming the order of which review is sought." *Sw. Bell*, 180 F.3d at 314. Lunderville's failure to designate the *Commission Order* in his petition for review therefore means that he has failed to invoke the Court's jurisdiction over that order.

B. The *Reconsideration Denial Order* Is Unreviewable Because Lunderville's Petition For Reconsideration Argued Only Manifest Error.

Under the Supreme Court's decision in *Locomotive Engineers*, an agency's denial of a petition for review that argues only manifest error, without pointing to new evidence or changed circumstances, is "unreviewable." 482 U.S. at 277, 278–81; *see also id.* at 280 ("[W]here a party petitions an agency for reconsideration on the ground of 'material error,' *i.e.*, on the same record that was before the agency when it rendered its original decision, an order which merely denies rehearing of the original order is not itself reviewable.") (internal quotation marks and alterations omitted); *Sw. Bell*, 180 F.3d at 311 ("As we read [*Locomotive Engineers*], a petition seeking review of an agency's decision not to reopen a proceeding is not reviewable unless the petition is based on new evidence or changed circumstances."). Like the requirement that the petition for review designate any order to be reviewed, reviewability under *Locomotive Engineers* is a threshold jurisdictional issue. *See Entravision*, 202 F.3d at 313 & n.**.

The Supreme Court based this rule on basic principles of administrative law. Ordinarily, the Court explained, if "the Commission refuses to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal." *Locomotive Eng'rs*, 482 U.S. at 278. And when a request for reconsideration does not point to any new evidence or changed circumstances, the decision whether to reconsider a previous ruling amounts to a decision "committed to agency discretion by law," which the Administrative Procedure Act makes unreviewable. *Id.* at 282 (quoting 5 U.S.C. § 701(a)(2)); *accord Sw. Bell*, 180 F.3d at 311; *Sendra Corp. v. Magaw*, 111 F.3d 162, 166 (D.C. Cir. 1997). This is consistent with a longstanding "tradition of nonreviewability * * * with regard to refusals to reconsider for material error." *Locomotive Eng'rs*, 482 U.S. at 282. Thus, when a petition for reconsideration is not based on new evidence or changed circumstances, "the agency's refusal to go back over ploughed ground is nonreviewable." *Id.* at 284.[6]

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[6] The Court further observed that it would "serve[] no purpose whatsoever" to permit review of an order denying reconsideration when the petitioner could have instead sought review of the original order, because this would "place[] before the courts precisely the same substance that could have been brought there by appeal from the original order—but asks them to review it on the strange, one-step-removed basis of whether the agency decision is not only unlawful, but *so* unlawful that the refusal to reconsider it is an abuse of discretion." *Locomotive Eng'rs*, 482 U.S. at 279. Thus, because Lunderville could have designated the *Commission Order* in his petition for review here, the fact that he failed to properly do so cannot support jurisdiction over the otherwise-unreviewable *Reconsideration Denial Order*. *See Sw. Bell*, 180 F.3d at 310–11, 313; *Sendra Corp.*, 111 F.3d at 166.

Under *Locomotive Engineers*, the Court lacks jurisdiction to review the *Reconsideration Denial Order*. Lunderville's petition for reconsideration was not based on new evidence or changed circumstances; instead, it simply argued that the *Commission Order* erred based on the same record and the same arguments that he had previously raised, *see Recon. Denial Order* ¶ 11 (App. 136) ("Lunderville's arguments based on *Advance* largely repeat those previously rejected by the Commission in this proceeding."), so the Commission "dimiss[ed] [the petition for reconsideration] as repetitious," *ibid.* The *Reconsideration Denial Order* did not modify the Commission's previous decision or otherwise reopen the proceeding. *Cf. Locomotive Eng'rs*, 482 U.S. at 278, 280–81; *Sendra Corp.*, 111 F.3d at 167. Accordingly, the agency's decision in the *Reconsideration Denial Order* to deny the petition for review as repetitious and not to reopen the proceeding is unreviewable under *Locomotive Engineers*.

II. LUNDERVILLE IS NOT ENTITLED TO A REDUCTION OR WAIVER OF THE WITHDRAWAL PAYMENT OWED UNDER 47 C.F.R. § 1.2104(g)(1).

Even if the Court were to find jurisdiction, Lunderville's petition for review should be denied on the merits. Lunderville's contention that the Commission was bound to apply (rather than overrule) the Bureau decision in *Advance Acquisition* is incorrect, because the Commission is not bound by unapproved staff-level decisions. Even if the Commission had not repudiated *Advance Acquisition*, moreover, Lunderville still would not be entitled to relief for the reasons explained by the Bureau

in this case. In any event, Lunderville has not made the exceptional showing required to support a waiver of the Commission's rules. And Lunderville's late attempt to rehash his same failed arguments as a constitutional equal-protection claim is forfeited, because he never presented that claim to the agency, and is in any event meritless.

A. The Commission Was Not Bound By, And Here Reasonably Disavowed, The Unapproved Staff Decision In *Advance Acquisition*.

Lunderville's contention that the Commission should have been required to apply the Bureau staff decision in *Advance Acquisition* is incorrect, because it is firmly established that the Commission itself is not bound by staff-level decisions that have never previously been reviewed or approved by the Commission.

As the D.C. Circuit has explained, "[t]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level." *Cmty. Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003); *accord Amor Family Broad. Grp. v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) ("[D]ecisions of a subordinate body of the Commission, the Mass Media Bureau," are "not binding on the Commission as a decisionmaker."). Just as the Supreme Court is not bound by decisions of this Court, the Commission is not bound by decisions of its subordinate Bureaus.

Thus, in a case directly analogous to this one, the D.C. Circuit rejected the argument that the Commission "acted inconsistently by denying [a] waiver request even though [its Media Bureau] has [previously] granted waivers" to other entities,

because "an agency is not bound by unchallenged staff decisions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). And in another analogous case, it rejected the argument that the Commission should have been required to refund the petitioner's filing fees because staff had previously granted refunds to other bidders, explaining that "an agency is not bound by the actions of its staff if the agency has not endorsed those actions." *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660–61 (D.C. Cir. 2004).

Here, the Commission reasonably and permissibly decided to disavow and overrule the staff-level decision in *Advance Acquisition* upon determining that its approach "was inconsistent with [Commission] precedent allowing waivers of the bid withdrawal payment requirement only in narrow circumstances and was not sufficiently tailored to the policy of [the] auction rules." *Commission Order* ¶ 10 (App. 111); *see id.* ¶¶ 11–18 (App. 111–14). Allowing withdrawal payments to be waived or reduced solely because the bidder contends that the amount owed is excessive "would be at odds with the purposes of the rule." *Id.* ¶ 16 (App. 113). Such a policy "would unduly encourage bidders in any future auction * * * to either engage in strategic behavior to 'game' the system," such as by "plac[ing] 'wildly high' bids that they later intend to withdraw," or to "otherwise fail to carefully 'consider the costs imposed on the auction process' in determining to place or withdraw their bids," contrary to the underlying purposes of the withdrawal-payment rule. *Ibid.* (quoting *1994 Competitive Bidding Order*, 9 FCC Rcd. at 2374 ¶ 151).

The Commission thus determined that, contrary to the Bureau's approach in *Advance Acquisition*, "it is fair to both the bidder withdrawing its bid, and the other bidders who formulated and submitted their bids under the same rules and constraints, to hold all bidders to the consequences of their bidding decisions." *Id.* ¶ 18 (App. 114). Accordingly, the Commission reasonably "decline[d] to follow * * * the Bureau [decision] in *Advance* and expressly overrule[d] the Bureau's analysis in that decision." *Ibid.*

Because the Commission was not bound by the Bureau's previous decision, moreover, the requirements that apply when an agency changes *its own* prior policy do not apply here. *Cf. Recon. Denial Order* ¶ 9 (App. 135–36) ("[Decisions] fault[ing] the Commission for failing to explain apparent inconsistencies between two Commission-level decisions[] d[o] not implicate the ability of an agency to overrule a staff holding with which it disagrees."). But even if those requirements did apply, they would be satisfied here because "the *Commission Order* contained precisely the kind of explanation" required. *Ibid.* To enact a change in policy, an agency need only "display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also, e.g.*, *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24 (D.C. Cir. 2015). The Commission here expressly acknowledged that it was overruling *Advance Acquisition* and provided a reasoned explanation for why it was it was adopting a different approach. *See Commission Order* ¶¶ 10–18 (App. 111–14).

Nor, on the facts here, can Lunderville show that he detrimentally relied on *Advance Acquisition*, or that the decision deprived him of fair notice that the Commission would enforce Section 1.2104(g)(1) as written, because that 2007 decision came years *after* he placed and withdrew his bid in the 2004 auction at issue here. And because the Commission's withdrawal-payment rule was promulgated years before the auction at issue, and indeed the *Auction 37 Procedures Notice* specifically advised prospective bidders of the rule, Lunderville is simply incorrect to claim that adhering to that rule here was in any way "retroactive." *See Recon. Denial Order* ¶ 10 & n.37 (App. 136); *see also Commission Order* ¶ 18 (App. 114) (Lunderville incurred his bid withdrawal payment "after being fully informed of the auction rules and procedures that would apply to [his] bids.").

B. Even Under *Advance Acquisition*, Lunderville Would Not Be Entitled To Relief.

Even if the Commission were required to apply *Advance Acqusition*, Lunderville still would not be entitled to any relief for the reasons explained by the Bureau in this case. *See Bureau Order* ¶¶ 21–26 (App. 85–87).

In *Advance Acquistion*, the Bureau ruled that "where a bid withdrawal payment exceeds both $4 million and 200 percent of the ultimate winning bid * * * it is unnecessarily high[.]" 22 FCC Rcd. at 18851–52 ¶ 9–10; *see Bureau Order* ¶ 23 (App. 86). Those two essential conditions are not satisfied here. As to the first condition, the amount of Lunderville's withdrawal payment is "well below the $4 million bid

withdrawal payment [that was] waived in *Advance*." *Bureau Order* ¶ 24 (App. 86). While Lunderville and his co-filers argued below "that their bid withdrawal payments are excessive because they are greater than $100,000," the Bureau explained that "such amounts are not necessarily out of line with the purpose of the bid withdrawal payment rule," particularly for individuals with the means to bid nearly a half-million dollars for a commercial broadcast license.[7] *Ibid.* Similarly, as to the second condition, Lunderville's $244,000 withdrawal payment is less than 200 percent of the $178,000 winning bid when the license was re-auctioned. *Cf. Bureau Order* ¶ 26 (App. 87) ("[O]nly in very exceptional circumstances will the comparison of ratios of bid withdrawal payments to winning bids * * * constitute a basis for reconsidering a bid withdrawal payment * * * and we find no exceptional circumstances here.").

Lunderville thus has not shown that amount of his withdrawal payment would entitle him to relief under *Advance Acquisition*, even if that staff decision had not been repudiated. Indeed, in his pleadings below, Lunderville himself "acknowledge[d] that Advance owed * * * substantially more * * * than the amount of the bid withdrawal payment that [Lunderville] was assessed[.]" *Commission Order* ¶ 13 (App. 112). Accordingly, Lunderville would not have qualified for a waiver or reduction of his withdrawal payment even under *Advance Acquisition*.

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[7] *See also Commission Order* ¶ 17 (App. 114) ("[While] bid withdrawals can in some cases result in costly bid withdrawal payments, * * * the rules are intended to have that consequence, so that they compel bidders to consider carefully the costs imposed on the auction process of withdrawing bids after a round has been completed.").

C. Lunderville Has Not Made The Exceptional Showing Necessary To Support A Waiver Of The Commission's Rules.

Under the Commission's rules, Lunderville's request for a reduction of his withdrawal payment is treated as a request for waiver of the withdrawal-payment rule. *See Commission Order* ¶ 10 (App. 111); *Bureau Order* ¶¶ 17–20 (App. 84–85). Although the Commission has authority to waive any provision of its rules, *see* 47 C.F.R. § 1.3, it may do so only when specific requirements are met. On the facts of this case, the agency did not abuse its discretion in finding that Lunderville has not made the exceptional showing necessary to permit—much less to compel—a waiver of the Commission's rules. *See Commission Order* ¶¶ 11–18 (App. 111–14).

Because "the very essence of waiver is the assumed validity of the general rule," an applicant for a waiver "faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1158 (D.C. Cir. 1969); *see Commission Order* ¶ 14 (App. 112–13). Courts have held that "waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest," *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and if it "will not undermine the policy, served by the rule, that has been adjudged in the public interest," *WAIT Radio*, 418 F.2d at 1157. The Commission has thus explained that "waivers are appropriate only if 'both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.'" *Commission Order* ¶ 14 (App. 113).

As the Commission explained below, Lunderville "ha[s] failed to meet the 'high hurdle' of establishing * * * either of the requirements for waiver of" the withdrawal-payment rule. *Commission Order* ¶ 14 (App. 112–13). The mere size of a withdrawal payment, standing alone, cannot constitute "special circumstances" absent a showing that it would "discourage the efficient aggregation of licenses," and no such showing has been made here. *Id.* ¶ 15 (App. 113) (internal quotation marks omitted). Similarly, "[n]othing in [the] auction rules includes any policy to avoid 'excessively high' bid withdrawal payments, based upon size of the payment." *Ibid.* On the contrary, allowing such waivers "would not serve the public interest" because it "would be at odds with the purposes of the rule to promote accurate information in the bidding process about the value of the licenses at auction, maximize opportunities for others to adjust their strategies in light of the bidding process, and thereby lead to a valuation of licenses that promotes their most efficient use." *Id.* ¶ 16 (App. 113). Accordingly, the Commission reasonably found that Lunderville has not made the exceptional showing necessary to support or compel a waiver of the withdrawal-payment rule in this case.

D. Any Constitutional Claim Is Both Forfeited And Meritless.

Lunderville's brief in this Court argues, for the first time, that the Commission has violated his right to equal protection under the Fifth and Fourteenth Amendments. But any attempt to raise a constitutional equal-protection claim at this stage is forfeited, because Lunderville failed to present that claim in the proceedings before

the Commission.[8] 47 U.S.C. § 405(a) (precluding judicial review "where the party seeking such review * * * relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass"); *see, e.g.*, *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470–71 (D.C. Cir. 1989). In any event, even if Lunderville were similarly situated to the bidder in *Advance Acquisition*, *but see Bureau Order* ¶¶ 23–26 (App. 86–87), the Commission afforded him equal treatment here by overruling *Advance Acquisition* and ruling that neither bidder should have been entitled to a waiver.[9]

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[8] Lunderville's petition for reconsideration before the Commission did contain a section with the heading "Constitutional Issues," App. 126–29, but that section argued only that the Commission's decision to disavow *Advance Acquisition* was arbitrary and capricious under the Administrative Procedure Act; it did not invoke any constitutional provisions or raise any constitutional equal-protection claim.

[9] Lunderville cites no authority for his apparent belief that, upon disavowing *Advance Acquisition*, the Commission was required—or even authorized—to reopen that closed proceeding and retrospectively attempt to collect the withdrawal payment that the Bureau waived without objection more than seven years earlier.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction or, in the alternative, denied.

Dated: November 18, 2016

Respectfully submitted,

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I, Scott M. Noveck, hereby certify that on November 18, 2016, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the First Circuit using the electronic CM/ECF system. Upon receiving notice from the Court, I will cause nine paper copies to be mailed to the Clerk of Court by first-class mail. Participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system. Some participants, marked with an asterisk, are not CM/ECF users; I certify that I have caused paper copies of the foregoing document to be served on those participants by first-class mail, unless another attorney for the same party is receiving electronic service.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM

47 C.F.R. § 1.2104(g)(1) (2004) provides in pertinent part:

§ 1.2104 Competitive bidding mechanisms.

* * *

(g) *Withdrawal, Default and Disqualification Payment*. As specified below, when the Commission conducts an auction pursuant to § 1.2103, the Commission will impose payments on bidders who withdraw high bids during the course of an auction * * * .

(1) *Bid withdrawal prior to close of auction*. A bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment equal to 3 percent of the amount of their bid withdrawals. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed at the close of the subsequent auction of the license.

Example 1 to paragraph (g)(1): Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $90 and withdraws. In that same auction, Bidder C wins the license at a bid of $95. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100–$95). Bidder B owes nothing.

Example 2 to paragraph (g)(1): Bidder A withdraws a bid of $100. Subsequently, Bidder B places a bid of $95 and withdraws. In that same auction, Bidder C wins the license at a bid of $90. Withdrawal payments are assessed as follows: Bidder A owes $5 ($100–$95). Bidder B owes $5 ($95–$90).

Example 3 to paragraph (g)(1): Bidder A withdraws a bid of $100. Subsequently, in that same auction, Bidder B places a bid of $90 and withdraws. In a subsequent auction, Bidder C places a bid of $95 and withdraws. Bidder D wins the license in that auction at a bid of $80. Withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of $100, or $3, and Bidder B would owe 3% of $90, or $2.70). At the end of the second auction, Bidder A would owe $5 ($100–$95) less the $3 interim withdrawal payment for a total of $2. Because Bidder C placed a subsequent bid that was higher than Bidder B's $90 bid, Bidder B would owe nothing. Bidder C would owe $15 ($95–$80).

* * *