

No. 21-71266

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOUNDATION FOR A BEAUTIFUL LIFE,

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

Jonathan S. Kanter
Assistant Attorney General

Robert B. Nicholson

Robert J. Wiggers
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave. NW
Washington, DC 20530

P. Michele Ellison
General Counsel

Jacob M. Lewis
Acting Deputy General Counsel

Adam G. Crews
Counsel

FEDERAL COMMUNICATIONS
COMMISSION
45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GLOSSARY.....	vi
INTRODUCTION	1
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF THE ISSUES	3
PERTINENT STATUTES AND REGULATIONS	4
COUNTERSTATEMENT OF THE CASE	4
A. LOW POWER FM RADIO SERVICE	4
B. THE FOUNDATION’S LOW POWER FM PERMIT AND LICENSE APPLICATION.....	5
C. THE COMMISSION’S RULEMAKING AND <i>ORDER</i> ON REVIEW	7
D. THE FOUNDATION’S PETITION FOR RECONSIDERATION.....	8
E. FINAL DENIAL OF THE FOUNDATION’S APPLICATIONS	10
STANDARDS OF REVIEW.....	11
SUMMARY OF THE ARGUMENT	11
ARGUMENT.....	13
I. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY DISMISSING THE FOUNDATION’S PROCEDURALLY DEFICIENT PETITION FOR RECONSIDERATION.....	13
II. THE <i>ORDER</i> SATISFIES THE APA.	17
A. The Commission’s Decision Was Reasonable And Reasonably Explained.....	17
B. The Foundation Had Proper Notice.....	21
CONCLUSION	23

TABLE OF AUTHORITIES

Cases:

<i>Arpin v. Santa Clara Valley Transp. Agency</i> , 261 F.3d 912 (9th Cir. 2001).....	21
<i>Bamford v. FCC</i> , 535 F.2d 78 (D.C. Cir. 1976).....	4
<i>BDPCS, Inc. v. FCC</i> , 351 F.3d 1177 (D.C. Cir. 2003).....	13
<i>Colorado Radio Corp. v. FCC</i> , 118 F.2d 24 (D.C. Cir. 1941).....	16
<i>FCC v. Pottsville Broad. Co.</i> , 309 U.S. 134 (1940).....	18
<i>FCC v. Prometheus Radio Project</i> , 141 S. Ct. 1150 (2021).....	11, 17
<i>FCC v. Schreiber</i> , 381 U.S. 279 (1965).....	18
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582 (1981).....	15
<i>GTE Serv. Corp. v. FCC</i> , 782 F.2d 263 (D.C. Cir. 1986).....	18, 21
<i>Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania</i> , 140 S. Ct. 2367 (2020).....	15, 23
<i>Mora-Meraz v. Thomas</i> , 601 F.3d 933 (9th Cir. 2010).....	22
<i>Mozilla Corp. v. FCC</i> , 940 F.3d 1 (D.C. Cir. 2019) (per curiam).....	18
<i>Nader v. FCC</i> , 520 F.2d 182 (D.C. Cir. 1975).....	18

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Pac. Gas & Elec. Co. v. FERC</i> , 746 F.2d 1383 (9th Cir. 1984)	17
<i>Sioux Valley Rural Telev., Inc. v. FCC</i> , 349 F.3d 667 (D.C. Cir. 2003)	11
<i>United States v. Hinkson</i> , 585 F.3d 1247 (9th Cir. 2009) (en banc).....	11, 14
<i>Vartelas v. Holder</i> , 566 U.S. 257 (2012)	20
 Statutes:	
5 U.S.C. § 553(b)	4, 12, 14, 21, 22
5 U.S.C. § 706	11, 23
28 U.S.C. § 2342(1)	3
28 U.S.C. § 2344.....	3
47 U.S.C. § 154(i)	3
47 U.S.C. § 154(j)	3, 12, 17
47 U.S.C. § 301.....	2, 3, 4, 7
47 U.S.C. § 303.....	3
47 U.S.C. § 312(b)	7
47 U.S.C. § 316.....	3
47 U.S.C. § 319.....	3
47 U.S.C. § 319(a)	5
47 U.S.C. § 319(b)	1, 5, 23

TABLE OF AUTHORITIES
(continued)

	Page(s)
47 U.S.C. § 319(c).....	5
47 U.S.C. § 402(a)	3
47 U.S.C. § 405(a)	3
Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011)	10, 23
 Regulations:	
47 C.F.R. § 1.3.....	16
47 C.F.R. § 1.4(b)(1)	3
47 C.F.R. § 1.429.....	9
47 C.F.R. § 1.429(b)	12, 13
47 C.F.R. § 1.429(b)(3)	15, 16
47 C.F.R. § 1.429(i)	13
47 C.F.R. § 73.854.....	2, 10, 23
47 C.F.R. § 73.3598(e).....	1, 5, 23
 Administrative Materials:	
Memorandum Opinion & Order, <i>Foundation for a Beautiful Life, Inc.</i> , FCC 21-112, 2021 WL 4953707 (rel. Oct. 25, 2021), <i>appeal filed</i> , No. 21-1239 (D.C. Cir. Nov. 22, 2021)	2, 5, 6, 7, 10

GLOSSARY

APA	Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. § 500 <i>et seq.</i>)
<i>Application Denial</i>	Memorandum Opinion & Order, <i>Foundation for a Beautiful Life, Inc.</i> , FCC 21-112, 2021 WL 4953707 (rel. Oct. 25, 2021)
Commission / FCC	Respondent Federal Communications Commission
Foundation	Petitioner Foundation for a Beautiful Life
<i>Order</i>	Report & Order, <i>Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules</i> , FCC 20-53, 35 FCC Rcd 4115, 2020 WL 1977105 (rel. Apr. 23, 2020), <i>reprinted at ER-52–92</i>
<i>Reconsideration Order</i>	Order on Reconsideration, <i>Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules</i> , FCC 21-70, 2021 WL 2514036 (rel. June 16, 2021), <i>reprinted at ER-3–15</i>

No. 21-71266

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FOUNDATION FOR A BEAUTIFUL LIFE,
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

INTRODUCTION

Foundation for a Beautiful Life is an unsuccessful former applicant for a radio station license. In 2015, the FCC gave the Foundation a permit to construct a Low Power FM station to serve Cupertino, California. The Foundation automatically forfeited that permit by failing to construct a compliant facility before the permit's 2018 expiration date. *See* 47 U.S.C. § 319(b); 47 C.F.R. § 73.3598(e). Nevertheless, the Foundation began broadcasting from an unauthorized facility—a choice

that was unlawful and that rendered it permanently ineligible to hold a Low Power FM radio license. *See* 47 U.S.C. § 301; 47 C.F.R. § 73.854. The Commission denied the Foundation’s radio license application on these grounds. *See* Memorandum Opinion & Order, *Foundation for a Beautiful Life, Inc.*, FCC 21-112, 2021 WL 4953707 (rel. Oct. 25, 2021) (the “*Application Denial*”), *appeal filed*, No. 21-1239 (D.C. Cir. Nov. 22, 2021).

Meanwhile, and well after the Foundation forfeited its construction permit, the FCC in 2020 revised certain rules for Low Power FM radio service to provide more flexibility to licensees and applicants. *See* Report & Order, *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, 35 FCC Rcd 4115, 2020 WL 1977105 (rel. Apr. 23, 2020) (the “*Order*”) (ER-52–92). The Commission decided that these new rules would apply only to license applications—unlike the Foundation’s—that had *not* been subject to a Media Bureau decision prior to their effective date. *See id.* ¶48 (ER-71). The Foundation asks this Court to set aside that decision and to require the FCC to apply these new rules to override a prior decision on its license application.

The Foundation’s challenge fails for at least two reasons. *First*, the Foundation never properly presented its claim to the agency, and the

Commission reasonably denied relief on that procedural ground alone. *Second*, the Commission satisfied the Administrative Procedure Act (APA) by providing notice and reasonably explaining its decision to apply the new Low Power FM rules only to applications not previously decided.

JURISDICTIONAL STATEMENT

The Commission had jurisdiction to adopt the April 23, 2020 final *Order* under the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, as amended, including 47 U.S.C. §§ 154(i), 154(j), 301, 303, 307–09, 316, and 319. On June 16, 2021, the Commission dismissed and alternatively denied the Foundation’s petition for reconsideration of the *Order* under 47 U.S.C. § 405(a), a ruling that was effective upon publication in the Federal Register on July 14, 2021. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.4(b)(1). The Foundation filed a timely petition for review on September 13, 2021, within 60 days of publication. *See* 28 U.S.C. § 2344; 47 U.S.C. § 405(a). This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF THE ISSUES

1. Whether the Commission reasonably dismissed the Foundation’s petition for reconsideration as noncompliant with the Commission’s rulemaking procedures?

2. Whether the Commission reasonably concluded and explained that interests in administrative efficiency and clarity to applicants justified applying its new Low Power FM service rules only to matters not previously subject to a staff decision?

3. Whether the Commission provided proper notice under 5 U.S.C. § 553(b) by identifying “the subjects” of its rulemaking?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. LOW POWER FM RADIO SERVICE

Low Power FM is an FCC-licensed noncommercial radio service that enables non-profits with limited expertise and small budgets to build and operate community-oriented stations serving highly localized areas. *See Order* ¶2 (ER-53).

The Communications Act provides that “[n]o person” may operate a radio station except “with a license” from the FCC. *See* 47 U.S.C. § 301. A construction permit is a “prerequisite” to obtaining a license. *Bamford v. FCC*, 535 F.2d 78, 79 n.2 (D.C. Cir. 1976). “No license shall be issued ... for the operation of any station unless a permit for its construction has

been granted by the Commission.” 47 U.S.C. § 319(a). A license requires that “all the terms, conditions, and obligations set forth in the ... permit” have been “fully met,” and the license must “conform generally” to the permit’s “terms.” *Id.* § 319(c).

A construction permit specifies the time in which to complete construction. *Id.* § 319(b). Under the Communications Act, a permit generally “will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow.” *Id.* The Commission’s rules provide that permits forfeit “automatically ... upon expiration” and “without any further affirmative cancellation by the Commission” if “construction has not been completed and ... an application for a license has not been filed.” 47 C.F.R. § 73.3598(e).

B. THE FOUNDATION’S LOW POWER FM PERMIT AND LICENSE APPLICATION

1. The Foundation is a former permittee for a Low Power FM radio station that would serve Cupertino, California. In 2015, the FCC granted the Foundation a construction permit with a May 19, 2018 expiration date. *See Application Denial*, 2021 WL 4953707, at *1 ¶2. Rather than build at the FCC-approved site (a specified tower on public parkland),

however, the Foundation constructed a non-compliant facility 5.73 kilometers away at a private residence in Saratoga, California. *See id.*

The day before its construction permit expired, the Foundation filed a license application with the FCC inaccurately certifying that it had constructed as authorized in the construction permit. *See id.* After the FCC learned of this discrepancy, the Foundation admitted that it constructed at the wrong site; as a result, its facility differed materially from what the FCC authorized. *Id.* ¶2 & n.10.

2. The Foundation attempted to cure the error by filing an application to modify its construction permit to designate the facility it actually built as its authorized facility. *Id.* ¶2. The Foundation filed that modification application on July 5, 2018—a month and a half after the construction permit’s mid-May expiration date. *Id.*

The Foundation’s modification application was faulty. As relevant here, then-applicable rules required that modified construction sites be within 5.6 kilometers of the original authorized site, but the Foundation built 5.73 kilometers away. *See id.* *5 ¶11. The FCC’s Media Bureau rejected the Foundation’s permit modification and license applications in March 2019 and again in October 2019 after a request for reconsideration. *See id.* *2 ¶¶3–4.

3. The Foundation appealed those denials to the full Commission. *Id.* ¶4. While that administrative appeal was pending, the Foundation notified the Commission in March 2020 that it had begun broadcasting from its unauthorized and unlicensed site. *Id.* ¶5. Because unlicensed broadcasting is illegal under 47 U.S.C. § 301, the FCC’s Media Bureau ordered the Foundation off the air in April 2020. *See id.* ¶6; 47 U.S.C. § 312(b) (authority to issue “cease and desist” orders).

C. THE COMMISSION’S RULEMAKING AND *ORDER* ON REVIEW

In July 2019—after the Foundation automatically forfeited its construction permit (in May 2018), and after the Media Bureau first rejected the Foundation’s applications (in March 2019)—the Commission issued a Notice of Proposed Rulemaking for its Low Power FM service rules. *See Order* ¶2 (ER-53); Notice of Proposed Rulemaking, 34 FCC Rcd 6537 (2019) (SER-3–25). After a comment period in which the Foundation did not participate, the Commission adopted a final *Order* that (among other things) expanded the distance for allowable modified construction sites from 5.6 to 11.2 kilometers from the originally authorized site, i.e., a distance that might (in the Foundation’s view) have helped in its earlier situation. *See Order* ¶¶16–21 (ER-59–60).

The Commission also decided, as a procedural matter, that any applications previously subject to a staff decision as of the *Order's* effective date would proceed under the old rules, and that other applications would be subject to the new rules. *Id.* ¶48 (ER-71). In adopting this approach, the Commission cited agency precedent from an earlier revision to FM service rules in which the FCC drew the same line. *See id.* ¶48 n.129 (ER-71).

D. THE FOUNDATION'S PETITION FOR RECONSIDERATION

The Foundation petitioned the Commission to reconsider its decision and urged the Commission to allow parties with applications subject to staff action to challenge that staff action based on the new rules. *See* Petition for Reconsideration at 12 (ER-50). During the rulemaking proceeding, the Foundation had appealed the Media Bureau's rejection of its applications to the full Commission. *See* pages 6–7, *supra*. The Foundation wanted the benefit of the new Low Power FM rules so that it could argue on appeal from the rejection that it built within the new rules' 11.2 kilometer allowance. The Foundation argued that it was the only Low Power FM applicant with an appeal of staff action pending before the Commission, and so giving the Foundation the

benefit of the rule change would not unsettle substantial completed work. See Reply in Support at 3 (ER-22).

The Commission rejected the petition for reconsideration for two independent reasons. See Order on Reconsideration, *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, FCC 21-70, 2021 WL 2514036 (rel. June 16, 2021) (the “*Reconsideration Order*”) (ER-3–15).

First, the Commission held that the Foundation’s petition was procedurally defective. The Foundation did not participate in the rulemaking process, despite the opportunity to do so, and offered only facts and arguments that it could have raised earlier. FCC rules do not ordinarily permit reconsideration in that situation, and the Commission applied those rules here. See *id.* ¶17 & n.49 (citing 47 C.F.R. § 1.429) (ER-10–11).

Second, the Commission explained on the merits that when “adopting new application processing procedures,” it must “establish a definitive cut-off point for transition to the new requirements.” *Id.* ¶19 (ER-11). This promotes “administrative efficiency” and provides “clear guidance to applicants.” *Id.* Consistent with past practice, the

Commission balanced “giving effect to the new rules” against “avoiding the need to revisit prior administrative action.” *Id.*

E. FINAL DENIAL OF THE FOUNDATION’S APPLICATIONS

After finalizing the new Low Power FM rules, the Commission resolved the Foundation’s administrative licensing appeal and denied the Foundation’s station license and construction permit modification applications on multiple independent procedural and substantive grounds. *See Application Denial*, 2021 WL 4953707, at *4 ¶9. The Commission also affirmed the Media Bureau’s 2020 order that the Foundation cease unlawful broadcasting. *Id.* *8 ¶20. Importantly, Congress has directed the Commission to “prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act[.]” Local Community Radio Act of 2010, Pub. L. No. 111-371, § 2, 124 Stat. 4072; *see* 47 C.F.R. § 73.854 (implementing this directive). The Commission’s decision is now on appeal to the D.C. Circuit. *See Foundation for a Beautiful Life, Inc. v. FCC*, No. 21-1239 (D.C. Cir. filed Nov. 22, 2021).

STANDARDS OF REVIEW

The Court may set aside the FCC’s actions only if they are arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the law. *See* 5 U.S.C. § 706(2). Review is “deferential” and requires only “that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The Court “may not substitute its own policy judgment for that of the agency,” but “simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.” *Id.*

The same standard governs the Commission’s application of its own procedural rules; review is only for “abuse [of] discretion.” *Sioux Valley Rural Telev., Inc. v. FCC*, 349 F.3d 667, 677 (D.C. Cir. 2003). An abuse of discretion occurs only if the agency (1) applies the wrong legal standard or (2) makes findings that are “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *See United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc).

SUMMARY OF THE ARGUMENT

I. The Commission did not abuse its discretion by dismissing the Foundation’s petition for reconsideration on procedural grounds. The

Foundation raised only previously known facts and arguments on reconsideration, in violation of the Commission's rules. *See* 47 C.F.R. § 1.429(b). Because the Commission's reasonable application of its procedural rules is sufficient to deny the petition, the Court need not reach the merits.

II. The Foundation's challenge fails on the merits regardless.

A. The Commission has broad discretion to make rules for its proceedings. *See* 47 U.S.C. § 154(j). That includes deciding not to undo completed staff action in light of new rules. The Commission reasonably explained why it chose that course: A bright-line rule against unsettling staff action provides clarity and promotes administrative efficiency. The APA required no more.

B. The Foundation's notice objection—which is asserted only in passing and therefore not preserved—also fails because (1) the Commission provided “a description of the subjects and issues involved” in the rulemaking, 5 U.S.C. § 553(b)(3), and (2) the specific rule challenged here is one of “agency organization, procedure, or practice” to which the notice requirement “does not apply,” *id.* § 553(b)(A).

ARGUMENT

I. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY DISMISSING THE FOUNDATION'S PROCEDURALLY DEFICIENT PETITION FOR RECONSIDERATION.

When the Commission independently dismisses a pleading on procedural *and* substantive grounds, courts “will affirm the agency so long as any one of the grounds is valid.” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003). Here, the Commission first and correctly held that the Foundation filed a “procedurally deficient” petition. *Reconsideration Order* ¶17 (ER-10).

The Commission’s rules limit the grounds on which a party can raise new facts or arguments in a petition for reconsideration, 47 C.F.R. § 1.429(b), and the Commission may “dismiss” a procedurally deficient petition, *id.* § 1.429(i). New arguments can be raised only if (1) they relate to “events which have occurred or circumstances which have changed since the last opportunity to present such matters”; (2) they were “unknown” until “after [the] last opportunity” to present them; or (3) the Commission determines that “the public interest” warrants their consideration. *See id.* § 1.429(b).

The Commission reasonably explained that because it had sought comment on a proposal to expand the distance within which Low Power

FM stations could apply to move, the Foundation had the opportunity “to inform the Commission that it supported the proposal and expected that, if adopted, the proposed rule would result in a favorable determination” of the Foundation’s pending application. *Reconsideration Order* ¶17 (ER-10). So, the Foundation’s argument was not based on anything that could not have been submitted during the comment period, nor did “the public interest” require the Commission to change course “for one applicant’s benefit.” *Id.* ¶17 & n.49 (ER-10–11). Because the Commission applied the correct legal standard and made findings that were not “illogical, implausible, or without support in inferences that may be drawn from the facts in the record,” the Commission did not abuse its discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

The Foundation argues (at 10) that it had no reason to participate in the comment period because the Commission provided insufficient notice under the APA. But proper notice requires only “a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). As the Commission explained, the Notice of Proposed Rulemaking announced that revision of the modification distance rule was at issue. *See Reconsideration Order* ¶17 (ER-10); Notice of Proposed Rulemaking, 34 FCC Rcd 6537, 6544–45 ¶¶14–15 (2019) (SER-10–11).

There is no merit to the Foundation’s argument that notice was insufficient because it did not say that the new rule would not apply to applications that had already been subject to a staff-level decision. That argument goes to an anticipated rule change’s final temporal scope, which is inherently an issue in any rule change. To require agencies expressly to raise temporal scope in their notices would run afoul of “the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (cleaned up).

The Foundation’s disagreement (at 10) with the Commission’s decision not to accept the petition “in the public interest,” 47 C.F.R. § 1.429(b)(3), also fails because “the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). And as the Commission explained, “one applicant’s benefit” did not justify redoing how the Commission “structured the implementation of

multiple new rules” for Low Power FM radio.¹ *Reconsideration Order* ¶17 & n.49 (ER-10–11).

The Foundation also quibbles (at 11) with the Commission’s citation to *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941), for the unremarkable proposition that “an offer of more evidence” after a decision is made frustrates agencies’ abilities to “operate efficiently or accurately.” *See Reconsideration Order* ¶17 n.49 (ER-10). Regardless whether *Colorado Radio* is distinguishable on its facts, the Commission cited it only for that otherwise commonsense principle.

Nor is the Foundation correct (at 11) that the Commission’s decision creates unduly onerous obligations for regulated parties. If such a party has good reason for its failure to present an available argument during the comment period, the “public interest” exception, 47 C.F.R. § 1.429(b)(3), and the Commission’s more general power to waive any rules for “good cause,” *id.* §1.3, remain at hand. The Foundation simply did not offer any such good reason, although future parties may do so on

¹ To the extent that the Foundation suggests (at 10) that the “public interest” exception *always* requires an agency to consider unjustifiably belated concerns, that approach would undermine finality in agency rulemaking by always allowing parties to raise new issues—and force their consideration—after the comment period closes.

different facts. *See Reconsideration Order* ¶17 n.49 (ER-10–11) (finding insufficient grounds to apply the public interest exception on this specific record).

Because the Commission considered the Foundation’s procedural arguments and provided a reasoned and well-supported response, *id.* ¶17 (ER-10), there was no abuse of discretion in rejecting the Foundation’s reconsideration petition on procedural grounds.

II. THE ORDER SATISFIES THE APA.

If the Court reaches the merits, it should likewise deny the petition. The Commission’s decision was “reasonable and reasonably explained,” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), and made after adequate notice. There was no APA violation.

A. The Commission’s Decision Was Reasonable And Reasonably Explained.

1. Agencies enjoy “wide discretion” over their procedures. *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). The Communications Act, in particular, provides that the FCC “may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j). The Supreme Court has long cited “this delegation of broad procedural

authority” as empowering the Commission “to resolve ‘subordinate questions of procedure.’” *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

Thus, courts have “upheld in the strongest terms” the FCC’s discretion “to control the disposition of [its] caseload.” *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975). The FCC is best positioned “to say whether one procedure for dealing with a particular issue at the administrative level is more or less efficient than another.” *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986). So, for example, courts have deferred to the FCC’s determinations that costs and administrative burdens justify adopting one procedure over another. *See, e.g., Mozilla Corp. v. FCC*, 940 F.3d 1, 73–74 (D.C. Cir. 2019) (per curiam) (deferring to the FCC’s decision not to consider certain documents because it would be “‘costly’ and ‘administratively difficult’”).

These principles support the Commission’s decision to apply its new Low Power FM service rules only to applications not already subject to staff action. *Order* ¶48 (ER-71). Ultimately, this line-drawing is an aspect of the FCC’s right “to control its own docket.” *Cf. GTE Serv. Corp.*, 782 F.2d at 274 n.12. If license applicants could cite the new Low Power FM service rules to say that the Media Bureau erred when it faithfully

applied earlier rules then in force, that could unsettle completed Bureau work; lead to duplication of effort as applications are re-evaluated; and thereby delay the FCC's processing of applications on its docket. This concern sits at the heart of "administrative efficiency," and the Commission reasonably cited "avoiding the need to revisit prior administrative action" in support of its decision to limit the new Low Power FM rules to applications not yet disposed of by its staff. *See Reconsideration Order* ¶19 (ER-11).

The Commission's adoption of a bright-line rule was also reasonable. As the Commission explained, its approach will "provide clear guidance to applicants." *Id.* And it also has the value of consistency; the Commission's line drawing in this proceeding mirrors the choice the Commission made in another recent rulemaking proceeding about FM service—a point the Foundation does not dispute. *See id.* ¶19 n.53; *id.* ¶20 (ER-11). Clarity and consistency are rational reasons for making a procedural choice.

2. The Foundation contests (at 8–9) the Commission's characterization of its new Low Power FM rules as "prospective," rather than retroactive, and (at 9–10) the Commission's alleged failure to

provide a reasoned explanation for excluding only the Foundation's application from the new rules. Neither argument is availing.

First, the rule provides “application processing procedures” for FCC staff; it tells them what rules they should apply when they evaluate a license application. *Reconsideration Order* ¶19 (ER-11). Specifically, it tells the staff to begin applying the more lenient new rules the day they become effective, but not to revisit applications already evaluated under the old rules. *See Order* ¶48 (ER-71). This line-drawing is not retroactive because it regulates agency procedure the day an application is assessed, not private conduct occurring before that date.

The Foundation concedes (at 8 n.2) that the rule change does not “adversely affect” any private party. The more lenient rules can only *benefit* parties that violated the old rules and now want refuge in the new rules. Thus, there is nothing retroactive about the rule change under the “classic formulation” that “[n]umerous decisions” apply: The change does not “take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.” *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (cleaned up).

Second, the Commission did not err by drawing such a line even if, as it recognized, it deprives only the Foundation of the benefit of the new rules. *See Reconsideration Order* ¶21 (ER-12). The Commission reasonably chose a bright-line rule that would unsettle *no* prior agency work and that gave clear guidance to *all* applicants. *Id.* ¶19 (ER-11). The Foundation’s mere disagreement with that balancing of interests is not an APA violation.²

B. The Foundation Had Proper Notice.

To the extent that the Foundation’s passing objection (at 10–11) to a lack of notice is a stand-alone claim,³ it fails for the reasons discussed in Part I, *see* pages 14–15, *supra*, and because the APA’s notice requirement “does not apply” to “rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). A rule fits this exception if it “is not inconsistent with [a] regulation and instead only seeks to clarify

² The Foundation’s suggestion that the Commission must “explain how administrative efficiency is *significantly* advanced,” Pet’r Br. 10 (emphasis added), seeks to impose a burden that the APA does not require. Balancing procedural costs and benefits is for the agency, which can reasonably choose to unsettle no staff-level work whatsoever for only a single applicant’s benefit. *Cf. GTE Serv. Corp.*, 782 F.2d at 274 n.12.

³ Any notice argument is “waived” because it was not “specifically and distinctly ... raised” in the Foundation’s statement of issues (at 1–2) and arises only as an unanalyzed “bare assertion” in the brief. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

language within that regulation.” *Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010). Because the Commission’s directive for when to apply the new Low Power FM rules merely clarifies for FCC staff the set of applications to which the new rules apply, *see Order* ¶48 (ER-71), the rule is one of “procedure,” not substance, and so the APA did not require notice. 5 U.S.C. § 553(b)(A).

CONCLUSION

The Court should deny the petition.⁴

Dated: February 2, 2022

Respectfully submitted,

/s/ Adam G. Crews

P. Michele Ellison
General Counsel

Jacob M. Lewis
Acting Deputy General Counsel

Adam G. Crews
Counsel

FEDERAL COMMUNICATIONS
COMMISSION

45 L Street NE
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

*Counsel for Respondent Federal
Communications Commission*

Jonathan S. Kanter
Assistant Attorney General

Robert B. Nicholson
Robert J. Wiggers
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave. NW
Washington, DC 20530

*Counsel for Respondent
United States of America*

⁴ The Court may wish to await the D.C. Circuit's decision on the Foundation's appeal of its license denial. If the D.C. Circuit affirms that the Foundation engaged in unlicensed broadcasting, then the Foundation will be barred from Low Power FM service. *See* Local Community Radio Act of 2010, Pub. L. No. 111-371, § 2, 124 Stat. 4072; 47 C.F.R. § 73.854. Alternatively, the D.C. Circuit may affirm that the Foundation forfeited its construction permit. *See* 47 U.S.C. § 319(b); 47 C.F.R. § 73.3598(e). Either outcome would render any possible error here harmless. *See* 5 U.S.C. § 706 (directing that "due account shall be taken of the rule of prejudicial error"); *Little Sisters of the Poor*, 140 S. Ct. at 2385 (stating that the APA does not give relief for harmless errors).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains words, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated .
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF FILING AND SERVICE

I certify that on February 2, 2022, I caused the foregoing Brief for Respondents to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit using the Court's CM/ECF system, which caused a true and correct copy of the same to be served on all attorneys registered to receive such notices.

/s/ Adam G. Crews

Adam G. Crews

FEDERAL COMMUNICATIONS
COMMISSION

45 L Street NE
Washington, DC

20554

(202) 418-1740

*Counsel for Respondent Federal
Communications Commission*

STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

	Page
47 U.S.C. § 301	Add. 2
47 U.S.C. § 319	Add. 3
47 C.F.R. § 1.429.....	Add. 4
47 C.F.R. § 73.854	Add. 5
47 C.F.R. § 73.3598	Add. 5

47 U.S.C. § 301 provides:

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 319 provides in pertinent part:

§ 319. Construction permits

(a) Requirements

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(b) Time limitation; forfeiture

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Licenses for operation

Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station

against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a) to (g) of this title shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

47 C.F.R. § 1.429 provides in pertinent part:

§ 1.429 Petition for reconsideration of final orders in rulemaking proceedings.

* * *

(b) A petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted only under the following circumstances:

- (1) The facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission;
- (2) The facts or arguments relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts or arguments relied on is required in the public interest.

* * *

(i) The Commission may grant the petition for reconsideration in whole or in part or may deny or dismiss the petition. Its order will contain a concise statement of the reasons for the action taken. Any order addressing a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be

dismissed by the staff as repetitious. In no event shall a ruling which denies a petition for reconsideration be considered a modification of the original order.

47 C.F.R. § 73.854 provides:

§ 73.854 Unlicensed radio operations.

No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner, including individually or with persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301. If an application is dismissed pursuant to this section, the applicant is precluded from seeking nunc pro tunc reinstatement of the application and/or changing its directors to resolve the basic qualification issues.

47 C.F.R. § 73.3598 provides in pertinent part:

§ 73.3598 Period of construction.

* * *

(e) Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.