

No. 22-1016

---

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

---

LEVINE/SCHWAB PARTNERSHIP  
D/B/A SCHWAB MULTIMEDIA LLC,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee.*

---

On Appeal from an Order of  
the Federal Communications Commission

---

**BRIEF FOR APPELLEE**

---

P. Michele Ellison  
*General Counsel*  
Sarah E. Citrin  
*Deputy Associate General Counsel*  
Rachel Proctor May  
*Counsel*  
FEDERAL COMMUNICATIONS  
COMMISSION  
45 L Street NE  
Washington, DC 20554  
(202) 418-1740  
fcclitigation@fcc.gov

---

**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

(A) **Parties and Amici.** All parties appearing in this Court are listed in the Brief for Appellant.

(B) **Ruling Under Review.** The notice of appeal challenges the following order of the Federal Communications Commission:

Memorandum Opinion and Order, *Levine/Schwab Partnership d/b/a Schwab Multimedia LLC, KWIF(AM), Culver City, CA*, FCC 22-1 (Jan. 5, 2022), *reprinted at* JA\_\_\_\_–\_\_\_\_.

(C) **Related Cases.** The order under review has not previously been before this Court or any other court. Appellee is aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

## TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
TABLE OF AUTHORITIES .....	iv
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF THE ISSUES .....	3
PERTINENT STATUTES AND REGULATIONS.....	4
STATEMENT OF THE CASE .....	4
A. Statutory And Regulatory Background .....	4
B. Agency Proceedings.....	8
1. Schwab’s First And Second Tolling Requests And 2019 Modification Application .....	8
2. Third Tolling Request.....	9
3. Fourth Tolling Request.....	10
4. Petition For Reconsideration And 2020 Modification Application .....	12
5. The <i>Order</i> On Appeal.....	13
SUMMARY OF THE ARGUMENT.....	17
ARGUMENT .....	19
I. SCHWAB HAS NOT DEMONSTRATED STANDING .....	21
II. SCHWAB DID NOT DEMONSTRATE IT QUALIFIED FOR TOLLING UNDER RULE 73.3598(B) OR (D) .....	23
A. Tolling Under Rule 73.3598(b) Is Unavailable For Site Loss .....	23
B. Schwab Did Not Qualify For An Extension Of Tolling Under Rule 73.3598(d).....	27
1. Schwab Never Demonstrated That COVID Delayed Construction .....	29

**TABLE OF CONTENTS  
(continued)**

	<b>Page</b>
2. There Was No Unexplained Inconsistency .....	34
III. SCHWAB DID NOT SEEK A WAIVER TO ACCOUNT FOR ITS SITE LOSS, AND DID NOT DEMONSTRATE THAT ITS SITE LOSS JUSTIFIED AN EXTENSION OF TIME .....	37
1. Any Argument That Schwab Was Entitled To A Waiver For Site Loss Is Barred Because It Was Not Presented To The Commission.....	38
2. Schwab Never Demonstrated That Its Site Loss Constituted Good Cause For A Waiver.....	41
CONCLUSION.....	45
CERTIFICATE OF COMPLIANCE .....	46

## TABLE OF AUTHORITIES\*

### Cases:

<i>Am. Wildlands v. Kempthorne</i> , 530 F.3d 991 (D.C. Cir. 2008).....	38
<i>Bartholdi Cable Co. v. FCC</i> , 114 F.3d 274 (D.C. Cir. 1997) .....	40
<i>BDPCS, Inc. v. FCC</i> , 351 F.3d 1177 (D.C. Cir. 2003) .....	42
<i>Beehive Tel. Co. v. FCC</i> , 180 F.3d 314 (D.C. Cir. 1999).....	32
<i>Comcast Corp. v. FCC</i> , 526 F.3d 763 (D.C. Cir. 2008).....	35, 43
<i>Consol. Commc'ns of California Co. v. FCC</i> , 715 F. App'x 13 (D.C. Cir. 2018).....	35, 37
<i>FCC v. Prometheus Radio Project</i> , 141 S. Ct. 1150 (2021) .....	16, 17
<i>Food &amp; Water Watch v. USDA</i> , 1 F.4th 1112 (D.C. Cir. 2021) .....	21
<i>Malkan FM Assocs. v. FCC</i> , 935 F.2d 1313 (D.C. Cir. 1991).....	32
<i>Marino v. Nat'l Oceanic &amp; Atmospheric Admin.</i> , 33 F.4th 593 (D.C. Cir. 2022).....	21, 22
<i>Nat'l Lifeline Ass'n v. FCC</i> , 983 F.3d 498 (D.C. Cir. 2020).....	43
<i>Ne. Cellular Tel. Co. v. FCC</i> , 897 F.2d 1164 (D.C. Cir. 1990) .....	41
<i>NetworkIP, LLC v. FCC</i> , 548 F.3d 116 (D.C. Cir. 2008).....	37, 41
<i>Northstar Wireless, LLC v. FCC</i> , No. 18-1209, 2022 WL 2203808 (D.C. Cir. June 21, 2022) .....	36
<i>NTCH, Inc. v. FCC</i> , 841 F.3d 497 (D.C. Cir. 2016).....	38, 40
<i>PSSI Glob. Servs., LLC v. FCC</i> , 983 F.3d 1 (D.C. Cir. 2020) .....	17, 34

---

\* *Authorities upon which we chiefly rely are marked with asterisks.*

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
<i>SNR Wireless LicenseCo, LLC v. FCC</i> , 868 F.3d 1021 (D.C. Cir. 2017) .....	35
<i>WAIT Radio v. FCC</i> , 418 F.2d 1153 (D.C. Cir. 1969) .....	41
 <b>Administrative Materials:</b>	
<i>Birach Broad. Corp.</i> , 18 FCC Rcd. 1414 (2003) .....	7, 20, 41
<i>Church Planters of Am.</i> , 29 FCC Rcd. 14023 (2014) .....	42
<i>Cram Commc'ns, LLC</i> , 23 FCC Rcd. 658 (2008) .....	20, 24, 42
<i>Fla. Cmty. Radio</i> , 35 FCC Rcd. 6854 (2020) .....	29
<i>Gray Television Licensee, WVFX(TV)</i> , File No. 0000160513 (MB Oct. 7, 2021) .....	36
<i>JNE Invs., Inc.</i> , 23 FCC Rcd. 623 (2008) .....	23, 42
<i>Letter to Cary S. Tepper</i> , Positive Alternative Radio, File No. BPFT-19980514 (MB Apr. 8, 2002) .....	25, 44
<i>Letter to KJLA-LLC</i> , File No. 0000162740 (MB Oct. 15, 2021) .....	36
<i>Letter to Rebecca Duke</i> , WMLB, 18 FCC Rcd. 5034 (MB 2003) .....	25, 44
* Memorandum Opinion and Order, <i>Streamlining of Mass Media Applications, Rules, and Processes</i> , 14 FCC Rcd. 17525 (1999) 5, 7, 24, 42, 43	
Notice of Proposed Rule Making, <i>Streamlining of Mass Media Applications, Rules, and Processes</i> , 13 FCC Rcd. 11349 (1998) .....	4
Public Notice, <i>Media Bureau Announces Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auctions 99 and 100</i> , 35 FCC Rcd. 9555 (MB Sept. 10, 2020) .....	11, 16

**TABLE OF AUTHORITIES**  
**(continued)**

		<b>Page(s)</b>
*	Report and Order, <i>Streamlining of Mass Media Applications, Rules, and Processes</i> , 13 FCC Rcd. 23056 (1998) .....	4, 5, 6, 7, 23, 31
	<i>Royce Int’l Broad. Co.</i> , 23 FCC Rcd. 9010 (2008) .....	24
	<i>Wendall &amp; Assocs.</i> , 17 FCC Rcd. 18576 (2002) .....	42
	<i>Word of God Fellowship</i> , WWIW-LD, File No. 0000159580 (MB Oct. 7, 2021) .....	44
	<b>Statutes:</b>	
	47 U.S.C. § 319(a) .....	4
	47 U.S.C. § 319(b) .....	4
	47 U.S.C. § 402(b) .....	3, 27
	47 U.S.C. § 402(c).....	3
	47 U.S.C. § 405(a) .....	19, 38
	47 U.S.C. § 405(a)(2).....	40
	<b>Regulations:</b>	
	47 C.F.R. § 1.3.....	8, 19, 20, 26, 41
	47 C.F.R. § 1.106(c).....	13, 16, 28, 30
	47 C.F.R. § 1.106(c)(2) .....	32
	47 C.F.R. § 73.3571.....	22
	47 C.F.R. § 73.3598.....	3, 9, 25
	47 C.F.R. § 73.3598(a) .....	5
*	47 C.F.R. § 73.3598(b).....	3, 6, 19, 23, 25

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page(s)</b>
47 C.F.R. § 73.3598(b)(1).....	6
47 C.F.R. § 73.3598(b)(1)-(5) .....	18, 23
47 C.F.R. § 73.3598(b)(2).....	6, 23
* 47 C.F.R. § 73.3598(c) .....	6
* 47 C.F.R. § 73.3598(d).....	3, 7, 19, 21, 23, 28, 29, 31, 36



**No. 22-1016**

---

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

---

LEVINE/SCHWAB PARTNERSHIP  
D/B/A SCHWAB MULTIMEDIA LLC,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
*Appellee.*

---

On Appeal from an Order of  
the Federal Communications Commission

---

**BRIEF FOR APPELLEE**

---

**INTRODUCTION**

Appellant Levine/Schwab Partnership (“Schwab”) received authorization to build an AM radio station in 2016. Under the Federal Communications Commission’s rules, Schwab had three years to construct the station before forfeiting its permit, unless it qualified for tolling under criteria defined in the Commission’s rules, or for a waiver of those rules for good cause shown.

After repeatedly granting Schwab's tolling requests, the FCC denied Schwab's fourth requested extension. Memorandum Opinion and Order, *Levine/Schwab Partnership d/b/a Schwab Multimedia LLC, KWIF(AM), Culver City, CA*, FCC 22-1 (Jan. 5, 2022) (JA\_\_-\_\_) (the "*Order*"). In its fourth tolling request, Schwab claimed that its failure to construct was due to ongoing impacts of the COVID-19 pandemic. But the Commission reasonably concluded that Schwab did not have a site to build on during the time it claimed that worker shortages and supply chain issues were preventing construction. The Commission accordingly denied tolling, because loss of a construction site is not on the list of criteria under which the Commission's rules provide for tolling. Alternatively, the Commission found that Schwab had failed to demonstrate any construction efforts that were hindered by COVID, as required for an extension of tolling to account for the pandemic. If Schwab now means to suggest that the Commission should have waived its rules to account for Schwab's loss of its construction site, Schwab never made this argument before the agency. The Commission's denial of Schwab's fourth request for an extension of time was reasonable, and the *Order* should be affirmed.

## JURISDICTIONAL STATEMENT

If the Court determines that Schwab has met its burden to establish standing, *but see infra* 21-22, the Court has jurisdiction to review the Commission's *Order* under 47 U.S.C. § 402(b). The *Order* was released on January 5, 2022, and Schwab timely filed its notice of appeal on February 4, 2022. *See id.* § 402(c).

## STATEMENT OF THE ISSUES

1. Whether Schwab has demonstrated that the remedy it seeks is likely to redress its claimed injury, as necessary to establish standing.

2. Whether the Commission reasonably denied Schwab's fourth request for tolling because (a) the circumstances under which tolling is allowed under 47 C.F.R. § 73.3598(b) do not include loss of its construction site; and (b) in the alternative, Schwab did not demonstrate construction delays caused by COVID, as required under 47 C.F.R. § 73.3598(d).

3. Whether, because Schwab never argued before the agency that it should waive the application of 47 C.F.R. § 73.3598 based on Schwab's site difficulties, (a) the Court now lacks jurisdiction to consider that claim, and (b) even if the Court had jurisdiction, the Commission acted reasonably in not granting a waiver.

## PERTINENT STATUTES AND REGULATIONS

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

### STATEMENT OF THE CASE

#### A. Statutory And Regulatory Background

The Communications Act provides that “[n]o license shall be issued . . . for the operation of any [radio] station unless a permit for its construction has been granted by the Commission.” 47 U.S.C. § 319(a). Construction permits “will be automatically forfeited if the station is not ready for operation” within a time frame set by the Commission, “unless [construction was] prevented by causes not under the control of the grantee.” *Id.* § 319(b).

Historically, the Commission allowed a permittee 18 months to complete the construction of a broadcast radio station. *See* Notice of Proposed Rule Making, *Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd. 11349, 11368 ¶ 51 (1998). “[M]any permittees [were] . . . able to complete construction within” that 18-month period. Report and Order, *Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd. 23056, 23088 ¶ 79 (1998) (“*Streamlining Order*”). But because “a significant number”

failed to do so, the Commission received “large numbers of extension applications each year,” which took “[s]ubstantial staff resources” to resolve. *Id.*

To “reduce the necessity for extensions,” the Commission issued a pair of orders in 1998 and 1999 in which it doubled “the authorized construction period” to ensure “sufficient time for a diligent permittee to complete construction” – even accounting for “significant construction difficulties.” *Streamlining Order*, 13 FCC Rcd. at 23088 ¶ 80; see Memorandum Opinion and Order, *Streamlining of Mass Media Applications, Rules, and Processes*, 14 FCC Rcd. 17525 (1999) (“*Streamlining Recon.*”). Under the rule adopted in those orders, initial construction permits for radio broadcast stations now specify a three-year term. 47 C.F.R. § 73.3598(a).

In adopting this more generous initial construction period, the Commission sought to “strike [a] balance between” competing policy concerns. *Streamlining Recon.*, 14 FCC Rcd. at 17539 ¶ 35. On the one hand, the Commission observed, “legitimate obstacles . . . may prevent construction” for reasons beyond a permittee’s control. *Id.* On the other, the public has a “fundamental” interest “in expediting new broadcast service and preventing the warehousing of spectrum.” *Id.*

To safeguard the public's interest in ensuring that the radio spectrum will be placed in use in a timely fashion, the Commission adopted "strict criteria" under which the three-year initial construction period will be tolled. *Streamlining Order*, 13 FCC Rcd. at 23093 ¶ 90. Tolling is available "when construction is prevented by" one of five specific "causes not under the control of the permittee." 47 C.F.R. § 73.3598(b). Most relevant here, those causes include when "[c]onstruction is prevented due to an act of God, defined in terms of natural disasters." 47 C.F.R. § 73.3598(b)(1). "Act of God encumbrances [are] narrowly construed and include only those periods where the permittee demonstrates that the construction progress was impossible, notwithstanding its diligent efforts." *Streamlining Order*, 13 FCC Rcd. at 23090 ¶ 84. Tolling is also available for any period during which "[t]he grant of [a] permit is the subject of administrative or judicial review." 47 C.F.R. § 73.3598(b)(2).

Permittees seeking tolling under Rule 73.3598(b) "must notify the Commission as promptly as possible and, in any event, within 30 days," of the natural disaster claimed to support a permittee's claim. 47 C.F.R. § 73.3598(c). Tolling based on an "act of God" encumbrance automatically expires after six months "unless the permittee submits

additional notifications at six-month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps [the permittee] has taken and proposes to take to resolve any remaining impediments.” *Id.* § 73.3598(d). “The burden is upon the permittee to show that any further tolling of the construction period is warranted.” *Streamlining Order*, 13 FCC Rcd. at 23091 ¶ 87.

In adopting the rule, the Commission recognized that “there may be rare and exceptional circumstances other than those delineated” in the rule that would warrant an extension of the permittee’s construction time. *Streamlining Recon.*, 14 FCC Rcd. at 17541 ¶ 42. Thus, in “very limited circumstances” when a permittee is “prevented from completing construction within three years for reasons beyond its control,” but those reasons are not among those enumerated, the Commission will “entertain requests for waiver of [the rule’s] strict tolling provisions.” *Id.* In such circumstances, a permittee seeking a waiver “should file its request as promptly as possible following the event upon which it bases its request, preferably within the same 30 day period afforded to tolling applicants.” *Birach Broad. Corp.*, 18 FCC Rcd. 1414, 1416 ¶ 8 (2003). And, as with all waivers of Commission

rules, waiver is only proper upon a showing of “good cause.” 47 C.F.R. § 1.3.

## **B. Agency Proceedings**

### **1. Schwab’s First And Second Tolling Requests And 2019 Modification Application**

On November 2, 2016, the Commission’s Media Bureau (“Bureau”) authorized Schwab to construct an AM radio station in Culver City, California. *Order* ¶ 2 (JA\_\_). After granting an initial tolling request to cover the time it took to address a competitor’s concerns, Schwab’s deadline to construct was April 13, 2020. *Order* ¶ 2 (JA\_\_).

In May 2019, Schwab submitted an application to modify its permit to move to a new site. *See Order* ¶¶ 5, 8 & n.8 (JA\_\_, \_\_, \_\_). Later that year, while the modification application was pending, Schwab also sought to toll the April 2020 deadline, citing difficulties at the proposed new site. *See id* n.8 (JA\_\_). The Bureau initially granted these modification and tolling applications, but later rescinded them to consider a competitor’s technical objections to the new site, which the Bureau had previously overlooked. *Id.* While those applications were again pending, Schwab decided not to move forward with the new site. *Id.*



## 2. Third Tolling Request

In March 2020 – approximately three weeks before Schwab’s permit to construct at the original site was set to expire – Schwab again sought to extend the construction deadline. *See Order* ¶ 3 (JA\_\_).

Schwab styled this petition alternatively as a request for tolling under 47 C.F.R. § 73.3598 and a “request for waiver of 47 U.S.C. § 319(b).” *Tolling Request and/or Request for Waiver of 47 USC § 319(b) at 1* (Mar. 23, 2020) (“Third Tolling Request”) (JA\_\_). Schwab claimed that it had “returned to the original granted [site],” but an Executive Order issued by the Governor of California imposing restrictions on certain economic activity in the wake of the COVID-19 pandemic made construction of its station at that time “impossible” because Schwab was “unable to get any vendors to commence installation of any equipment.” *Id.* at 2 (JA\_\_). Schwab accordingly requested an extension “for a minimum of six (6) months . . . until such time that the COVID-19 National Emergency has abated, the California Executive Order is rescinded, and normal economic and business activity can resume.” *Id.* at 3 (JA\_\_).

The Bureau granted Schwab’s request for tolling, concluding that the effects of the COVID pandemic “fall[] within one of the criteria for

tolling in 47 C.F.R. § 73.3598(b)(1).” Letter Order at 1 (MB Mar. 24, 2020) (JA\_\_). In doing so, the Bureau informed Schwab that, “[i]f construction [could not] resume within 6 months due to the COVID-19 closure,” Schwab would be required to “file a status report by September 23, 2020, requesting continued tolling treatment.” *Id.*

### 3. Fourth Tolling Request

On September 21, 2020, Schwab requested an “extension of tolling . . . due to the continuing ‘Act of God’ caused by COVID-19.” Request for Extension of Tolling Issued March 24, 2020 at 1 (“Fourth Tolling Request”) (JA\_\_); *see Order* ¶ 3 (JA\_\_). Schwab stated that Los Angeles County was “under code ‘Purple,’” meaning that the virus was “still ‘Widespread,’” and that “many non-essential business operators [were] closed.” Fourth Tolling Request at 1 (JA\_\_). Schwab claimed that, as a result, “the COVID-19 crisis ha[d] made it virtually impossible to obtain equipment because of supply chain issues.” *Id.* “[M]ost importantly,” Schwab asserted, “consulting engineers and tower crews [were] simply not available or [were] unwilling to travel to this ‘hot zone.’” *Id.* In addition, Schwab claimed, “it would be difficult to find construction crews to work” in Culver City because of “poor air quality” from wildfires. *Id.* at 2 (JA\_\_).

In support of these claims, Schwab attached to its petition two exhibits describing certain city and county COVID restrictions. *See* Fourth Tolling Request at 7-38 (JA\_\_-\_\_); *see also* Order n.39 (JA\_\_) (describing the exhibits). It also asserted that the “Commission ha[d] acknowledged this ongoing problem” in a Media Bureau release that recognized that the pandemic had affected the construction of some radio stations and noted the availability of construction deadline waivers. Fourth Tolling Request at 1 (JA\_\_) (citing Public Notice, *Media Bureau Announces Availability of Construction Deadline Waivers for Certain FM Translator Stations Awarded in Auctions 99 and 100*, 35 FCC Rcd. 9555 (MB Sept. 10, 2020) (“Public Notice”)).

Schwab also contended that the FCC should waive the construction deadline for good cause under Section 1.3. *See* Fourth Tolling Request at 2-3 (JA\_\_-\_\_). In support of its waiver argument, Schwab stated: “Both the applicable provisions of Section 73.3598 described hereinabove together with the other circumstances described which fall within the penumbras of the tolling provisions, demonstrate circumstances beyond the control of [Permittee] which currently prevent completion of construction associated with the aforementioned Construction Permit.” *Id.* at 2 (JA\_\_).

Finding that Schwab's evidence and arguments supported neither an extension of "act of God" tolling nor a waiver of the construction deadline, the Bureau denied Schwab's request. Letter Order (MB Sept. 25, 2020) (JA\_\_).

#### **4. Petition For Reconsideration And 2020 Modification Application**

Schwab petitioned for reconsideration. Levine/Schwab Partnership Petition for Reconsideration (Oct. 26, 2020) ("Recon. Pet.") (JA\_\_). On the same date, it filed a second modification application to construct KWIF at a new, alternative site. *See Order* ¶ 4 (JA\_\_).

In the "Background" section of the reconsideration petition, Schwab explained that the landlord at its original, permitted site had – at some unspecified time prior to May 2019 – "rescinded the verbal agreement it had with [Schwab] to use" the site because another radio station had moved there. Recon. Pet. ¶ 1 (JA\_\_). Schwab explained that it had responded to the loss of its original construction site by filing its 2019 modification application, and that, because of a competitor's "ongoing informal objection" to that application, it had since leased the new site identified in the 2020 modification application. *Id.*; *see id.* ¶¶ 4-5 (JA\_\_-\_\_). In addition, characterizing the Bureau's conclusion

that Schwab had not “provide[d] any evidence that it even tried to construct the station” as “categorically false,” Schwab attached nine documents to support that claim. *Id.* ¶ 4, *see* Exs. 1-9 (JA\_\_-\_\_).

The Bureau denied reconsideration. Letter Order (MB Dec. 7, 2020) (“*Bureau Decision*”) (JA\_\_). It explained that Schwab’s newly submitted documents were barred by 47 C.F.R. § 1.106(c), which limits the circumstances under which new information can be submitted on reconsideration, because none of them “relate[d] to events occurring or circumstances which changed after Schwab filed its Tolling Request,” or were “unknown to Schwab at the time it filed the Tolling Request.” *Id.* at 3-4, *see also id.* at 6 & nn.24-34 (JA\_\_, \_\_). The Bureau also explained that even if it were to consider the untimely evidence, it would not find the evidence persuasive. *Id.* at 6 (JA\_\_). Because Schwab had run out of time to construct its station, the permit had “expired on its own terms,” *id.* at 7 (JA\_\_), and the Bureau dismissed both pending applications to modify the station location, *see id.* at 1 (JA\_\_).

## 5. The *Order On Appeal*

The Commission affirmed the Bureau’s decision. “Based on the record evidence,” the Commission explained, “site loss, a circumstance

which does not qualify for tolling” under the Commission’s rules, “was the proximate cause of Schwab’s inability to construct.” *Order* ¶ 6 (JA\_\_); *see id.* ¶ 8 (JA\_\_).

As support for this finding, the Commission observed that the owner of Schwab’s original site had “rescinded Schwab’s permission to use the site sometime prior to” Schwab’s filing of its May 2019 site modification application. *Order* ¶ 8 (JA\_\_). Schwab had never since shown, the Commission found, that its landlord had reinstated that earlier permission, “or that any other useability issues were resolved.” *Id.*; *see id.* ¶ 5 & n.25 (JA\_\_). Thus, the Commission explained, when Schwab claimed pandemic-related delays in its Third and Fourth Tolling Requests, it “had no site that was both authorized and available” on which to construct. *Id.* ¶ 8 (JA\_\_) Moreover, the Commission emphasized, Schwab had not “claim[ed] that the pandemic caused its years-long site availability issues or explain[ed] how the pandemic could have disrupted construction, equipment delivery, or arrival of crews at the Original Site at a time when Schwab no longer had the site owner’s permission to build there.” *Id.*

This finding that site loss was the proximate cause of Schwab’s failure to construct was sufficient, in the Commission’s judgment, to

deny Schwab's application for review. *See Order* ¶¶ 6, 9 (JA\_\_\_, \_\_\_). Nonetheless, "in the interest of a complete record," the Commission also "address[ed] Schwab's pandemic-related arguments," and denied the application for review on the "alternative and independent grounds" that those arguments were unpersuasive. *Id.* ¶ 6 (JA\_\_\_); *see id.* ¶¶ 9-14 (JA\_\_-\_\_).

In response to Schwab's claim that the Bureau gave insufficient weight to the effects of the COVID pandemic, the Commission explained that the agency "has long held that permittees that seek additional construction time following a disaster must establish a material nexus between the disaster and the failure to construct." *Order* ¶ 10 & n.36 (JA\_\_\_). Schwab "did not adequately meet that burden," *id.* ¶ 10 (JA\_\_\_), the Commission explained, because it "failed to show how the pandemic . . . had affected [its] ability to construct any facilities." *Id.* n.39 (JA\_\_\_). The "claims of supply chain disruptions and worker shortages generally in California," which Schwab cited in its Fourth Tolling Request, "did not establish that Schwab itself experienced such issues or that such matters prevented [KWIF's] construction." *Id.* ¶ 12 (JA\_\_\_). Although the Public Notice Schwab had cited in its Fourth Tolling Request specifically apprised permittees like Schwab "that they should make 'a

specific showing of the impact of the pandemic on the permittee” if they sought “an extension of construction deadlines due to the pandemic,” Schwab had “failed to demonstrate that COVID encumbered any of its construction efforts.” *Id.* ¶¶ 10, 13 (JA\_\_-\_\_) (quoting Public Notice, 35 FCC Rcd. at 9556). And the new documents Schwab included with its petition for reconsideration were “late-filed and procedurally barred.” *Order* ¶ 11 (JA\_\_) (citing 47 C.F.R. § 1.106(c)). Even if they were considered, the Commission found, they “would not have changed the outcome because nothing therein . . . showed any meaningful construction efforts.” *Id.* ¶ 12 (JA\_\_).

Finally, the Commission rejected Schwab’s argument that denial of an extension was inconsistent with the Commission’s efforts to promote AM radio. Rather, the Commission explained, adherence to the agency’s deadline rules is “necessary to ensure that the public benefits from the efficient use of . . . spectrum, and to prevent spectrum warehousing.” *Id.* ¶ 14 (JA\_\_).

### STANDARD OF REVIEW

The Administrative Procedure Act “requires that agency action be reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Under this “deferential” standard,



a reviewing court “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 Court “accept[s] the Commission’s findings of fact so long as they are supported by substantial evidence on the record as a whole.” *PSSI Glob. Servs., LLC v. FCC*, 983 F.3d 1, 7 (D.C. Cir. 2020).

### SUMMARY OF THE ARGUMENT

Having already received repeated extensions of time to construct its radio station, Schwab argues that the Commission erred in denying its Fourth Tolling Request. But Schwab failed to make the required showing to qualify for more time under the Commission’s rules. Even assuming Schwab has standing – which Schwab has failed to demonstrate – its appeal rests on arguments that Schwab did not make to the agency, made untimely, or has failed to support. The appeal should be denied.

I. Schwab has not met its burden to demonstrate that a favorable ruling of this Court will redress its claimed injury by allowing Schwab to construct a radio station. Schwab has not shown that it is likely to be able to construct a station at either its original site or any other site before its permit expires.

II.a. The Commission reasonably concluded that the strict criteria governing tolling do not include site loss. 47 C.F.R. § 73.3598(b)(1)-(5). Site loss is not listed in the grounds specified for tolling in the rule; indeed, Schwab apparently concedes (Br. 23) that site loss is not a covered ground for rule-based tolling. Instead, Schwab suggests that the *Order* incorrectly forecloses the possibility of any site-loss related extension of construction time. That mischaracterizes the *Order*, which recognized that the Commission may waive its rules for reasons that fall outside the criteria for rule-based tolling.

II.b. The Commission reasonably concluded that Schwab did not qualify for additional tolling based on the effects of COVID because Schwab did not demonstrate a material nexus between the pandemic and Schwab's failure to complete construction. Schwab's generalized evidence that the pandemic was causing worker shortages and supply chain issues did not demonstrate that those issues had affected Schwab, and the documents regarding Schwab's purported construction efforts also did not show any COVID-related disruption. Schwab was on notice that, to receive an extension of "act of God" tolling, it was required to explain how the pandemic "continues to cause delays in construction, any construction progress, and the steps [Schwab] has taken and

proposes to take to resolve any remaining impediments.” 47 C.F.R. § 73.3598(d).

III. Because Schwab never argued before the Commission that it should receive a waiver of its construction deadline based on site difficulties, the Court lacks jurisdiction to consider that claim. *See* 47 U.S.C. § 405(a). But if the Court does reach this argument, the Commission’s purported failure to waive the application of the construction deadline rules to Schwab was not arbitrary and capricious, because Schwab did not even attempt to demonstrate that its site loss constituted good cause for a waiver. *See* 47 C.F.R. § 1.3.

### ARGUMENT

In affirming the Bureau’s denial of Schwab’s Fourth Tolling Request in the *Order* under review, the Commission found that “site loss” – not the COVID pandemic – “was the proximate cause of Schwab’s inability to construct.” *Order* ¶ 6 (JA\_\_). Under Rule 73.3598(b), “[s]ite loss [is] a circumstance which does not qualify for tolling.” *Id.* ¶ 6; *see also id.* ¶ 2 n.6 (JA\_\_, \_\_). The reason that “[t]he Commission does not grant tolling for site-related difficulties” under the rule is that “the choice of sites is a permittee’s independent business decision within its control, and the Commission has determined that a

three-year construction period provides ample opportunity for permittees to overcome unanticipated difficulties, including siting issues.” *Id.* ¶ 8 (JA\_\_).

The Commission acknowledged that there may be “impediments of a similar magnitude” to the criteria set forth in Rule 73.3598(b) that, although they do not “qualify for tolling treatment” under that rule, may entitle a permittee to “more time” by way of waiver of the construction period. *Order* ¶ 2 n.6 (JA\_\_). But to receive additional time, the permittee must show “good cause” for such a waiver. 47 C.F.R. § 1.3; *see Order* nn.6, 51; *see also Cram Commc’ns, LLC*, 23 FCC Rcd. 658, 662 ¶ 12 (2008) (where permittee did not cite any “encumbrance cognizable under the tolling rule,” the request for additional time “could be considered only on a waiver basis”); *Birach Broad. Corp.*, 18 FCC Rcd. at 1415-1416 ¶¶ 5-6 (encumbrance did not fall under tolling criteria and, separately, did not satisfy waiver standard).

Even assuming Schwab has standing, the Commission’s determination that Schwab was not entitled to a further extension of time to construct its radio station was entirely reasonable.

## I. SCHWAB HAS NOT DEMONSTRATED STANDING

To establish standing, Schwab “must show (1) an injury in fact that is ‘concrete and particularized’ and ‘actual or imminent’; (2) that the injury is fairly traceable to the defendant’s challenged conduct; and (3) that the injury is likely to be redressed by a favorable decision.”

*Marino v. Nat’l Oceanic & Atmospheric Admin.*, 33 F.4th 593, 596 (D.C. Cir. 2022) (citations omitted).

Here, Schwab has not shown “a likelihood that the requested relief will redress the alleged injury.” *Marino*, 33 F.4th at 596; *see also Food & Water Watch v. USDA*, 1 F.4th 1112, 1117 (D.C. Cir. 2021).

Schwab asserts that “[r]eversing the FCC and the Bureau’s actions, reinstating KWIF’s Construction Permit and its Modification Applications, and granting tolling of the Construction Permit expiration would redress Schwab’s injuries by allowing Schwab to construct KWIF and recoup its investments.” Br. 20. But Schwab has not demonstrated it has, or is likely to have, a viable site to build on during the remaining permit term. (When the tolling granted in response to Schwab’s Third Tolling Request expired, Schwab had 22 days left on its permit. *Order* n.18 (JA\_\_). Tolling pursuant to 47 C.F.R. § 73.3598(d) is granted in increments of up to six months.)

As explained *supra* at 8, 12-13, Schwab’s permit authorized it to construct a station at a specified site, but Schwab lost its landlord’s permission to build at that site, and it has not offered, in support of its claim of standing, any evidence that it has resolved, or is likely to resolve, its issues with its landlord. *See Order* ¶ 8 (JA\_\_). Although Schwab has applied to the Commission (twice) to modify its permit to move to a new site, *see* 47 C.F.R. § 73.3571, Schwab makes no showing that either site is likely to be approved, or that construction can proceed promptly once it is approved. The court cannot simply assume construction is viable when Schwab itself contends (Br. 36) that there exist “well-documented issues facing AM stations in selecting tower sites in the Los Angeles area.” *See also* Recon. Pet. ¶ 5 (describing “ground conductivity” issues at site proposed in May 2019) (JA\_\_); *see also* Br. 3 (describing “protracted technical disputes” that delayed approval of first site). Because Schwab’s theory of redressability rests on “unadorned speculation” that it has a viable path to construction, Schwab has failed to demonstrate standing. *Marino*, 33 F.4th at 596.

## II. SCHWAB DID NOT DEMONSTRATE IT QUALIFIED FOR TOLLING UNDER RULE 73.3598(B) OR (D)

As the Commission reasonably found, Schwab's Fourth Tolling Request failed to satisfy any of the criteria for tolling under Rule 73.3598(b), and did not meet the requirements for an extension of tolling under Rule 73.3598(d).

### A. Tolling Under Rule 73.3598(b) Is Unavailable For Site Loss

Rule 73.3598(b) identifies five circumstances under which the construction deadline "shall toll." 47 C.F.R. § 73.3598(b)(1)-(5). That list does not include site-related issues. *See id.* Consistent with the text of the rule itself – which provides for tolling "when construction is prevented by the following causes," *id.* § 73.3598(b) – the Commission has made clear that tolling under Rule 73.3598 is allowed "only" under the "strict criteria" that the rule enumerates. *Streamlining Order*, 13 FCC Rcd. at 23090, 23093 ¶¶ 84, 90; *see also JNE Invs., Inc.*, 23 FCC Rcd. 623, 629-630 ¶¶ 15-18 (2008) (denying a request for tolling premised on litigation that did not meet the description of legal proceedings for which the text of Rule 73.3598(b)(2) allows tolling).

In adopting the rule's criteria for tolling, the Commission rejected requests to include "the loss of an approved tower site," *Streamlining*

*Recon.*, 14 FCC Rcd. at 17538 ¶ 34, and recognized that delays arising “simply from misjudgments in specifying tower sites” were not a ground for tolling, *id.* at 17539 ¶ 37; *see also Cram Commc’ns*, 23 FCC Rcd. at 661 ¶ 10 (“the Commission rejected suggestions to add site-related difficulties to the tolling criteria”); *Royce Int’l Broad. Co.*, 23 FCC Rcd. 9010, 9016 ¶ 15 (2008) (similar).

By doubling the construction time allowed under an initial permit, the Commission explained, it had already provided an “adequate safety valve for diligent permittees to complete construction within [the] permit’s term,” even when they face “obstacles [to] construction.” *Streamlining Recon.*, 14 FCC Rcd. at 17539 ¶ 35. Coupled with this more generous initial time period, the Commission reasoned, strict criteria for tolling would “establish an incentive for all potential applicants to plan construction carefully,” and “to bring to the construction process the same degree of urgency brought to other business endeavors.” *Id.* at 17539 ¶ 36.

Schwab claims that “Commission precedent does not preclude tolling eligibility for site-related difficulties,” Br. 22, and that the *Order* “established a new policy . . . that tolling would not be granted under any circumstances for site issues resulting from a landlord’s actions,”



Br. 29, which the Commission applied to Schwab without “fair notice,” Br. 31. But that cannot be squared with the clear language of Rule 73.3598(b) and the agency’s consistent interpretation of that language in its adopting orders and many orders since. *See supra*. Indeed, Schwab elsewhere appears to concede that site loss does not qualify for tolling under Rule 73.3598(b), and is instead addressed through “requests for waiver.” *See* Br. 23.

Schwab’s “tolling” argument simply conflates tolling under Rule 73.3598 with waiver of that rule for good cause under Rule 1.3. *See, e.g.,* Br. 30 (“[T]olling requests for site issues . . . are reviewed on a case-by-case basis under the Commission’s general waiver standard, which it failed to apply to Schwab.”). When Schwab claims, for example, that various Media Bureau decisions have “granted tolling for site loss,” Br. 35, *see id.* at 34, the cited decisions all granted waiver of the Commission’s construction deadline rules, not tolling under Rule 73.3598. *See, e.g.,* *Letter to Cary S. Tepper*, Positive Alternative Radio, File No. BPFT-19980514 (MB Apr. 8, 2002) (“*Cary S. Tepper*”) (“waiver of our rules is warranted”) (JA\_\_); *Letter to Rebecca Duke*, WMLB, 18 FCC Rcd. 5034, 5035 (MB 2003) (“WMLB”) (circumstances “warrant[]

waiver of our rules”).<sup>1</sup> Schwab identifies no place in the *Order* where the Commission purported to foreclose the possibility of waiver under Rule 1.3 for permittees that experience site loss. But Schwab never argued that the loss of its construction site justified waiver of the deadline rules, as we explain in Part III.

Schwab’s challenge (Br. 36-39) to the Commission’s factual determination that site loss was the proximate cause of Schwab’s delayed construction is also unavailing. Schwab argues that “the Record did not demonstrate that Schwab permanently lost access to the Original Site.” Br. 36. But the Commission made no finding about “permanent” loss – it simply concluded that Schwab had no site that was “authorized and available” to build on when Schwab claimed that COVID and wildfires were preventing construction. *Order* ¶¶ 5, 8 (JA\_\_, \_\_). Schwab admits (Br. 4) that “the Original Site’s landlord prohibited Schwab from constructing KWIF at the site because of alleged technical issues,” although the site “remained available for lease

---

<sup>1</sup> Although the Bureau decisions Schwab cites are not part of the record, the Joint Appendix includes decisions not published in the FCC Record for the convenience of the Court.

by Schwab should the [technical] issue[s] be resolved.” Schwab does not claim ever to have resolved these technical issues.<sup>2</sup>

**B. Schwab Did Not Qualify For An Extension Of Tolling Under Rule 73.3598(d).**

The Commission’s determination that site loss caused Schwab’s delay in construction was, taken alone, a sufficient basis to deny Schwab’s application for review. *See Order* ¶ 9 (JA\_\_\_). Nonetheless, “in the interest of a complete record,” the Commission went on to address “Schwab’s pandemic-related arguments.” *Id.* ¶ 6 (JA\_\_\_). The Commission reasonably “reject[ed] Schwab’s allegation that the Bureau erred in not granting [further] tolling based on other causes, such as COVID.” *Id.*; *see id.* at ¶¶ 9-14 (JA\_\_-\_\_).

To be sure, the agency has allowed broadcasters and others “significant relief during the pandemic.” *Order* ¶ 10 (JA\_\_\_). Schwab itself was a beneficiary of the Media Bureau’s practice, at the

---

<sup>2</sup> Schwab failed to preserve any argument regarding the Bureau’s “fire-related denial.” *Order* n.14 (JA\_\_\_); *see* Br. 44-45. And to the extent Schwab seeks to challenge other portions of the underlying *Bureau Decision* – as distinct from the Commission’s *Order* – on the standard for analyzing Schwab’s COVID-based claims (Br. 39) and certain other topics (Br. 39-42, Br. 51-54), we note that this Court reviews the Commission’s final *Order*, and not the Bureau decisions that preceded it. *See* 47 U.S.C. § 402(b).

pandemic's onset, of "treat[ing] COVID-related tolling requests as urgent and, thus, grant[ing] tolling liberally without detailed verification of permittee contentions." *Id.* ¶ 12 n.48 (JA\_\_). But, under the Commission's rules, "permittees that seek additional construction time following a disaster must establish a material nexus between the disaster and [the] failure to construct." *Id.* ¶ 10 (JA\_\_). And tolling resulting from an act of God ends after six months, unless the permittee "submits [an] additional notification[] . . . detailing how the act of God continues to cause delays in construction, any construction progress, and the steps [the permittee] has taken and proposes to take to resolve any remaining impediments." 47 C.F.R. § 73.3598(d).

Schwab's Fourth Tolling Request "did not provide adequate evidence . . . to support its claim that the COVID pandemic was the cause of its continued failure to construct," as necessary under Rule 73.3598(d). *Order* ¶ 6 & n.39 (JA\_\_, \_\_). In all events, these documents were "late-filed and procedurally barred." *Id.* ¶ 6 (JA\_\_); *see* 47 C.F.R. § 1.106(c).

## 1. Schwab Never Demonstrated That COVID Delayed Construction

A permittee that seeks an extension of “act of God” tolling beyond the initial six-month term must “submit[] [an] additional notification[] . . . detailing how the act of God continues to cause delays in construction, any construction progress, and the steps [the permittee] has taken and proposes to take to resolve any remaining impediments.” 47 C.F.R. § 73.3598(d); *see Fla. Cmty. Radio*, 35 FCC Rcd. 6854, 6857 ¶ 9 (2020) (denying extension of “act of God” tolling where permittee “made no showing in its request for a tolling extension that Hurricane Michael continued to cause delays in construction”). The Commission thus correctly recognized that, to obtain an extension of the Bureau’s March 2020 grant of COVID-based tolling, Schwab had to show a “material nexus between the [pandemic] and [Schwab’s] failure to construct.” *Order* ¶ 10 (JA\_\_).

In seeking an extension of the “act of God” tolling granted in March 2020, Schwab relied on generalized evidence showing that some California businesses were subject to COVID restrictions, and that, as a general matter, the pandemic was causing some worker shortages and supply chain disruptions. *See Fourth Tolling Request* at 1 & nn.2-4

(JA\_\_-\_\_); *see id.* Exs. 2, 3 (government websites addressing COVID status and restrictions for Los Angeles County and for Culver City). But the Commission reasonably concluded that this type of generalized evidence “did not establish that Schwab itself experienced” delays caused by the pandemic. *Order* ¶ 12 (JA\_\_). And the FCC’s recognition that some stations had experienced COVID-related construction delays was likewise insufficient to overcome Schwab’s “fail[ure] to demonstrate that COVID encumbered any of its construction efforts.” *Id.* ¶ 13 (JA\_\_).

In its petition for reconsideration, Schwab submitted a number of documents purporting to show that it had made efforts to construct the station. At the outset, as the Commission reasonably concluded, the late-filed submission of those documents was barred by the Commission’s rules, which “preclude consideration of facts first presented on reconsideration unless the facts are new, previously unknown through the exercise of ordinary diligence, or consideration is required in the public interest.” *Order* ¶ 11 (JA\_\_) (citing 47 C.F.R. § 1.106(c)).

Schwab does not contend that the documents at issue were new or previously unknown when Schwab submitted them. Instead, Schwab

argues (Br. 49) that its reconsideration petition presented the “first opportunity to present this evidence” because the need to provide “detailed evidence of its ongoing construction efforts” “was not apparent to Schwab” until the Bureau denied its Fourth Tolling Request. But that is not the test, and in any event, Schwab was well aware throughout the proceeding that the Commission’s rules require a permittee requesting an extension of “act of God” tolling to “detail[] how the act of God continues to cause delays in construction, any construction progress, and the steps [the permittee] has taken and proposes to take to resolve any remaining impediments.” 47 C.F.R. § 73.3598(d); *see also Streamlining Order*, 13 FCC Rcd. at 23091 ¶ 87.

Schwab claims the Bureau instructed Schwab merely to “state . . . that the Pandemic continued to hinder” construction if it sought an extension of tolling. Br. 49. The Bureau did no such thing: it stated that, if “construction [could not] resume within 6 months due to the COVID-19 closure,” Schwab would be required to “file a status report . . . requesting continued tolling treatment.” Letter Order at 1 (MB Mar. 24, 2020) (JA\_\_). And even if the Bureau had provided direction contrary to Rule 73.3598(d), that would not excuse Schwab’s failure to adhere to the Commission’s codified rules. *See Malkan FM*

*Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (where published rules were clear, contrary information by FCC staff did not excuse noncompliance).

Schwab also argues (Br. 50) that the “Bureau could have reviewed Schwab’s construction evidence under Section 1.106(c)’s public interest prong,” which allows consideration of otherwise untimely information when the public interest so requires. 47 C.F.R. § 1.106(c)(2). But Schwab did not even “seek a finding that consideration of the untimely evidence was in the public interest.” *Order* ¶ 11 (JA\_\_). Schwab notes (Br. 50) that, in other “circumstances concerning station construction and site availability,” the agency has recognized a public interest in considering untimely documents. That did not require the Commission to do so here, where Schwab did not even attempt to make a public interest showing. *See Beehive Tel. Co. v. FCC*, 180 F.3d 314, 320 (D.C. Cir. 1999).

In any event, the Commission reasonably found that consideration of the untimely documents submitted with Schwab’s petition for reconsideration “would not have changed the outcome,” even if those documents had been timely submitted, because they did not show “meaningful construction efforts,” much less that any such efforts were



thwarted by the pandemic. *Order* ¶ 12 (JA\_\_). A “price quote for a transmitter and compilation of a list of studio equipment did not support a claim of construction efforts” because they did not show that Schwab had “actually purchased equipment, that equipment it ordered had been delayed, or that it had tried to install equipment but was unsuccessful in attempts to engage a construction crew” as a result of the pandemic. *Id.* ¶ 12 & n.45 (JA\_\_). The Commission also reasonably concluded that evidence related to efforts to secure a site – site leases and legal bills – was not evidence that Schwab “undertook construction efforts,” let alone experienced pandemic-related delay.<sup>3</sup> *Id.*; *see also id.* ¶ 8 (JA\_\_) (Schwab did not “claim that the pandemic caused its years-long site availability issues”). Although Schwab asserts its untimely documents “illustrate the Pandemic’s impact on Schwab’s efforts,” Br. 52, the only document it cites that even mentions the pandemic is an email from a Culver City official stating that the “pandemic has shut down the mall.” Recon. Pet. Ex. 7 (JA\_\_). As the Commission explained, “neither Schwab nor the letter explain the connection

---

<sup>3</sup> Even if Commission has considered “site leases” in other tolling or waiver cases (Br. 53-54), that would not require the Commission to conclude on this record that the leases Schwab submitted were probative of pandemic-related delays to Schwab’s construction efforts.

between mall closure and permitting delays for the antenna site,” which was located on an “adjacent property owned by the mall.” *Order* n.33 (JA\_\_). The Commission’s conclusion that Schwab failed to demonstrate a nexus between COVID and the delayed construction of KWIF was thus supported by substantial record evidence and is not arbitrary. *PSSI Glob. Servs.*, 983 F.3d at 7.

## 2. There Was No Unexplained Inconsistency

Schwab claims that agency treated Schwab inconsistently with prior Bureau actions involving requests for pandemic-based extensions. This claim is without merit.

Schwab contends (Br. 42) that the Commission “failed to justify” why it applied “stricter standards” to the Fourth Tolling Request than the Bureau had applied to Schwab’s Third Tolling Request. But when Schwab filed its Third Tolling Request in March 2020 – right as pandemic-related restrictions in the United States began to take hold – the Bureau necessarily “had limited information . . . with respect to COVID,” and as a result “granted tolling liberally without detailed verification of permittee contentions.” *Order* n.48 (JA\_\_). The Commission did not decide whether the Bureau’s initial grant of tolling was reasonable. *See id.* (“We note this Bureau-level decision is not

binding on the Commission.”). But regardless, the Bureau’s grant of Schwab’s request at the outset of the pandemic does not call into question the reasonableness of the Commission decision in 2022 – with the benefit of additional information concerning both “COVID in general and Schwab’s specific circumstances,” *id.* – to require Schwab to demonstrate the nexus between COVID and its construction delays.

Schwab also argues (Br. 47) that the Commission failed to explain “the disparate treatment of Schwab from similarly situated broadcasters who sought tolling on the basis of construction delays caused by the pandemic.” In the first place, Schwab never brought those decisions to the Commission’s attention, and even if Schwab had, “unchallenged staff decisions are not Commission precedent.” *Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008). The Commission may depart from them “without explanation.” *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1039 (D.C. Cir. 2017); *see also Consol. Commc’ns of California Co. v. FCC*, 715 F. App’x 13, 15 (D.C. Cir. 2018) (“nonbinding, staff-level decisions” “do not establish a prior practice from which the FCC must justify a departure”).

While Schwab quibbles with the strength of those permittees’ showings, it does not contend that the permittees in those cases

received pandemic-based extensions without demonstrating a connection between the pandemic and the delays they experienced. *See* Br. 46-47 (citing *Letter to KJLA-LLC*, File No. 0000162740 (MB Oct. 15, 2021) (detailing specific impediment that had since been resolved, with estimated completion date within 90 days) (JA\_\_); and *Gray Television Licensee, WVFX(TV)*, File No. 0000160513 at 2 (MB Oct. 7, 2021) (granting waiver where permittee detailed specific equipment that was not delivered due to “manufacturing and delivery backlogs” and provided a schedule for completion) (JA\_\_)).<sup>4</sup> And because the Commission applied the “reasonably comprehensible requirements” of Rule 73.3598(d) and Commission precedent in concluding that Schwab had not demonstrated the requisite nexus, Schwab should not “be heard to complain about lack of notice.” *Northstar Wireless, LLC v. FCC*, No. 18-1209, 2022 WL 2203808, at \*21 (D.C. Cir. June 21, 2022).

---

<sup>4</sup> Schwab refers to this this decision as “KKTm-LP,” *see* Br. 47, but the Letter Order to *Gray Television Licensee* dated October 7, 2021 in File No. 0000160513 is for station WVFX (JA\_\_).

### III. SCHWAB DID NOT SEEK A WAIVER TO ACCOUNT FOR ITS SITE LOSS, AND DID NOT DEMONSTRATE THAT ITS SITE LOSS JUSTIFIED AN EXTENSION OF TIME

In upholding the Bureau's denial of additional time for Schwab to construct, the Commission "affirm[ed] the Bureau's conclusion that there [were] no grounds for tolling or waiver" merely because Schwab's station "is the 'last' authorized AM station yet to be built" and "the Commission has recognized that AM stations provide important local programming, has not held an AM auction since that in which Schwab received the Permit, [and] has not announced any plans to open another nationwide AM filing window." *Order* ¶ 14 & n.56 (JA\_\_). Schwab argues (Br. 55-56) that the Commission should have granted Schwab more time to construct its station to serve the interest in promoting AM radio. But "[a]d hoc departures from [the Commission's] rules, even to achieve laudable aims, cannot be sanctioned." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008); *see also Consol. Commc'ns of California*, 715 F. App'x at 15 ("[p]romotion of the public interest, without more, does not compel the FCC to grant a waiver"). The Commission reasonably refused to depart from its rules on these grounds.

Schwab also seems to suggest (Br. 30) that the Commission erred in “fail[ing] to apply” its general waiver standard to account for Schwab’s “site issues.” *See also* Br. 25 & n.4. This “fleeting” argument, even if properly raised in Schwab’s brief, *but see Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008), is not before the Court because Schwab did not raise it before the Commission. And even if the Court had jurisdiction to consider this claim, there was nothing arbitrary about the Commission’s failure to grant a site loss-based waiver when Schwab never asked for one, nor even attempted to show that its site loss justified an extension of time.

**1. Any Argument That Schwab Was Entitled To A Waiver For Site Loss Is Barred Because It Was Not Presented To The Commission**

The Communications Act provides that a litigant that “relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass” must present the issue to the Commission by way of a petition for reconsideration as “a condition precedent to judicial review.” 47 U.S.C. § 405(a); *see NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016).

Schwab never argued in the agency proceeding that the loss of its original permitted site justified an extension of time. Prior to Schwab’s

reconsideration petition, Schwab “was silent as to the site loss issue and suggested that Schwab could still construct at the Original Site but for COVID.” *Order* ¶ 5 (JA\_\_). In its reconsideration petition, Schwab did no more than “note[] that Schwab had lost the landlord’s permission to use the Original Site well before filing the [Third] Tolling Request.”

*Order* ¶ 4 (JA\_\_).

Site loss-based waiver was also not among the three arguments Schwab raised in its application for Commission review of its denial of reconsideration. *See Application for Review* at 1-8 (JA\_\_-\_\_). In that application, Schwab complained, first, that the Bureau had improperly “ignored” the evidence that Schwab had submitted for the first time with its reconsideration petition. *See id.* at 3-4 (JA\_\_-\_\_). Second, Schwab argued that the Bureau had “ignored” “[t]he far-reaching effects of [the] COVID-19 pandemic,” which in Schwab’s view the Bureau should have analogized to “acts of God such as” recent hurricanes after which the FCC had “tolled construction permits” for affected permittees. *Id.* at 5-7 (JA\_\_-\_\_). Third, Schwab argued that “the express rationale” of the agency’s “AM Revitalization” proceeding – which recognized “the importance of AM Radio with regard to local programming” – warranted giving Schwab more time to construct its station. *Id.* at 6-7 (JA\_\_-\_\_).

Nowhere in the application for review did Schwab seek a waiver based on its site difficulties. Nor did Schwab raise any of the Media Bureau decisions it now cites (at Br. 33-36) in support of that claim.

This Court has repeatedly observed that “[t]he Commission need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner.” *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (internal quotation marks omitted); *see also NTCH, Inc.*, 841 F.3d at 508 (“vague allusions” before the agency to an argument raised on appeal “do not serve to satisfy the requirements of section 405(a)”). Even if the reference to site loss in Schwab’s reconsideration petition could be construed to raise the issue, “[u]nder the plain language of Section 405, an issue cannot be preserved for judicial review simply by raising it before a Bureau of the FCC.” *Bartholdi*, 114 F.3d at 279. “It is ‘the Commission’ itself that must be afforded the opportunity to pass on the issue.” *Id.* (quoting 47 U.S.C. § 405(a)(2)). Because the Commission had no opportunity to pass on whether Schwab’s site issues met the Commission’s waiver standard, this Court lacks jurisdiction to consider that question.



## 2. Schwab Never Demonstrated That Its Site Loss Constituted Good Cause For A Waiver

In any event, the Commission reasonably applied its construction deadline rules to Schwab – rather than waiving those rules – because Schwab made no attempt to show that its site loss constituted good cause.

The Commission may waive its rules only upon a showing of “good cause,” 47 C.F.R. § 1.3, which exists “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); *see also NetworkIP*, 548 F.3d at 127 (the Commission must “adhere to its own rules and regulations” unless it finds both a public interest basis *and* a justification for departure from the general rule). Waiver applicants thus face a “high hurdle” and “must plead with particularity the facts and circumstances which warrant such action.” *Birach Broad. Corp.*, 18 FCC Rcd. at 1415 ¶ 6 (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)).

In the context of construction delays, the Commission has explained that waivers will only be granted for “rare and exceptional circumstances . . . beyond [a permittee’s] control.” *Streamlining Recon.*,

14 FCC Rcd. at 17541 ¶ 42; *see Wendall & Assocs.*, 17 FCC Rcd. 18576, 18583 ¶ 23 (2002) (denying waiver). The Commission therefore denies waivers where the permittee contributed to the delay through lack of diligence, or where the circumstances were not otherwise rare and exceptional. *See JNE Invs.*, 23 FCC Rcd. at 631 ¶ 22 (affirming denial of waiver when “unusual circumstances” that had supported permittee’s earlier waiver no longer existed); *Cram Commc’ns*, 23 FCC Rcd. at 662-663 ¶¶ 12-13 (denying waiver where permittee did not request waiver and where delay was caused in part by permittee’s lack of diligence).

Schwab did not argue that its site loss warranted a waiver, and nothing required the Commission to waive Schwab’s construction deadline *sua sponte*. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1181-82 (D.C. Cir. 2003) (the rules “never compel the Commission to grant a waiver”). While Schwab suggests (at 32) that the Commission must grant an extension any time “circumstances beyond the permittee’s control delay[] its station’s construction,” the Commission has rejected this argument. *See Church Planters of Am.*, 29 FCC Rcd. 14023, 14025 ¶ 3 (2014). Indeed, if waivers were granted in response to any “unanticipated delay over which [permittees] have no direct control” – such as “winter weather, a more-lengthy-than-expected initial zoning

process, [or] vendor/manufacturer/contractor problems” – waivers would be “so common that they could negate the underlying rule.” *Id.*<sup>5</sup>

Schwab argues in its brief that it is “similarly situated” to parties that, in other proceedings, received extensions of construction deadlines from the Media Bureau related to “site difficulties.” Br. 33; *see id.* 33-

36. But Schwab never made that claim before the Commission.

Moreover, Schwab has not shown that the Commission has ever endorsed any of these Bureau-level decisions. *See Comcast*, 526 F.3d at 769 (“[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions.” (internal quotation marks omitted)).

In any event, as Schwab itself appears to concede, whether site-related issues warrant relief “must . . . be assessed on a case-by-case

---

<sup>5</sup> Schwab also suggests (at 1, 22) that the Commission’s tolling and waiver framework is inconsistent with the text of 47 U.S.C. § 319(b) (requiring automatic forfeiture of construction permits that fail to meet the Commission’s deadline unless construction is “prevented by causes not under the control of the [permittee]”). Schwab never presented this argument below, so it is not before the court. *See Nat’l Lifeline Ass’n v. FCC*, 983 F.3d 498, 509 (D.C. Cir. 2020). Moreover, in promulgating the rule, the Commission rejected the argument that the tolling framework is inconsistent with the statute, explaining that the Commission did not expect delay-causing factors outside the tolling criteria to be “generally so insurmountable that their effects cannot be overcome during the course of three years,” and that the agency would entertain waiver requests for exceptional cases of insurmountable delay. *Streamlining Recon.*, 14 FCC Rcd. at 17539, 17541 ¶¶ 35, 42.

basis,” Br. 32, an assessment that – as explained above, *see supra* at 41-42 – turns on rare and exceptional circumstances beyond even a diligent permittee’s control. Yet, beyond conclusory assertions that that the Commission has engaged in “disparate treatment” (Br. 34) Schwab makes little effort to explain why it is similarly situated to the parties in the Media Bureau decisions it cites with regard to that standard. *See* Br. 33-34 (citing *Word of God Fellowship*, WWIW-LD, File No. 0000159580 (MB Oct. 7, 2021) (JA\_\_)) (permittee “demonstrated that it has been diligently making progress towards completion of [station]” and had “all of the equipment necessary to build out its facility is on site and ready to be installed,” but was “unable to complete construction due local permitting delays”); *Cary S. Tepper* at 1-2 (JA\_\_-\_\_) (permittee had secured all necessary equipment but was unable to install it because, two months before the permit was due to expire, its site access was blocked by homeland security measures implemented after September 11, 2001); and *WMLB*, 18 FCC Rcd. at 5036 (applicant was “especially diligent” in filing an application to build on a new site within 30 days of losing its original site, and filing a second application within 30 days of the Bureau’s denial of its first application)). Especially given the Commission’s finding that Schwab’s construction efforts were not

“meaningful,” *Order* ¶ 12 (JA\_\_), it is not apparent – and Schwab does not explain – why the Commission was bound to find Schwab’s case analogous.

## CONCLUSION

The *Order* should be affirmed.

Dated: June 24, 2022

Respectfully submitted,

/s/ Rachel Proctor May

P. Michele Ellison  
*General Counsel*

Sarah E. Citrin  
*Deputy Associate General Counsel*

Rachel Proctor May  
*Counsel*

FEDERAL COMMUNICATIONS  
COMMISSION

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

*Counsel for Appellee Federal  
Communications Commission*

**CERTIFICATE OF COMPLIANCE**Certificate of Compliance With Type-Volume Limitation,  
Typeface Requirements and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1):
  - this document contains 8,769 words, *or*
  - this document uses a monospaced typeface and contains \_\_\_\_\_ lines of text.
  
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
  - this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook, *or*
  - this document has been prepared in a monospaced spaced typeface using \_\_\_\_\_ with \_\_\_\_\_.

/s/ Rachel Proctor May  
Rachel Proctor May  
*Counsel for Appellee*

**STATUTORY ADDENDUM**

**STATUTORY ADDENDUM CONTENTS**

	<b>Page</b>
<b>47 U.S.C. § 319 .....</b>	<b>Add. 2</b>
<b>47 U.S.C. § 402 .....</b>	<b>Add. 3</b>
<b>47 U.S.C. § 405 .....</b>	<b>Add. 4</b>
<b>47 C.F.R. § 1.3 .....</b>	<b>Add. 5</b>
<b>47 C.F.R. § 1.106 .....</b>	<b>Add. 6</b>
<b>47 C.F.R. § 73.3598 .....</b>	<b>Add. 8</b>



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

### **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.

47 U.S.C. § 402 provides in pertinent part:

**Judicial review of Commission's orders and decisions**

\* \* \*

(b) Right to appeal

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

- (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
- (7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
- (8) By any radio operator whose license has been suspended by the Commission.

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

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

47 U.S.C. § 405 provides in pertinent part:

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

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or

designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. § 1.3 provides in pertinent part:

**Suspension, amendment, or waiver of rules.**

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

47 C.F.R. § 1.106 provides in pertinent part:

**Petitions for reconsideration in non-rulemaking proceedings.**

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

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

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the

action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

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

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

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

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

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

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

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

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

**Period of construction.**

(a) Except as provided in the last two sentences of this paragraph (a), each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; low power FM; TV translator; TV booster; FM translator; or FM booster station, or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. An eligible entity that acquires an issued and outstanding construction permit for a station in any of the services listed in this paragraph (a) shall have the time remaining on the construction permit or eighteen months from the consummation of the assignment or transfer of control, whichever is longer, within which to complete construction and file an application for license. For purposes of the preceding sentence, an “eligible entity” shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR parts 121 through 201, at the time the transaction is approved by the FCC, and holds:

(1) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit; or

(2) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will hold the construction permit, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

(3) More than 50 percent of the voting power of the corporation that will hold the construction permit if such corporation is a publicly traded company.

(b) The period of construction for an original construction permit shall toll when construction is prevented by the following causes not under the control of the permittee:

- (1) Construction is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes);
  - (2) The grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement;
  - (3) A request for international coordination, with respect to an original construction permit for a new DTV station, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received, or the licensee or permittee is challenging the response from Canada or Mexico on the grounds that the facility as approved would not permit the station to serve the population that is both approved by the Commission and served by the station's TV (analog) facility to be vacated by June 12, 2009;
  - (4) A request for international coordination, with respect to a construction permit for stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received; or
  - (5) Failure of a Commission-imposed condition precedent prior to commencement of operation.
- (c) A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation. All notifications must be filed in triplicate with the Secretary and must be



placed in the station's local public file. For authorizations to construct stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, the Commission will identify and grant an initial period of tolling when the grant of a construction permit is encumbered by administrative or judicial review under the Commission's direct purview (e.g., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), a request for international coordination under paragraph (b)(4) of this section, or failure of a condition under paragraph (b)(5) of this section. When a permit is encumbered by administrative or judicial review outside of the Commission's direct purview (e.g., local, state, or non-FCC Federal requirements), the permittee is required to notify the Commission of such tolling events.

(d) A permittee must notify the Commission promptly when a relevant administrative or judicial review is resolved. Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six-month intervals detailing how the act of God continues to cause delays in construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments. For authorizations to construct stations in the Low Power FM service, on FM channels reserved for noncommercial educational use, and for noncommercial educational full power television stations, the Commission will cease the tolling treatment and notify the permittee upon resolution of either:

- (1) Any encumbrance by administrative or judicial review of the grant of the construction permit under the Commission's direct purview;
- (2) The request for international coordination under paragraph (b)(4) of this section; or

(3) The condition on the commencement of operations under paragraph (b)(5) of this section.