

BRIEF FOR APPELLEE

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

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No. 10-1344  
—————

ENVIRONMENTEL, LLC,  
  
APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION  
  
APPELLEE.

—————  
ON APPEAL OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
  
—————

AUSTIN C. SCHLICK  
GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH  
ACTING ASSOCIATE GENERAL COUNSEL

MAUREEN K. FLOOD  
COUNSEL

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

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

### **1. Parties.**

All parties, intervenors, and amici in this case are listed in the Brief for the Appellant.

### **2. Rulings under review.**

*Thomas K. Kurian, Assignor; AMTS Consortium LLC, Assignee; Application for Consent to Partial Assignment of the License for Station WQCP809, 25 FCC Rcd 13863 (2010).*

### **3. Related cases.**

The *Order* on review has not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.

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## **GLOSSARY**

ACL	AMTS Consortium LLC (a.k.a. Environmental)
AMTS	Automated Maritime Telecommunications System
Commission or FCC	Federal Communications Commission
Division or MD	Mobility Division
ULS	Universal Licensing System
Wireless Bureau or WTB	Wireless Telecommunications Bureau

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BRIEF FOR APPELLEE

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**JURISDICTION**

The Federal Communications Commission (“FCC” or “Commission”) released the *Order* on appeal on September 22, 2010. *Thomas K. Kurian, Assignor; AMTS Consortium LLC, Assignee; Application for Consent to Partial Assignment of the License for Station WQCP809*, 25 FCC Rcd 13863 (2010) (“*Order*”). This Court’s jurisdiction rests on 47 U.S.C. § 402(b)(6).

**QUESTION PRESENTED**

Thomas K. Kurian contracted with appellant Environmental, LLC, to partially assign a radio spectrum license to Environmental. As the licensee of record, Kurian applied for – and the FCC’s staff approved – the assignment,

but Kurian subsequently notified the FCC that he was withdrawing his assignment application. Having received no notification from Environmental (the proposed assignee) that the assignment had been consummated, FCC staff processed Kurian's withdrawal request as a routine matter and granted the withdrawal. Environmental filed a notification later that same day claiming that the assignment had been consummated earlier, but the staff subsequently dismissed that notification, finding that there was no assignment to consummate because the application already had been withdrawn. On review, the Commission affirmed both staff actions and determined that the staff properly followed FCC precedent by declining to interject itself into the private contractual dispute between Kurian and Environmental over whether the proposed assignment had been consummated.

Environmental now challenges the FCC's *Order*.

The question presented is:

Whether the Commission acted within its discretion in denying review of the staff's decisions to (1) process Kurian's request to withdraw the assignment application and (2) dismiss Environmental's subsequent notification of consummation.

## STATUTES AND REGULATIONS

Pertinent statutory provisions and regulations are set forth in the addendum in this brief.

### COUNTERSTATEMENT

#### I. STATUTORY AND REGULATORY BACKGROUND

The Communications Act of 1934, as amended, establishes a system for licensing the use of radio spectrum and vests in the Commission the exclusive authority to grant radio licenses. 47 U.S.C. § 301. Under Section 310(d) of the Communications Act, any assignment of a radio license requires the Commission’s consent. 47 U.S.C. § 310(d); *see also* 47 C.F.R. § 1.948(a) (“authorizations in the Wireless Radio Services may be assigned by the licensee to another party ... only upon application to and approval by the Commission.”).

To initiate an assignment, the assignor (*i.e.*, the licensee of record) must file an application for Commission approval using FCC Form 603. 47 C.F.R. § 1.948(c); *see also* *Wireless Telecommunications Bureau Announces Changes to the Universal Licensing System to Implement the Commission’s Immediate Approval Procedures for Wireless License Assignments and Transfers*, Public Notice, 20 FCC Rcd 13042, \*\*4 (WTB 2005) (“2005 Public Notice”). The assignor typically submits Form 603 through the FCC’s Universal Licensing System (“ULS”), an Internet-based filing system that

allows parties to submit licensing applications for processing by the Commission.

The Commission (including the FCC's Wireless Telecommunications Bureau, acting on delegated authority) approves a proposed assignment by "affirmatively consent[ing] to the application." 47 C.F.R. § 1.948(j)(1)(vi); see also n.5, *infra*. "Grant of an assignment application represents the Commission's finding that the proposed transaction satisfies [the FCC's] rules and policies and is in the public interest." *Tsooris Corp.*, 12 FCC Rcd 1675, 1678 (1997). FCC consent to the assignment is reflected in a public notice issued promptly after the grant. 47 C.F.R. § 1.948(j)(1)(vii).

Such consent is permissive only, in that it "permits the parties to consummate a sale" but "does not compel them to do so." *Tsooris Corp.*, 12 FCC Rcd at 1678; see also *AMTS Consortium, LLC Application to Partially Assign License for Station WQCP810 to Northeast Utils. Serv. Co.*, 25 FCC Rcd 526, 531 (¶ 18) (2010) ("*ACL-NUSCO Assignment Order*").

Under the FCC's rules, the assignor – and only the assignor – may seek Commission approval to withdraw an assignment application. See 47 C.F.R. § 1.934(a)(1) ("Any applicant may request that its application be withdrawn or dismissed."). An assignment application may be withdrawn even after the agency has consented to the assignment. The assignor remains the licensee of

record until the Commission accepts notification that the assignment has been consummated. *Thomas K. Kurian, Assignor; AMTS Consortium LLC, Assignee; Application for Consent to Partial Assignment of the License for Station WQCP809*, 24 FCC Rcd 4849, 4851 (¶ 6, n.18) (2009) (“*Division Order*”) (JA ); *see also Warren C. Havens Request to Extend Constr. Deadline for Certain VHF Public Coast Station Geographic Area Licenses*, 19 FCC Rcd 7054 (¶ 1, n.2) (WTB 2004) (“*Havens Order*”) (explaining that Havens, the assignor, remained the licensee of record until the FCC received notice that pending assignments had been consummated).<sup>1</sup> Thus, the assignor may withdraw the assignment application at any time until the proposed assignee files a notification of consummation with the Commission. *Division Order*, 24 FCC Rcd at 4851 (¶ 6, n.18) (JA ); 47 C.F.R. § 1.948(d).

If the assignor requests permission to withdraw the assignment application, the Commission “will dismiss the application.” 47 C.F.R. § 1.934(a)(1)(i-ii).<sup>2</sup> But if the assignor and the assignee decide to proceed with the transaction, they must consummate the assignment and the assignee

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<sup>1</sup> Whether – and, if so, when – an assignment has been “consummated” is a question informed by contract law principles governing when an assignment of a property interest is deemed complete. *See pp. 25-31, infra.*

<sup>2</sup> The request to withdraw the assignment application (like the assignment application itself) would have to be consistent with the Communications Act and the FCC’s rules and policies. *See 47 U.S.C. § 310(d).*

must provide notification of the consummation to the FCC within 180 days of public notice of agency approval, unless a request for an extension of time to consummate is filed before the 180-day period expires. 47 C.F.R. § 1.948(d). In addition to complying with the 180-day deadline for consummation and notice to the Commission, the assignee must notify the FCC of the consummation no later than 30 days after the consummation occurs. *Id.* The notice of consummation, which the assignee files by again using FCC Form 603, accordingly must include the date on which the transaction was consummated. *Id.* If the assignor and assignee fail to comply with the 180-day deadline for consummation and notification, or fail to request an extension of time to do so, the FCC will rescind approval of the assignment and send a dismissal letter to the parties. *Federal Communications Commission Announces Waiver Relief for Untimely Notifications of Consummation of Wireless License Assignment and Transfer of Control Applications*, Public Notice, 19 FCC Rcd 24549, 24550 (2004) (“2004 Public Notice”).

## II. FACTUAL BACKGROUND

### A. The Wireless Bureau's Consent To Kurian's Partial Assignment Application And Its Subsequent Grant Of Kurian's Request To Withdraw His Application.

In a spectrum auction that the FCC concluded in September 2004, Thomas K. Kurian submitted the winning bid for an AMTS<sup>3</sup> license that authorized Kurian to provide AMTS service along waterways in a number of western states (the "AMTS License"). *See Wireless Telecommunications Bureau Announces the Grant of 10 Automated Maritime Telecommunications System Licenses*, Public Notice, 20 FCC Rcd 8244 (WTB 2004); *see also Division Order*, 24 FCC Rcd 4849 (¶ 2) (JA ).

In June 2005, Kurian filed an application requesting FCC consent to assign a portion of the spectrum governed by the AMTS License to AMTS Consortium, LLC.<sup>4</sup> *Division Order*, 24 FCC Rcd at 4849 (¶ 2) (JA ). The FCC's Wireless Telecommunications Bureau consented to the application on

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<sup>3</sup> Automated Maritime Telecommunications System ("AMTS") service is principally a type of wireless radio service that uses antennas at coast stations to provide maritime voice and data communications, akin to a cellular phone systems, for tugs, barges, and other vessels on waterways. *Amendment of the Commission's Rules Concerning Maritime Communications*, Second Memorandum Opinion and Order and Fifth Report and Order, 17 FCC Rcd 6685, 6695 (¶ 22) (2002).

<sup>4</sup> At that time, Environmental operated under the name AMTS Consortium LLC ("ACL"). For convenience, we refer to ACL as Environmental.

April 7, 2006. *Id.*<sup>5</sup> Following administrative litigation before the FCC between Kurian and his ex-wife (who opposed the partial assignment), the Wireless Bureau’s Mobility Division granted requests for an extension of time until November 10, 2007 to consummate the assignment. *Id.* ¶ 2 & n.7. (JA ).<sup>6</sup>

On October 12, 2007, almost a month before the consummation deadline, Kurian completed and filed a Form 603 request seeking Commission approval to withdraw his assignment application. *Division Order*, 24 FCC Rcd 4850 (¶ 3) (JA ). The Mobility Division duly processed Kurian’s withdrawal request six days later on October 18, 2007, *id.*, consistent with the Commission’s rules. *See* 47 C.F.R. § 1.934(a)(1)(ii). The assignment application was thereafter listed in ULS as “Withdrawn.” *Division Order*, 24 FCC Rcd at 4850 (¶ 3) (JA ).

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<sup>5</sup> The Wireless Telecommunications Bureau (“Wireless Bureau”) may consent to an assignment application under authority delegated to it by the Commission. *See* 47 C.F.R. §§ 0.131(a) (functions of Wireless Bureau), 0.331 (delegation of authority to Wireless Bureau); *see also* 47 U.S.C. § 155(c) (generally authorizing delegation of authority to FCC staff).

<sup>6</sup> Kurian’s ex-wife filed an informal opposition to the partial assignment to Environmental. *Division Order*, 24 FCC Rcd at 4849 n.5 (JA ). Although Mrs. Kurian’s pleadings in opposition were eventually denied or dismissed, the uncertainty caused by the litigation delayed consummation of the assignment. *Id.*

Later that same day,<sup>7</sup> Environmental filed a notification of consummation.<sup>8</sup> *Division Order*, 24 FCC Rcd at 4850 (¶ 3) (JA ). Environmental asserted in its notification that the assignment of the AMTS License had been consummated on October 10, 2007 – two days before Kurian’s request to withdraw the application. *Id.* The Mobility Division dismissed Environmental’s notification of consummation, however, because Kurian’s withdrawal of the application had been granted before Environmental’s submission of its notification of consummation. *Id.* Thus, by the time of Environmental’s filing, there was no approved assignment to consummate. *Id.*

**B. The Mobility Division’s Denial Of Environmental’s Petitions For Reconsideration**

On November 19, 2007, Environmental filed a petition asking the Wireless Bureau to reconsider the Mobility Division’s decision to grant

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<sup>7</sup> Environmental contends that it filed the notification of consummation on October 17, 2007, the day before the staff processed Kurian’s withdrawal request. Br. 17, 41. That is incorrect. The documentary evidence confirms that Environmental filed the notification of consummation on October 18, 2007. *Division Order*, 24 FCC Rcd at 4850 (¶ 3) (JA ), *Order*, 25 FCC Rcd at 13864 (¶ 2) (JA ). Indeed, the Environmental’s Form 603 bears that date. *See* Environmental Notification of Consummation (JA ).

<sup>8</sup> Environmental filed this notice manually (by letter and e-mail) and electronically (by filing it as a “pleading” using ULS). Environmental was unable to file the notice electronically using ULS because that system does not accept notifications of consummation for assignment applications that are in “Withdrawn” status. *Division Order*, 24 FCC Rcd at 4850 (¶ 3, n.8).

Kurian's request to withdraw the assignment application. Petition for Reconsideration at 1 (Nov. 19, 2007) (JA ). On November 23, Environmental filed a second petition seeking reconsideration of the Mobility Division's dismissal of the notification of consummation that Environmental submitted on October 18, 2007. Petition for Reconsideration at 1 (Nov. 23, 2007) (JA ). The Mobility Division denied Environmental's petitions, finding that they "d[id] not demonstrate any error by the Division in processing the withdrawal request or in consequentially dismissing Environmental's notification of consummation." *Division Order*, 24 FCC Rcd at 4850 (¶ 5) (JA ).

The Mobility Division rejected Environmental's claim that only Environmental, as the proposed assignee, could withdraw the assignment application. *Division Order*, 24 FCC Rcd at 4851 (¶ 6) (JA ). Rather, the Division explained, FCC rule 1.948(c) provides that "an assignment application is an application by the proposed *assignor* for the Commission to consent to the proposed assignment of the rights granted by the station license(s)." *Id.* & n.17 (emphasis added) (JA ). Thus, "only the proposed assignor" (*i.e.*, Kurian) "may request withdrawal of an assignment application." *Id.*

The Mobility Division further found that it was not prohibited from processing Kurian's request to withdraw the application, despite the fact that Kurian did not serve it on Environmental. The Division noted that neither of Environmental's petitions for reconsideration identified any Commission rule requiring such service. *Division Order*, 24 FCC Rcd at 4851 (¶ 7) (JA ).

The Mobility Division also refused to consider Environmental's contention that, although the Commission had not been notified of consummation, the approved assignment actually had been consummated prior to Kurian's request to withdraw the application. The Division explained that its licensing staff is not obligated to investigate whether the transaction remains unconsummated before processing a prospective assignor's request to withdraw an approved assignment application for which no consummation notification has been received. *Division Order*, 24 FCC Rcd at 4851 (¶ 8) (JA ). The Division further observed that "[i]t would ... be illogical to accept and process notifications of consummation relating to a withdrawn assignment application" because "[u]pon the withdrawal of an approved assignment application," the participants are divested of authority to consummate the transaction. *Id.*

Concluding that "the gist of [Environmental's] grievance appears to be that Kurian's withdrawal request constitute[d] a breach of [the] contract he

entered into with [Environmental],” the Mobility Division noted that “[t]he Commission has long held that it is not the proper forum for the resolution of private disputes such as this, and . . . claims for redress stemming from such disputes should be adjudicated by courts of competent jurisdiction.” *Division Order*, 24 FCC Rcd at 4852 (¶ 9) (JA ). Finally, the Division emphasized that the “processing of the withdrawal request . . . does not immunize [Kurian] from the legal consequences of such withdrawal” should Environmental eventually prevail on a breach of contract claim properly brought in a state or federal court qualified to consider private contract law questions. *Id.*

**C. The Commission’s *Order Denying Review Of The Staff’s Actions***

On May 21, 2009, Environmental filed an application for Commission review of the Mobility Division’s denial of its petitions for reconsideration. The FCC denied review. *Order*, 25 FCC Rcd 13863 (JA ).

The Commission found no merit to Environmental’s claim that an assignment application cannot be withdrawn after the transaction is consummated in fact. *Order*, 25 FCC Rcd at 13864 (¶ 4) (JA ). The FCC explained that Environmental had identified “no authority for the proposition that consummation of which the Commission has not been notified cuts off an assignor’s ability to withdraw a consented assignment application, or the

Commission’s ability to act on such a request.” *Id.*, 25 FCC Rcd at 13865 (¶ 5) (JA ). The Commission, moreover, “concur[red]” with the Mobility Division “that licensing staff is not required to verify that the transaction remains unconsummated before processing a request to withdraw an assignment application.” *Id.* n. 17 (JA ). The Commission found that “[t]he processing of Kurian’s withdrawal request was a routine matter,” making the staff’s refusal to process Environmental’s subsequent notification of consummation proper “based on the simple fact that, at the time the notification was filed, there was no longer a consented assignment application to which it could apply.” *Order*, 25 FCC Rcd at 13685 (¶ 5) (JA ).

The Commission also rejected Environmental’s claim that the Mobility Division improperly interposed itself in a private contractual dispute when it failed to credit Environmental’s representation that the transaction had been consummated. *Order*, 25 FCC Rcd at 13865 (¶ 6) (JA ). As the Commission explained, the Mobility Division “did not purport to determine whether the transaction should be deemed to have been consummated under state law,” but simply “act[ed] according to ... standard [FCC] procedures in processing a withdrawal request, and then dismissing an unprocessable consummation notification.” *Id.* Indeed, “[b]y adhering to its routine practice ... the [Mobility] Division’s actions were consistent with the

Commission’s policy of not intervening in private contractual disputes that are the province of the courts.” *Id.* By contrast, “granting Environmental the relief requested” would have required the Mobility Division to determine whether the transaction had been consummated under the applicable state law, and thus “would have interjected the Commission into a private contractual dispute between Kurian and Environmental.” *Id.*

The Commission accordingly denied Environmental’s application for review and affirmed the Mobility Division’s decisions to (1) grant Kurian’s request to withdraw the assignment application and (2) dismiss Environmental’s subsequently filed notification of consummation. *Order*, 25 FCC Rcd at 13685 (¶ 7) (JA ).

## **SUMMARY OF ARGUMENT**

1. The Commission acted within its broad procedural discretion when it denied Environmental’s Application for Review. As both the Mobility Division and the Commission found, Environmental did not demonstrate any abuse of discretion in the staff’s routine processing of the withdrawal request or in dismissing Environmental’s subsequent notification of consummation. The FCC’s rules and processes allowed Kurian, as the assignor, to withdraw his application up to the point that the Commission received a notification of consummation from Environmental, the proposed assignee. Kurian filed his

withdrawal request prior to such notification. Consistent with the Commission's licensing regulations, agency staff processed that request as a routine matter, and dismissed Environmental's subsequently filed notification of consummation on the ground that there was no live assignment application to consummate.

2. The Commission also reasonably concluded that granting Environmental its requested relief would be inconsistent with the agency's longstanding policy of not intervening in private contract disputes. Both the Mobility Division and the Commission found that the gravamen of Environmental's grievance was that in withdrawing the assignment application, Kurian breached his contract with Environmental. Yet both this Court and the FCC have long held that the courts, rather than the Commission, are the proper forum to resolve such disputes. Environmental, moreover, has failed to demonstrate its eligibility for an exemption from this generally applicable rule.

3. The Court should not reach Environmental's remaining claims because Environmental did not present them to the Commission. 47 U.S.C. § 405(a) (barring court review of issues of fact or law upon which the FCC has had no opportunity to pass); *Qwest Corp. v. FCC*, 482 F.3d 471, 474

(D.C. Cir. 2007). But even if these newly minted claims had been properly raised, they provide no basis for reversing the Commission’s decision.<sup>9</sup>

## ARGUMENT

### I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL.

To the extent that Environmental challenges the reasonableness of the Commission’s decision, the Court must affirm the agency unless its action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). This “[h]ighly deferential” standard of review “presumes the validity of agency action.” *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000).

The Commission, moreover, enjoys broad latitude to establish its own procedures. *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)

(“subordinate questions of procedure in ascertaining the public interest, when

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<sup>9</sup> The FCC does not contest Environmental’s standing before this Court. Environmental alleges an injury-in-fact – *i.e.*, loss of a license that it expected to obtain pursuant to an assignment. According to Environmental, that injury is, in part, traceable to the FCC’s decisions to grant Kurian’s withdrawal of his assignment application and dismiss Environmental’s notification of consummation of the assignment. Moreover, if the Court were to adopt all of Environmental’s arguments in their entirety as the holding of the Court, including Environmental’s claim that the FCC was compelled to accept Environmental’s notification of consummation (Br. 30-32), Environmental’s claims arguably would be redressable by Commission action on remand. *See Arcibo Radio Corp.*, 101 F.C.C.2d 545, \*3-4 (¶¶ 9-10) (1985) (adhering to court ruling in a contract dispute, FCC waived assignment application signature rule to facilitate court-approved sale to qualified licensee).

the Commission’s licensing authority is invoked ... were explicitly and by implication left to the Commission’s own devising, so long ... as it observes the basic requirements designed for the protection of private as well as public interest.”).

Finally, the Commission’s interpretation “of its own rules is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Star Wireless LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (internal quotation marks and citation omitted); *see also Damsky v. FCC*, 199 F.3d 527, 535 (D.C. Cir. 2000) (the Court affords substantial deference to the Commission’s interpretation of its own rules and policies, and “will uphold the FCC’s interpretation unless it is ‘plainly erroneous or inconsistent with the regulation.’”) (internal quotation marks and citation omitted).

## **II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN AFFIRMING THE MOBILITY DIVISION’S DECISION TO PROCESS KURIAN’S WITHDRAWAL REQUEST AND DISMISS ENVIRONMENTELE’S SUBSEQUENT NOTIFICATION OF CONSUMMATION.**

Under the Commission’s licensing rules, an assignor may file an application to assign its license, or a portion thereof, to another. *Division Order*, 24 FCC Rcd at 4851 (¶ 6) (JA ); 47 C.F.R. § 1.948(c). Once filed, “the proposed assignor” – the licensee of record – “may request withdrawal of [the] assignment application” (*Division Order*, 24 FCC Rcd at 4851 (¶ 6)

(JA ); 47 C.F.R. § 1.934(a)(1)), and may do so at any time until the prospective assignee formally notifies the Commission that the assignment has been consummated. *Division Order*, 24 FCC Rcd at 4851, n.18 (JA ). Upon receipt of such a request, the Commission “*will* dismiss that application.” 47 C.F.R. § 1.934(a)(1)(i-ii) (emphasis added).

In this case, Kurian submitted an application to partially assign the spectrum for the AMTS License to Environmental. *Order*, 25 FCC Rcd at 13863 (¶ 2) (JA ). The Commission’s staff consented to the partial assignment. *Id.* Subsequently, on October 12, 2007, Kurian filed a request to withdraw his application. Because Environmental failed to timely notify the Commission that the transaction had been consummated, as required by FCC rule 1.948(d), the Commission’s staff properly granted Kurian’s withdrawal request. *Id.* Accordingly, the assignment application was duly designated as “withdrawn” in ULS on October 18, 2007. *Id.*

As the Commission found, “[t]he processing of Kurian’s withdrawal request was a routine matter” that the Mobility Division performed in accordance with the FCC’s rules and regulations. *Id.*, 25 FCC Rcd at 13865 (¶ 5) (JA ). Once Kurian’s application had been lawfully withdrawn, the Mobility Division reasonably dismissed Environmental’s subsequent

notification of consummation because there was no live assignment to consummate. *Id.*

The Commission’s interpretation of its own rules is sound and entitled to substantial deference. *Star Wireless LLC*, 522 F.3d at 473; *Damsky*, 199 F.3d at 536. Here, the Commission reasonably applied its rules to find that the Mobility Division’s decisions to (1) grant Kurian’s request to withdraw the assignment application and (2) dismiss Environmental’s subsequently filed notification of consummation were proper. *Order*, 25 FCC Rcd at 13685 (¶ 7) (JA ). Because the agency committed no abuse of discretion in doing so, its decision denying Environmental’s application for review should be affirmed. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (“The Commission abuses its discretion when it arbitrarily violates its own rules, not when it follows them.”).

**A. The Commission Had Authority To Process Kurian’s Withdrawal Request And Dismiss Environmental’s Consummation Notification.**

Environmental argues that “once the FCC approved the Kurian/[Environmental] transaction in April, 2006 under 47 U.S.C. § 310(d), its regulatory role with respect to this transaction ceased.” Br. 30. Specifically, Environmental contends that the Commission lacked authority to process Kurian’s request to withdraw the assignment application and,

accordingly, lacked discretion to refuse to process Environmental's subsequent notification of consummation in light of the prior withdrawal. Br. 28-32. Both of Environmental's claims are wrong.

Environmental's first claim rests on the erroneous view that "[t]here is no FCC rule allowing the withdrawal of a license application as a matter of course simply upon the request of the applicant." Br. 29, n.14; *see also* Br. 41. This argument ignores rule 1.934(a)(1), which expressly provides that "[a]ny applicant may request that its application be withdrawn or dismissed." 47 C.F.R. § 1.934(a)(1). Pursuant to the FCC's regulations implementing Section 310(d) of the Act, a license remains with the assignor until the Commission accepts the assignee's notification of consummation. *Division Order*, 24 FCC Rcd at 4851, n.18 (JA ); *Havens Order*, 19 FCC Rcd at 7054 (¶ 1, n.2). Kurian, the licensee of record, was thus permitted to withdraw his assignment application on October 12, 2007 – six days prior to Environmental's submission of its purported consummation notice – because he remained the "applicant" for purposes of rule 1.934(a)(1). And once an applicant makes such a request, as Kurian did here, the Commission "will" grant the request. 47 C.F.R. § 1.934(a)(1)(i) (emphasis added). Finding no conflict with the Communications Act or the FCC's rules and policies, the

Mobility Division’s decision to process Kurian’s withdrawal request was entirely proper.

Environmental, without support in the Act or the FCC’s implementing regulations, asserts that a withdrawal request “must be supported by facts which *prima facie* support [the] ... request (*e.g.*, that parties have mutually agreed to withdraw the assignment application, that the assignment transaction cannot be consummated, etc.).” Br. 22; *see also* Br. 31, n.16.

According to Environmental, Kurian’s request – which “was unaccompanied by *any factual* support whatsoever” – was procedurally deficient. *Id.* But neither rule 1.934(a)(1) nor Commission precedent require the “factual support” demanded by Environmental. Likewise, Form 603 – which the Commission uses to process license assignment applications and requests to withdraw such applications – does not require an assignor to explain the basis for a proposed withdrawal, nor does it provide a space on the form for the assignor to present this information.

There would have been no basis for the Commission to require Kurian to demonstrate that he had obtained Environmental’s consent, given that Kurian (as the licensee of record) had full authority under the FCC’s rules to withdraw his application, and to do so without explanation. To the extent that Environmental now contends that Kurian’s withdrawal request was

inconsistent with Kurian’s agreement with Environmental (either because he failed to obtain Environmental’s consent to the withdrawal or because the transaction had been consummated in fact), its claim is grounded in contract law, not the Communications Act or the FCC’s licensing rules. *See infra*, pp. 25-31. Furthermore, as both the Commission and the judiciary have long held, contract claims are to be settled by courts of competent jurisdiction – not the FCC. *Id.* It follows that the Commission’s licensing staff was not required to consider, let alone “investigate any ostensible conflict” between, Kurian’s October 12, 2007 request to withdraw the assignment application and Environmental’s October 18, 2007 notification of consummation. *See* Br. 31; *see also* Br. 22.

Environmental’s second claim rests on the assertion that “the Commission is not vested with any discretion under § 1.948(d) [of its rules] to refuse to file or deny a notice of consummation,” Br. 30, the filing of which Environmental analogizes to a “ministerial act.” Br. 28-29.

Environmental is mistaken. In fact, the Commission does have such discretion, and has regularly exercised it. *See ACL-NUSCO Assignment Order*, 25 FCC Rcd at 531 (¶ 18) (explaining that “parties ... consummate the transaction ... at their own risk, including the risk that the grant might subsequently be rescinded”); *Improvement Leasing Co.*, 73 F.C.C.2d 676,

684 (¶ 19) (1979) (“consummation in no way prejudices the Commission’s ability to take any remedial action it may consider necessary at a future date”), *aff’d sub nom. WATCH v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981); *Amendment of Section 1.948(d) of the Commission’s Rules to Extend the Time for Consummation and Notification of Wireless Transfers and Assignments*, 1999 WL 988172, (¶ 4, n.4) (1999) (revisions to rule 1.948(d) “do[] not modify [the FCC’s] authority to impose additional consummation and notification requirements on specific transactions.”).<sup>10</sup>

The Commission, for example, has notified licensees that it will rescind approval of a transfer or assignment if it does not receive timely notification of consummation, even if the transaction has been consummated in fact. *See 2004 Public Notice*, 19 FCC Rcd at 24550. Accordingly, if the

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<sup>10</sup> Environmental further asserts that “it is undisputed that in the instant case the Wireless Bureau *was* notified of the consummation of the [Environmental]/Kurian transaction” and therefore “it no longer maintained the discretion to approve the Withdrawal Application.” Br. 40-41. The “notification” cited by Environmental is an October 17, 2007 e-mail from Environmental principal Warren C. Havens to Wireless Bureau staff. That is not proper notification of consummation, however, because the e-mail stated only that Environmental *intended* to file a notification of consummation in the near future, whereas section 1.948(d) of the Commission’s rules requires an assignee to actually file a notification of consummation using Form 603. *See* 47 C.F.R. § 1.948(d). In fact, Environmental tried to file electronically a notification of consummation using Form 603 on October 18, 2007, but ULS blocked the submission because the assignment application had been withdrawn. *Division Order*, 24 FCC Rcd at 4850 (¶ 3, n.8) (JA ).

assignee files a consummation notification after the filing deadline, the Wireless Bureau will dismiss it, because the parties cannot consummate a license assignment that no longer has the requisite Commission consent. *See, e.g., Notice of Dismissal*, File No. 0004638774 (WTB March 23, 2011); *Notice of Dismissal*, File No. 0004636664 (WTB March 9, 2011) (Attachment B). Likewise, the Commission has corrected its licensing records to reflect a court ruling that set aside an assignment or transfer previously approved by the agency (and putatively consummated by the parties), after the court found that the transaction had never been lawfully consummated. *See Tsooris Corp.*, 12 FCC Rcd at 1678-79 (¶ 8); *Dale J. Parsons, Jr.*, 10 FCC Rcd 2718, 2719-20 (¶¶ 8-13) (1995). In light of the precedent establishing that the Commission may “unwind” a consummated transaction after the fact, it follows that the agency may dismiss a notification of consummation where, as here, there is no pending assignment to consummate.

Once Kurian’s application had been lawfully withdrawn, the Mobility Division reasonably dismissed Environmental’s subsequent notification of consummation “based on the simple fact that, at the time the notification was filed, there was no longer a consented assignment application to which it could apply.” *Order*, 25 FCC Rcd at 13865 (¶ 5) (JA ). As the Mobility

Division explained, “[u]pon the withdrawal of an approved assignment application, the participants no longer have Commission authority to consummate the proposed transaction.” *Division Order*, 24 FCC Rcd at 4851-52 (¶ 8) (JA ). It “would therefore be illogical to accept and process notifications of consummation relating to a withdrawn assignment application.” *Id.* (JA ).

**B. The Commission Acted Reasonably And Consistent With Precedent When It Declined To Consider Environmental’s Breach Of Contract Claims.**

Environmental next complains that the Wireless Bureau erred in processing Kurian’s request to withdraw the assignment application because the transaction allegedly had been consummated before the withdrawal request was filed. Br. 28-30. However, as the Mobility Division and the Commission explained, whether or not the transaction was consummated prior to withdrawal is a matter governed by state law. *Division Order*, 24 FCC Rcd at 4852 (¶ 9) (JA ); *Order*, 25 FCC Rcd at 13865 (¶ 6) (JA ). “[C]onsistent with the Commission’s policy of not intervening in private contractual disputes that are the province of the courts,” the Mobility Division acted reasonably when it “adher[ed] to its routine practice,” as set forth in the FCC’s regulations, by processing Kurian’s withdrawal request. *Order*, 25 FCC Rcd at 13865 (¶ 6) (JA ); *see also Listeners’ Guild v. FCC*,

813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing “the Commission’s longstanding policy of refusing to adjudicate private contract law questions”); *Northwest Broad., Inc.*, 12 FCC Rcd 3289 (1997), *aff’d sub nom. Montierth v. FCC*, 159 F.3d 636 (D.C. Cir 1998) (*per curiam*) (the FCC historically and consistently has left questions of private contracts to local courts of competent jurisdiction).

As the Mobility Division recognized, “the gist” of Environmental’s grievance with Kurian’s withdrawal request appeared to be that the request breached a contract with Environmental. *Division Order*, 24 FCC Rcd at 4852 (¶ 9) (JA ).<sup>11</sup> But “where a licensee is accused of breaching a contract to assign its license, the determination of whether a breach occurred is left to a local state court.” *Merkely*, 94 F.C.C.2d 829, 838 (¶ 18) (1983), *recon. denied*, 56 RR 2d 413 (1984), *aff’d per curiam*, 776 F.2d 365 (D.C. Cir. 1985). That is because “[t]he Commission,” which is charged with implementation and enforcement of the Communications Act, “does not possess the resources, the expertise or the jurisdiction to adjudicate such

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<sup>11</sup> See e.g., Br. 18 (“Kurian succeeded in unilaterally killing the deal between him and [Environmental], in derogation of the plain terms of the Agreement.”); *id.* at 30 (“[O]nce the transaction between [Environmental] and Kurian was consummated (*i.e.*, once all precedent to the closing of the transaction had occurred), Kurian’s obligations to transfer its license to [Environmental] vested as a matter of contract law.”).

claims fully.” *Id.*; see also *Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (“We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.”).

Environmental unsuccessfully tries to distinguish this case from *Listeners’ Guild* and *Regents* – which were cited by the Mobility Division (24 FCC Rcd at 4852 (¶ 9, n.24) (JA )) and the Commission (25 FCC Rcd at 13864 (¶ 3, n.11) (JA )) – by arguing that the validity of its agreement with Kurian is not directly at issue here. Br. 27-28. That alleged distinction does not undermine the FCC’s finding that Environmental’s dispute with Kurian is a matter of contract law that the Commission should not itself decide. Just like Environmental’s potential breach of contract claim, Environmental’s claim in this case is based on its contention that Kurian’s request to withdraw the assignment application came after the partial assignment was validly consummated. See Br. 28-32, 40-41; Application for Review at 2-7 (JA ). Environmental asked the Commission to disregard Kurian’s assertion that a valid consummation had occurred. But as the FCC has repeatedly found, “[w]hether consummation of a Commission-approved sale occurred is a contractual issue within the province of a local court, not the Commission.”

*Inforum Commc'ns, Inc.*, 20 FCC Rcd 820, 827 (¶ 12) (2005); *Tsooris Corp.*, 12 FCC Rcd at 1678 (¶ 8) (same).<sup>12</sup>

In *Tsooris Corp.*, for example, the Commission refused to determine whether an assignment had been consummated after an assignor contested the assignee's properly filed notice of consummation. 12 FCC Rcd at 1676 (¶ 2). The Commission instead notified the parties that after a local court of competent jurisdiction resolved the conflict over the consummation, "[t]he parties may then refer that court's determination as to their rights to [the FCC] for any action appropriate under the circumstances." *Id.* (citations and quotation marks omitted). In other words, while the dispute was initially brought to the Commission, the FCC underscored that it was for a court to determine whether and, if so, when a valid consummation had occurred. *Id.* After a state court found that there was no such consummation, the

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<sup>12</sup> Environmental contends that "once all conditions precedent to the closing of the Agreement occurred ..., consummation of the Agreement had taken place." Br. 28; *see also* Br. 31-32. Environmental thus assumes the very question that it wanted the Wireless Bureau decide, *i.e.*, whether Environmental had satisfied its duties under the Agreement and therefore accomplished "consummation" of the transaction. *See, e.g., Lyle v. Andrews*, 227 S.E.2d 686 (Va. 1976) (purchaser's refusal to consummate a sale subjected him to liability for breach of contract); *Casey v. Jones*, 339 A.2d 33, 34 (Md. 1975) (interpreting a contract to find that a broker was not entitled to a commission after the purchaser refused to consummate a sale). That would have embroiled the Mobility Division's licensing staff in a contract dispute – contrary to longstanding FCC precedent.

Commission, upon the request of the assignor, “chang[ed] the licensee of record to comport with the court’s determination.” *Id.*, 12 FCC Rcd at 1679 (¶ 9).

Accordingly, there is no merit to Environmental’s contention that the Commission “took sides in the contractual dispute between Kurian and [Environmental], effectively resolving [the] dispute in favor of Kurian.” Br. 32. In processing Kurian’s first-filed request to withdraw his assignment application, the Commission rightly declined to become embroiled in resolving a question of state contract law.<sup>13</sup> “[T]he [Mobility] Division did not purport to determine whether the transaction should be deemed consummated under state law,” the Commission explained, “nor does anything in the [*Division*] Order affect the rights of the parties under state law.” *Order*, 25 FCC Rcd at 13865 (¶ 6) (JA ).<sup>14</sup> Rather, it is for the courts

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<sup>13</sup> Where there is a dispute as to whether an assignment was consummated, the Commission adheres to the *status quo* until a court of competent jurisdiction resolves the dispute. Thus, if the license had already been placed in the assignee’s name, the Commission leaves the license in the assignee’s name until a court decides otherwise. *See, e.g., Tsooris Corp.*, 12 FCC Rcd at 1676 (¶ 2), *Inforum Commc’ns*, 20 FCC Rcd at 827 (¶ 12). Likewise, if the license was still in the assignor’s name at the time of the dispute, the Commission leaves the license in the assignor’s name until a court decides otherwise.

<sup>14</sup> Mobility Division staff only asked Environmental whether Kurian (the licensee of record) actually filed the withdrawal application. *See* pp. 33-34, *infra*.

to decide whether the consummation was valid, after which “[t]he Commission can ... take whatever steps are necessary, if any, to accommodate the court’s ruling on matters within its jurisdiction.” *See Tsooris Corp.*, 12 FCC Rcd at 1676 (¶ 9).

Indeed, the Mobility Division emphasized that “[its] processing of the withdrawal request ... does not immunize any party from the legal consequences of [the] withdrawal.” 24 FCC Rcd at 4852-53 (¶ 9) (JA ); *see also Northwest Broad., Inc.*, 12 FCC Rcd at 3295-96 (¶ 14) (1997) (“[A]pproval of an assignment application . . . is not intended to prejudice any relief to which the parties may ultimately be entitled or to foreclose the Commission from taking any appropriate action in light of any such court decision.”). Thus, if Environmental were to prevail on a breach of contract claim in a court of competent jurisdiction, and the court required specific performance as a remedy, the Commission could amend its licensing records to reflect the court’s ruling. *See Tsooris Corp.*, 12 FCC Rcd at 1679 (¶ 9) (Commission approves staff action correcting the agency’s licensing records to comply with a court’s determination that consummation of transfer had not occurred); *Dale J. Parsons*, 10 FCC Rcd at 2719-20 (¶¶ 6, 9) (same).

Indeed, Environmental concedes that it could “preserve its contractual rights” by “fil[ing] a specific performance suit,” after which it could

“commenc[e] the license assignment review process ... before the Wireless Bureau,” should a court rule in its favor. Br. 32. Nonetheless, Environmental has declined to institute such a proceeding, claiming that it “would engender further delay and expense.” *Id.* The Commission was not required to break with its longstanding policy of deferring to the courts on contract matters to settle this private contract dispute, simply because Environmental may find it more convenient to proceed before the agency.

**C. Environmental Is Not Eligible For An “Exception” To The General Rule That The Commission Does Not Intervene In Private Contractual Disputes.**

Environmental acknowledges “the FCC’s general rule that it does not interject itself in contractual matters.” Br. 33. Nonetheless, Environmental contends that the Commission abused its discretion in declining to make any exception for Environmental here. Br. 35-41. There is no merit to Environmental’s argument.

Environmental claims that the Commission will set aside an “assignment-related document” that “is filed under an ostensible authority which in fact does not exist.” Br. 34. According to Environmental, the Commission’s refusal to dismiss Kurian’s request to withdraw his assignment application was thus arbitrary and capricious given Kurian’s alleged lack of candor. Br. 34-36, 38-41. As an initial matter, all of the cases cited by

Environmental were decided by the Commission’s staff on delegated authority, and as this Court has held, a party cannot challenge a Commission-level order based on its alleged inconsistency with staff-level decisions. *See Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (affirming this Court’s “well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions.”).

Those staff decisions, moreover, are inapposite. In *Nevada Cogeneration Association Station WPMR751, Las Vegas, Nevada*, 24 FCC Rcd 5501, 5502 (¶ 6) (WTB 2009), the Mobility Division determined that Kurian was not authorized to submit an assignment application on behalf of the putative assignor, thus the purported assignment was *void ab initio*.<sup>15</sup> Similarly, in *Pacific Wireless Technologies, Inc. 800 Mhz Station KGQ445*, 18 FCC Rcd 7833, 7834 (¶ 2) (WTB 2003), the Mobility Division’s predecessor reinstated a license to the original assignor (Lodi), after its putative agent notified the staff that he had lacked authority to assign Lodi’s license to assignee Pacific Wireless. As in *Nevada Cogeneration Association*, the unauthorized assignment was *void ab initio* because the

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<sup>15</sup> Environmental argues that *Nevada Cogeneration Association* provides evidence of Kurian’s “propensity for making false filings with FCC” (Br. 36) and “misrepresentations.” Br. 40. The Commission made no such findings in that order and took no enforcement action against Kurian on that basis.

putative agent lacked authority to act as Lodi's signatory. *Id.*, 18 FCC Rcd at 7835 (¶ 3). Finally, in *Palmetto Cmmc's Co. WDIX, Yadkinville, North Carolina*, 6 FCC Rcd 2193, 2194-95 (¶ 10) (Rev.Bd 1991), the former Review Board revisited grant of a broadcast construction permit after it discovered that the licensee had misrepresented its ownership structure and, as a result, it was unclear who actually held the license.

Here, by contrast, there is no dispute that Kurian is the licensee of record for the AMTS License. Unlike the putative assignors in the staff-level decisions cited by Environmental, Kurian must be assumed to have had authority to file, and subsequently withdraw, his own application to partially assign that license to Environmental. *See* pp. 19-25, *supra*.

Indeed, Environmental's proposed "exception" to the rule that the Commission will not decide matters of state contract law turns on allegations regarding Kurian's lack of candor – not his lack of authority as the licensee of record. Br. 38. Environmental seems to contend that "Kurian's Withdrawal request was tantamount to an assertion that consummation had not occurred." Br. 31. In support, Environmental relies on an October 17, 2007, e-mail from Scot Stone, Deputy Chief of the Mobility Division, to Warren C. Havens, Environmental principal (JA ), in which Mr. Stone inquired, "Is the withdrawal request legitimate?" Br. 16. When read in context, however, it is

clear that the purpose of that e-mail was to determine whether Kurian had actually filed the withdrawal request – not whether he had obtained Environmental’s consent to do so.

As background, the Commission’s licensing staff discovered that in May 2007 Mr. Kurian’s former wife had, without authorization, withdrawn an assignment application filed with the Commission by one of Mr. Kurian’s business associates, and then changed the associate’s ULS password so that he could take no further action concerning the application. *Pappammal Kurian*, 24 FCC Rcd 4842, 4846 (WTB MD 2009). Mr. Stone’s inquiry was made to ensure that Mr. Kurian – and not Mrs. Kurian, who had opposed the partial assignment to Environmental – had filed the request to withdraw the assignment application. Indeed, Mr. Stone explained to Havens on October 18, 2007 that “[w]e have confirmed that Thomas Kurian did in fact file the Withdrawal, and have processed the WD accordingly.” *See* October 18, 2007 e-mail from Scot Stone to Warren Havens (JA ). Environmental does not dispute that the withdrawal request was in fact filed by Kurian.

As the staff decisions cited by Environmental make clear, the Commission has an obligation under the Communications Act to ensure that licenses are held and assigned only by those with authority to do so. By contrast, “licensing staff is not required to verify that the transaction remains

unconsummated before processing a request to withdraw an assignment application” (*Order*, 25 FCC Rcd at 13865 (¶ 5, n.17) (JA )); *see also Division Order*, 24 FCC Rcd at 4851 (¶ 8) (JA )), because consummation is a matter of contract law. Environmental’s allegations about Kurian’s lack of candor do not provide a valid basis for the Commission to depart from its general rule that it does not interject itself into private contractual disputes.

Environmental further contends that the FCC will intervene in a contract dispute “where a rule of the Commission has been violated.” Br. 33. But as we explain below, *see pp. 35-37*, Environmental never presented to the Commission its newly minted claim that Kurian violated the Commission’s *ex parte* rules. Given Environmental’s failure to allege (much less show) a rule violation, it cannot take advantage of an exception that turns on the existence of such a violation.

**III. ENVIRONMENTEL HAS WAIVED ITS REMAINING CLAIMS WHICH, EVEN IF PROPERLY PRESENTED, WOULD PROVIDE NO BASIS TO REVERSE THE COMMISSION’S ORDER.**

**A. Environmental’s Claim That Kurian Violated The Commission’s *Ex Parte* Rules Is Barred By 47 U.S.C. § 405(a) And Is Incorrect.**

Environmental complains that the Commission did not address whether Kurian violated the FCC’s *ex parte* rules when he failed to serve Environmental with his request to withdraw the assignment application. Br.

21. The reason why the Commission did not address this issue is straightforward: Environmental failed to raise it. *See* Application for Review (JA ). Hence, Environmental’s claim that Kurian violated the Commission’s *ex parte* rules (Br. 41-55) is not properly before the Court because it was not raised before the agency.<sup>16</sup>

Section 405(a) of the Communications Act provides that the filing of a petition for reconsideration with the FCC is a “condition precedent to judicial review” of any “questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass.” 47 U.S.C. § 405(a). Environmental cannot avoid section 405(a)’s bar by alleging that it presented the *ex parte* issue to the Wireless Bureau in its petitions for reconsideration. This Court has long held that “an issue cannot be preserved for judicial review simply by raising it before a Bureau of the FCC” because “[i]t is ‘the Commission’ itself that must be afforded the opportunity to pass.” *Bartholdi Cable Co. Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997); *see also Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C. Cir. 2001)

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<sup>16</sup> The Commission’s *ex parte* rules address public disclosure of written or oral communications that are directed to the merits or outcome of a proceeding and that, if written, are not served on all of the parties to the proceeding and, if oral, are made without giving all the parties to a proceeding advance notice and an opportunity to be present. *See* 47 C.F.R §§ 1.1200 through 1.1216.

(raising an argument before the Mass Media Bureau did not provide the Commission an opportunity to pass on the issue for purposes of section 405(a)). This Court has held that under section 405(a), it “generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission.” *Qwest Corp*, 482 F.3d at 474; *accord Havens v. FCC*, Judgment, No. 02-1358, slip. op. at 2 (D.C. Cir. May 24, 2011) (Court held it “lacked jurisdiction” to consider an argument appellant did not argue before the Commission). Because Environmental never presented its *ex parte* claim to the Commission, that claim is now barred, and the Court should dismiss it.

In any event, Environmental’s claim fails on the merits. Kurian was not required to serve his request to withdraw the assignment application on Environmental because 47 C.F.R. § 1.1204(a)(1) exempts from the Commission’s *ex parte* requirements those presentations that involve the filing of “required forms.”

An assignor requesting Commission consent to withdraw an assignment application is required to file FCC Form 603. *See 2005 Public Notice*, 20 FCC Rcd at 13046. That is precisely what Kurian did here. *Bureau Order*, 24 FCC Rcd at 4850 (¶ 3). Accordingly, Kurian was not required to serve Environmental with his request to withdraw the assignment application, because the filing of a required form – in this case, FCC Form

603 – is exempt under the Commission’s *ex parte* rules. *See Ass’n. for Cmty. Educ., Inc.*, 19 FCC Rcd 12682, 12685 (¶ 8) (2004) (request for technical modification of FM translator authorizations filed on FCC Form 349 is exempt from *ex parte* requirements); *Beyond the Bay Media Group*, 21 FCC Rcd 6967, 6974 (¶ 20) (MB 2006) (request to amend an application to modify broadcast facilities filed on FCC Form 301 is exempt from *ex parte* requirements); *Saga Cmmc’s of New England, LLC*, 21 FCC Rcd 2466, 2468 (¶¶ 6-7) (GC 2006) (same).

**B. Environmental’s Claim That Kurian’s Withdrawal Request Was Not Effective On The Date It Was Filed Is Barred By 47 U.S.C. § 405(a) And Fails On The Merits.**

Environmental finally asserts that the Mobility Division’s decision to process Kurian’s withdrawal request is *void ab initio* because the Wireless Bureau failed to timely issue a Public Notice announcing that decision, as required by section 1.933(a) of the Commission’s rules. *Br. 55 citing 47 C.F.R. § 1.933(a)(2)* (explaining that “[p]eriodically, the Commission issues Public Notices in the Wireless Radio Services listing information of public significance,” including “Commission actions on pending applications previously listed as accepted for filing”). That claim, like Environmental’s *ex parte* argument, is barred by section 405(a) of the Act because it was never

presented to the Commission. 47 U.S.C. § 405(a); *Qwest Corp.*, 482 F.3d at 474. The Court should therefore dismiss it.

Regardless, the Wireless Bureau's delay in listing the action on public notice provides no basis for overturning the Mobility Division's decisions to process Kurian's withdrawal request and dismiss Environmental's subsequent notification of consummation.<sup>17</sup> At most, the Wireless Bureau's delay in providing public notice of those actions constituted "harmless error." *Celcom Commc'ns Corp. v. FCC*, 789 F.2d 67, 70 n.5 (D.C. Cir. 1986) (finding the failure to issue a Public Notice harmless error because the appellant received actual notice of the Commission's decision). Environmental, like the appellant in *Celcom, id.*, "suffered no injury," because the Mobility Division "notified" Environmental on October 23, 2007, that it had processed Kurian's request to withdraw the assignment application and dismissed its notice of consummation. See Notice of Dismissal (JA ). Indeed, there is no question that Environmental had actual notice of the Mobility Division's actions because it sought reconsideration by the Wireless Bureau shortly thereafter. (JA ).

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<sup>17</sup> The Wireless Bureau, acting on delegated authority, issues such Public Notices on behalf of the Commission. See n.5, *supra*.

Environmental nonetheless contends that “the Wireless Bureau’s procedural misstep had demonstrably negative consequences.” Br. 56. Relying on section 1.103(a) of the Commission’s rules, 47 C.F.R. § 1.103(a), Environmental argues that the Public Notice set the effective date of Kurian’s withdrawal request as June 4, 2008, so that the Commission’s “conclusion that the Consummation Notification could not have been processed once the Withdrawal Request was filed and processed” was “based upon an incorrect premise as to the effective dates of the parties’ responsive filings.” Br. 56; *see also* Br. 8.

Environmental’s reliance on Rule 1.103(a) is misplaced. That rule establishes the effective date of actions taken by the full Commission. *See* 47 C.F.R. § 1.103(a) (“[u]nless otherwise specified by law or Commission rule ... the effective date of any Commission action shall be the date of public notice of such action.”). However, it was the Mobility Division, acting on delegated authority, that processed Kurian’s request to withdraw the assignment application. And the effective dates of actions taken pursuant to delegated authority are determined by rule 1.102(b)(1). *See* 47 C.F.R. § 1.102(b)(1) (“Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of

such action, or in the event such a document is not released, upon release of a public notice announcing the action in question.”).

Had Environmental relied upon the correct rule, its claim would still fail on the merits. Although the Mobility Division actually processed Kurian’s request to withdraw the assignment application on October 18, 2007 (a fact of which, as noted above, Environmental had actual knowledge), rule 1.102(b)(1) established the effective date for *that* action as June 4, 2008 – the date upon which the Wireless Bureau issued the Public Notice. But the Public Notice does not affect in any way the effective date of Kurian’s withdrawal request, because it was not a Bureau-level action subject to rule 1.102(b). Kurian’s request to withdraw the assignment application was filed on October 12, 2007, six days prior to Environmental’s subsequent notification of consummation. And as discussed above (*see* pp. 19-25, *supra*), the Commission will process a withdrawal request if it is filed – as in this case – prior to the FCC’s receipt of notification of consummation.

## CONCLUSION

For the reasons set forth herein, the appeal should be dismissed in part and otherwise denied on the merits.

Respectfully submitted,

AUSTIN C. SCHLICK  
GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH  
ACTING ASSOCIATE GENERAL  
COUNSEL

/s/ Maureen K. Flood

MAUREEN K. FLOOD  
COUNSEL

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

June 1, 2011

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

ENVIRONMENTEL, LLC,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE.

No. 10-1344

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 8,807 words.

/s/ Maureen K. Flood  
Maureen K. Flood  
Counsel  
Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1740 (Telephone)  
(202) 418-2819 (Fax)

June 1, 2011

# Appendix A: Statutes and Regulations

5 U.S.C. § 706  
47 U.S.C. § 155  
47 U.S.C. § 301  
47 U.S.C. § 310  
47 U.S.C. § 402  
47 U.S.C. § 405  
47 C.F.R. § 0.131  
47 C.F.R. § 0.331  
47 C.F.R. § 1.102  
47 C.F.R. § 1.103  
47 C.F.R. § 1.933  
47 C.F.R. § 1.934  
47 C.F.R. § 1.948  
47 C.F.R. § 80.123

5 U.S.C. § 706

Scope of Review.

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

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

47 U.S.C. § 155

(a) Chairman; duties; vacancy

The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports, except that any commissioner may present his own or minority views or supplemental reports, to represent the Commission in all matters requiring conferences or communications with other governmental officers, departments or agencies, and generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission. In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.

(b) Organization of staff

From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. Each such integrated bureau shall include such legal, engineering, accounting, administrative, clerical, and other personnel as the Commission may determine to be necessary to perform its functions.

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining,

ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

(2) As used in this subsection the term “order, decision, report, or action” does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. 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, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

(9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

#### (d) Meetings

Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.

#### (e) Managing Director; appointment, functions, pay

The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule.

47 U.S.C. § 301

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. § 310

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; multilateral or bilateral agreement to which United States and foreign country are parties as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis

by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term “regional concentration rules” means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

47 U.S.C. § 402

(a) Procedure

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

(b) Right to appeal

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

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

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

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

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

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 405

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

Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon

which the Commission gives public notice of the order, decision, report, or action complained of.

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

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

47 C.F.R. § 0.131

Marine VHF public coast stations, including AMTS coast stations, may provide service to stations on land in accordance with the following:

- (a) The public coast station licensee must provide each associated land station with a letter, which shall be presented to authorized FCC representatives upon request, acknowledging that the land station may operate under the authority of the associated public coast station's license:
- (b) Each public coast station serving stations on land must afford priority to marine-originating communications through any appropriate electrical or mechanical means.
- (c) Land station identification shall consist of the associated public coast station's call sign, followed by a unique numeric or alphabetic unit identifier;
- (d) Radio equipment used on land must be certified for use under part 22, part 80, or part 90 of this chapter. Such equipment must operate only on the public correspondence channels authorized for use by the associated public coast station;
- (e) Transmitter power shall be in accordance with the limits set in § 80.215 for ship stations and antenna height shall be limited to 6.1 meters (20 feet) above ground level;
- (f) Land stations may only communicate with public coast stations and must remain within radio range of associated public coast stations; and,
- (g) The land station must cease operation immediately upon written notice by the Commission to the associated public coast station that the land station is causing harmful interference to marine communications.

47 C.F.R. § 0.331

Authority delegated.

The Chief, Wireless Telecommunications Bureau, is hereby delegated authority to perform all functions of the Bureau, described in § 0.131, subject to the exceptions and limitations in paragraphs (a) through (d) of this section, and also the functions described in paragraph (e) of this section.

(a) Authority concerning applications.

(1) The Chief, Wireless Telecommunications Bureau shall not have authority to act on any radio applications that are in hearing status.

(2) The Chief, Wireless Telecommunications Bureau shall not have authority to act on any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines.

(b) Authority concerning forfeitures and penalties. The Chief, Wireless Telecommunications Bureau, shall not have authority to impose, reduce, or cancel forfeitures pursuant to the Communications Act of 1934, as amended, and imposed under regulations in this Chapter in amounts of more than \$80,000 for commercial radio providers and \$20,000 for private radio providers. Payments for bid withdrawal, default or to prevent unjust enrichment that are imposed pursuant to Section 309(j) of the Communications Act of 1934, as amended, and regulations in this Chapter implementing Section 309(j) governing auction authority, are excluded from this restriction.

(c) Authority concerning applications for review. The Chief, Wireless Telecommunications Bureau shall not have authority to act upon any applications for review of actions taken by the Chief, Wireless Telecommunications Bureau pursuant to any delegated authority, except that the Chief may dismiss any such application that does not comply with the filing requirements of § 1.115 (d) and (f) of this chapter.

(d) Authority concerning rulemaking proceedings. The Chief, Wireless Telecommunications Bureau shall not have the authority to act upon notices

of proposed rulemaking and inquiry, final orders in rulemaking proceedings and inquiry proceedings, and reports arising from any of the foregoing except such orders involving ministerial conforming amendments to rule parts, or orders conforming any of the applicable rules to formally adopted international conventions or agreements where novel questions of fact, law, or policy are not involved. In addition, revisions to the airport terminal use list in § 90.35(c)(61) of this chapter and revisions to the Government Radiolocation list in § 90.371(b) of this chapter need not be referred to the Commission. Adoption of certain technical standards applicable to hearing aid compatibility under § 20.19 of this chapter made together with the Chief of the Office of Engineering and Technology, as specified in § 20.19(k) of this chapter, also need not be referred to the Commission. Also, the addition of new Marine VHF frequency coordination committee(s) to § 80.514 of this chapter need not be referred to the Commission if they do not involve novel questions of fact, policy or law, as well as requests by the United States Coast Guard to:

- (1) Designate radio protection areas for mandatory Vessel Traffic Services (VTS) and establish marine channels as VTS frequencies for these areas; or
  - (2) Designate regions for shared commercial and non-commercial vessel use of VHF marine frequencies.
  - (3) Designate by footnote to frequency table in § 80.373(f) of this chapter marine VHF frequencies are available for intership port operations communications in defined port areas.
- (e) The Chief of the Wireless Telecommunications Bureau is delegated authority jointly with the Chief of the Office of Engineering and Technology to administer provisions of § 15.713(h)(8) of this chapter pertaining to the registration of event sites where large numbers of wireless microphones that operate on frequencies specified in § 74.802 of this chapter are used.

47 C.F.R. § 1.102

Effective dates of actions taken pursuant to delegated authority.

(a) Final actions following review of an initial decision.

(1) Final decisions of a commissioner, or panel of commissioners following review of an initial decision shall be effective 40 days after public release of the full text of such final decision.

(2) If a petition for reconsideration of such final decision is filed, the effect of the decision is stayed until 40 days after release of the final order disposing of the petition.

(3) If an application for review of such final decision is filed, or if the Commission on its own motion orders the record of the proceeding before it for review, the effect of the decision is stayed until the Commission's review of the proceeding has been completed.

(b) Non-hearing and interlocutory actions.

(1) Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question.

(2) If a petition for reconsideration of a non-hearing action is filed, the designated authority may in its discretion stay the effect of its action pending disposition of the petition for reconsideration. Petitions for reconsideration of interlocutory actions will not be entertained.

(3) If an application for review of a non-hearing or interlocutory action is filed, or if the Commission reviews the action on its own motion, the Commission may in its discretion stay the effect of any such action until its review of the matters at issue has been completed.

47 C.F.R. § 1.103

Effective dates of Commission actions; finality of Commission actions.

(a) Unless otherwise specified by law or Commission rule (e.g. §§ 1.102 and 1.427), the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules: Provided, That the Commission may, on its own motion or on motion by any party, designate an effective date that is either earlier or later in time than the date of public notice of such action. The designation of an earlier or later effective date shall have no effect on any pleading periods.

(b) Notwithstanding any determinations made under paragraph (a) of this section, Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or judicial review, on the date of public notice as defined in § 1.4(b) of these rules.

47 C.F.R. § 1.933

Public Notices.

(a) Generally. Periodically, the Commission issues Public Notices in the Wireless Radio Services listing information of public significance.

Categories of Public Notice listings are as follows:

- (1) Accepted for filing. Acceptance for filing of applications and major amendments thereto.
- (2) Actions. Commission actions on pending applications previously listed as accepted for filing.
- (3) Environmental considerations. Special environmental considerations as required by Part 1 of this chapter.
- (4) Informative listings. Information that the Commission, in its discretion, believes to be of public significance. Such listings do not create any rights to file petitions to deny or other pleadings.

(b) Accepted for filing public notices. The Commission will issue at regular intervals public notices listing applications that have been received by the Commission in a condition acceptable for filing, or which have been returned to an applicant for correction. Any application that has been listed in a public notice as acceptable for filing and is (1) subject to a major amendment, or (2) has been returned as defective or incomplete and resubmitted to the Commission, shall be listed in a subsequent public notice. Acceptance for filing shall not preclude the subsequent dismissal of an application as defective.

(c) Public notice prior to grant. Applications for authorizations, major modifications, major amendments to applications, and substantial assignment or transfer applications for the following categories of stations and services shall be placed on Public Notice as accepted for filing prior to grant:

- (1) Wireless Telecommunications Services.

(2) Industrial radiopositioning stations for which frequencies are assigned on an exclusive basis.

(3) Aeronautical enroute stations.

(4) Aeronautical advisory stations.

(5) Airport control tower stations.

(6) Aeronautical fixed stations.

(7) Alaska public fixed stations.

(8) Broadband Radio Service; and

(9) Educational Broadband Service.

(d) No public notice prior to grant. The following types of applications, notices, and other filings need not be placed on Public Notice as accepted for filing prior to grant:

(1) Applications or notifications concerning minor modifications to authorizations or minor amendments to applications.

(2) Applications or notifications concerning non-substantial (pro forma) assignments and transfers.

(3) Consent to an involuntary assignment or transfer under section 310(b) of the Communications Act.

(4) Applications for licenses under section 319(c) of the Communications Act.

(5) Requests for extensions of time to complete construction of authorized facilities.

(6) Requests for special temporary authorization not to exceed 30 days where the applicant does not contemplate the filing of an application for regular operation, or not to exceed 60 days pending or after the filing of an application for regular operation.

(7) Requests for emergency authorizations under section 308(a) of the Communications Act.

(8) Any application for temporary authorization under section 101.31(a) of this chapter.

(9) Any application for authorization in the Private Wireless Services.

47 C.F.R. § 1.934

Defective applications and dismissal.

(a) Dismissal of applications. The Commission may dismiss any application in the Wireless Radio Services at the request of the applicant; if the application is mutually exclusive with another application that is selected or granted in accordance with the rules in this part; for failure to prosecute or if the application is found to be defective; if the requested spectrum is not available; or if the application is untimely filed. Such dismissal may be “without prejudice,” meaning that the Commission may accept from the applicant another application for the same purpose at a later time, provided that the application is otherwise timely. Dismissal “with prejudice” means that the Commission will not accept another application from the applicant for the same purpose for a period of one year. Unless otherwise provided in this part, a dismissed application will not be returned to the applicant.

(1) Dismissal at request of applicant. Any applicant may request that its application be withdrawn or dismissed. A request for the withdrawal of an application after it has been listed on Public Notice as tentatively accepted for filing is considered to be a request for dismissal of that application without prejudice.

(i) If the applicant requests dismissal of its application with prejudice, the Commission will dismiss that application with prejudice.

(ii) If the applicant requests dismissal of its application without prejudice, the Commission will dismiss that application without prejudice, unless:

(A) It has been designated for comparative hearing; or

(B) It is an application for which the applicant submitted the winning bid in a competitive bidding process.

(2) If an applicant who is a winning bidder for a license in a competitive bidding process requests dismissal of its short-form or long-form application, the Commission will dismiss that application with prejudice. The applicant will also be subject to default payments under Subpart Q of this part.

(3) An applicant who requests dismissal of its application after that application has been designated for comparative hearing may submit a written petition requesting that the dismissal be without prejudice. Such petition must demonstrate good cause and be served upon all parties of record. The Commission may grant such petition and dismiss the application without prejudice or deny the petition and dismiss the application with prejudice.

(b) Dismissal of mutually exclusive applications not granted. The Commission may dismiss mutually exclusive applications:

(1) For which the applicant did not submit the winning bid in a competitive bidding process; or

(2) That receive comparative consideration in a hearing but are not granted by order of the presiding officer.

(c) Dismissal for failure to prosecute. The Commission may dismiss applications for failure of the applicant to prosecute or for failure of the applicant to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing, but may be with prejudice in cases of non-compliance with § 1.945 of this part. Dismissal will generally be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing. The Commission may dismiss applications with prejudice for failure of the applicant to comply with requirements related to a competitive bidding process.

(d) Dismissal as defective. The Commission may dismiss without prejudice an application that it finds to be defective. An application is defective if:

(1) It is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character;

(2) It requests an authorization that would not comply with one or more of the Commission's rules and does not contain a request for waiver of these rule(s), or in the event the Commission denies such a waiver request, does not contain an alternative proposal that fully complies with the rules;

- (3) The appropriate filing fee has not been paid; or
- (4) The FCC Registration Number (FRN) has not been provided.
- (5) It requests a vanity call sign and the applicant has pending another vanity call sign application with the same receipt date.

(e) Dismissal because spectrum not available. The Commission may dismiss applications that request spectrum which is unavailable because:

- (1) It is not allocated for assignment in the specific service requested;
- (2) It was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing harmful interference; or
- (3) Reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(f) Dismissal as untimely. The Commission may dismiss without prejudice applications that are premature or late filed, including applications filed prior to the opening date or after the closing date of a filing window, or after the cut-off date for a mutually exclusive application filing group.

47 C.F.R. § 1.948

Assignment of authorization or transfer of control, notification of consummation.

(a) General. Except as provided in this section, authorizations in the Wireless Radio Services may be assigned by the licensee to another party, voluntarily or involuntarily, directly or indirectly, or the control of a licensee holding such authorizations may be transferred, only upon application to and approval by the Commission.

(b) Limitations on transfers and assignments.

(1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

(2) In other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership, and the relationships of the owners, including family relationships.

(3) Designated Entities, as defined in § 1.2110(a) of this part, must comply with §§ 1.2110 and 1.2111 of this part when seeking to assign or transfer control of an authorization.

(4) Stations must meet all applicable requirements regarding transfers and assignments contained in the rules pertaining to the specific service in which the station is licensed.

(5) Licenses, permits, and authorizations for stations in the Amateur, Ship, Commercial Operator and Personal Radio Services (except 218-219 MHz Service) may not be assigned or transferred, unless otherwise stated.

(c) Application required. In the case of an assignment of authorization or transfer of control, the assignor must file an application for approval of the assignment on FCC Form 603. If the assignee or transferee is subject to the ownership reporting requirements of § 1.2112, the assignee or transferee must also file an updated FCC Form 602 or certify that a current FCC Form 602 is on file.

(1) In the case of a non-substantial (pro forma) transfer or assignment involving a telecommunications carrier, as defined in § 153(44) of the Communications Act, filing of the Form 603 and Commission approval in advance of the proposed transaction is not required, provided that:

(i) the affected license is not subject to unjust enrichment provisions under subpart Q of this part;

(ii) the transfer or assignment does not involve a proxy contest; and

(iii) the transferee or assignee provides notice of the transaction by filing FCC Form 603 within 30 days of its completion, and provides any necessary updates of ownership information on FCC Form 602.

(2) In the case of an involuntary assignment or transfer, FCC Form 603 must be filed no later than 30 days after the event causing the involuntary assignment or transfer.

(d) Notification of consummation. In all Wireless Radio Services, licensees are required to notify the Commission of consummation of an approved transfer or assignment using FCC Form 603. The assignee or transferee is responsible for providing this notification, including the date the transaction was consummated. For transfers and assignments that require prior Commission approval, the transaction must be consummated and notification provided to the Commission within 180 days of public notice of approval, and notification of consummation must occur no later than 30 days after actual consummation, unless a request for an extension of time to consummate is filed on FCC Form 603 prior to the expiration of this 180-day period. For transfers and assignments that do not require prior Commission approval, notification of consummation must be provided on FCC Form 603 no later than 30 days after consummation, along with any necessary updates of ownership information on FCC Form 602.

(e) Partial assignment of authorization. If the authorization for some, but not all, of the facilities of a radio station in the Wireless Radio Services is assigned to another party, voluntarily or involuntarily, such action is a partial assignment of authorization. To request Commission approval of a partial assignment of authorization, the assignor must notify the Commission on FCC Form 603 of the facilities that will be deleted from its authorization upon consummation of the assignment.

(f) Partitioning and disaggregation. Where a licensee proposes to partition or disaggregate a portion of its authorization to another party, the application will be treated as a request for partial assignment of authorization. The assignor must notify the Commission on FCC Form 603 of the geographic area or spectrum that will be deleted from its authorization upon consummation of the assignment.

(g) Involuntary transfer and assignment. In the event of the death or legal disability of a permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee, the Commission shall be notified promptly of the occurrence of such death or legal disability. Within 30 days after the occurrence of such death or legal disability (except in the case of a ship or amateur station), an application shall be filed for consent to involuntary assignment of such permit or license, or for involuntary transfer of control of such corporation, to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved. The procedures and forms to be used are the same procedures and forms as those specified in paragraph (b) of this section. In the case of Ship, aircraft, Commercial Operator, Amateur, and Personal Radio Services (except for 218-219 MHz Service) involuntary assignment of licenses will not be granted; such licenses shall be surrendered for cancellation upon the death or legal disability of the licensee. Amateur station call signs assigned to the station of a deceased licensee shall be available for reassignment pursuant to § 97.19 of this chapter.

(h) Disclosure requirements. Applicants for transfer or assignment of licenses in auctionable services must comply with the disclosure requirements of §§ 1.2111 and 1.2112 of this part.

(i) Trafficking. Applications for approval of assignment or transfer may be reviewed by the Commission to determine if the transaction is for purposes of trafficking in service authorizations.

(1) Trafficking consists of obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use.

(2) The Commission may require submission of an affirmative, factual showing, supported by affidavit of persons with personal knowledge thereof, to demonstrate that the assignor did not acquire the authorization for the principal purpose of speculation or profitable resale of the authorization. This showing may include, for example, a demonstration that the proposed assignment is due to changed circumstances (described in detail) affecting the licensee after the grant of the authorization, or that the proposed assignment is incidental to a sale of other facilities or a merger of interests.

(j) Processing of applications. Applications for assignment of authorization or transfer of control relating to the Wireless Radio Services will be processed pursuant either to general approval procedures or the immediate approval procedures, as discussed herein.

(1) General approval procedures. Applications will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (j)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 603, including any information and certifications (including those of the proposed assignee or transferee relating to eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is filed, and must include payment of the required application fee(s) (see § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application,

or determine to subject the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed, if filed electronically, and any required application fee has been paid (see § 1.1102); if filed manually, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days after the necessary data in the manually filed application is entered into ULS.

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (see § 1.933(a)) promptly issued after the grant.

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) Immediate approval procedures. Applications that meet the requirements of paragraph (j)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (j)(1) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if assigned or transferred, create a geographic overlap with spectrum in any licensed Wireless Radio Service (including the same service) in which the proposed assignee or transferee already holds a direct or indirect interest of 10% or more (see § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the assignee or transferee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (see §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The assignment or transfer of control does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules, and there is no pending issue as to whether the license is subject to revocation, cancellation, or termination by the Commission.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the assignment or transfer of control will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after the filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data in the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (see § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (see §§ 1.106(f), 1.108, 1.113).

47 C.F.R. § 1.1204

Exempt ex parte presentations and proceedings.

(a) Exempt ex parte presentations. The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda period prohibition (§ 1.1203):

(1) The presentation is authorized by statute or by the Commission's rules to be made without service, see, e.g., § 1.333(d), or involves the filing of required forms;

(2) The presentation is made by or to the General Counsel and his or her staff and concerns judicial review of a matter that has been decided by the Commission;

(3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, provided that, if not otherwise submitted for the record, Commission staff promptly places the presentation or a summary of the presentation in the record and discloses it to other parties as appropriate.

(4) The presentation involves a military or foreign affairs function of the United States or classified security information;

(5) The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision;

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a communications matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or Joint board proceeding) provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its

decision-making process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

Note 1 to paragraph (a): Under paragraphs (a)(5) and (a)(6) of this section, information will be relied on and disclosure will be made only after advance coordination with the agency involved in order to ensure that the agency involved retains control over the timing and extent of any disclosure that may have an impact on that agency's jurisdictional responsibilities. If the agency involved does not wish such information to be disclosed, the Commission will not disclose it and will disregard it in its decision-making process, unless it fits within another exemption not requiring disclosure (e.g., foreign affairs). The fact that an agency's views are disclosed under paragraphs (a)(5) and (a)(6) does not preclude further discussions pursuant to, and in accordance with, the exemption.

(7) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by 47 U.S.C. 332;

(8) The presentation is a written presentation made by a listener or viewer of a broadcast station who is not a party under § 1.1202(d)(1), and the presentation relates to a pending application that has not been designated for hearing for a new or modified broadcast station or license, for renewal of a broadcast station license or for assignment or transfer of control of a broadcast permit or license;

(9) The presentation is made pursuant to an express or implied promise of confidentiality to protect an individual from the possibility of reprisal, or there is a reasonable expectation that disclosure would endanger the life or physical safety of an individual;

(10) The presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement, subject to the following limitations:

(i) This exemption does not apply to restricted proceedings designated for hearing;

(ii) In restricted proceedings not designated for hearing, any new written information elicited from such request or a summary of any new oral information elicited from such request shall promptly be served by the person making the presentation on the other parties to the proceeding. Information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits, shall not be deemed to be new information for purposes of this section. The Commission or its staff may waive the service requirement if service would be too burdensome because the parties are numerous or because the materials relating to such presentation are voluminous. If the service requirement is waived, copies of the presentation or summary shall be placed in the record of the proceeding and the Commission or its staff shall issue a public notice which states that copies of the presentation or summary are available for inspection. The Commission or its staff may determine that service or public notice would interfere with the effective conduct of an investigation and dispense with the service and public notice requirements;

(iii) If the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure of any new written information elicited from such request or a summary of any new oral information elicited from such request must be made in accordance with the requirements of § 1.1206(b), provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement. As in paragraph (a)(10)(ii) of this section, information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits, shall not be deemed to be new information for purposes of this section;

Note 2 to paragraph (a): If the Commission or its staff dispenses with the service or notice requirement to avoid interference with an investigation, a determination will be made in the discretion of the Commission or its staff as to when and how disclosure should be made if necessary. See Amendment of Subpart H, Part I, 2 FCC Rcd 6053, 6054 ¶¶10–14 (1987).

(iv) If the presentation is made in a proceeding subject to the Sunshine period prohibition, disclosure must be made in accordance with the requirements of § 1.1206(b) or by other adequate means of notice that the Commission deems appropriate;

(v) In situations where new information regarding the merits is disclosed during settlement discussions, and the Commission or staff intends that the

product of the settlement discussions will be disclosed to the other parties or the public for comment before any action is taken, the Commission or staff in its discretion may defer disclosure of such new information until comment is sought on the settlement proposal or the settlement discussions are terminated.

(11) The presentation is an oral presentation in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay. A detailed summary of the presentation shall promptly be filed in the record and served by the person making the presentation on the other parties to the proceeding, who may respond in support or opposition to the request for expedition, including by oral ex parte presentation, subject to the same service requirement.

(12) The presentation is between Commission staff and:

(i) The administrator of the interstate telecommunications relay services fund relating to administration of the telecommunications relay services fund pursuant to 47 U.S.C. 225;

(ii) The North American Numbering Plan Administrator or the North American Numbering Plan Billing and Collection Agent relating to the administration of the North American Numbering Plan pursuant to 47 U.S.C. 251(e);

(iii) The Universal Service Administrative Company relating to the administration of universal service support mechanisms pursuant to 47 U.S.C. 254; or

(iv) The Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e), provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding;

(vi) The Pooling Administrator relating to the administration of thousands-block number pooling pursuant to 47 U.S.C. 251(e).

(b) Exempt proceedings. Unless otherwise provided by the Commission or the staff pursuant to § 1.1200(a), ex parte presentations to or from

Commission decision-making personnel are permissible and need not be disclosed with respect to the following proceedings, which are referred to as “exempt” proceedings:

- (1) A notice of inquiry proceeding;
- (2) A petition for rulemaking, except for a petition requesting the allotment of a broadcast channel (see also § 1.1206(a)(1)), or other request that the Commission modify its rules, issue a policy statement or issue an interpretive rule, or establish a Joint Board;
- (3) A tariff proceeding (including directly associated waiver requests or requests for special permission) prior to it being set for investigation (see also § 1.1206(a)(4));
- (4) A proceeding relating to prescription of common carrier depreciation rates under section 220(b) of the Communications Act prior to release of a public notice of specific proposed depreciation rates (see also § 1.1206(a)(9));
- (5) An informal complaint proceeding under 47 U.S.C. 208 and § 1.717 of this chapter or 47 U.S.C. 255 and either §§ 6.17 or 7.17 of this chapter; and
- (6) A complaint against a cable operator regarding its rates that is not filed on the standard complaint form required by § 76.951 of this chapter (FCC Form 329).

Notes 1 to 3 to paragraph (b): [Reserved]

Note 4 to paragraph (b): In the case of petitions for rulemaking that seek Commission preemption of state or local regulatory authority, the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.

47 C.F.R. § 80.123

Marine VHF public coast stations, including AMTS coast stations, may provide service to stations on land in accordance with the following:

- (a) The public coast station licensee must provide each associated land station with a letter, which shall be presented to authorized FCC representatives upon request, acknowledging that the land station may operate under the authority of the associated public coast station's license:
- (b) Each public coast station serving stations on land must afford priority to marine-originating communications through any appropriate electrical or mechanical means.
- (c) Land station identification shall consist of the associated public coast station's call sign, followed by a unique numeric or alphabetic unit identifier;
- (d) Radio equipment used on land must be certified for use under part 22, part 80, or part 90 of this chapter. Such equipment must operate only on the public correspondence channels authorized for use by the associated public coast station;
- (e) Transmitter power shall be in accordance with the limits set in § 80.215 for ship stations and antenna height shall be limited to 6.1 meters (20 feet) above ground level;
- (f) Land stations may only communicate with public coast stations and must remain within radio range of associated public coast stations; and,
- (g) The land station must cease operation immediately upon written notice by the Commission to the associated public coast station that the land station is causing harmful interference to marine communications.

Appendix B:  
WTB Dismissal Notices



Federal Communications Commission  
Wireless Telecommunications Bureau  
1270 Fairfield Road  
Gettysburg, PA 17325-7245  
NOTICE OF DISMISSAL

Date: 03/09/2011  
Reference No: 5121691  
File No.: 0004636664  
RadioService : AL  
Call Sign:  
Market Area:  
FAC#:

ATTN: DEBBIE CHAPPELL  
LRB RANCHES LLC DBA BRIGGS RANCHES  
PO BOX 1417  
VICTORIA, TX 77902-1417

Re: LRB RANCHES LLC DBA BRIGGS RANCHES

Your application is in a dismissal status effective 03/08/2011 without prejudice in accordance with Section 1.934 of the Commission's Rules for the reason(s) indicated below. If you still wish to be licensed, you must file a new application, fee, FCC Form 159 for feeable applications, and all required showings. If you currently hold a valid license, you may continue to operate under the parameters of that authorization.

If you are currently operating under authority provided by the Commission's Rules based on your submission of the above referenced application, you must immediately cease operation until such time as you come into compliance with the Rules.

**Certain services are subject to mandatory electronic filing pursuant to Section 1.913.** For all other services, you may file your application either electronically or manually, but not both. Electronic filing is recommended for the few radio services where manual filing is permitted. For information on how to file an application electronically, visit the website at <http://wireless.fcc.gov/uls>. If you wish to file your application manually, application forms can be obtained from the FCC's website at <http://www.fcc.gov/formpage.html>, by calling the FCC's Forms Distribution Center 800-418-FORM (800-418-3676), or from FCC's Fax Information System by dialing (202) 418-0177. For additional assistance, you may visit the website at <http://esupport.fcc.gov>. You may also call the FCC at (877) 480-3201 (TTY 717-338-2824). To provide quality service and ensure security, all telephone calls are recorded.

Your application for Notification of Consummation (NT) has been un-granted and has been dismissed. The associated Assignment application, file number 0004628263, was "un-consented" and placed back into pending status. There were some issues on the Assignment that needed to be corrected and has been returned on March 8, 2011 requesting that information. However, a NT cannot sit in pending status while a AA is in pending status, therefore the NT is being dismissed.

Once the AA application (0004628263) has been amended, resubmitted and re-consented, you will be able to file a NEW NT (you cannot re-file an application that has been dismissed).

IF you have questions you may contact our ULS Hotline at 1-877-480-3201, select option 2.



Federal Communications Commission  
Wireless Telecommunications Bureau  
1270 Fairfield Road  
Gettysburg, PA 17325-7245  
NOTICE OF DISMISSAL

Date: 03/23/2011  
Reference No: 5127937  
File No.: 0004638774  
RadioService : AL  
Call Sign:  
Market Area:  
FAC#:

ATTN: LEGAL DEPARTMENT  
INEOS INDUSTRIES US LLC  
2600 SOUTH SHORE BOULEVARD  
LEAGUE CITY, TX 77573

Re: INEOS INDUSTRIES US LLC

Your application is in a dismissal status effective 03/22/2011 without prejudice in accordance with Section 1.934 of the Commission's Rules for the reason(s) indicated below. If you still wish to be licensed, you must file a new application, fee, FCC Form 159 for feeable applications, and all required showings. If you currently hold a valid license, you may continue to operate under the parameters of that authorization.

If you are currently operating under authority provided by the Commission's Rules based on your submission of the above referenced application, you must immediately cease operation until such time as you come into compliance with the Rules.

**Certain services are subject to mandatory electronic filing pursuant to Section 1.913.** For all other services, you may file your application either electronically or manually, but not both. Electronic filing is recommended for the few radio services where manual filing is permitted. For information on how to file an application electronically, visit the website at <http://wireless.fcc.gov/uls>. If you wish to file your application manually, application forms can be obtained from the FCC's website at <http://www.fcc.gov/formpage.html>, by calling the FCC's Forms Distribution Center 800-418-FORM (800-418-3676), or from FCC's Fax Information System by dialing (202) 418-0177. For additional assistance, you may visit the website at <http://esupport.fcc.gov>. You may also call the FCC at (877) 480-3201 (TTY 717-338-2824). To provide quality service and ensure security, all telephone calls are recorded.

Your application is dismissed for the following reason:

The consent of associated TC application file number 0004623349 has been reversed and the application has been returned to a pending status due to invalid signatures. In view of this, the NT application cannot be acted upon and is dismissed. If the TC application file number 0004623349 is consented at a later date, a new consummation NT application must be filed.

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

**Environmentel, LLC, Appellant,**

**v.**

**Federal Communications Commission, Appellee.**

**CERTIFICATE OF SERVICE**

I, Maureen K. Flood, hereby certify that on June 1, 2011, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Tamir D. Damari  
Nossaman, LLP  
1666 K Street, N.W., Suite 500  
Washington, D.C. 20006-2803

/s/ Maureen K. Flood