

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

TV Communications Network, Inc.,)	
)	
Appellant,)	
)	
v.)	No. 11-1443
)	
FEDERAL COMMUNICATIONS)	
COMMISSION)	
)	
Appellee.)	

**MOTION OF THE FEDERAL COMMUNICATIONS
COMMISSION FOR DISMISSAL IN PART AND FOR
SUMMARY AFFIRMANCE IN PART**

Appellant TV Communications Network, Inc. (“TVCN”) was the winning bidder at an auction conducted by the Federal Communications Commission (“FCC” or “Commission”) of radio spectrum licenses. TVCN acquired those licenses subject to the condition that it would make full and timely payment for the licenses under an installment payment plan. After TVCN failed to make timely payments, its licenses automatically cancelled pursuant to the Commission’s rules.

In this case, TVCN seeks to challenge two FCC decisions: (1) an order issued on January 5, 2010, declining TVCN’s request for a waiver of the Commission’s automatic cancellation rules and for reinstatement of

TVCN's licenses (the *Installment Payment Order*);¹ and (2) a subsequent order dismissing TVCN's untimely petition for administrative reconsideration of the *Installment Payment Order* (the *Reconsideration Dismissal Order*).² Because TVCN did not file its appeal from the *Installment Payment Order* within the thirty-day window prescribed by section 402(c) of the Communications Act, 47 U.S.C. § 402(c), that appeal should be dismissed for lack of jurisdiction. And because TVCN's challenge to the *Reconsideration Dismissal Order* is clearly without merit, the Court should affirm that order without briefing and argument. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (summary affirmance is appropriate where "the merits of [the] case are so clear that expedited action is justified.").

¹ *Alpine PCS, Inc.; CommNet Communications Network, Inc.; GLH Communications, Inc.; Inforum Communications, Inc.; Lancaster Communications, Inc.; Allen Leeds; TV Communications Network, Inc.; Virginia Communications, Inc. Requests for Waiver of the Installment Payment Rules and Reinstatement of Licenses*, Memorandum Opinion and Order, 25 FCC Rcd 469 (2010) ("*Installment Payment Order*"), *aff'd*, *Alpine PCS, Inc. v. FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010), *reh. denied*, No. 10-1020 (D.C. Cir., Feb. 10, 2011).

² *TV Communications Network, Inc., Request for Waiver of the Installment Payment Rules and Reinstatement of Licenses*, Order on Reconsideration, 26 FCC Rcd 14891 (2011) ("*Reconsideration Dismissal Order*").

BACKGROUND

A. Statutory and Regulatory Framework

Licensing Through Spectrum Auctions. Section 301 of the Communications Act of 1934 (“Communications Act” or “the Act”), 47 U.S.C. § 301, vests in the FCC exclusive authority to grant spectrum licenses when the agency finds that the “public convenience, interest, or necessity will be served thereby.” 47 U.S.C. § 307(a); *see also id.* § 309(a). In 1993, Congress amended the Act to authorize the FCC to award certain spectrum licenses through a system of “competitive bidding,” *i.e.*, by auction. *See* 47 U.S.C. § 309(j). Congress specified that the use of auctions would not “diminish the authority of the Commission under the other provisions of [the Act] to regulate or reclaim spectrum licenses.” 47 U.S.C. § 309(j)(6)(C).

The FCC’s Installment Payment Program. Pursuant to the Act’s competitive bidding provisions, the FCC adopted rules for certain auctions permitting qualified small businesses to pay their winning bids in installments. *See* 47 C.F.R. § 1.2110 (1994).³ Under those rules, when a

³ The FCC has discontinued the use of installment payments for future auctions, but has allowed entities already paying in installments to continue to do so. *See TV Communications Network, Inc.*, Order, 22 FCC Rcd 1397, 1399 (¶ 3) (WTB 2007) (“*Staff Order*”), *aff’d*, *Installment Payment Order*,

licensee elects to take advantage of an installment payment plan, its license is conditioned on the “full and timely” performance of the licensee’s obligations under the plan, and its failure to make full and timely payments automatically triggers cancellation of the license. 47 C.F.R. § 1.2110(d)(4) (1994). *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2391 (¶ 240) (1994); *Installment Payment Order*, 25 FCC Rcd at 472 (¶ 3); *see also Morris Commnc’ns v. FCC*, 566 F.3d 184, 186 (D.C. Cir. 2009).

In 1997, the FCC amended its installment payment rules to provide for “automatic” grace periods for licensees paying for their licenses in installments. *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, 13 FCC Rcd 374, 436 (1997). Under the amended rules, a licensee that misses a required installment payment has the benefit of two grace periods during which the missed payment can be paid (along with applicable late fees), without incurring cancellation of the license. *See* 47 C.F.R. § 1.2110(f)(4)(i), (ii) (2001).⁴ If, however, the

25 FCC Rcd 469, *recon. dismissed, Reconsideration Dismissal Order*, 26 FCC Rcd 14891.

⁴ At the time of TVCN’s first missed payment, the grace period was 90 days. *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15310 (¶ 28) (2000), *recon. denied*, 18 FCC Rcd 10180

licensee persists in failing to make its required payment by the end of the second grace period, the license “automatically cancel[s]” without any action by the FCC, and the defaulting licensee is “subject to debt collection procedures.” *Id.*, § 1.2110(g)(4)(iv) (1998). In other words, the licensee loses its license, is not refunded prior payments, and is subject to collection of the outstanding debt due.

Waiver Rule. Section 1.925 of the FCC’s rules permits the Commission to consider whether to waive its wireless service rules where an applicant shows (1) “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest,” or (2) “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” 47 C.F.R. § 1.925. *See Morris Commc’ns*, 566 F.3d at 189.

B. This Proceeding

TVCN’s License Payment Defaults and Subsequent Waiver

Requests. TVCN won twelve Broadband Radio Service licenses at auction and elected to pay for those licenses through the FCC’s installment payment

(2003). The grace period changed to three calendar months on October 30, 2000. *Id.*

program. TVCN subsequently acquired two additional licenses in the secondary market that were also subject to installment payment obligations. *Installment Payment Order*, 25 FCC Rcd at 478 (¶ 13).

TVCN failed to make the installment payment due in November 1998 for one of its licenses (License MDB405) and, after the expiration of the two grace periods, that license cancelled automatically. *See id.*; *Staff Order*, 22 FCC Rcd at 1400 (¶ 7). In November 2001 — after missing the August 31, 2001 installment payment for all of its remaining licenses — TVCN asked the FCC to waive its installment payment rules for six months or until the company could obtain the necessary funding to make the required payments. TVCN claimed that “[u]nforeseen economic conditions” had forced it to seek potential buyers for its licenses and that its attempts to find such buyers or negotiate financing had not been successful. TVCN Nov. 29, 2001 Letter. TVCN failed to tender the required payment by the expiration of the two grace periods and, on March 1, 2002, the remaining 13 licenses cancelled automatically. *Installment Payment Order*, 25 FCC Rcd at 478 (¶ 13).

After the FCC initiated debt collection procedures, TVCN on February 4, 2003 filed another request for a waiver of the installment payment rules for the previously cancelled licenses, and asked for a one-year grace period for making payment. TVCN stated that it had been continually

“losing money” on its service and had been “avoiding filing for bankruptcy under the hope that the Commission would grant [its waiver] request.”

TVCN February 4, 2003 Letter at 1. TVCN subsequently told the FCC that it had entered into an agreement to transfer the licenses to another entity.

Staff Order, 22 FCC Rcd at 1402 (¶ 8).

FCC Orders. In an order released January 29, 2007, the FCC’s staff denied TVCN’s waiver request. *Staff Order*, 22 FCC Rcd 1397.

On January 5, 2010, the FCC affirmed the *Staff Order* and seven similar staff denials of waivers of the installment payment rules. *Installment Payment Order*, 25 FCC Rcd 469. The FCC concluded that TVCN had failed to show, under the first part of 47 C.F.R. § 1.925, that the grant of a waiver would further the objectives underlying the automatic cancellation rule and the public interest. *Id.* at 481-89 (¶¶ 18-31). The FCC explained that the automatic cancellation rule safeguards the integrity of the auction and licensing process by ensuring that entities that have won licenses at auction on the promise of full payment of the winning bid remain willing and able to fulfill their payment obligations. *Id.* at 481 (¶ 19). Granting a waiver here, the agency observed, would undermine that purpose. *Id.* at 486-87 (¶¶ 28-29). It would also give auction bidders an increased incentive to make bids they could not pay, and would reduce opportunities for

competing bidders — who could honor their payment obligations — to win licenses. *See id.* at 482-83 (¶ 21).

The FCC accordingly applied its consistent “policy of strict enforcement of the automatic cancellation rule” in this case. *Id.* at 483 (¶ 22). The agency noted that TVCN had neither paid its outstanding debt nor made consistent post-default payments with an unconditional promise to pay its remaining debt in accordance with the FCC’s payment terms. *Id.* at 486 (¶ 28 & n.125).

The FCC further concluded that TVCN had failed to show any unique or unusual factual circumstances that justified a grant of a waiver. *Id.* at 489-96 (¶¶ 32-46) (discussing failure to satisfy standard under 47 C.F.R. § 1.925). The agency specifically noted that where, as in this case, a successful auction bidder has sought to justify its failure to honor its installment payment obligations by relying on its asserted financial distress, the Commission has consistently declined to waive the automatic cancellation rule. *Id.* at 491 (¶ 35).

Notice to TVCN. On January 5, 2010, the day the *Installment Payment Order* was released, the FCC emailed a copy to TVCN at the email address listed in its application for review. The next day, the FCC (1) announced its decision in its Daily Digest (a public list of recent FCC

actions), (2) placed the order on its website, and (3) sent TVCN another copy of the order by certified mail to the mailing address listed on TVCN's application for review. Although the U.S. Postal Service ("USPS") left a notice of the certified mail at TVCN's address on January 8, 2011, TVCN did not sign a receipt for the package until February 3, 2011.

Reconsideration Dismissal Order, 26 FCC Rcd at 14892 (¶ 4).

Judicial and Reconsideration Proceedings. On February 4, 2010, Alpine PCS, Inc. ("Alpine"), another licensee that failed to make timely installment payments and was denied a waiver of the automatic cancellation rule in the *Installment Payment Order*, filed a timely notice of appeal of that order. On December 21, 2010, this Court denied Alpine's appeal of the *Installment Payment Order*. *Alpine PCS, Inc. v. FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010), *reh. denied*, No. 10-1020 (D.C. Cir., Feb. 10, 2011).

While the *Alpine* case was before this Court, TVCN, on February 18, 2010, filed with the Commission a petition asking the agency (1) to extend retroactively the deadline for filing a petition for reconsideration of the *Installment Payment Order*, and (2) to reconsider the *Installment Payment Order*. In support of its extension request, TVCN asserted that it did not receive a copy of the *Installment Payment Order* by certified mail until February 3, 2010, because its Chief Executive Officer was "away from the

office during the month of January.” TVCN Petition at 1. TVCN acknowledged that it had not monitored the FCC’s public releases to ascertain whether the FCC had ruled on its waiver. *Id.*

On October 14, 2011, the FCC denied TVCN’s request for an extension of time and dismissed its reconsideration petition.

Reconsideration Dismissal Order, 26 FCC Rcd 14891. The Commission explained that section 405(a) of the Communications Act requires that petitions for reconsideration be filed within 30 days of public notice of the decision from which reconsideration is sought. *Id.* at 14893 (¶ 5). *See* 47 U.S.C. § 405; *see also* 47 C.F.R. § 1.106(f) (FCC’s implementing rule). Because public notice of the *Installment Payment Order* occurred on January 5, 2010, the date the order was released (*see* 47 C.F.R. § 1.4(b)(2)), the statutory deadline for filing TVCN’s reconsideration petition was February 4, 2010, and thus TVCN filed its petition two weeks after that deadline had passed. *Reconsideration Dismissal Order*, 26 FCC Rcd at 14893 (¶ 5). *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

The FCC concluded that TVCN had not shown the extraordinary circumstances necessary to excuse its failure to meet the statutory filing deadline. *Id.* at 14894 (¶ 8). The agency explained that TVCN had not alleged, let alone shown, any agency error in providing notice. *Id.* at 14893

(¶ 7). The FCC noted that TVCN’s own pleading, which recounts TVCN’s failure to monitor its mail between January 8, 2010, and February 3, 2010, suggests that TVCN’s delay in receiving actual notice of the *Installment Payment Order* “was a business decision or an oversight entirely within [TVCN’s] control.” *Id.* The FCC also explained that TVCN could have ascertained when the *Installment Payment Order* was released by checking the FCC’s daily releases on the FCC’s web site and could have obtained a copy of the decision online. *Id.* at 14894 n.20. Even with the delay in actual notice, the FCC pointed out that TVCN could have filed its two-page reconsideration petition “on February 4, 2010, the final day of the 30-day filing period.” *Id.* at 14894 n.20. Accordingly, the FCC concluded that there was “no basis” for granting TVCN’s extension request or considering its petition for reconsideration. *Id.* at 14894 at (¶ 8).

On November 14, 2010, TVCN appealed the *Installment Payment Order* and *Reconsideration Dismissal Order* to this Court.

ARGUMENT

I. THE COURT SHOULD DISMISS TVCN’S APPEAL OF THE INSTALLMENT PAYMENT ORDER FOR LACK OF JURISDICTION.

TVCN’s appeal from the *Installment Payment Order* was filed over 19 months after the deadline for appealing that order passed. Because the

appeal was untimely filed, the Court should dismiss it for lack of jurisdiction.

Section 402(b)(5) gives this Court exclusive jurisdiction to adjudicate appeals by “the holder of any . . . station license which has been . . . revoked by the Commission.” 47 U.S.C. § 402(b)(5). This Court has held that section 402(b) governs judicial challenges by a licensee to the cancellation of its licenses for failure to make timely installment payments. *Nextwave Personal Comm’ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001), *aff’d*, 537 U.S. 293 (2003). The Court reasoned that “[e]ven if the Commission did not formally ‘revoke’ [the] licenses, that is certainly the effect of the license cancellation. . . .” *Id.*; *see also N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (Court’s jurisdiction under section 402(b) “involve[s] issues ‘ancillary’ to the grants or denials of licenses,” including waiver decisions related to licensing).

To properly invoke this Court’s jurisdiction to review an FCC order under section 402(b), an aggrieved party must file a notice of appeal within 30 days of the date of public notice of that order. 47 U.S.C. § 402(c). “The time limit imposed by 47 U.S.C. § 402(c) is jurisdictional, *i.e.*, if the appeal is not filed in accordance with the statutory terms, ‘it *must* be dismissed.’” *Waterway Comm’cns Sys., Inc. v. FCC*, 851 F.2d 401, 405 (D.C. Cir. 1988)

(quoting *Nat'l Black Media Coal. v. FCC*, 760 F.2d 1297, 1298 (D.C. Cir. 1985)); accord *Freeman Eng'g Assoc. Inc. v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997). See also *N. Am. Catholic Programming*, 437 F.3d at 1208, 1210 (dismissing appeal filed 32 days after public notice).⁵ Consistent with that bright-line jurisdictional limitation, Federal Rule of Appellate Procedure 26(b)(1) provides, subject to exceptions not relevant here, that “court[s] may not extend the time to file . . . a notice of appeal.”

The FCC gave public notice of the *Installment Payment Order* on January 5, 2010, the date the order was released, see 47 C.F.R. § 1.4(b)(2). Accordingly, the 30-day window prescribed by section 402(c) for filing a notice of appeal from the *Installment Payment Order* closed on February 4, 2010. See 47 U.S.C. § 402(c). TVCN did not, however, file its notice of appeal from the *Installment Payment Order* until November 14, 2011 — more than 19 months past the statutory deadline.⁶ The Court thus lacks jurisdiction to review that order.

⁵ As this Court has pointed out, “[s]ection 402(c) makes *public* notice, not *private* notice, the operative event for purposes of the running of the statutory filing period, and it makes no exception for *excusable* failure to file within thirty days of proper public notice.” *Nat'l Black Media Coal*, 760 F.2d at 1299. Accordingly, the Court has refused to accept a late-filed notice of appeal that allegedly was caused by the FCC’s failure to provide appellants with personal notice of its decision. *Id.*

⁶ It is immaterial that TVCN incorrectly styled its notice as a “Petition for Review.” See *N. Am. Catholic Programming*, 437 F.3d at 1208-09. Indeed,

The FCC's dismissal of TVCN's untimely petition for reconsideration did not open up a new 30-day window for filing an appeal from the *Installment Payment Order*. It is well-established that only a *timely* petition for administrative reconsideration tolls a statutory time period for the filing of a judicial appeal. *Williston Basin Interstate Pipeline v. FERC*, 475 F.3d 330, 334-35 (D.C. Cir. 2006); *see also Nat'l Bank of Davis. v. Office of Comptroller of Currency*, 725 F.2d 1390, 1391-92 (D.C. Cir. 1984); *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940) ("The filing of an untimely petition for rehearing which is not entertained or considered on its merits . . . can not operate to extend the time for appeal.""). And, as shown below, TVCN's reconsideration petition (like its appeal) was untimely filed. Were the rule otherwise, any party challenging an FCC order governed by section 402(b) could avoid the 30-day statutory window for appeals simply by filing with the agency an untimely petition for administrative reconsideration and then filing a notice of appeal within 30 days of the reconsideration order dismissing that untimely petition.

To properly challenge the *Installment Payment Order*, TVCN, within the 30-day period ending on February 4, 2010, was required to either: (1) file

TVCN characterized this case as an "appeal" in the body of its filing, and cited section 402(c) (applicable to appeals under section 402(b)(5)) as authority for the filing. *See* TVCN Petition for Review at 1, 2.

a petition for agency reconsideration, which would have rendered the *Installment Payment Order* nonfinal and tolled the time period for filing an appeal until the FCC acted on reconsideration;⁷ or (2) file a notice of appeal with this Court. It did neither, and its appeal from the *Installment Payment Order* therefore should be dismissed for lack of jurisdiction.

II. THE COURT SHOULD SUMMARILY AFFIRM THE *RECONSIDERATION DISMISSAL ORDER.*

This Court will summarily affirm an administrative order without briefing and argument where “the merits of [the] case are so clear that expedited action is justified.” *Taxpayers Watchdog*, 819 F.2d at 297. As shown below, the claim that the FCC erred by enforcing the deadline prescribed in 47 U.S.C. § 405(a) for filing of petitions for agency reconsideration is so clearly meritless that the Court should summarily affirm the *Reconsideration Dismissal Order*.

Section 405(a) imposes a 30-day deadline for the filing of petitions for reconsideration. 47 U.S.C. § 405(a); *see also* 47 C.F.R. § 1.106. TVCN indisputably missed that statutory filing deadline. It waited until February 18, 2011 to seek reconsideration, while any such petition was due two weeks earlier on February 4. *See* p. 10, *supra*. In the absence of “extraordinary circumstances,” the Court has made clear that the FCC must enforce the

⁷ *See, e.g., Stone v. INS*, 514 U.S. 386, 392 (1995).

statutory filing deadline and dismiss untimely reconsideration petitions.

E.g., Reuters Ltd. v. FCC, 781 F.2d 946, 952 (D.C. Cir. 1986); *see Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (Court has “discouraged the Commission from accepting [untimely reconsideration] petitions in the absence of extremely unusual circumstances.”).

Here, TVCN points to *no* circumstances – let alone “extraordinary circumstances” – that would justify compelling the FCC to exempt TVCN from complying with the statutory filing deadline. Although TVCN suggests it did not know that the FCC had issued its *Installment Payment Order* until February 3, 2011, TVCN does not claim, let alone demonstrate, that any alleged lack of notice was the result of agency error.

Reconsideration Dismissal Order, 26 FCC Rcd at 14893 (¶ 7). On January 5, 2010, the day the *Installment Payment Order* was released, the FCC e-mailed TVCN a copy of the *Installment Payment Order* to the address that TVCN had provided to the agency. *Id.* at 14892 (¶ 4). On January 6, 2010, the FCC announced the release of the order in its Daily Digest and made the *Installment Payment Order* publicly available on its website. *Id.* at 14894 n.20. That same day, the FCC sent TVCN another copy of the *Installment Payment Order* by certified mail to the address listed on its application for review and, two days later, USPS left TVCN a notice at its business address

that the certified mail was ready for delivery. *Id.* at 14892 (¶ 4). Yet TVCN did not file its reconsideration petition until February 18, 2011 – two weeks after the February 4, 2011 deadline for seeking administrative reconsideration had passed.

To the extent that TVCN was unaware of the public release of the *Installment Payment Order*, that is solely attributable to its own failure to: (1) read its e-mail messages; (2) timely monitor and sign for mail delivered by the USPS,⁸ and (3) check the FCC’s website for the status of its waiver request. That lack of diligence does not qualify as “extraordinary circumstances” justifying a departure from the statutorily prescribed deadline for seeking administrative reconsideration. *E.g., Reuters*, 781 F.2d at 952; *Virgin Islands Tel. Corp.*, 989 F.2d at 1237.

Because TVCN has no colorable argument that the FCC erred in dismissing the company’s untimely petition for reconsideration, the Court should summarily affirm the *Reconsideration Dismissal Order*.⁹

⁸ TVCN argues that it did not sign for the certified mail because its Chief Executive Officer was “away from the office during the month of January.” TVCN Petition at 1. TVCN, however, does not explain why it did not arrange for someone else to monitor and sign for TVCN’s mail during its CEO’s extended absence from the office.

⁹ This Court has held that a waiver is warranted only where the delay in notification makes it “impossible” for the party filing a reconsideration petition to comply with the section 405(a) filing deadline. *A/B Financial, Inc. v. FCC*, 76 F.3d 1244, 1245 (D.C. Cir. 1995) (Table). That is not the

CONCLUSION

The Court should dismiss TVCN's untimely appeal of the *Installment Payment Order* for lack of jurisdiction, and should summarily affirm the *Reconsideration Dismissal Order*.

Respectfully submitted,

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case here. TVCN acknowledged that, by no later than February 3, 2011, it had received actual notice of the *Installment Payment Order*. Yet TVCN inexplicably chose not to file its reconsideration petition (which was less than two pages long) the following day – the last day of the 30-day filing period. Instead, it waited more than a week, belatedly seeking reconsideration on February 16. *Reconsideration Dismissal Order*, 26 FCC Rcd at 14894 n.20.

**IN THE UNITED STATES COURT OF APPEALS
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TV Communications Network, Inc., Appellant

v.

**Federal Communications Commission and the United States of
America, Appellee.**

CERTIFICATE OF SERVICE

I, Laurel R. Bergold, hereby certify that on December 22, 2011, I electronically filed the foregoing Motion for Dismissal and Summary Affirmance with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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