

BRIEF FOR APPELLEE

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

\_\_\_\_\_  
No. 11-1330  
\_\_\_\_\_

PMCM TV, LLC,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

\_\_\_\_\_  
ON APPEAL FROM AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

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

### **1. Parties.**

All parties, intervenors, and amici appearing in this Court and before the Commission are listed in the appellant's brief.

### **2. Ruling under review.**

*Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696 (2011) (J.A. 196).

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

This case has not previously been before this Court. We are not aware of any related case pending before this Court or any other Court.

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## GLOSSARY

BOC	Bell Operating Company
Br.	Brief
Commission or FCC	Federal Communications Commission
DTV	Digital Television
J.A.	Joint Appendix
LPTV	Low Power Television
Nave	Nave Broadcasting, LLC
PMCM	PMCM TV, LLC
UHF	Ultra High Frequency (TV Channels 14-69)
VHF	Very High Frequency (TV Channels 2-13)

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ON APPEAL FROM AN ORDER OF THE  
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BRIEF FOR APPELLEE

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**JURISDICTION**

The *Order* on appeal was released on September 15, 2011.

*Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696 (2011) (J.A. 196) (“*Order*”). Appellant PMCM TV, LLC (“PMCM”) filed its notice of appeal on September 21, 2011. This Court’s jurisdiction rests on 47 U.S.C. § 402(b).

## STATEMENT OF ISSUE

In this case, appellant PMCM, a licensee of two very high frequency (“VHF”) television channels in Nevada and Wyoming, asked the Federal Communications Commission (“Commission” or “FCC”) to grant the cross-country “reallocation” of those two channels to New Jersey and Delaware. Invoking a statute that had been applied only once before in its nearly 30-year history – when the FCC in 1983 approved a request by a New York City station to change its community of license to suburban New Jersey without moving its transmission facilities – PMCM argued that the Commission was required to move the VHF channels pursuant to section 331(a) of the Communications Act, 47 U.S.C. § 331(a).

The first sentence of that provision directs the Commission to “allocate” commercial VHF channels (*i.e.*, channels licensed for commercial use, as opposed to noncommercial educational use) so that each state has at least one such channel “if technically feasible.” *Id.* The next sentence provides, without any mention of technical feasibility, that “the Commission shall, notwithstanding any other provision of law,” order the “reallocation” of a licensee’s VHF channel to an unserved state if that licensee “notifies” the Commission that it agrees to such reallocation. *Id.* PMCM argued that the statute stripped the Commission of all discretion to consider its two relocation

requests, confining the agency to the purely ministerial role of approving PMCM's requested move of the VHF channels. According to PMCM, the statute requires such a result, even though it would permit PMCM to abandon service to viewers of the existing Nevada and Wyoming stations and to move its operations thousands of miles – without any FCC inquiry into whether the move is in the public interest and without any consideration of whether the moved stations' operation in their new locations would interfere with the signals of existing stations.

The Commission denied PMCM's requests. Based on the text, structure, purposes, and legislative history of section 331(a), the Commission concluded that the second sentence of that provision (on which PMCM relied) applies only where an existing channel allocation precludes a new allocation of the same channel to an unserved state due to concerns about signal interference. Here, it is undisputed that PMCM's existing channel allocations (for locations thousands of miles from New Jersey and Delaware) do not have that preclusive effect. Thus, the licensee's requested moves were not required by section 331(a).

The case presents a single question for the Court's review: Whether the Commission reasonably construed section 331(a) of the Communications

Act when it denied PMCM's requests to move its Nevada and Wyoming stations to New Jersey and Delaware.

## **COUNTERSTATEMENT**

### **I. REGULATORY BACKGROUND**

Section 307(b) of the Communications Act, 47 U.S.C. § 307(b), provides, in general, that when the Commission exercises its authority to grant, renew, or modify station licenses in the public interest, it "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

To fulfill that mandate, the Commission long ago established the following criteria (in descending order of priority) for allotting television broadcast licenses: (1) "[t]o provide at least one television service to all parts of the United States;" (2) "[t]o provide each community with at least one television broadcast station;" (3) "[t]o provide a choice of at least two television services to all parts of the United States;" (4) "[t]o provide each community with at least two television stations;" and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Amendment of Section 3.606 of the*

*Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167 (¶ 63) (1952) (“*Television Assignments Sixth R&O*”).

New channel allotments applying these settled priorities customarily are made after notice-and-comment rulemaking proceedings and a public interest finding by the Commission that the allotment to the community would further the policy goals of section 307(b).<sup>1</sup> These goals reflect Congress's intent “to create a nationwide, locally oriented system of broadcasting in which broadcasters are expected to serve the needs and interests of their communities.” *Order* ¶ 19 (J.A. 204). The Commission's rules implementing section 307(b) likewise are designed to ensure broadcasters will not create radio interference for other stations, “as interference would deprive stations and their viewers of the full benefit of the allocated spectrum.” *Id.* (J.A. 204-05).

Established Commission policy further provides that “when a frequency becomes available to a community for the first time, ‘the proper procedure to follow in such cases is to allow applications to be filed under’” 47 U.S.C. § 309(a), which provides for the grant of license applications when “the public interest, convenience and necessity will be served” thereby.

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<sup>1</sup> Letter from William T. Lake, Chief, Media Bureau, to PMCM TV, LLC, 24 FCC Rcd 14588, at page 3 (Media Bur. 2009) (“*Bureau Order*”) (J.A. 122) (citing *Television Assignments Sixth R&O*, 41 F.C.C. at 167).

*Bureau Order* at 3 (J.A. 122) (quoting *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Riverside and Santa Anna, California)*, 65 FCC 2d 920, 921, 924 (1977)). That is because “the resulting ‘opportunity for competing filings . . . allows [the Commission] to select the applicant which will best serve the public interest.’” *Ibid.* Under current law, when more than one party files an application for a channel, that selection is made through competitive bidding pursuant to 47 U.S.C. § 309(j). *Order* ¶ 19 (J.A. 204-05).

Once a station is in operation, subsequent proposals that would result in withdrawal of service from a community “have long been considered to be *prima facie* inconsistent with the public interest. *Order* ¶ 20 & n.62 (J.A. 206); *Bureau Order* at 6 & n.30 (J.A. 125-26) (cataloguing precedent). Accordingly, such proposals generally “must be supported by a strong showing of countervailing public interest benefits.” *Order* ¶ 20 n.62 (J.A. 206).

By the 1950s, all available commercial VHF channels (TV channels 2 through 13) had been allotted to East Coast metropolitan areas, including New York City, Philadelphia, and Baltimore. *Order* ¶ 3 (J.A. 197). VHF signals cover large areas, and the Commission’s rules therefore establish minimum distance separation requirements to ensure that the VHF channels

are technically feasible – *i.e.*, do not cause harmful interference with other allotted stations. *Order* ¶ 3 & nn.5 & 6 (J.A. 197). As a consequence, given the VHF allotments already made to other East Coast communities, it was not technically feasible to allocate any commercial VHF channels to either New Jersey or Delaware. *Id.*

In 1982, Congress enacted section 331(a) of the Communications Act, 47 U.S.C. § 331(a). That two-sentence provision, introduced by Senator Bradley to help remedy the absence at that time of any VHF commercial television stations in his home state of New Jersey,<sup>2</sup> provides, in the first sentence, that the Commission’s policy shall be “to allocate channels” for VHF commercial television broadcasting to ensure that at least one such channel is “allocated to each State, if technically feasible.” 47 U.S.C. § 331(a). The second sentence states, without express reference to technical feasibility, that “[i]n any case” in which a commercial VHF station licensee “notifies the Commission” that it will “agree to the reallocation of its channel” to a community in an unserved state, the Commission “shall, notwithstanding any other provision of law, order such reallocation. . . .”

*Ibid.*

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<sup>2</sup> *Multi-State Commc’ns, Inc. v. FCC*, 728 F.2d 1519, 1521, 1523-24 (D.C. Cir. 1984).

Prior to the events leading to this case, section 331(a) had been invoked only once in 30 years – immediately after it was enacted. RKO General, Inc. (“RKO”), the licensee of WOR-TV, Channel 9, New York, N.Y., was in the midst of a comparative license renewal proceeding at the time section 331(a) was enacted in 1982.<sup>3</sup> Because the “reallocation” procedure set forth in the second sentence of section 331(a) enabled RKO to avoid the risk of losing its license for WOR-TV to a competing applicant, RKO “notified the Commission . . . that it agree[d] to the requirements of Section 331” and that it would “relocate its main studio to Secaucus, New Jersey,” while “its transmitter w[ould] remain atop the World Trade Center in New York City,” thereby allowing RKO to continue broadcasting within its existing coverage area. *Petition to Reallocate VHF Television Channel 9 from New York, New York, to a City Within the City Grade Contour of Station WOR-TV*, Report and Order, 53 Rad.Reg. 2d (P&F) 469, 470 (¶ 2) (1983) (“*WOR-TV Reallocation Order*”), *aff’d*, *Multi-State Commc’ns*, 728 F.2d 1519. The Commission granted the reallocation request in those circumstances, giving New Jersey “a first commercial VHF station,” and “moot[ing] the competing

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<sup>3</sup> Under the procedures in existence at the time, the filing of mutually exclusive applications for a license at the end of its term required comparative hearings to determine which applicant was better qualified. Among other things, such hearings could consider financial and character qualification issues. *Multi-State Commc’ns*, 728 F.2d at 1521.

application” that was pending in the comparative proceeding. *Id.* at 470, 471 (¶¶ 2, 6).

## **II. PMCM’S PROPOSAL TO MOVE ITS VHF STATIONS TO NEW JERSEY AND DELAWARE**

### **A. PMCM’s “Reallocation” Requests**

Pursuant to the DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009), full-power television stations were required to cease providing analog television service by June 13, 2009, and the Commission was directed to terminate all full-power analog television licenses. To accomplish this directive, the Commission established a multi-step process by which stations elected channels for post-transition digital television (“DTV”) operations. *See Order* ¶ 6 n. 21 (J.A. 199).

On June 13, 2009, when WWOR-TV (formerly, WOR-TV) ceased operations on its analog Channel 9 as part of the DTV transition, New Jersey once again was left without a VHF commercial station. *Order* ¶ 6 (J.A. 199). The state of Delaware also lacked a VHF commercial station. At the same time, because WWOR-TV and other stations in the region had vacated their analog VHF channels in favor of digital Ultra-High Frequency (“UHF”)

channels,<sup>4</sup> it became technically possible to allocate new VHF channels to both New Jersey and Delaware under the first sentence of section 331(a), without causing harmful interference to existing stations. *Order* ¶ 24 (J.A. 208).

On June 15, 2009, PMCM filed with the FCC “notifications” pursuant to section 331(a) asking the Commission to move to the East Coast two stations in the western United States that PMCM had recently acquired. Specifically, PMCM sought to move VHF Station KVVN(TV), Channel 3, in Ely, Nevada, to Middletown Township, New Jersey, and VHF Station KJWY, Channel 2, in Jackson, Wyoming, to Wilmington, Delaware.<sup>5</sup> PMCM claimed entitlement to these cross-country moves because neither New Jersey nor Delaware had any operational VHF commercial broadcast

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<sup>4</sup> Since June 12, 2009, a number of television stations in urbanized areas have requested the substitution of UHF channels for their assigned post-transition VHF channels because the “technical advantages of analog VHF channels . . . no longer exist in the current digital environment.” *Bureau Order* at 8 (J.A. 127) (citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14627 (1997)). For example, some VHF channels are subject to “higher ambient noise levels due to leaky power lines, vehicle ignition systems, and other impulse noise sources.” 12 FCC Rcd at 14627.

<sup>5</sup> Letter from Donald J. Evans and Harry F. Cole to FCC Secretary (June 15, 2009) (“KVVN Application”) (J.A. 9); Letter from Donald J. Evans and Harry F. Cole to FCC Secretary (June 15, 2009) (“KJWY Application”) (J.A. 17).

stations as of that date. KVVV Application at 2 (J.A. 10); KJWY Application at 1 (J.A. 17).

Nave Broadcasting, LLC (“Nave”), the licensee of Station WKOB-LP in New York City, objected to the notifications.<sup>6</sup> Nave asserted that moving PMCM’s channels to New Jersey and Delaware would cause “massive interference” with stations in New York and Philadelphia, including its own station WKOB. Nave Objection at 4 (J.A. 43). Nave also argued that PMCM’s recent acquisitions of the Nevada and Wyoming stations evinced an attempt “intentionally [to] subvert[] a section of the Communications Act [section 331(a)] to its own financial advantage.” *Id.* at 2 (J.A. 41). Specifically, Nave pointed out that PMCM had finalized its acquisition of Station KJWY just three days before filing its application to move that station to Delaware. *Id.* Nave also asserted that PMCM’s application to acquire that station did not provide the FCC or interested persons any notice that PMCM intended only to provide “very short-term service to [the Jackson, Wyoming] community.” *Id.* Nave similarly asserted that PMCM had purchased Nevada Station KVVV only seven months before submitting its move request. *Id.* at 2-3 (J.A. 41-42). According to Nave, “[t]he object of Section 331 was to

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<sup>6</sup> Consolidated Informal Objection to Notifications (Dec. 4, 2009) (J.A. 34) (“Nave Objection”).

make it easier for a New York VHF station to relocate to New Jersey without relocating its transmitter site,” not to move broadcasting facilities thousands of miles, leaving the existing community of license without service and causing harmful interference in the new community. *Id.* at 9 (J.A. 48); *see generally id.* at 4-9, 16-18 (J.A. 43-48, 55-57). In this regard, Nave asserted that PMCM’s proposed moves would “result in the complete loss of television service to residents of Ely, Nevada and Jackson, Wyoming.” *Id.* at 17 (J.A. 56).

PMCM, in response, “acknowledge[d] that its operations in Delaware and New Jersey will negatively impact LPTV [low power television] stations in the vicinity,” but asserted that such stations, “by operation of law, must accept any such interference from a full service station.”<sup>7</sup> PMCM argued that section 331(a) left the Commission no discretion but to approve PMCM’s requests and grant it new licenses to operate stations in New Jersey and Delaware. *Id.* at 2-3 (J.A. 97-98).

On December 18, 2009, the Commission’s Media Bureau denied PMCM’s requests. *Bureau Order* (J.A. 120). Addressing the text, purpose, structure, and legislative history of section 331(a), the Bureau concluded that

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<sup>7</sup> Letter from Donald J. Evans and Harry F. Cole to FCC Secretary, at 5 (Dec.12, 2009) (J.A. 100) (citing 47 C.F.R. § 74.702(b)) (“PMCM Response”).

the direction to “reallot[e]” channels in the second sentence of that provision was most reasonably interpreted “to mean the shifting of a channel allocation from one community to another community under circumstances where the channel cannot be used simultaneously at both locations due to interference concerns.” *Bureau Order* at 6 (J.A. 125). By contrast, PMCM’s operation of stations in Nevada and Wyoming did not preclude the FCC from allocating the same channels (3 and 2, respectively) in New Jersey or Delaware, and thus its requested moves were not governed by the reallocation procedure set forth in the second sentence of section 331(a). *Bureau Order* at 8 (J.A. 127).

While denying PMCM’s requests, the Bureau simultaneously initiated rulemaking proceedings – consistent with normal allotment processes – to allot Channel 4 to Atlantic City, New Jersey and Channel 5 to Seaford, Delaware. *Id.*<sup>8</sup> The Bureau found that such action – which had become possible because stations in the region recently had vacated their VHF channels in favor of UHF channels as part of the DTV transition (*see Order*

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<sup>8</sup> See *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Atlantic City, New Jersey)*, Notice of Proposed Rulemaking, 24 FCC Rcd 14601 (Media Bur. 2009); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (Media Bur. 2009).

¶ 24 (J.A. 208)) – would fulfill the Congressional policy, expressed in the first sentence of section 331(a), of “allot[ting] at least one VHF channel to each State, if technically feasible.” *Bureau Order* at 8 (J.A. 127).

**B. This Court’s Dismissal of PMCM’s Petition For A Writ of Mandamus**

After the Bureau denied its requests, PMCM filed a petition for a writ of mandamus in this Court, seeking an order directing the Commission “to comply immediately with Section 331(a) by reallocating PMCM’s channels as indicated in PMCM’s notifications and issuing PMCM appropriate licenses.” *In re PMCM TV, LLC*, D.C. Circuit No. 10-1001, Petition for Writ of Mandamus at 21-22 (filed January 5, 2010). PMCM argued that the statute confined the FCC to a purely ministerial role and required the Commission to grant its requests. *Id.* at 11, 21. On May 12, 2010, the Court denied the mandamus petition without requesting a response from the Commission. The Court found, among other things, that “Petitioner has not demonstrated that the Federal Communications Commission has violated a clear duty to act.” *Id.*, Order, D.C. Circuit No. 10-1001 (filed May 12, 2010). By separate orders filed August 6, 2010, the Court similarly denied PMCM’s requests for panel rehearing and rehearing *en banc* of the mandamus denial, with no member of the Court requesting a vote. *Id.*, Orders, D.C. Circuit No. 10-1001 (filed Aug. 6, 2010).

### C. The *Order On Review*

Shortly after PMCM filed its mandamus petition with this Court, on January 19, 2010, PMCM also filed an application for administrative review of the *Bureau Order* by the full Commission.<sup>9</sup>

Nave again filed in opposition,<sup>10</sup> arguing that the Commission should affirm the Bureau's reasonable interpretation of the term "reallocation" in section 331(a). Nave Opposition at 7 (J.A. 161). Nave contended that, unlike PMCM's reading, the Bureau's interpretation harmonized Congress's goal of ensuring that every state had at least one VHF station with practical considerations, such as the avoidance of harmful interference. *Id.* at 3 (J.A. 157). Indeed, Nave pointed to an *ex parte* communication that PMCM filed with the FCC in which PMCM readily conceded that its interpretation of the statute "would preclude Commission discretion even in . . . *extreme* situations" that would "lead to unacceptable interference." *Id.* at 3 n.5, Attachment A (PMCM 9/15/09 *ex parte*) at 3 (J.A. 157, 166) (emphasis added).

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<sup>9</sup> Contingent/Protective Application for Review of PMCM TV, LLC and Request for Prompt Related Relief (Jan. 19, 2010) (J.A. 130) ("Application for Review").

<sup>10</sup> Opposition to Contingent/Protective Application for Review of PMCM TV, LLC and Request for Prompt Related Relief (Feb. 3, 2010) (J.A. 155) ("Nave Opposition").

On September 15, 2011, the Commission issued the *Order* on appeal, denying PMCM's application for administrative review and affirming the Bureau's interpretation of section 331(a). *Order* ¶ 1 (J.A. 196). The Commission determined that the language and structure of section 331(a) reveal "a narrowly drawn statutory scheme." *Order* ¶ 14 (J.A. 202). The Commission explained that the first sentence of section 331(a) directs it "to 'allocate' at least one commercial VHF channel to each state 'if technically feasible.'" *Id.* (quoting section 331(a)). By contrast, the second sentence provides, without express reference to technical feasibility, that if a licensee notifies the Commission that it will agree to the "reallocation of its channel" to an unserved state, the Commission shall order such reallocation and issue a corresponding license "notwithstanding any other provision of law." *Id.* (quoting section 331(a)).

Reading these two provisions together, and in light of its traditional mechanisms for allocating channels in the public interest under 47 U.S.C. § 307(b), the Commission determined that Congress did not intend "for Section 331(a) to operate as a substitute for normal allocation procedures where, as here, the Commission can fulfill the statutory mandate of [the first sentence to] allocate[e] at least one commercial VHF channel to each state using those procedures." *Order* ¶ 23 (J.A. 208). Those procedures protect

against unnecessary loss of service by other communities – such as Ely, Nevada and Jackson, Wyoming in this case – and ensure that all relevant policies are considered and that all interested parties are afforded an opportunity to seek a license when a newly allotted channel is available. *Order* ¶¶ 19, 20 & n.62 (J.A. 205, 206). The Commission found that, in contrast to the prior application of the section 331(a) reallocation procedure to WOR-TV in 1983 – when there was no technically feasible way to allocate a new VHF channel to New Jersey because existing channel allocations precluded new allocations to that state – normal allocation procedures are possible for New Jersey and Delaware today. *Order* ¶¶ 22-23 (J.A. 206-08). Indeed, the Commission noted, those allocation procedures have now been implemented to provide VHF channels to both New Jersey and Delaware. *Id.* ¶ 22 (J.A. 207).

The Commission reasoned further that “the absence of a technical feasibility proviso in the second sentence does not mean that Congress meant to require the Commission to order reallocations that would cause interference to other channels.” *Order* ¶ 14 (J.A. 202). Rather, the Commission stated, it reflects an appreciation that the narrow circumstance to which the second sentence applies would never pose a risk of technical infeasibility. *Id.* That circumstance, the Commission concluded, was limited

to cases – like the earlier WOR-TV reallocation from New York City to Secaucus, New Jersey – that did not add a new broadcast signal to a geographic area, but rather changed an existing station’s official community of license by reallocating its channel to the new community. *Id.* ¶¶ 14-15 (J.A. 202-03); *see also id.* ¶¶ 4-5, 8-9 (J.A. 198-99, 200).

#### **D. Other Developments**

In March and April of 2010, respectively, the Commission allotted VHF Channel 4 to Atlantic City, New Jersey and VHF Channel 5 to Seaford, Delaware.<sup>11</sup> Both states, therefore, now have “not less than one [commercial VHF] channel.” 47 U.S.C. § 331(a).

### **SUMMARY OF ARGUMENT**

Taking account of the statutory text, structure, purposes, and legislative history of section 331(a), the Commission reasonably construed the second sentence of that provision to apply solely in circumstances, not present here, in which interference concerns arising from an existing channel allocation preclude a new allocation of the same channel to an unserved state. That was the case with the WOR-TV reallocation in 1983, which was a major focus of

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<sup>11</sup> *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Atlantic City, New Jersey)*, Report and Order, 25 FCC Rcd 2606 (Video Div., Media Bur. 2010); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Report and Order, 25 FCC Rcd 4466 (Video Div., Media Bur. 2010).

the statute's legislative history. *See Order* ¶¶ 3-5, 16 (J.A. 197-99, 203). In those circumstances, a broadcaster's voluntary reallocation of its channel to the unserved state may be the only technically feasible way to provide VHF service to that state. The FCC's reasonable construction of the statute is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

As PMCM conceded below,<sup>12</sup> its reading of the reallocation provision would compel the grant of reallocation requests in "any case" (Br. 20 (quoting section 331(a)), even if such reallocations would result in harmful interference with other stations. Such a reading "confuses 'plain meaning' with literalism." *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1045 (D.C. Cir. 1997). The Commission reasonably rejected that reading because it ignores Congress's clearly expressed intent, in the first sentence of section 331(a), that commercial VHF channels be allocated to unserved states "if technically feasible," and would yield the absurd result of compelling technically infeasible moves to the detriment of the public. *Order* ¶¶ 14-15, 20 (J.A. 202-03, 205). Indeed, such a result would undermine the overriding statutory goal of having an expert agency (the FCC) allocate spectrum licenses in the public interest so as to avoid signal interference. *See*

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<sup>12</sup> PMCM 9/15/09 *ex parte* at 3 (J.A. 166).

*Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454 (1989) (statutory words “of general meaning” should be construed to avoid “absurd results”) (internal quotation marks omitted).

PMCM claims that the Commission’s own interpretation of the statute is inconsistent with precedent and would permit harmful interference. Br. 35-45. But PMCM demonstrates no such inconsistency, and its contention that the Commission’s interpretation would allow reallocations that could cause harmful interference is not properly before the Court because it was not first presented to the agency as required by 47 U.S.C. § 405(a). In any event, the Commission reasonably explained that the reallocation procedure specified in the second sentence of section 331(a) applies to a defined universe of cases – such as the WOR-TV reallocation in 1983 – in which “technical feasibility is assured.” *Order* ¶ 14 (J.A. 202).

## ARGUMENT

### I. THE ORDER IS REVIEWED UNDER DEFERENTIAL STANDARDS.

PMCM’s challenge to the FCC’s interpretation of section 331(a) of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837. Under *Chevron*, if “Congress has directly spoken to the precise question at issue,” the Court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. In determining

whether Congress has spoken unambiguously, the Court uses “the customary statutory interpretation tools of text, structure, purpose, and legislative history.” *California Metro Mobile Commc’ns, Inc. v. FCC*, 365 F.3d 38, 44-45 (D.C. Cir. 2004) (internal quotation marks omitted); *accord Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d at 1047. If “the purported ‘plain meaning’ of a statute’s word or phrase happens to render the statute senseless,” that is evidence of “ambiguity rather than clarity.” *Alarm Indus. Commc’ns Comm. v. FCC*, 131 F.3d 1066, 1068 (D.C. Cir. 1997). And “if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843.

The Commission likewise is entitled to substantial deference in construing its own precedent. *Cassel v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998). The Commission’s “interpretation of the intended effect of its own orders is controlling unless clearly erroneous.” *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001).

PMCM cannot overcome the high burden imposed on parties challenging agency action.

**II. THE COMMISSION’S READING OF SECTION 331(a) COMPORTS WITH THE TEXT, STRUCTURE, PURPOSES, AND LEGISLATIVE HISTORY OF THAT PROVISION.**

The Commission acted well within its discretion in rejecting PMCM’s argument that the agency had a non-discretionary duty under the second sentence of 47 U.S.C. § 331(a) to relicense Nevada Station KVVN(TV), Channel 3, in New Jersey and Wyoming Station KJWY, Channel 2, in Delaware. Specifically, PMCM argues that its “reallocation” notifications qualified for non-discretionary treatment, because both New Jersey and Delaware were without VHF channels at the time of the notifications and the language of the second sentence applies to “any case” in which a VHF licensee notifies the Commission that it agrees to the “reallocation” of its channel to an unserved state. Br. 16, 20 (quoting section 331(a)).

As the Commission explained, the term “reallocation” in the second sentence of section 331(a) is properly construed as referring to the “shifting of a channel from one community to another community under circumstances where the channel cannot be used simultaneously at both locations because such dual operations would cause interference.” *Order* ¶ 1 (J.A. 196). Here, there is no dispute that the operation of PMCM’s stations in Nevada and Wyoming has no preclusive effect on use of the same channels in New Jersey or Delaware. Accordingly, the Commission correctly determined that section

331(a) does not “allow[] PMCM to obtain licenses to move its operations from Nevada and Wyoming to New Jersey and Delaware.” *Order* ¶ 24 (J.A. 208).

Section 331(a) provides:

It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of the Communications Act of 1934.

47 U.S.C. § 331(a).

The FCC explained that “[a]n examination of the wording and structure of Section 331(a) reveals a narrowly drawn statutory scheme.” *Order* ¶ 14 (J.A. 202). Specifically, “[t]he first sentence of Section 331(a) directs the Commission to ‘allocate’ at least one commercial VHF channel to each state ‘if technically feasible.’” *Ibid.* The second sentence directs the Commission, “upon a licensee’s notification to the Commission that it is willing to agree to the ‘reallocation of its channel’ to an unserved state, to order such

reallocation and issue a license for the reallocated channel, ‘notwithstanding any other provision of law.’” *Ibid.* Thus, the agency explained, “Congress directed the Commission to allocate at least one commercial VHF channel to each state, using normal allocation procedures, *where it is technically feasible to do so.*” *Ibid.* (emphasis added). By contrast, where it is “not technically feasible to establish [that] objective using normal procedures, Congress provided an alternative mechanism” – the mechanism that PMCM invokes here – “that was intended to facilitate reallocations to unserved states by removing the comparative hearing requirements that otherwise would put a licensee’s existing operations at risk and inhibit voluntary reallocations.”

*Ibid.*<sup>13</sup>

Accordingly, the Commission reasonably determined that where, as here, normal allocation procedures with normal public-interest protections can be employed to implement the first sentence of section 331(a) by “allocating” a new VHF channel in an unserved state, Congress did not intend the second sentence to apply. *Order* ¶ 14 (J.A. 202); *see also id.* ¶ 23 (J.A.

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<sup>13</sup> *See Bureau Order* at 5 (J.A. 124) (noting that, at the time section 331 was enacted, “the Commission regarded a petition to amend the TV Table of Allotments to change an allotment’s community of license as an event triggering an opportunity for all interested parties to file applications for the new allotment, even when the channel was already occupied by a station and no new service would result from the change in community of license because the station already served that area”).

208) (“We do not think Congress intended for Section 331(a) to operate as a substitute for normal allocation procedures where, as here, the Commission can fulfill the statutory mandate of allocating at least one commercial VHF channel to each state using those procedures.”).

Instead, the FCC concluded that the second sentence of section 331(a) applies only when existing VHF stations in other states make it infeasible to allocate a new VHF channel to the *unserved* state. In that situation, as in the case of WOR-TV in the early 1980s, the statute permits the licensee of a VHF station with an existing broadcast footprint that covers communities in the unserved state to reallocate its channel to the unserved state. That interpretation of the second sentence of section 331(a) – which the Commission described as “involving reallocations of channels to nearby communities where the two allocations are mutually exclusive” – would reach only that subset of cases in which “technical feasibility is assured” and harmful interference would *never* be a problem. *Order* ¶ 14 (J.A. 202). As the Commission noted, that common-sense interpretation explained why “Congress did not believe it was necessary to require technical feasibility explicitly” in the second sentence of section 331(a). *Ibid.*

PMCM’s expansive reading of the second sentence, by contrast, would render the first and second sentences of section 331(a) internally inconsistent

and yield absurd results. If the second sentence were read to reach “any case” in which a VHF licensee seeks to move its station to a state with no VHF station, as PMCM asserts (Br. 16, 20 (quoting section 331(a)), it not only would undermine Congress’s express concern, reflected in the first sentence, that technical feasibility be assured, but also would risk the absurd result of mandating that the Commission approve new broadcast service that provides a poor quality signal while impairing the signal of other area stations, as well. *See, e.g., Public Citizen*, 491 U.S. at 454 (despite use of “broad” statutory language, “consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe the legislator intended to include the particular act”) (internal quotation marks omitted).

The Commission reasonably concluded that Congress intended to avoid this result through its use of the term “reallocation” in the second sentence. It noted that, prior to the enactment of section 331(a), the Commission had used that term to address circumstances, such as the eventual WOR-TV channel reallocation, in which the prior channel allotment and the reallocated channel were mutually exclusive and reallocation, therefore, would avoid the risk of harmful interference. *See Order* ¶ 21 (J.A.

206) (noting that in its pre-section 331 “*New Jersey Inquiry*, . . . the Commission clearly distinguished between an allotment, *i.e.*, the drop-in of a . . . channel 8 to New Jersey, and the ‘reallocation’ of existing channels in New York to New Jersey”) (citing *Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey*, 58 FCC 2d 790, 802-04 (1976)); *id.* ¶ 14 (J.A. 202) (noting that “technical feasibility is assured” in such circumstances).

PMCM contends (Br. 39-42) that the Commission misread its precedent in attributing that narrow meaning to the term “reallocation.” However, the only pre-enactment decision that PMCM cites in support of its argument is *SRC, Inc., San Angelo, TX*, 21 FCC 2d 901, 907 (1970). That case is consistent with the Commission’s description of its precedent because it involved the “reallocation” of a previously deleted Texas channel back to the *same* community. Thus, it did not involve “the deletion of a channel from one community and the addition of the same channel in another community where simultaneous operation on that channel in both communities would be feasible.” *Order* ¶ 21 (J.A. 206). Nor are the post-enactment decisions PMCM cites (Br. 39-40) inconsistent with the Commission’s view of its

earlier precedent: each involved proposed “reallocations” between mutually exclusive communities.<sup>14</sup>

According to PMCM, the Commission’s conclusion that “reallocation” has had a narrow consistently-defined meaning also is undermined “by the Commission’s own acknowledgement” that it has used the term “allocate” in a “‘colloquial, *i.e.*, erroneous’ manner.” Br. 40 (quoting *Oversight of the Radio and TV Broadcast Rules*, 1 FCC Rcd 849, 849 (Media Bur. 1986)). Not so. The cited order addressed the Commission’s prior misuse of the “terms ‘allotment’ and ‘assignment’” and did not identify any misuse of the terms “allocations” or “reallocations.” *Oversight of the Radio and TV Broadcast Rules*, 1 FCC Rcd at 849 (¶4). PMCM provides no basis upon which to overcome the deference to which the Commission is entitled in

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<sup>14</sup> See *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Montrose and Scranton, Pennsylvania)*, 3 FCC Rcd 1061 (Media Bur. 1988); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 23 FCC Rcd 4220, 4283 (¶ 162) (2008) (reciting Johnstown to Jeannette, Pennsylvania reallocation); *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Snyder, Texas)*, 6 FCC Rcd 5791 (1991). Each of the cited cases involved UHF stations. Rule 73.610(b)(1), 47 C.F.R. § 73.610(b)(1), which governed analog channel allotments, delineated the minimum UHF station separation distances for Zone 1 (which includes Pennsylvania) and Zone 2 (which includes Texas). Because those minimum separation requirements were not met in the cited cases, the proposed reallocations involved mutually exclusive communities.

interpreting its own prior orders. *MCI WorldCom Network Servs., Inc. v. FCC*, 274 F.3d at 547.

The legislative history of section 331(a) also strongly supports the Commission's reading of "reallocation." Although PMCM argues that the statute's *Conference Report* reflects a Congressional intent that the reallocation provision apply to "'any licensee' in 'a' state, without limitation as to the location of that licensee's station," Br. 23 (quoting H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1453 ("*Conference Report*")), that report also expressed an intent that a licensee seeking to invoke the reallocation procedure under section 331 "will move its *studio and offices* to and operate for the public benefit of the unserved State." 1982 U.S.C.C.A.N. 1453 (emphasis added). The quoted language makes no reference to any movement of the licensee's transmission facilities.

Similarly, as the Commission noted, Senator Bradley explained that under the legislation he authored "'the reallocation of a license to New Jersey will mean that the licenseholder will move its studios and offices to New Jersey.'" *Order* ¶ 5 (J.A. 198) (quoting 128 Cong. Rec., S10946 (Aug. 19, 1982)). The notable absence of any reference to the relocation of transmission facilities supports the Commission's construction of section 331(a).

Indeed, in FCC administrative proceedings a year before section 331 was enacted, Senators Bradley and Williams of New Jersey had filed a petition on behalf of their state “proposing that [WOR-TV’s channel 9] be reallocated [from New York City] to any of several communities in New Jersey over which the current operation [of WOR-TV] places a city grade signal,” while noting that their proposal would *not* require the physical relocation of the channel 9 transmission facilities. *Order* ¶ 4 (J.A. 198) (quoting *Petition to Reallocate VHF-TV Channel 9 from New York, New York, to a City Within the City Grade Contour of WOR-TV*, 84 FCC 2d 280, 282 (1981)). The enactment of section 331 the following year effectively provided WOR-TV the same limited relief the New Jersey Senators had sought unsuccessfully through administrative action. There is every indication in the surrounding circumstances that section 331(a) was intended specifically to address WOR-TV’s station. *See Order* ¶¶ 3-5, 16 (J.A. 197-99, 203) (detailing legislative history). There is no indication in the statute’s legislative history that Congress contemplated any possible application of section 331 that could cause harmful interference, as could occur if the statute were read to require non-discretionary relocation of broadcast transmission facilities from anywhere in the county to an unserved state.

Even if PMCM were correct that “reallocation,” in other contexts, would be construed more broadly, the Commission’s reading was entirely reasonable in the specific context of section 331(a), because it reconciles the first and second sentences of that provision. This Court’s *Bell Atlantic* decision is instructive. That case examined two subsections of 47 U.S.C. § 272. The first subsection, section 272(a), provides that, “normally, a Bell Operating Company (‘BOC’) may not provide origination of most communications services between Local Access and Transport Areas (‘interLATA [or long-distance] services’) except through a separate affiliate.” *Bell Atlantic*, 131 F.3d at 1045. The second subsection, section 272(e)(4), states that a BOC “‘may provide . . . interLATA . . . facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates.’” *Id.* (quoting section 272(e)(4)).

The Court noted that, “[a]t first blush, the second provision appears to give back what the first section takes away, *i.e.*, a BOC’s ability to provide interLATA origination services in a physically integrated network with its local exchange services.” *Id.* To avoid that “anomalous result,” however, the FCC interpreted section 272(e)(4) to include an additional caveat (reflected in the highlighted language that follows) – *i.e.*, that a BOC “‘may provide any interLATA services ‘*it is otherwise authorized to provide,*’ so long as it

provides them on a non-discriminatory basis.” *Id.* (quoting FCC order).

Rejecting the BOC petitioners’ claim that “the plain meaning of § 272(e)(4) precludes the Commission’s interpretation because the literal meaning of the words ‘may provide any’ operates as an unrestricted affirmative grant of authority for them to deliver integrated interLATA services,” the Court found that petitioners’ argument “confuses ‘plain meaning’ with literalism.” *Id.* The Court concluded that the statute was ambiguous and upheld the Commission’s reasonable construction. *Id.* at 1047-50.

A similar result should obtain here. Like the petitioners’ argument in *Bell Atlantic*, PMCM’s contention (Br. 20) that the second sentence of section 331(a) applies to “any case” in which a licensee agrees to the reallocation of its VHF channel to an unserved state “confuses ‘plain meaning’ with literalism.” 131 F.3d at 1045. It would negate Congress’s expressed concern about technical feasibility, *i.e.*, preventing harmful interference. Indeed, because that “purported ‘plain meaning’ of [section 331(a)] happens to render the statute senseless, we are encountering ambiguity rather than clarity,” permitting the Commission to interpret the provision in a manner that is reasonable in light of its overall language, structure, purpose and legislative history. *Alarm Indus. Commc’ns v. FCC*, 131 F.3d at 1068.

PMCM attempts to explain Congress's express concern with technical feasibility in the first sentence of section 331(a) – and the absence of any such stated concern in the second sentence – by contending that the second sentence only applies where the Commission first has failed to implement Congress's command in the initial sentence to ensure that, if technically feasible, each state has a VHF channel. Br. 28; *see also* Br. 45 (describing the second sentence of section 331(a) as a “back-up mechanism”). But section 331(a), by its terms, does not provide for sequential attempts to implement the first sentence and then the second. Any eligible licensee (such as the licensee in the *Multi-State* case) could have invoked the reallocation procedure on the first day after section 331 was enacted in 1982, without waiting for the Commission to “fail[]” (Br. 28) to implement the first sentence. Thus, under PMCM's reading, “Congress' directive in the first sentence . . . to consider technical feasibility . . . would be rendered superfluous if the second sentence of the statute were interpreted to require the Commission to reallocate a channel despite technical infeasibility.” *Bureau Order* at 6 n.27 (J.A. 125); *see also Order* ¶ 14 (J.A. 202) (noting that PMCM “has suggested no reason why Congress would be concerned about technical feasibility in the first sentence of section 331(a) . . . but completely unconcerned about technical feasibility in the second sentence”). Indeed,

PMCM's own actions in this case undermine the interpretive theory advanced in its appellate brief: PMCM did not wait for the FCC to "fail" to allocate a channel under the first sentence; instead, it attempted to foreclose the normal notice-and-comment process by rushing to submit a "reallocation" request two days after New Jersey lost its analog VHF channel.<sup>15</sup>

PMCM argues that its "proposed reallocations would not in any event cause any interference to existing stations entitled to protection." Br. 20.

That argument misses the point. Whether or not PMCM's requested moves would have caused harmful interference, PMCM concedes that, under its reading of the statute, the Commission would be required to grant any move request even if it would cause harmful interference to existing stations.

PMCM 9/15/09 *ex parte* at 3 (J.A. 166). The FCC reasonably took account of the ramifications of PMCM's reading of the statute (*see Bureau Order* at 7 n.33 (J.A. 126)) – particularly where that reading would undermine the core purpose of FCC spectrum allocations. *See Red Lion Broad. Co. v. FCC*, 395

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<sup>15</sup> Relatedly, PMCM asserts that, notwithstanding implementation issues associated with the DTV transition, the Commission could have invoked the first sentence of section 331(a) to allocate new VHF channels to New Jersey and Delaware earlier than it did. Br. 32-34. That claim is baseless for the reasons the Commission outlined. *See Order* ¶ 22 (J.A. 206-07). And it has no bearing on the interpretive question in this case – whether PMCM's request to move its Nevada and Wyoming channels to New Jersey and Delaware is governed by the second sentence of section 331(a).

U.S. 367, 376 (1969) (“Without government control, the [broadcast] medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.”).

PMCM also claims that the Commission’s construction is unreasonable, because, even on its own terms, it allegedly would not prevent harmful interference in certain circumstances. Br. 42-43. Because this argument was not raised below, it is barred by 47 U.S.C. § 405(a), which prevents the Court ““from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass.”” *American Family Ass’n v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004) (quoting section 405(a)); accord *AT&T Corp. v. FCC*, 317 F.3d 227, 235-36 (D.C. Cir. 2003).

In any event, PMCM’s argument fails on the merits. As noted above, because the second sentence of section 331(a) – in stark contrast with the preceding sentence – makes no mention of technical feasibility, the Commission concluded that that sentence addresses a universe of applications in which “technical feasibility is assured” and thus where harmful interference would *never* be a problem. *Order* ¶ 14 (J.A. 202). PMCM itself offered no plausible alternative reading, since, by PMCM’s lights, the statute imposes upon the Commission the ministerial duty of granting “reallocations” of channels from anywhere in the country to unserved states *regardless* of

whether the reallocated channel causes harmful interference. PMCM 9/15/09 *ex parte* at 3 (J.A. 166).

PMCM also errs in contending that the Commission's *Order* impermissibly rewrites the second sentence of section 331(a) to "alter . . . the term 'notwithstanding any other provision of law' to read 'notwithstanding some, but not all, other provisions of law.'" Br. 29. The Commission did no such thing. Rather, it reasonably construed the statute to mean that "reallocations" within the meaning of the second sentence must be granted on a non-discretionary basis "notwithstanding" the competitive selection process and the section 307(b) criteria that otherwise would apply. *Order* ¶¶ 14, 16 (J.A. 202, 203).

Focusing on the Commission's explanation that "reallocation" should be construed in light of Congress's intent to remove the impediment of comparative hearings for licensees willing to reallocate their channels to New Jersey, PMCM contends that the Commission mistakenly assumed that only nearby stations faced such a risk in changing their community of license. Br. 35-36 (citing *Order* ¶ 16 (J.A. 203)). PMCM argues that, because licensees of distant channels faced the same risk when changing their communities of license, Congress's intent to remove that risk provides no reasonable basis for the Commission to interpret "reallocation" narrowly. *Id.* PMCM misreads

the *Order*. The Commission stated that the licensee of a distant channel that wanted to operate on the same channel (say, Channel 2) in New Jersey or Delaware “could have petitioned the Commission to *allocate* a *new* channel [2] to New Jersey or Delaware had it been technically feasible for the Commission to do so” with no impact on the licensee’s existing distant license. *Order* ¶ 16 (J.A. 203); *see also Bureau Order* at 5 (J.A. 124) (noting that the licensee of a distant channel could “petition for a new channel allocation, not a reallocation” without putting the license for its existing distant channel at risk).

By contrast, the licensee of a nearby Channel 2 station could not obtain the allocation of a new simultaneously-operating channel on the same frequency in either New Jersey or Delaware, because of harmful interference with its existing channel. In that situation, rather than requesting allocation of a “new channel,” it could request a “reallocation” pursuant to the second sentence of section 331(a). Absent the “alternative mechanism” (*Order* ¶ 14 (J.A.202)) provided by that sentence, at the time section 331(a) was enacted,

the licensee would have risked losing its license in a comparative hearing.<sup>16</sup>

The Commission's interpretation of "reallocation" properly addresses that limited concern.

PMCM next contends that the Commission's construction is inconsistent with this Court's observation in *Multi-State* that "[t]he plain language of section 331 commands that if any licensee volunteers to move to an unserved state, 'the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license. . . .'" Br. 17 (quoting *Multi-State*, 728 F.2d at 1524) (emphasis removed). But, unlike this case, no allocation of a new channel using normal procedures – pursuant to the first sentence of section 331(a) – was technically feasible in *Multi-State Order* ¶ 23 (J.A. 208). Moreover, the licensee that agreed to the reallocation of its channel in *Multi-State* was merely moving its offices and studios from New York City to Secaucus, New Jersey, and was not moving its broadcast transmission facilities or otherwise presenting any new threat of harmful

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<sup>16</sup> PMCM notes that, *subsequent to* the enactment of section 331, the Commission amended its rules to allow a licensee to seek reallocation of its channel to a new community of interest without placing its existing authorization at risk, so long as the new community of interest is mutually exclusive with the existing allotment. Br. 37 (citing *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4872-73 (¶ 22) (1989)). That change has no bearing on the meaning of section 331, which was designed to remove impediments to reallocation that existed at the time section 331 was enacted in 1982.

interference to existing stations. *WOR-TV Reallocation Order*, 53 Rad.Reg. 2d at 470 (¶ 2). “[I]ts transmitter w[ould] remain atop the World Trade Center in New York City,” thereby allowing the licensee to continue broadcasting within its existing coverage area. *Ibid.* Accordingly, that licensee’s request was governed by the second sentence of section 331(a).

The language from *Multi-State* on which PMCM relies responds to the claim that, *notwithstanding* the applicability of the second sentence of section 331(a) to the licensee’s reallocation request, the Commission nevertheless should have “conduct[ed] a comparative hearing to determine which of two or more competing license applicants would better service the public interest.” *Id.* at 1524. It thus has no bearing on PMCM’s request to move its stations thousands of miles, which the Commission reasonably determined is not governed by the second sentence of section 331(a).

Indeed, although the Court in *Multi-State* “did not examine or construe the term ‘reallocate,’” its analysis of the term “allocate” strongly supports the Commission’s conclusion in the *Order* that the second sentence of section 331(a) should not be interpreted in isolation, divorced from the preceding sentence. *Order* ¶¶ 17, 18 (J.A. 203-04). *See Multi-State*, 728 F.2d at 1522 (rejecting appellants’ construction of “allocated” because statutory

interpretation “requires more than a superficial and isolated examination of the statute’s plain words”).

Finally, PMCM argues that the Commission’s construction of section 331(a) is inconsistent with the statute’s purpose “to provide each “unserved” state with an operating commercial VHF station” because it reduces the pool of parties potentially eligible to seek mandatory “reallocation.” Br. 24-25 (quoting *Multi-State*, 728 F.2d at 1524). PMCM’s reading, however, would effectively eliminate the Commission’s ability to remedy the problem of unserved areas through the first sentence of section 331(a) – a provision that itself otherwise would maximize the pool of potential licensees. Nothing in the text of the statute or the legislative history suggests that Congress intended to maximize the pool of reallocation requesters at the expense of other goals – including the goal of avoiding harmful interference in license allocations. Although PMCM’s reading would increase the number of potential parties requesting moves under the second sentence of section 331(a), it also would undermine Congress’s concerns about technical

feasibility. A faithful reading of the statute does not require such a self-defeating result. *Public Citizen*, 491 U.S. at 454.<sup>17</sup>

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In sum, the Commission reasonably concluded that the reallocation procedure specified in the second sentence of section 331(a) is limited to situations involving the “shifting of a channel from one community to another community under circumstances where the channel cannot be used simultaneously [by different broadcasters] at both locations because such dual operations would cause interference.” *Order* ¶ 1 (J.A. 196). Because it is undisputed that the operation of PMCM’s stations in Nevada and Wyoming would not have precluded allocation of the same television channels for use in New Jersey and Delaware, the Commission correctly determined that section 331(a) did not require it to grant PMCM’s requests.

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<sup>17</sup> PMCM similarly contends that the Commission’s construction “would inexplicably *preclude* . . . non-contiguous states – Alaska and Hawaii – and most U.S. territories” from relief under the second sentence of section 331(a). Br. 43-44. That result, however, is hardly “inexplicable.” If a non-contiguous state or territory is without a VHF station, resort to the reallocation procedure in the second sentence would be entirely unnecessary: there would be no technical feasibility impediment (stemming from out-of-state or territory VHF stations) to allocating a new VHF channel to that state or territory.

**CONCLUSION**

For the foregoing reasons, the Court should deny PMCM's appeal.

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February 2, 2012

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

PMCM TV, LLC,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

No. 11-1330

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 8,820 words.

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February 2, 2012

## **STATUTORY APPENDIX**

47 C.F.R. § 73.610(b)(1)

47 C.F.R. § 74.702(b)

47 U.S.C. § 307(b)

47 U.S.C. § 309

47 U.S.C. § 331(a)

47 U.S.C. § 405(a)

47 C.F.R. § 73.610(b)(1)

CODE OF FEDERAL REGULATIONS  
TITLE 47. TELECOMMUNICATION  
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION  
SUBCHAPTER C. BROADCAST RADIO SERVICES  
PART 73. RADIO BROADCAST SERVICES  
SUBPART E. TELEVISION BROADCAST STATIONS

**§ 73.610 Minimum distance separation between stations**

\* \* \* \* \*

(b) Minimum co-channel allotment and station separations:

(1)

Kilometers

Zone	Channels 2-13	Channels 14-69
I	272.7 (169.5 miles)	248.6 (154.5 miles)
II	304.9 (189.5 miles)	280.8 (174.5 miles)
III	353.2 (219.5 miles)	329.0 (204.5 miles)

\* \* \* \* \*

47 C.F.R. § 74.702(b)

CODE OF FEDERAL REGULATIONS  
TITLE 47. TELECOMMUNICATION  
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION  
SUBCHAPTER C. BROADCAST RADIO SERVICES  
PART 74. EXPERIMENTAL RADIO, AUXILLIARY, SPECIAL  
BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES  
SUBPART G. LOW POWER, TV, TV TRANSLATOR, AND TV  
BOOSTER STATIONS

**§ 74.702 Channel assignments**

\* \* \* \* \*

(b) Changes in the TV Table of Allotments or Digital Television Table of Allotments (§§ 73.606(b) and 73.622(a), respectively, of part 73 of this chapter), authorizations to construct new TV broadcast analog or DTV stations or to authorizations to change facilities of existing such stations, may be made without regard to existing or proposed low power TV or TV translator stations. Where such a change results in a low power TV or TV translator station causing actual interference to reception of the TV broadcast analog or DTV station, the licensee or permittee of the low power TV or TV translator station shall eliminate the interference or file an application for a change in channel assignment pursuant to § 73.3572 of this chapter.

\* \* \* \* \*

47 U.S.C. § 307(b)

UNITED STATES CODE ANNOTATED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND  
RADIOTELEGRAPHS  
CHAPTER 5. WIRE OR RADIO COMMUNICATION  
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO  
PART I. GENERAL PROVISIONS

**§ 307. Licenses**

\* \* \* \* \*

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

\* \* \* \* \*

47 U.S.C. § 309

UNITED STATES CODE ANNOTATED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5. WIRE OR RADIO COMMUNICATION  
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO  
PART I. GENERAL PROVISIONS

**§ 309. Application for license**

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application--

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

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(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

47 U.S.C. § 309 (cont'd)

Page 3

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(c) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this

47 U.S.C. § 309 (cont'd)

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section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for

47 U.S.C. § 309 (cont'd)

Page 5

intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of temporary operations under subsection (b)

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

47 U.S.C. § 309 (cont'd)

Page 6

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(i) Random selection

**(1) General authority**

Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

**(2)** No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law--

**(A)** adopt procedures for the submission of all or part of the evidence in written form;

**(B)** delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

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(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term “media of mass communications” includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term “minority group” includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

47 U.S.C. § 309 (cont'd)

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(4)(A) The Commission shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) Not later than 180 days after August 10, 1993, the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection.

**(5) Termination of authority**

(A) Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997.

(B) Subparagraph (A) of this paragraph shall not apply with respect to licenses or permits for stations described in section 397(6) of this title.

**(j) Use of competitive bidding**

**(1) General authority**

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license

47 U.S.C. § 309 (cont'd)

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or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups

47 U.S.C. § 309 (cont'd)  
Page 10

of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed; and

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

47 U.S.C. § 309 (cont'd)

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(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

47 U.S.C. § 309 (cont'd)

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(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

47 U.S.C. § 309 (cont'd)  
Page 13

- (A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;
- (B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);
- (C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;
- (D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;
- (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;
- (F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;
- (G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or
- (H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

47 U.S.C. § 309 (cont'd)

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(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), and (E), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

47 U.S.C. § 309 (cont'd)

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Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraph (E)(ii);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

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Page 16

(D) Disposition of cash proceeds

Cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(E) Transfer of receipts

(i) Establishment of fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer \$7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term “recovered analog spectrum” has the meaning provided in paragraph (15)(C)(vi).

47 U.S.C. § 309 (cont'd)  
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(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

47 U.S.C. § 309 (cont'd)

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(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2012.

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(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report--

- (A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;
- (B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);
- (C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;
- (D) evaluating whether and to what extent--
  - (i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;
  - (ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;
  - (iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and
  - (iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

47 U.S.C. § 309 (cont'd)  
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(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

47 U.S.C. § 309 (cont'd)

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(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

47 U.S.C. § 309 (cont'd)

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(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

**(E) Implementation with respect to pending applications.**--In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

47 U.S.C. § 309 (cont'd)

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(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than \$400,000,000, and if such amount is less than \$400,000,000, the Commission shall recover an amount equal to \$400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

#### (F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

47 U.S.C. § 309 (cont'd)

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(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial full-power television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

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Page 25

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(D) Redesignated (C)

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding;

47 U.S.C. § 309 (cont'd)  
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conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of--

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

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Page 27

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Report

Within one year after the date of enactment of this paragraph, the Commission shall submit a report to Congress--

(I) specifying when the Commission intends to reschedule auctions 31 and 44 (other than the blocks excepted by clause (i)); and

(II) describing the progress made by the Commission in the digital television transition and in the assignment and allocation of additional spectrum for advanced mobile communications services that warrants the scheduling of such auctions.

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term "recovered analog spectrum" means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

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(I) the spectrum required by section 337 to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after the date of enactment of this paragraph, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the total cash proceeds from any auction of eligible frequencies described in section 923(g)(2) of this title shall at least equal 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 923(g)(2) of this title if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

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Page 29

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

(k) Broadcast station renewal procedures

(1) Standards for renewal

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are

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appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e) of this section, that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited

In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

(l) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) of this section to assign such license or permit;

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(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on August 5, 1997.

47 U.S.C.A. § 331(a)

UNITED STATES CODE ANNOTED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5. WIRE OR RADIO COMMUNICATIONS  
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO  
PART I. GENERAL PROVISIONS

**§ 331. Very high frequency stations and AM radio stations**

(a) Very high frequency stations

It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of this title.

\* \* \* \* \*

47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED  
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS  
CHAPTER 5. WIRE OR RADIO COMMUNICATION  
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE  
PROVISIONS

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

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

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

\* \* \* \* \*

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

**PMCM, TV, LLC, Appellant**

**v.**

**Federal Communications Commission, Appellee.**

**CERTIFICATE OF SERVICE**

I, Laurence N. Bourne, hereby certify that on February 2, 2012, 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.

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