

BRIEF FOR RESPONDENTS

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

\_\_\_\_\_  
No. 12-9543  
\_\_\_\_\_

COUNCIL TREE INVESTORS, INC. AND BETHEL NATIVE  
CORPORATION,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

\_\_\_\_\_  
ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

JOSEPH F. WAYLAND  
ACTING ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON  
ROBERT J. WIGGERS  
ATTORNEYS

UNITED STATES  
DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

SEAN A. LEV  
GENERAL COUNSEL

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

LAURENCE N. BOURNE  
COUNSEL

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

---

## TABLE OF CONTENTS

|   |      |
|---|------|
| STATEMENT OF RELATED CASES .....  | viii |
| GLOSSARY .....  | ix   |
| JURISDICTION.....   | 1    |
| QUESTIONS PRESENTED.....  | 3    |
| STATUTES AND REGULATIONS .....  | 5    |
| COUNTERSTATEMENT OF THE CASE.....   | 5    |
| COUNTERSTATEMENT OF FACTS.....  | 6    |
| I. REGULATORY BACKGROUND .....  | 6    |
| A. Spectrum License Auctions And “Designated Entities”.....   | 6    |
| B. The 2006 Amendments To The DE Rules .....  | 9    |
| C. Major Auctions Conducted Under the 2006 DE Rules.....  | 12   |
| 1. Auction 66 (the AWS Auction) .....   | 12   |
| 2. Auction 73 (the 700 MHz Auction) .....   | 13   |
| II. PETITIONERS’ PRIOR JUDICIAL CHALLENGES TO<br>THE DE RULES AND THE AUCTIONS CONDUCTED<br>UNDER THEM..... | 15   |
| A. Council Tree’s Initial Judicial Challenge to the DE Rules<br>( <i>Council Tree I</i> ).....              | 15   |
| B. <i>Council Tree II</i> .....   | 17   |
| C. <i>Council Tree III</i> .....  | 18   |
| III. THE D BLOCK WAIVER PROCEEDING.....   | 21   |
| SUMMARY OF ARGUMENT .....   | 26   |
| STANDARD OF REVIEW .....  | 28   |

ARGUMENT .....28

I. THE COMMISSION REASONABLY DISMISSED  
PETITIONERS’ RECONSIDERATION PETITION AS  
MOOT AND THEIR “SUPPLEMENT” AS UNTIMELY.....28

II. THIS COURT LACKS JURISDICTION TO CONSIDER  
PETITIONERS’ CHALLENGE TO THE CONDUCT OF  
AUCTION 73 UNDER THE NOW-VACATED DE  
RULES. ....32

III. PETITIONERS’ REQUEST TO RESCIND AUCTION 73  
IS BARRED BY *COUNCIL TREE III*. ....39

IV. APA SECTION 706(2) WOULD NOT REQUIRE  
RESCISSION OF AUCTION 73 EVEN IF THE RESULTS  
OF THAT AUCTION WERE PROPERLY BEFORE THE  
COURT. ....45

CONCLUSION .....51

STATEMENT REGARDING ORAL ARGUMENT.....51

## TABLE OF AUTHORITIES

### CASES

|   |        |
|---|--------|
| <i>21<sup>st</sup> Century Telesis Joint Venture v. FCC</i> , 318 F.3d 192 (D.C. Cir. 2003).....  | 32     |
| <i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 200 (1995) .....   | 7      |
| <i>Biggerstaff v. FCC</i> , 511 F.3d 178 (D.C. Cir. 2007).....  | 34     |
| <i>Charter Commc’ns, Inc. v. FCC</i> , 460 F.3d 31 (D.C. Cir. 2006).....  | 33     |
| <i>Council Tree Commc’ns, Inc. v. FCC</i> , 324 F. App’x 3 (D.C. Cir. 2009).....  | 5, 18  |
| <i>Council Tree Commc’ns, Inc. v. FCC</i> , 503 F.3d 284 (3d Cir. 2007) .....   | 5, 17  |
| <i>Council Tree Commc’ns, Inc. v. FCC</i> , 619 F.3d 235 (3d Cir. 2010) , <i>cert. denied</i> , 131 S. Ct. 1784 (2011). .....               | passim |
| <i>Council Tree Commc’ns, Inc. v. FCC</i> , No. 06-2943 (3d Cir. June 29, 2006).....  | 16     |
| <i>Davis Cnty. Solid Waste Mgmt. v. United States EPA</i> , 108 F.3d 1454 (D.C. Cir. 1997).....   | 49     |
| <i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940) .....   | 31, 38 |
| <i>Forest Guardians v. Babbitt</i> , 174 F.3d 1178 (10th Cir. 1999).....  | 49     |
| <i>Fresno Mobile Radio, Inc. v. FCC</i> , 165 F.3d 965 (D.C. Cir. 1999).....  | 6      |
| <i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944) .....  | 45, 46 |
| <i>HRI, Inc. v. EPA</i> , 198 F.3d 1224 (10th Cir. 2000).....   | 35, 36 |
| <i>Idaho Farm Bureau v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995).....   | 49     |
| <i>In re Council Tree Investors, Inc. and Bethel Native Corp.</i> , Order, No. 11-9569, Document: 01018771560 (10th Cir. Jan. 4, 2012)..... | 24     |

|   |                |
|---|----------------|
| <i>Kennecott Utah Copper Corp. v. Dep’t of Interior</i> ,<br>88 F.3d 1191 (D.C. Cir. 1996) .....                                  | 34, 35         |
| <i>Los Angeles Ltd. P’ship v. FCC</i> , 70 F.3d 1358 (D.C.<br>Cir. 1995).....   | 17             |
| <i>MACTEC, Inc. v. Gorelick</i> , 427 F.3d 821 (10th Cir.<br>2005).....   | 40, 41, 42, 44 |
| <i>Morris v. Noe</i> , 672 F.3d 1185 (10th Cir. 2012) .....   | 30             |
| <i>Motor Vehicle Mfrs. Ass’n of the United States, Inc.<br/>v. State Farm Mutual Auto. Ins. Co.</i> , 463 U.S. 29<br>(1983) ..... | 28             |
| <i>Natural Res. Def. Council v. EPA</i> , 513 F.3d 257<br>(D.C. Cir. 2008).....   | 39             |
| <i>NetworkIP, LLC v. FCC</i> , 548 F.3d 116 (D.C. Cir.<br>2008).....  | 32             |
| <i>Ohio v. EPA</i> , 838 F.2d 1325 (D.C. Cir. 1988).....  | 35             |
| <i>Omnipoint Corp. v. FCC</i> , 78 F.3d 620 (D.C. Cir.<br>1996).....  | 7              |
| <i>PGBA, LLC v. United States</i> , 389 F.3d 1219 (Fed.<br>Cir. 2004).....  | 50             |
| <i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946).....  | 46             |
| <i>Qwest Corp. v. FCC</i> , 258 F.3d 1191 (10th Cir.<br>2001).....  | 28, 50         |
| <i>Qwest Corp. v. FCC</i> , No. 99-9546 (10th Cir. Aug.<br>27, 2001).....   | 50             |
| <i>Rio Grande Silvery Minnow v. Bureau of<br/>Reclamation</i> , 601 F.3d 1096 (10th Cir. 2010) .....                              | 29             |
| <i>Sorenson Commc’ns, Inc. v. FCC</i> , 567 F.3d 1215<br>(10th Cir. 2009) .....   | 28             |
| <i>Sugar Cane Growers Coop. v. Veneman</i> , 289 F.3d<br>89 (D.C. Cir. 2002).....   | 48             |
| <i>U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship</i> ,<br>513 U.S. 18 (1994) .....  | 46             |

|  |        |
|--|--------|
| <i>United States ex rel. Taylor v. Gabelli</i> , 345 F. Supp. 2d 313 (S.D.N.Y. 2004) ..... | 10     |
| <i>WAIT Radio v. FCC</i> , 418 F.2d 1153 (D.C. Cir. 1969).....                             | 24, 29 |
| <i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982) .....                            | 45, 46 |
| <i>West Penn Power Co. v. EPA</i> , 860 F.2d 581 (3d Cir. 1988).....                       | 17     |
| <i>Yapp v. Excel Corp.</i> , 186 F.3d 1222 (10th Cir. 1999).....                           | 41, 42 |

## **ADMINISTRATIVE DECISIONS**

|   |          |
|---|----------|
| <i>Alpine PCS, Inc., Requests for Waiver</i> , 25 FCC Rcd 469 (2010) .....  | 32       |
| <i>Amendment of the Commission’s Rules to Establish Part 27, the Wireless Commc’ns Serv.</i> , 12 FCC Rcd 10785 (1997).....   | 9        |
| <i>Implementation of Section 309(j) of the Communications Act – Competitive Bidding</i> , 11 FCC Rcd 136 (1995) .....   | 9        |
| <i>Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures</i> , 21 FCC Rcd 1753 (2006)..... | 8, 9, 10 |
| <i>Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures</i> , 21 FCC Rcd 4753 (2006)..... | 3, 7, 10 |
| <i>Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures</i> , 21 FCC Rcd 6703 (2006)..... | 11       |
| <i>Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures</i> , 23 FCC Rcd 5425 (2008)..... | 12       |

|  |            |
|--|------------|
| <i>Service Rules for the 698-746, 747-762 and 777-792 MHz Bands</i> , 21 FCC Rcd 9345 (2006) .....   | 13         |
| <i>Service Rules for the 698-746, 747-762 and 777-792 MHz Bands</i> , Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (2007) ..... | passim     |
| <i>Service Rules for the 698-746, 747-762 and 777-792 MHz Bands</i> , 22 FCC Rcd 15289 (2007) .....  | 18         |
| <i>Service Rules for the 698-746, 747-762 and 777-792 MHz Bands</i> , 23 FCC Rcd 8047 (2008) .....   | 15, 23, 29 |

## **STATUTES AND REGULATIONS**

|                                      |              |
|--------------------------------------|--------------|
| 5 U.S.C. § 706 .....                 | 47           |
| 5 U.S.C. § 706(2).....               | 27, 45       |
| 5 U.S.C. § 706(2)(A).....            | 28           |
| 28 U.S.C. § 2342 .....               | 48           |
| 28 U.S.C. § 2344 .....               | 2, 4, 27, 33 |
| 47 U.S.C. § 154(j) .....             | 31           |
| 47 U.S.C. § 307 .....                | 2, 6         |
| 47 U.S.C. § 309 .....                | 2, 6         |
| 47 U.S.C. § 309(j)(1).....           | 6            |
| 47 U.S.C. § 309(j)(3)(A) .....       | 6            |
| 47 U.S.C. § 309(j)(3)(B) .....       | 6, 7, 19     |
| 47 U.S.C. § 309(j)(3)(C) .....       | 6            |
| 47 U.S.C. § 309(j)(3)(D) .....       | 6            |
| 47 U.S.C. § 402(a).....              | 2, 4, 33     |
| 47 C.F.R. § 1.106(f) .....           | 25, 31       |
| 47 C.F.R. § 1.2110(a).....           | 7            |
| 47 C.F.R. § 1.2110(b)(1)(i) .....    | 11           |
| 47 C.F.R. § 1.2110(b)(3)(iv)(A)..... | 11           |
| 47 C.F.R. § 1.2110(b)(3)(iv)(B)..... | 11           |

|  |    |
|--|----|
| 47 C.F.R. § 1.2110(f)(2)(i) – (iii)..... | 7  |
| 47 C.F.R. § 1.2111(d)(2)(i) .....        | 11 |

**OTHERS**

|  |    |
|--|----|
| <i>Restatement (Second) of Judgments § 24</i><br>(1982) .....  | 42 |
| Ronald M. Levin, <i>Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law</i> , 53 Duke L.J. 291 (2003)..... | 48 |
| United States Dep’t of Justice, <i>Attorney General’s Manual on the Administrative Procedure Act</i> 108<br>(1947) .....                 | 47 |

## STATEMENT OF RELATED CASES

There are three cases related to this one: (1) *Council Tree Commc'ns v. FCC*, 503 F.3d 284 (3d Cir. 2007); (2) *Council Tree Commc'ns v. FCC*, No. 07-1454. 324 F. App'x 3 (D.C. Cir. 2009); and (3) *Council Tree Commc'ns v. FCC*, 619 F.3d 235 (3d Cir. 2010), *cert denied*. 131 S. Ct. 1784 (2011).

## GLOSSARY

|               |  |
|---------------|--|
| APA           | Administrative Procedure Act                     |
| Auction 66    | the AWS spectrum license auction                 |
| Auction 73    | the 700 MHz spectrum license auction             |
| AWS           | Advanced Wireless Services                       |
| Bethel Native | Bethel Native Corporation                        |
| Council Tree  | Council Tree Investors, Inc.                     |
| DE            | designated entity                                |
| FCC           | Federal Communications Commission                |
| J.A.          | Joint Appendix                                   |
| MHz           | megahertz  |
| MMTC          | Minority Media and<br>Telecommunications Council |
| Pet. Br.      | Petitioners' Brief                               |

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

No. 12-9543

---

COUNCIL TREE INVESTORS, INC. AND BETHEL NATIVE  
CORPORATION,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

---

ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

BRIEF FOR RESPONDENTS

---

**JURISDICTION**

Petitioners Council Tree Investors, Inc. and Bethel Native Corporation (collectively, “petitioners”) challenge the Commission’s *D Block Waiver Order* and *Waiver Reconsideration Order*. *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules for the Upper 700 MHz Band D Block*, Order, 22 FCC Rcd 20354 (2007) (“*D Block Waiver Order*”) (J.A.

6), *petition for recon. dismissed*, 27 FCC Rcd 908 (2012) (“*Waiver Reconsideration Order*”) (J.A. 12). In those orders, the Commission (1) granted a limited waiver of one rule governing the eligibility of certain small businesses for targeted competitive bidding benefits in connection with one major spectrum license auction (known as the 700 MHz auction or Auction 73), and (2) dismissed, as moot and untimely, respectively, petitioners’ petition for reconsideration and “supplement” regarding that waiver grant. Because petitioners filed their petition for judicial review within 60 days of the entry of the *Waiver Reconsideration Order*, this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344 to consider their challenge to the Commission’s decision to dismiss the petition for administrative reconsideration of the *D Block Waiver Order* as moot and their supplement as untimely. *See Waiver Reconsideration Order* ¶ 4 & n.12 (J.A. 13-14).

This Court lacks jurisdiction, however, to consider petitioners’ attempt to use their petition for review of the *D Block Waiver Order* and the *Waiver Reconsideration Order* as a vehicle to rescind the results of Auction 73. As discussed in Argument II, below, the relevant conduct of Auction 73 was the subject of an earlier order for which the time for review has long since passed.

## QUESTIONS PRESENTED

The FCC conducts competitive auctions to allocate licenses to use portions of the electromagnetic spectrum. 47 U.S.C. §§ 307, 309. In 2006, to address documented instances of fraud and abuse, the agency revised and tightened certain rules designed to encourage the participation of small businesses (known as “designated entities” or “DEs”) in such auctions.

*Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, 21 FCC Rcd 4753 (2006) (“*DE Second Report & Order*”). In an April 2007 rulemaking order, the Commission determined that those revised DE eligibility rules should apply to Auction 73. *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 ¶ 6 (2007) (“*700 MHz First Report and Order*”).

The Commission conducted Auction 73 in early 2008 pursuant to the revised DE rules – save for a limited waiver that the Commission granted in the *D Block Waiver Order* with respect to one rule for one license. The license subject to that waiver, however, was not ultimately awarded. On direct review of the *DE Second Report & Order*, in response to a challenge brought by Council Tree and Bethel Native, the Third Circuit in 2010 set

aside two of the revised DE rules for inadequate notice under the Administrative Procedure Act (“APA”), but the court rejected petitioners’ request that it rescind Auction 73 for having been conducted pursuant to those rules. *Council Tree Commc’ns, Inc. v. FCC*, 619 F.3d 235, 248-59 (3d Cir. 2010) (“*Council Tree III*”), *cert. denied*, 131 S. Ct. 1784 (2011).

Petitioners now seek the same remedy on review of the *D Block Waiver Order* and the *Waiver Reconsideration Order*.

The case presents the following questions for review:

(1) Whether the Commission reasonably dismissed petitioners’ request for reconsideration of the *D Block Waiver Order* as moot and their “supplement” as untimely and beyond the scope of the waiver proceeding.

(2) Whether petitioners’ challenge is untimely, and thus beyond this Court’s jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2344, insofar as petitioners seek rescission of Auction 73.

(3) Whether petitioners’ challenge is barred by principles of claim preclusion insofar as petitioners seek rescission of Auction 73.

(4) Whether, if the results of Auction 73 are properly before the Court, the Court retains remedial discretion to deny petitioners’ request for rescission.

## STATUTES AND REGULATIONS

Relevant statutes and regulations are contained in an addendum to this brief.

## COUNTERSTATEMENT OF THE CASE

This case reflects petitioners' fourth attempt – in three different courts of appeals – to set aside spectrum license auctions conducted under revised bidding credit eligibility rules that the Commission adopted in 2006. The Third Circuit dismissed their first challenge as “incurably premature.” *Council Tree Commc’ns, Inc. v. FCC*, 503 F.3d 284, 287-91 (3d Cir. 2007) (“*Council Tree I*”). The D.C. Circuit dismissed their second challenge as untimely because petitioners sought review of the wrong order. *Council Tree Commc’ns, Inc. v. FCC*, 324 F. App’x 3, 4-5 (D.C. Cir. 2009) (“*Council Tree II*”). In petitioners' third challenge, the Third Circuit upheld one challenged DE eligibility rule and set aside two others for inadequate notice under the APA, but rejected petitioners' request to set aside the results of multi-billion dollar auctions (including Auction 73) conducted under those rules. *Council Tree III*, 619 F.3d at 248-59. Petitioners now ask this Court to rescind Auction 73 on review of two orders that granted – and dismissed reconsideration of – a narrow waiver of one DE eligibility rule for a single Auction 73 license that was never ultimately awarded.

## COUNTERSTATEMENT OF FACTS

### I. REGULATORY BACKGROUND

#### A. Spectrum License Auctions And “Designated Entities”

The Communications Act of 1934 authorizes the FCC to award licenses to use the electromagnetic spectrum to provide communications services. *See* 47 U.S.C. §§ 307, 309. Since 1993, the Act has required the Commission to award spectrum licenses “through a system of competitive bidding,” *i.e.*, by auction. 47 U.S.C. § 309(j)(1).

The statute directs the Commission to design auction rules and procedures that “balance a number of potentially conflicting objectives.” *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999). These objectives include: developing and deploying new technologies and services “for the benefit of the public . . . without administrative or judicial delays,” 47 U.S.C. § 309(j)(3)(A); avoiding “unjust enrichment,” *id.* § 309(j)(3)(C); ensuring the “efficient and intensive use of the electromagnetic spectrum,” *id.* § 309(j)(3)(D); and “promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses,” *id.* § 309(j)(3)(B). In adopting rules, the Act requires the agency to avoid “excessive concentration of licenses . . . by disseminating licenses among a wide variety of applicants,” including several statutorily prescribed groups commonly referred to as “designated entities”: “small businesses,

rural telephone companies, and businesses owned by members of minority groups and women.” 47 U.S.C. § 309(j)(3)(B).<sup>1</sup>

To promote the participation of these designated entities in spectrum license auctions, the Commission has made them eligible for bidding credits, which discount the payments DEs are required to make for licenses they win at auction “in an amount measured as a percentage” of their winning bids. *Council Tree III*, 619 F.3d at 239 (citing 47 C.F.R. § 1.2110(f)(2)(i) – (iii)). For example, if a company that meets the DE criteria qualifies for a 20 percent bidding credit in a particular auction, and if the company makes a winning bid of \$500,000 for a license in that auction, it will be required to pay only \$400,000 to obtain that license.

To qualify for bidding credits, a prospective DE must demonstrate that its gross revenues, in combination with those of its “attributable” interest holders, fall below certain caps that vary with the service to be provided. *See DE Second Report & Order*, 21 FCC Rcd at 4757 ¶ 9. For purposes of

---

<sup>1</sup> Although FCC rules define “designated entities” to include “businesses owned by members of minority groups and/or women,” 47 C.F.R. § 1.2110(a), the Commission eliminated any DE benefits that were based on the race or gender of an applicant’s owners after the Supreme Court ruled in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), that certain federal affirmative action programs were unconstitutional. *See Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996). Since *Adarand*, bidding credits have been available only to eligible small businesses based on specific size standards.

assessing an applicant's eligibility for bidding credits, the Commission since 2000 has attributed to the applicant: the applicant's own gross revenues; those of its affiliates; those of its "controlling interests" (*i.e.*, those entities that have *de jure* or *de facto* control over the applicant); and those of the affiliates of its controlling interests. *Id.* at 4758-59 ¶ 12.

The agency has also taken further steps to ensure that "only legitimate small businesses reap the benefits of the Commission's designated entity program." *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, 21 FCC Rcd 1753, 1757 ¶ 6 (2006) ("*DE Further Notice*"). For example, under the FCC's unjust enrichment rules, a DE that has used bidding credits to acquire a license must return some or all of those credits if it loses its eligibility for bidding credits or subsequently transfers its license to an entity that is not eligible for DE status. At various times, FCC rules have required repayment of bidding credits if a licensee loses its DE

eligibility at some point during the ten-year license term.<sup>2</sup> The rules in effect at the beginning of 2006, however, required repayment of bidding credits only if a licensee lost its DE eligibility within the first five years after it won the license. *See Council Tree III*, 619 F.3d at 240-41.

### **B. The 2006 Amendments To The DE Rules**

In administering its auction program, the FCC discovered several instances of fraud and abuse by applicants improperly claiming eligibility for DE benefits. For example, some putative DEs were “put[ting] themselves forward as small companies in order to qualify for auction discounts,” even though they had entered into agreements to lease their prospective spectrum rights to larger firms that were not entitled to such benefits. *See DE Further Notice*, 21 FCC Rcd at 1771 (Statement of Comm’r Copps). Other bidders reportedly had acquired discounted licenses “not for the legitimate objective of developing or offering spectrum services,” but rather “as investments to be later sold for profit in the after-market.” *United States ex rel. Taylor v.*

---

<sup>2</sup> *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 11 FCC Rcd 136, 180 (1995) (requiring total reimbursement of bidding credits if eligibility was lost at any time during the ten-year license term); *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Commc’ns Serv.*, 12 FCC Rcd 10785, 10918-19 (1997) (providing for 100 percent reimbursement for loss of eligibility during the first five years of the license term, with declining reimbursement obligations for years six through ten).

*Gabelli*, 345 F. Supp. 2d 313, 321-22 (S.D.N.Y. 2004) (internal quotation marks and brackets omitted).

In February 2006, after petitioner Council Tree submitted a proposal to tighten some of the eligibility rules for DE benefits, the Commission issued a notice of proposed rulemaking. That notice sought comment on measures to “prevent companies from circumventing the objectives of the designated entity eligibility rules” and to ensure that DE benefits are “available only to bona fide small businesses.” *DE Further Notice*, 21 FCC Rcd at 1757 ¶¶ 6-7.

In April 2006, after reviewing comments submitted in response to the *DE Further Notice*, the FCC issued the *DE Second Report & Order*. In an effort to prevent fraud and abuse in the DE program, that order amended and tightened the agency’s auction rules for designated entities in several respects. With regard to leasing and resale arrangements, the Commission adopted two new eligibility restrictions designed to ensure that every recipient of DE benefits uses its licenses to provide telecommunications services directly to the public. *DE Second Report & Order*, 21 FCC Rcd at 4762-64 ¶¶ 21-27. One restriction – the 25% Attribution Rule – provided that “if a DE leases or resells (including at wholesale) more than 25% of its spectrum capacity to any single lessee or purchaser, it must add that lessee’s or purchaser’s revenues to its own to determine its continued eligibility for

DE credits.” *Council Tree III*, 619 F.3d at 251 (citing 47 C.F.R. § 1.2110(b)(1)(i) & (b)(3)(iv)(B)). The other restriction – the 50% Impermissible Relationship Rule – disqualified license applicants or licensees for DE benefits “if they lease[d] or [resold] (including at wholesale) more than 50% of their spectrum capacity” on an aggregate basis. *Id.* at 253 (citing 47 C.F.R. § 1.2110(b)(3)(iv)(A)).

The Commission also strengthened its unjust enrichment rule by returning to a ten-year (rather than five-year) repayment period. Under the Ten-Year Repayment Schedule, a DE that transferred its license to a non-DE or otherwise lost eligibility for DE benefits at any time during the first ten years of its license would have to repay some or all of its bidding credits. *See Council Tree III*, 619 F.3d at 240-41 (citing 47 C.F.R. § 1.2111(d)(2)(i)).

On May 5, 2006, petitioners Council Tree and Bethel Native, along with the Minority Media and Telecommunications Council (“MMTC”), jointly filed a petition for expedited reconsideration of the *DE Second Report & Order*. *See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, 21 FCC Rcd 6703, 6704 n.2 (2006) (“*DE Reconsideration Order*”). Because a major auction (the Advanced Wireless Services (“AWS”) auction, also known as “Auction 66”) was scheduled to commence

shortly thereafter, the Commission on its own motion issued an order on reconsideration before the comment period on Council Tree’s reconsideration petition had closed. In that order, the agency clarified certain aspects of the new DE rules and addressed the issues raised by Council Tree’s reconsideration petition. *Id.* at 6706-20 ¶¶ 7-44. But the FCC did not formally grant or deny Council Tree’s reconsideration petition, which remained pending until the agency denied it in March 2008.<sup>3</sup>

### **C. Major Auctions Conducted Under the 2006 DE Rules**

The FCC conducted two major spectrum license auctions while the revised DE rules – including the 25% Attribution Rule, the 50% Impermissible Relationship Rule, and the Ten-Year Repayment Schedule – were in effect.

#### **1. Auction 66 (the AWS Auction)**

In 2006, the Commission held Auction 66 (the AWS auction). That auction yielded “nearly \$14 billion in winning bids.” *Council Tree III*, 619 F.3d at 248. DEs accounted for “57 of the 104 winning bidders” in Auction 66, “winning 20% of the individual licenses auctioned.” *Id.* Although non-

---

<sup>3</sup> *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures*, 23 FCC Rcd 5425 (2008) (“*DE Second Reconsideration Order*”).

DEs won a substantial majority of the most expensive licenses, two DEs were among the top ten winners in terms of dollar amount. *Id.*

## **2. Auction 73 (the 700 MHz Auction)**

Auction 73, conducted in early 2008, involved reallocation of the 700 MHz spectrum that television broadcasters had relinquished in converting from analog to digital broadcast format. In the notice of proposed rulemaking to establish service rules for the 700 MHz spectrum in advance of Auction 73, the Commission sought comment, among other things, on whether “any changes to Commission competitive bidding rules are necessary or desirable” in connection with that auction. *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 21 FCC Rcd 9345, 9372 ¶ 56 (2006) (“700 MHz Notice”). In its April 2007 *700 MHz First Report and Order*, the FCC determined that its “existing competitive bidding rules do not require modification for purposes of an auction of commercial 700 MHz Band licenses.” 22 FCC Rcd 8064 ¶ 6.

Noting the comments of Council Tree and others proposing various revisions to the DE rules for Auction 73, *see id.* ¶¶ 59-61, the Commission found that some of those proposals – such as adopting new DE set-asides – “risk[ed] denying the licenses to other applicants that may be more likely to use them effectively or efficiently for the benefit of consumers.” *Id.* ¶ 63.

The Commission determined, by contrast, that its recent experience applying the DE rules in Auction 66 had demonstrated that those rules afford DEs “substantial opportunity to compete with larger businesses for spectrum . . . without any set-asides.” *Ibid.* Prior to the auction, the Commission did waive the 50% Impermissible Relationship Rule with respect to one unique license (the so-called D Block license), for which the 700 MHz service rules had prescribed a Commission-approved Public/Private Partnership between the winning bidder and a Commission-selected Public Safety Broadband Licensee. *D Block Waiver Order* ¶¶ 1-2 (J.A. 6-7); *see* pp. 21-25, below.

Auction 73 “generated about \$19 billion in winning bids.” *Council Tree III*, 619 F.3d at 248. DEs in Auction 73 comprised 119 of 214 qualified bidders, 56 of the 101 winners, and won 35% of the individual licenses. *Ibid.* But no bidder – DE or otherwise – won the D Block license in Auction 73. Because bidding for the D Block license “did not meet the applicable reserve price of \$1.33 billion” established by FCC rules, “there was no winning bid for that license.” *Service Rules for the 698-746, 747-762 and 777-792 MHz*

*Bands*, 23 FCC Rcd 8047, 8049 ¶ 1 (2008) (“700 MHz *Second Further Notice*”).<sup>4</sup>

## **II. PETITIONERS’ PRIOR JUDICIAL CHALLENGES TO THE DE RULES AND THE AUCTIONS CONDUCTED UNDER THEM**

This case represents petitioners’ fourth attempt to challenge the Commission’s 2006 DE rules and auctions conducted under them. Petitioners previously sought judicial review twice in the Third Circuit and once in the D.C. Circuit.

### **A. Council Tree’s Initial Judicial Challenge to the DE Rules (*Council Tree I*)**

On June 7, 2006, Council Tree, Bethel Native, and MMTC filed a petition for review in the Third Circuit, challenging the *DE Second Report & Order*, the *DE Reconsideration Order*, and a public notice regarding the

---

<sup>4</sup> The Commission decided “not to re-offer the D Block license immediately in order to provide additional time to consider options with respect to the D Block spectrum.” *700 MHz Second Further Notice*, 23 FCC Rcd at 8049 ¶ 1 (internal quotation marks omitted). In the *700 MHz Second Further Notice*, the Commission sought comment on possible modifications to the various rules governing the D Block license, including the adoption of a rule that would codify the waiver granted in the *D Block Waiver Order*. See *id.* at 8105-06 ¶¶ 166-67. The agency has yet to make any changes to the D Block rules, and the D Block spectrum license remains unassigned.

timing of the AWS auction.<sup>5</sup> Petitioners also asked the Third Circuit to stay the FCC's new DE rules and the upcoming AWS auction pending judicial review on the merits. On June 29, 2006, the Third Circuit denied petitioners' stay request, concluding that "[t]he public interest . . . militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date." *Council Tree Commc'ns, Inc. v. FCC*, No. 06-2943, slip op. at 6 (3d Cir. June 29, 2006). After briefing on the merits, the court, in September 2007, dismissed the petition for review as "incurably premature," because petitioners had filed it (1) while their request for reconsideration of the *DE Second Report & Order* was still pending before the FCC, and (2)

---

<sup>5</sup> Although MMTC participated in the Third Circuit litigation, it has not joined Council Tree and Bethel Native in the judicial challenge before this Court.

before the *DE Reconsideration Order* had been published in the Federal Register. *Council Tree I*, 503 F.3d at 287-91.<sup>6</sup>

***B. Council Tree II***

Council Tree did not seek judicial review of the Commission's decision, in the *700 MHz First Report and Order*, to apply the DE rules to Auction 73. Instead, Council Tree attempted to obtain review of the application of those rules to Auction 73 by challenging – this time in the D.C. Circuit – the Commission's August 2007 *700 MHz Second Report and*

---

<sup>6</sup> Petitioners could have taken action to cure the jurisdictional impediments that the Third Circuit ultimately identified (in advance of Auction 73) in its September 2007 *Council Tree I* decision. Specifically, petitioners could have: (1) eliminated the error of filing their petition for review of the *DE Reconsideration Order* before Federal Register publication by waiting one week – from June 7, 2006 (when they filed their petition for review) until June 14, 2006 (when the *DE Reconsideration Order* was published in the Federal Register, at 71 Fed. Reg. 34272) – to file their petition for review; and (2) eliminated the impediment caused by their pending administrative reconsideration petition by withdrawing that petition prior to filing their petition for review. See *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988) (court would have jurisdiction if West Penn's "petition for reconsideration is withdrawn" and West Penn "file[s] a new petition for review"); *Los Angeles Ltd. P'ship v. FCC*, 70 F.3d 1358, 1360 (D.C. Cir. 1995) (time period for seeking judicial review "begins to run anew on withdrawal by the petitioning party of its administrative petition for reconsideration").

*Order*,<sup>7</sup> which had adopted additional service-specific rules (unrelated to the DE rules) to govern the licenses that would be made available at Auction 73.

In an unpublished judgment, the D.C. Circuit dismissed Council Tree's second challenge as untimely. *Council Tree II*, 324 F. App'x at 4-5 (holding that the *700 MHz Second Report and Order* did not reopen the agency's prior determination that the DE rules did not require modification in connection with the auction of 700 MHz Band licenses). *See also* Pet. Br. 25 (acknowledging that the D.C. Circuit's *Council Tree II* decision "den[ie]d a challenge by Petitioners to the conduct of Auction 73, on grounds that the August 2007 [order] . . . appealed by Petitioners in that case had not 'reopened' the initial April 2007 agency decision to apply the [DE rules] to Auction 73"). Less than two months later, the D.C. Circuit denied Council Tree's petition for rehearing and rehearing *en banc*.

### **C. *Council Tree III***

After the FCC issued the March 2008 *DE Second Reconsideration Order* formally denying Council Tree's petition for reconsideration of the *DE Second Report & Order*, petitioners filed a new petition for review of the *DE Second Report & Order* in the Third Circuit. They contended that the DE

---

<sup>7</sup> *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289 (2007) ("*700 MHz Second Report and Order*").

rules adopted in that order violated the Communications Act, were arbitrary and capricious, and were issued in violation of the notice-and-comment requirements of the APA. Not only did petitioners ask that the rules be vacated; they also urged the court to unwind both the AWS (Auction 66) and 700 MHz (Auction 73) auctions and to order that those auctions be conducted again without the allegedly offending DE rules.

The Third Circuit this time granted the petition in part and denied it in part. *Council Tree III*, 619 F.3d at 248-59. The court rejected petitioners' argument that the revised DE rules were inconsistent with the Communications Act. It noted that, although the Act required that the FCC's rules allow for the "disseminat[ion] [of] licenses among a wide variety of applicants, including small businesses [and] rural telephone companies," the statute also included other competing requirements. *Id.* at 249 n.7 (quoting 47 U.S.C. § 309(j)(3)(B)). The court went on to explain: "Given the general agreement that the DE program can be abused, as well as the continuing participation by DEs in auctions held under the new rules, we cannot conclude that the FCC has failed to promote small-business participation at all." *Id.*

Turning to petitioners' APA claims, the court reached different conclusions for different rules. It upheld the 25% Attribution Rule, rejecting

petitioners' notice-and-comment and arbitrary-and-capricious challenges to that rule. *Council Tree III*, 619 F.3d at 251-53. With respect to the 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule, however, the court determined that the Commission had provided inadequate notice under the APA. *Id.* at 253-56.<sup>8</sup>

Despite that finding, the Third Circuit expressly declined petitioners' request that the court "rescind Auctions 66 and 73." *Council Tree III*, 619 F.3d at 257. It reasoned that rescission of those auctions "would involve unwinding transactions worth more than \$30 billion, upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers." *Id.* Such potential "large-scale disruption in wireless communications," the court observed, "would have broad negative implications for the public interest." *Id.* The court further observed that nothing in the record indicated that the winners of Auctions 66 and 73 "were anything but innocent third parties in relation to the FCC's improper rulemaking." *Id.* "Under these circumstances," the Third Circuit concluded that "it would be imprudent and unfair to order rescission of the auction

---

<sup>8</sup> Having reached that conclusion, the court found it unnecessary to consider petitioners' further argument that those rules were arbitrary and capricious. *Id.* at 255 n.8, 256 n.10.

results.” *Id.* at 258. Instead, the Third Circuit concluded that the appropriate remedy for the APA notice violations was to vacate the defective rules, leaving the auction results undisturbed. *Id.*

Petitioners sought Supreme Court review of *Council Tree III*. In their petition for certiorari, they asserted that, once the Third Circuit ruled that two of the challenged DE rules violated the APA, it was obligated to rescind Auctions 66 and 73.<sup>9</sup> The Supreme Court denied certiorari on March 28, 2011. *Council Tree Investors, Inc. v. FCC*, 131 S. Ct. 1784.

### **III. THE D BLOCK WAIVER PROCEEDING**

When the Commission granted the limited waiver of the 50% Impermissible Relationship Rule for the Auction 73 D Block license in November 2007, *see* p. 14, above, the agency predicated that waiver on “the unique circumstances and obligations of the D Block license.” *D Block Waiver Order* ¶ 7 (J.A. 9). In particular, the Commission observed that the D Block service rules required that licensee to “construct[] and operat[e] a nationwide, interoperable broadband network . . . to provide both a commercial service and a broadband network service to public safety

---

<sup>9</sup> Council Tree Petition for a Writ of Certiorari, S.Ct. No. 10-834, 2010 WL 5323991 at \*19 - \*23, \*26 - \*28 (Dec. 22, 2010).

entities.” *D Block Waiver Order* ¶ 9 (J.A. 10).<sup>10</sup> Because those unique circumstances were inapplicable to other Auction 73 licenses, the Commission stressed that the “waiver applies *only* to arrangements for spectrum capacity on the D Block.” *D Block Waiver Order* ¶ 7 (J.A. 9). The agency took no action to revisit or disturb the normal operation of the new DE rules outside that limited circumstance.

On December 7, 2007, the last day for filing such a request, petitioners asked the Commission to reconsider the *D Block Waiver Order*. Petitioners noted that they currently were “seeking the rescission of [the new DE] rules in a pending case in the U.S. Court of Appeals for the Third Circuit.”

---

<sup>10</sup> The Commission explained that the D Block license would be subject to extraordinary regulatory oversight conditions not applicable to other licensees:

The single nationwide 10-megahertz D Block commercial license will be awarded to a winning bidder only after it enters into a Commission-approved Network Sharing Agreement (“NSA”) . . . . Reflecting the importance of the terms of the NSA to the public interest, we provided that the Commission will oversee the negotiation of the NSA, and will play an active role in the resolution of disputes among the relevant parties . . . . These licensing obligations subject the D Block licensee to unique requirements, including significant Commission oversight and coordination, in order to assure that it participates in the provision of extensive, uninterrupted public safety and commercial service for the benefit of the public.

*D Block Waiver Order* ¶ 2 (citations omitted) (J.A. 7).

Council Tree Petition for Reconsideration, December 7, 2007, Summary (J.A. 31). In petitioners’ view, however, the *D Block Waiver Order* created “new problems of its own.” *Id.* In particular, they complained that the Commission’s “selective waiver approach” would result in improper “disparate treatment of similarly situated DEs.” *Id.* at 8, 11 (J.A. 40, 43). Accordingly, petitioners argued that the *D Block Waiver Order* “should be reconsidered and rescinded.” *Id.* at 14 (J.A. 46); *see also* Council Tree Reply to Opposition, Jan. 2, 2008, at 10 (“Reply to Opposition”) (J.A. 98) (repeating request that *D Block Waiver Order* “should be reconsidered and rescinded”).

When Auction 73 concluded, no party had submitted a bid for the D Block license that met the applicable reserve price of \$1.33 billion – which meant that there was no winning bid for that license. *700 MHz Second Further Notice*, 23 FCC Rcd at 8049 ¶ 1. Rather than seek immediately to re-auction that license, the agency decided to seek comment on possible changes to the various rules governing the D Block. *Id.* at 8049 ¶ 1, 8105-06 ¶¶ 166-67. In the meantime, petitioners’ request to “reconsider[] and rescind[]” the *D Block Waiver Order* remained pending.

On May 18, 2011 – following the Supreme Court’s denial of their petition for writ of certiorari in *Council Tree III* – petitioners filed a

“supplement” to their petition for reconsideration. This submission – which was filed more than three years after both the close of Auction 73 and the deadline for seeking reconsideration – sought to “[r]efashion[]” the relief that petitioners requested in their original reconsideration petition. Supplement to Council Tree Petition for Reconsideration, May 18, 2011, at 4 (“May 2011 Supplement”) (J.A. 103). In the May 2011 Supplement, petitioners argued for the first time that the Commission should respond to their reconsideration petition by “vacat[ing] the results of Auction 73.” *Id.* at 9 (J.A. 108).

On February 1, 2012 – having been directed by this Court to provide a timetable for action on petitioners’ reconsideration petition<sup>11</sup> – the Commission issued the *Waiver Reconsideration Order*. In that order, the Commission dismissed Council Tree’s petition for reconsideration of the *D Block Waiver Order*. The agency explained that because “[t]he very essence of waiver is the assumed validity of the general rule,” the Third Circuit’s intervening vacatur of the 50% Impermissible Relationship Rule rendered moot the petitioners’ request for reconsideration of the Commission waiver of that rule. *Waiver Reconsideration Order* ¶ 4 & n.11 (J.A. 13) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-58 (D.C. Cir. 1969)).

---

<sup>11</sup> *In re Council Tree Investors, Inc. and Bethel Native Corp.*, Order, No. 11-9569, Document: 01018771560 (10th Cir. Jan. 4, 2012).

The Commission also denied petitioners’ motion for leave to file their May 2011 Supplement, and accordingly dismissed that supplement. *Waiver Reconsideration Order* ¶ 4 (J.A. 13-14). The Commission noted that its rules require that a “petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action” with respect to which reconsideration is sought. *Id.* ¶ 4 n.12 (J.A. 13-14) (quoting 47 C.F.R. § 1.106(f)). By contrast, petitioners had untimely proffered their reconsideration supplement “more than three and a half years after release of the *D Block Waiver Order*.” *Id.* ¶ 4 (J.A. 13-14). Moreover, the Commission ruled, petitioners’ supplement sought substantially to expand the scope of the relief sought from rescission of the limited D Block waiver granted in the *D Block Waiver Order* to complete rescission of the results of Auction 73. *Id.* ¶ 4 n.12 (J.A. 13-14). The Commission stressed that the petitioners’ rationale for that result – that Auction 73 had been conducted under unlawful DE rules – could have (and should have) been presented in a challenge to the April 2007 700 MHz *First Report and Order*. The subject was beyond the scope of the *D Block Waiver Order*, however, which had not reopened the issue. *Ibid.* Accordingly, the Commission declined to exercise whatever discretion it might have to consider the late-file pleading. *Ibid.*

This petition for review followed.

## SUMMARY OF ARGUMENT

1. Although petitioners seek to use this proceeding as a vehicle to set aside Auction 73 (a result they have repeatedly and unsuccessfully sought in multiple litigations), the validity of Auction 73 is not before the Court. Rather, the only question properly presented in this case is whether the Commission reasonably dismissed petitioners' request for reconsideration and rescission of the limited waiver of the 50% Impermissible Relationship Rule that the Commission granted in the *D Block Waiver Order* with respect to the specialized D Block license. Because the D Block license was never awarded and the 50% Impermissible Relationship Rule was subsequently vacated, the Commission properly determined that petitioners' challenge to the *D Block Waiver Order* was moot. *Waiver Reconsideration Order* ¶ 4 (J.A. 13-14). It also was well within the Commission's discretion to dismiss as untimely the reconsideration "supplement" petitioners filed more than three and a half years after the applicable filing deadline specified in the Commission's rules.

2. This Court lacks jurisdiction to consider petitioners' request that it rescind the results of Auction 73 on the ground that the auction was conducted under two DE rules that have since been vacated. Petitioners acknowledge that the decision to apply those now-vacated DE rules to

Auction 73 was made in 2007 in the *700 MHz First Report and Order* and that petitioners previously failed to obtain review of that decision. Pet. Br. 25. The statutory 60-day period for obtaining review of that decision has now long since passed. 28 U.S.C. § 2344. Neither the *D Block Waiver Order* nor the *Waiver Reconsideration Order* took any action to “reopen” that decision so as to provide a new filing window in which to seek judicial review.

3. Even if petitioners’ challenge to the conduct of Auction 73 under the DE rules were timely, it would be barred by principles of claim preclusion. In *Council Tree III*, the Third Circuit considered and rejected on the merits the same claim brought by the same parties – *i.e.*, the claim that the results of Auction 73 should be rescinded because the auction was conducted under invalid rules. *See Council Tree III*, 619 F.3d at 257-58. Petitioners are precluded from relitigating that claim in this Court.

4. Finally, even if the Court had jurisdiction to reach the results of Auction 73 and petitioners’ challenge were not otherwise barred, the Court still would retain – and should exercise – the discretion to reject petitioners’ request to impose the extraordinarily disruptive remedy of rescission. Contrary to petitioners’ argument, this Court has not ruled that 5 U.S.C. § 706(2) requires it to vacate all agency action that does not meet the

standards of that section. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1205, 1207 (10th Cir. 2001), *clarified by* Order (10th Cir. Aug. 27, 2001) (remanding without vacating FCC rules).

## STANDARD OF REVIEW

Petitioners bear a high burden to establish that the *D Block Waiver Order* and *Waiver Reconsideration Order* are “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A). Under this highly deferential standard, “[a]n agency’s action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious.” *Sorenson Commc’ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *See, e.g., Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## ARGUMENT

### **I. THE COMMISSION REASONABLY DISMISSED PETITIONERS’ RECONSIDERATION PETITION AS MOOT AND THEIR “SUPPLEMENT” AS UNTIMELY.**

The November 2007 *D Block Waiver Order* granted a limited waiver of the 50% Impermissible Relationship Rule with respect to the D Block license in Auction 73. *D Block Waiver Order* ¶ 1 (J.A. 6). The relief petitioners sought in their December 2007 petition for reconsideration was that the *D*

*D Block Waiver Order* be “reconsidered and rescinded.” Reconsideration Petition at 14 (J.A. 46). When Auction 73 was concluded in March 2008, the D Block license addressed in the *D Block Waiver Order* was not issued, because no bidder met the applicable reserve price for that license. *700 MHz Second Further Notice*, 23 FCC Rcd at 8049 ¶ 1. And the Third Circuit in *Council Tree III* ultimately vacated the rule that the *D Block Waiver Order* had waived. *Council Tree III*, 619 F.3d at 259. In those circumstances, the Commission properly dismissed Council Tree’s reconsideration petition as moot: The petition sought to rescind the waiver of a rule that no longer existed, for a license that was never issued. *Waiver Reconsideration Order* ¶ 4 & n.11 (citing *WAIT Radio v. FCC*, 418 F.2d at 1157-58 (“the very essence of waiver is the assumed validity of the general rule . . . .”)). See *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111-12 (10th Cir. 2010) (dismissing as moot challenge to agency conduct under superseded rules).

Petitioners’ brief presents no legal argument against the only thing the FCC did in the *D Block Waiver Order* – *i.e.*, grant a limited waiver of the 50% Impermissible Relationship Rule with respect to the D Block license. Petitioners have thus waived any argument that the *D Block Waiver Order* was itself arbitrary and capricious. See *Morris v. Noe*, 672 F.3d 1185, 1193

(10th Cir. 2012) (“argument insufficiently raised in the opening brief is deemed waived”).

Petitioners instead challenge the Commission’s mootness ruling in the *Waiver Reconsideration Order*. They do so, however, only by mischaracterizing the issue that was presented to the agency in their reconsideration petition. Ignoring their prayer for rescission of the *D Block Waiver Order*<sup>12</sup> – which would have left all of the DE rules in place for the D Block – petitioners assert that they had asked the Commission in the waiver proceeding to suspend the new DE rules for all licenses covered by Auction 73. Br. 45 & n.96. But the Commission’s mootness ruling correctly held petitioners to their prayer for relief, concluding that the “original petition sought reconsideration of only the Commission’s decision to waive the [50% Impermissible Relationship Rule]” for the D Block license. *Waiver Reconsideration Order* ¶ 4 n.12 (J.A. 13-14).

Nor was it arbitrary for the Commission to dismiss Council Tree’s May 2011 “supplement,” by which petitioners attempted to expand the scope of the waiver proceeding from one addressing a narrow waiver of one DE rule for one Auction 73 license, to a proceeding challenging the results of Auction 73 in its entirety. May 2011 Supplement at 4-9 (J.A. 103-08); *see id* at 4

---

<sup>12</sup> *See* Petition for Reconsideration at 14 (J.A. 46).

(J.A. 103) (describing the supplement as “Refashion[ing] the Requested Relief”); *Waiver Reconsideration Order* ¶ 4 n.12 (J.A. 13-14) (finding that the supplement “go[es] beyond the scope of the underlying order” and “seek[s] to expand substantially the scope of the relief sought in the reconsideration petition”). Given the Commission’s well-established discretion to define the scope of its own proceedings, the agency would have been entirely within its rights to reject the supplement as beyond the scope of the narrow D Block waiver proceeding, even if it had been timely filed.<sup>13</sup>

In fact, however, the supplement was “filed more than *three and a half years* after release of the *D Block Waiver Order*,” in clear violation of the normal 30-day window for filing reconsideration and related pleadings. *Waiver Reconsideration Order* ¶ 4 & n.12 (J.A. 13-14) (emphasis added) (citing 47 C.F.R. § 1.106(f), which requires that “[t]he petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action”). Although the agency “has some discretion to consider late-filed supplements to timely filed petitions,” *Waiver Reconsideration Order* ¶ 4 n.12 (J.A. 13-14), courts have

---

<sup>13</sup> See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (stating that “subordinate questions of procedure,” including “scope of the inquiry,” are “explicitly and by implication left to the Commission’s own devising, so long . . . as it observes the basic requirements designed for the protection of private as well as public interest”) (citing 47 U.S.C. § 154(j)).

repeatedly “discouraged the Commission from accepting late petitions in the absence of extremely unusual circumstances.” *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003) (affirming FCC’s failure to consider supplemental filings that were untimely under Rule 1.106(f)); *see also NetworkIP, LLC v. FCC*, 548 F.3d 116, 126-27 (D.C. Cir. 2008) (setting aside FCC decision to accept late-filed pleadings absent “unusual or compelling circumstances”).

The supplement raised issues beyond the scope of the existing waiver proceeding. Moreover, petitioners themselves had failed to take advantage of a prior opportunity to obtain review of the application of the DE rules to Auction 73 (*i.e.*, through a challenge to the *700 MHz First Report and Order*). In those circumstances, the Commission was entirely justified in declining to consider petitioners’ untimely supplement.<sup>14</sup>

## **II. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONERS’ CHALLENGE TO THE CONDUCT OF AUCTION 73 UNDER THE NOW-VACATED DE RULES.**

Although petitioners nominally seek review of the *D Block Waiver Order* and the *Waiver Reconsideration Order*, the real focus of their

---

<sup>14</sup> *Waiver Reconsideration Order* ¶ 4 n.12 (J.A. 13-14) (citing *Alpine PCS, Inc., Requests for Waiver*, 25 FCC Rcd 469, 479-80 ¶ 16 nn.90 & 91 (2010) (declining to accept late filed supplements under Rule 1.106(f) where they attempted to expand the scope of issues and could have been presented earlier)).

challenge is the application of the now-vacated DE rules to Auction 73. They seek “nullification of FCC spectrum Auction 73” because it was conducted pursuant to those vacated rules. Pet. Br. 3; *see also id.* at 25-26, 36-37. This Court lacks jurisdiction to consider that claim. The decision to apply the DE rules in the 700 MHz auction was not made in either the *D Block Waiver Order* or the *Waiver Reconsideration Order* on review here. Rather, that action was taken in the *700 MHz First Report and Order* issued in April 2007. The time for challenging that order has long since passed. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2344 (requiring petitions for review of FCC orders to be filed within 60 days after issuance); *Charter Commc’ns, Inc. v. FCC*, 460 F.3d 31, 38 (D.C. Cir. 2006) (“a petitioner’s failure to file within [the 60-day statutory window] constitutes a bar to our review”).

Petitioners acknowledge that the decision to apply the DE rules to Auction 73 was made in the *700 MHz First Report and Order*. Pet. Br. 25, 28. They further acknowledge that the D.C. Circuit previously rejected their attempt to challenge the application of the DE rules to that auction, because petitioners had mistakenly sought review of the *700 MHz Second Report and Order* instead of the *700 MHz First Report and Order*. *See* Pet. Br. 25 (noting D.C. Circuit decision “denying a challenge by Petitioners to the conduct of Auction 73, on grounds that the August 2007 [*700 MHz Second*

*Report and Order*] appealed by Petitioners in that case had not ‘reopened’ the initial April 2007 agency decision to apply the [DE] Rules to Auction 73”). Petitioners argue, however, that the *D Block Waiver Order* “reopen[ed] the question of how [the agency] would apply the new DE rules to Auction 73,” thus providing petitioners with a new opportunity to challenge Auction 73. Pet. Br. 29. That claim is baseless.

At least in the rulemaking context, a party may obtain review after the initial 60-day filing window has passed if it is “clear from the administrative record” in a subsequent proceeding that the agency intended to “reopen” the substantive question on which review is sought. *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007). Thus, “if an agency in the course of a rulemaking proceeding solicits comments on a pre-existing regulation or otherwise indicates its willingness to reconsider such a regulation by inviting and responding to comments, then a new review period is triggered.” *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996). However, “an agency [does not] reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.” *Biggerstaff*, 511 F.3d at 186 (internal quotation omitted). The reopening doctrine thus does not provide “a license for bootstrapping procedures by which petitioners

can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on grounds that the agency had re-opened the issue.” *Kennecott Utah Copper*, 88 F.3d at 1213 (internal quotation omitted) (construing narrowly the “reopening rule” of *Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988)). Compare Pet. Br. 32 (citing *Ohio v. EPA*).

This Court has not directly decided whether to adopt the D.C. Circuit’s “reopener doctrine,” but its own articulation of whether a subsequent order reflects a “sufficient degree of separateness, novelty, and finality” to trigger another opportunity for judicial review covers essentially the same ground. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1238 & n.8 (10th Cir. 2000). Thus, the Court looks to whether a subsequent order “reconsidered or revisited” an earlier decision or, stated differently, “whether it represents a new decision or merely a reaffirmance of previous action.” *Id.* at 1238.

The orders on review did not “reconsider[]” or “revisit[]” the Commission’s prior decision to apply the DE rules to Auction 73 generally. Rather, those orders involved the waiver of one DE rule with respect to one license that was never awarded. Thus, review of those orders provides no jurisdictional basis to seek rescission of any license award, much less the award of billions of dollars worth of licenses outside the scope of the D Block waiver.

Petitioners contend (Br. 16, 29 n.66) that the Commission reopened the application of the DE rules generally by adopting a “new,” “D Block Uniqueness” rationale for the conduct of Auction 73. *See* pp. 21-22, above. But that rationale did not provide a new justification for the application of the DE rules to Auction 73 as a whole. Rather it explained why a limited waiver of the 50% Impermissible Relationship Rule was warranted for the highly specialized D Block license.

The same is true of the *D Block Waiver Order*'s references to the continued application of the DE rules outside the limited contours of the D Block waiver. *See* Pet. Br. 16 n.36. Those references do not revisit and re-justify the application of the DE rules to Auction 73. Rather, they make clear that – the D Block waiver aside – application of the DE rules to Auction 73 otherwise remained untouched. *See D Block Waiver Order* ¶¶ 7-10 (J.A. 9-11).

The facts of this case are wholly unlike those at issue in this Court's *HRI v. EPA* decision, upon which petitioners rely. *See* Pet. Br. 30-31. *HRI* involved a jurisdictional dispute between the EPA and New Mexico's environmental agency with respect to implementation of the Safe Drinking Water Act. In 1993, the EPA had ruled that a parcel of land was “Indian country” outside of the state's jurisdiction. *HRI*, 198 F.3d at 1237. In 1997,

the EPA issued a second ruling with respect to the same parcel. That further decision stated that although the agency “believes” the land is Indian country, it would retain jurisdiction (and deny the state permitting authority) under its distinct “authority to issue permits on *disputed* lands.” *Ibid.* (emphasis added). The EPA continued that its “decision to treat the status of [the parcel] as in dispute does *not* require [New Mexico] to concede jurisdiction, nor does it *grant* the Navajo Nation jurisdiction.” *Id.* at 1237-38. “Rather,” the EPA stated, it “has determined only that there is a dispute such that [the] EPA will issue the permit until the status of [the parcel] is resolved.” *Id.* at 1238. On these facts, this Court held that the 1997 ruling “reopen[ed]” the jurisdictional status of the land “for review,” *id.* at 1237, because it had “reconsidered or revisited” the 1993 decision to treat the parcel as “Indian country” and issued a new decision to treat it as “in dispute,” *id.* at 1238.

In contrast to the EPA’s decision to revise the jurisdictional status of the land in *HRI*, the *D Block Waiver Order* and *Waiver Reconsideration Order* did not revisit or alter the status of the DE rules with respect to Auction 73 generally. Rather, the Commission simply waived one rule with regard to one license. Those orders thus do not provide petitioners a renewed opportunity to seek an across-the-board rescission of the licenses granted in the auction.

Moreover, their contrary assertions notwithstanding (Pet. Br. 36 & n.78), petitioners did not even ask the Commission to reopen the application of the DE rules to Auction 73 generally in their reconsideration petition.<sup>15</sup> Rather, petitioners noted that they were seeking rescission of the DE rules in *another* forum – the judicial proceedings before the Third Circuit. Council Tree Reconsideration Petition, Summary (J.A. 31). Although petitioners asserted that the rationale for the waiver logically undermined the basis for the 50% Impermissible Relationship Rule in its entirety, *id.* at 7-11 (J.A. 39-43), the only relief Council Tree sought in its reconsideration petition was that the *D Block Waiver Order* be “reconsidered and rescinded,” not that it be expanded. *Id.* at 14 (J.A. 46); *accord* Council Tree Reply to Opposition at 10 (J.A. 98). That limited request for relief followed logically from petitioners’ contention that the purported “selective waiver approach” undertaken in the *D Block Waiver Order* created “new problems of its own” – *i.e.*, “disparate

---

<sup>15</sup> Petitioners would not have had the power, had they asked for such relief in their reconsideration petition and related pleadings, unilaterally to reopen for review the conduct of Auction 73 pursuant to the DE rules. As discussed above, the Commission defined the scope of the waiver proceeding in the *D Block Waiver Order*, and that scope did not involve a general reopening of the conduct of Auction 73 under the DE rules. The determination to so limit the scope of the proceeding was firmly within the agency’s well-established discretion. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138 (affirming agency discretion regarding “scope of . . . inquiry”).

treatment of similarly situated DEs.” Reconsideration Petition at Summary, 8, 11 (J.A. 31, 40, 43).

It was not until petitioners filed their May 2011 “supplement” that they asked the Commission to reopen the application of the DE rules to Auction 73 and requested that the agency “vacate the results of Auction 73.” May 2011 Supplement at 9 (J.A. 108). But that procedurally improper filing was, as the Commission determined, both untimely and beyond the scope of the proceeding. *Waiver Reconsideration Order* ¶ 4 & n.12 (J.A. 13-14).

### **III. PETITIONERS’ REQUEST TO RESCIND AUCTION 73 IS BARRED BY *COUNCIL TREE III*.**

Even if petitioners’ challenge to the conduct of Auction 73 under the DE rules were timely (and thus within this Court’s jurisdiction to review), it nevertheless would be barred by principles of claim preclusion.<sup>16</sup> That is so because the Third Circuit in *Council Tree III* considered and rejected on the merits the same claim, brought by the same parties. Petitioners Council Tree and Bethel Native in that case unsuccessfully claimed that the results of Auction 73 should be rescinded because the auction was conducted pursuant to the now-vacated 50% Impermissible Relationship Rule and the Ten-Year

---

<sup>16</sup> See *Natural Res. Def. Council v. EPA*, 513 F.3d 257, 260 (D.C. Cir. 2008) (noting “a possible difficulty with EPA’s timeliness” defense, but holding that petitioner’s challenge to an EPA rule was nevertheless barred by claim preclusion).

Repayment Schedule. Petitioners are barred from relitigating that claim before this Court.

“Under Tenth Circuit law,” the elements of claim preclusion are: “(1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits.” *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). Claim preclusion follows in these circumstances “unless the party seeking to avoid preclusion did not have a ‘full and fair opportunity’ to litigate the claim in the prior suit.” *Ibid.* (internal citation omitted). Each of these criteria is met in this case.

First, the *Council Tree III* decision is a final judgment on the merits. In that decision, having found that the 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule were adopted with inadequate APA notice, the court expressly addressed the proper remedy. The court observed that petitioners “urge not only that we vacate the rules . . . , but also that we exercise our equitable authority to rescind Auctions 66 and 73.” 619 F.3d at 257. The Third Circuit assumed that it had jurisdiction to reach the conduct of the auctions, but expressly *declined* “to order rescission of the auction

results.” *Id.* at 258.<sup>17</sup> The Supreme Court subsequently denied petitioners’ petition for certiorari seeking to review the Third Circuit’s judgment.

*Council Tree Investors, Inc. v. FCC*, 131 S. Ct. 1784.

Second, petitioners in this case (Council Tree and Bethel Native Corporation) also were petitioners in *Council Tree III*, and the FCC and United States were respondents in both cases. Accordingly, as relevant here, there was “identity of the parties in the two suits.” *MACTEC*, 427 F.3d at 831.<sup>18</sup>

Third, there is “identity of the cause of action in both suits.” *Ibid.* This Court employs the “‘transactional approach’ found in the *Restatement (Second) of Judgments* § 24” in determining what constitutes a “cause of action” for claim preclusion purposes. *MACTEC*, 427 F.3d at 832; accord *Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir. 1999). The *Restatement* describes “the concept of a transaction” in this context as “a natural grouping or common nucleus of operative facts.” *Restatement (Second) of Judgments* §

---

<sup>17</sup> The *Council Tree III* court noted that the FCC and others had contested its jurisdiction to reach the auctions themselves. The court declined to rule directly on that claim, 619 F.3d at 257 n.12, but its analysis rejecting petitioners’ rescission request logically assumes, for purposes of that analysis, that it would have had jurisdiction to unwind the auction.

<sup>18</sup> Between the time the Third Circuit decided *Council Tree III* and the Supreme Court denied certiorari in that case, Council Tree Communications, Inc. changed its name to Council Tree Investors, Inc.

24 cmt b (1982). “What constitutes the same transaction or series of transactions is ‘to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit.’” *Yapp*, 186 F.3d at 1227 (quoting *Restatement (Second) of Judgments* § 24).<sup>19</sup> Where, as here, the two cases involve the same cause of action, a final judgment on the merits in the first case “precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action.” *Id.* at 1226 n.4 (internal quotation omitted) (emphasis added); accord *MACTEC*, 427 F.3d at 831.

The *Council Tree III* case and this case share the same claim – that the conduct of Auction 73 pursuant to the 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule was unlawful and must be rescinded. From the outset of the *Council Tree III* proceedings, petitioners attempted to challenge not only the promulgation of those rules, but also the conduct of spectrum license auctions under them. Thus, in their April 7, 2008 petition for review in *Council Tree III*, petitioners “request[ed] that [the Third Circuit]

---

<sup>19</sup> The transactional test is variously articulated as “focus[ing] upon whether the two suits are both based upon a discrete and unitary factual occurrence,” whether both suits “depend upon the same operative nucleus of fact,” whether “two claims are based on the same, or nearly the same, factual allegations,” or whether “the two suits seek to redress the same injury.” *Yapp*, 186 F.3d at 1227 (internal quotations omitted).

grant this Petition for Review, declare unlawful, reverse, vacate, and set aside the *FCC [DE Rulemaking] Orders*, [and] vacate the results of spectrum auctions . . . conducted pursuant to the rules unlawfully adopted and affirmed in those *FCC Orders*.” Petition for Review, No. 08-2036, at 5 (3d Cir. April 7, 2008) (copy attached hereto as Exhibit 1). In their opening merits brief in *Council Tree III*, petitioners argued that “[a]uction results are necessarily vulnerable to timely legal challenges to defective rules which played an essential role in producing those very auction results.” Supplemental Brief of Petitioners, No. 08-2036, at 33 (3d Cir. Aug. 11, 2008), *available at* 2008 WL 4574157 (3d Cir. 2008). And petitioners argued in their reply brief that “auction overturn is the *only* meaningful remedy” in the case. Supplemental Reply Brief of Petitioners, No. 08-2036, at 20 (3d Cir. Oct. 20, 2008), *available at* 2008 WL 5148981 (3d Cir. 2008) (emphasis added).

Petitioners focus their current challenge to the *D Block Waiver Order* and *Waiver Reconsideration Order* on the same claim. Specifically, they challenge the “conduct[] [of] Auction 73 with the unlawfully adopted rules in

place.” Pet. Br. 4.<sup>20</sup> The Third Circuit addressed and rejected that claim in *Council Tree III* when it declined to set aside the results of Auction 73, notwithstanding that the auction was conducted pursuant to the since-vacated 50% Impermissible Relationship Rule and the Ten-Year Repayment Schedule. 619 F.3d at 257-59.

Petitioners are in no position to argue that they were denied a “‘full and fair opportunity’ to litigate the claim in the prior suit.” *MACTEC*, 427 F.3d at 831 (internal citation omitted). As noted above (pp. 18-21), not only did they strenuously present their claim to the Third Circuit; they also made the claim to the Supreme Court in their unsuccessful petition for a writ of certiorari.

In sum, petitioners are barred by principles of claim preclusion from relitigating here the same cause of action that the Third Circuit rejected on the merits. There is nothing remotely unfair about that result. *MACTEC*, 427 F.3d at 831. Indeed, as the Third Circuit properly stressed, rescinding Auction 73 would “involve unwinding transactions worth [billions of dollars], upsetting what are likely billions of dollars of additional investments

---

<sup>20</sup> *Accord id.* at 37 (challenging as “unlawful agency action” the “FCC’s conduct of Auction 73” while “adher[ing] to the Unlawful Rules”); *id.* at 38-40 (advocating “[t]he simple proposition that the conduct of a spectrum auction pursuant to indisputably unlawful rules is *itself* unlawful agency action”); *id.* at 49 (asking “how can the FCC’s Auction 73, conducted pursuant to the Unlawful Rules survive?”); *id.* at 51 (requesting that the Court “set aside the conduct and results of Auction 73”).

made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers.” *Council Tree III*, 619 F.3d at 257. Those adverse consequences for “innocent third parties” (*ibid.*) would surely be even greater today – two years further down the road to full deployment.

**IV. APA SECTION 706(2) WOULD NOT REQUIRE RESCISSION OF AUCTION 73 EVEN IF THE RESULTS OF THAT AUCTION WERE PROPERLY BEFORE THE COURT.**

Even if the conduct of Auction 73 pursuant to now-vacated rules were properly before the Court in this case (and it is not), petitioners are mistaken in claiming that section 706(2) of the APA, 5 U.S.C. § 706(2), requires this Court to rescind that auction. Although the APA provides that reviewing courts “shall . . . set aside” agency action that does not meet the standards set forth in section 706(2), the Supreme Court has recognized that such language does not, without more, limit a court’s traditional discretion to structure equitable remedies. *See Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944). That is so because courts ordinarily are “not mechanically obligated to grant [equitable relief] for every violation of law,” but instead retain the authority to “mould each decree to the necessities of the particular case.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982).

Vacatur is an equitable remedy. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). It is well settled that limits on the judiciary's equitable discretion are not lightly presumed, *see Romero-Barcelo*, 456 U.S. at 313, and that "the bare fact" of a legal shortcoming does not compel injunctive relief, *id.* at 314. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Id.* at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *accord Hecht*, 321 U.S. at 329-30.

The language in section 706(2) providing that reviewing courts "shall . . . set aside" unlawful agency action is insufficient to displace the courts' equitable discretion to remand an agency's order without vacating it. In *Hecht*, the Court considered a provision of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (50 U.S.C. app. 901 *et seq.*), that stated that, if a statutory violation had occurred or would occur, "a permanent or temporary injunction, restraining order, or other order shall be granted." 321 U.S. at 322. The Court explained that the phrase "shall be granted" was "less mandatory than a literal reading might suggest." *Id.* at 328. The Court construed the phrase *not* to impose "an absolute duty" to issue compliance

orders “under any and all circumstances,” but rather to grant authority to the courts to issue all appropriate equitable remedies. *Id.* at 329.

As in *Hecht*, Congress used the term “shall” in section 706(2) in a “less mandatory” sense to describe the scope of the courts’ authority in reviewing agency actions. That reading is well supported by the text of the statute.

First, the last clause of section 706 itself directs the reviewing court to take “due account” of “the rule of prejudicial error.” 5 U.S.C. § 706. That clause – which applies to cases, such as this one, in which the Third Circuit did not foreclose the agency from reaching the same result on remand – is flatly inconsistent with a reading of the “shall . . . set aside” language that would impose a rigid duty to vacate all agency orders that suffer from procedural defects or deficient explanations but are not *ultra vires*.<sup>21</sup>

Moreover, the Hobbs Act, which provides the basis, if any, for this Court’s jurisdiction in this case, specifically authorizes reviewing courts not

---

<sup>21</sup> Reading section 706(2) to leave undisturbed a reviewing court’s traditional discretion to decline to vacate a deficient agency action in all circumstances also finds support in the Attorney General’s Manual on the APA. The Manual states that the language currently codified in Section 706(2) simply “restate[s] the scope of the judicial function in reviewing final agency action” and notes, consistent with *Hecht*, that “[c]ourts having jurisdiction have always exercised the power *in appropriate cases* to set aside agency action” that has been determined to be unlawful. United States Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 108 (1947) (emphasis added).

only to “set aside” agency actions, but also to “suspend” them “in whole or in part.” 28 U.S.C. § 2342. As one legal scholar has observed, “[i]f the APA is read to mean that every action that fails the review standards of section 706 must be ‘set aside,’” provisions such as the Hobbs Act (and others) “become difficult to explain.”<sup>22</sup>

The understanding that section 706(2) preserves the reviewing court’s traditional remedial discretion is buttressed by common sense. If the APA required vacatur of every agency action that failed to meet section 706’s standards, even the most vital agency actions would have to be nullified, without regard to the disruptive consequences of doing so, for technical errors or easily correctable gaps in the agency’s reasoning. Not surprisingly, therefore, a number of circuits have a well-established practice of remanding defective orders without vacatur when equitable considerations so dictate. *See, e.g., Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (remanding agency rule involving support program for sugar producers for lack of notice and comment, but declining to vacate rule when crops had already been plowed under pursuant to the program and vacatur would be “an invitation to chaos”); *Davis Cnty. Solid Waste Mgmt. v. United*

---

<sup>22</sup> Ronald M. Levin, *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 313 & n.89 (2003).

*States EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (on rehearing, deciding to vacate only in part to avoid “significantly greater pollution emissions” than full vacatur would require); *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (declining to vacate when doing so would risk extinction of endangered species and waste of a “significant expenditure of public resources”).

While acknowledging this practice by other circuits (Pet. Br. 39-40), petitioners cite this Court’s decision in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), for the proposition that section 706 precludes the exercise of remedial discretion. Br.40-41. That case, however, involved APA section 706(1) – not section 706(2) – and held that the former provision imposed on courts a non-discretionary duty to “compel” agency action “unlawfully withheld or unreasonably delayed.” 174 F.3d at 1187 (quoting Section 706(1)). As the Federal Circuit has noted, that decision construing Section 706(1) is “inapposite” with respect to the construction of section 706(2) that petitioners urge this Court to consider. *PGBA, LLC v. United*

*States*, 389 F.3d 1219, 1227 & n.5 (Fed. Cir. 2004).<sup>23</sup> On the pertinent question of whether an arbitrary and capricious agency order may be remanded without being vacated, this Court has ruled in the affirmative. *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1205, 1207 (10th Cir. 2001) (remanding without vacating certain inadequately explained FCC universal service support rules).<sup>24</sup> The *Qwest* decision refutes petitioners' assertion that this Court reads section 706(2) to require vacatur in all instances of agency error.

The Third Circuit in *Council Tree III* fully explained why the equities would not support rescission of Auction 73. Among other things, such a remedy would: “unwind[]” billions of dollars in transactions conducted by “innocent third parties;” upset “billions of dollars of additional investments made in reliance on the results;” “seriously disrupt[] existing or planned wireless service for untold numbers of customers;” and have “broad negative

---

<sup>23</sup> Petitioners also point to cases under the APA in which this Court decided to vacate agency decisions and stated that unlawful agency orders “will” or “must” be “set aside.” Pet.Br. 41-43 & n.90. But none of those cases squarely presented the question whether remand without vacatur may be permissible when equitable factors so dictate.

<sup>24</sup> *See also* Order of Clarification at 4, *Qwest Corp. v. FCC*, No. 99-9546 (10th Cir. Aug. 27, 2001) (explaining that its reported opinion “did not vacate the rules adopted in the FCC’s Ninth Order,” but “merely reversed and remanded for further hearings” so that the Commission’s existing universal support mechanisms pursuant to the Ninth Order “may remain in effect . . . pending the completion” of proceedings on remand).

implications for the public interest in general.” 619 F.3d at 257. If this Court finds the question of remedy with respect to Auction 73 to be properly presented in this case, it can and should reach the same conclusion.

### **CONCLUSION**

The petition for review should be dismissed or denied.

### **STATEMENT REGARDING ORAL ARGUMENT**

We believe that oral argument will assist the Court in resolving the issues in this case.

Respectfully submitted,

JOSEPH F. WAYLAND  
ACTING ASSISTANT ATTORNEY  
GENERAL

SEAN A. LEV  
GENERAL COUNSEL

ROBERT B. NICHOLSON  
ROBERT J. WIGGERS  
ATTORNEYS

PETER KARANJIA  
DEPUTY GENERAL COUNSEL

UNITED STATES  
DEPARTMENT OF JUSTICE  
WASHINGTON, D.C. 20530

JACOB M. LEWIS  
ASSOCIATE GENERAL COUNSEL

/s/ Laurence N. Bourne

LAURENCE N. BOURNE  
COUNSEL

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

July 23, 2012

## **CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

### **Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 11,185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in 14-point Times New Roman type, or

this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: July 23, 2012

/s/ Laurence N. Bourne

---

Laurence N. Bourne  
Counsel  
Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1750

# **EXHIBIT 1**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

COUNCIL TREE COMMUNICATIONS, INC.,  
BETHEL NATIVE CORPORATION, AND THE  
MINORITY MEDIA AND TELECOMMUNICATIONS  
COUNCIL

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and the UNITED STATES OF AMERICA,  
Respondents.

---

Docket No. 08-2036

*Filed: 4/8/08*

**PETITION FOR REVIEW**

Council Tree Communications, Inc. (“Council Tree”), Bethel Native Corporation (“Bethel Native”) and the Minority Media and Telecommunications Council (“collectively “Petitioners”), by their counsel and pursuant to 28 U.S.C. §§ 2112, 2342 and 2344, 47 U.S.C. § 402(a) and Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petition this Court for review of the following three related orders of the Federal Communications Commission (“FCC” or “Commission”): (i) the *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 06-52, 21 FCC Rcd 4753 (2006), published in the Federal Register on May 4, 2006, 71 Fed. Reg. 26245 (“*Second R&O*”); (ii) the *Order on Reconsideration of the Second Report and Order*, FCC 06-78, 21 FCC Rcd 6703 (2006), published in the Federal Register on June 14, 2006, 71 Fed. Reg. 34272, granting in part and denying in part reconsideration of the *Second R&O* (“*First Reconsideration Order*”); and (iii) the *Second Order on Reconsideration of the Second Report and Order*, FCC 08-92, (rel. March 26, 2008), published in the Federal Register on April 4, 2008, 73 Fed. Reg. 18528, denying Petitioners’ Petition for Reconsideration

of the *Second R&O*, as well as (iv) the related *Public Notice*, Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006, FCC 06-71, 21 FCC Rcd 5598 (2006) (together, the “*FCC Orders*”). Copies of each of the *FCC Orders* are provided as Exhibits 1 – 4 hereto.

### **Issues on Review**

In the *FCC Orders*, the Commission adopted, subsequently “clarified,” and ultimately sustained twice on reconsideration modified rules governing benefits reserved for small businesses, rural telephone companies and minority- and women-owned businesses (collectively referred to herein as “designated entities” or “DEs”) in connection with the FCC’s competitive bidding process relating to spectrum auctions. This Court has subject matter jurisdiction to review these rules under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Venue is proper in this Court under 28 U.S.C. § 2343 because Petitioner Council Tree is a Delaware corporation. This Petition for Review is also filed within the 10-day period prescribed for participation in any lottery conducted pursuant to 28 U.S.C. § 2112 and 47 C.F.R. § 1.13(a).

All three Petitioners participated in the subject rulemaking proceeding before the Commission and Council Tree and Bethel Native are designated entities interested in and directly affected by the *FCC Orders*. Petitioners seek this Court’s review because the rules adopted in and later upheld with minor revisions in the *FCC Orders* ignore – indeed, contradict – statutory mandates directing the Commission to ensure the participation of designated entities in auctions and to avoid the excessive concentration of licenses in the hands of incumbent licensees. As a result of the application of these rules for two important spectrum auctions, financing available to designated entities has been sharply curtailed, effectively denying Council Tree, Bethel Native and other designated entities their legally-mandated opportunity to participate in the Advanced

Wireless Services auction (“Auction 66”).<sup>1</sup> In Auction 66, large incumbent wireless service operators obtained the vast majority of the most desirable spectrum licenses available for bid, and successful participation by designated entities was dramatically reduced from prior auctions, to 4% of the value of the spectrum obtained in Auction 66. In the most recent auction, Auction 73, which closed on March 18, 2008,<sup>2</sup> DEs obtained only 2.9% of the value of the spectrum, illustrating the continuing negative impact of these *FCC Orders* on DEs.

Review is sought, *inter alia*, on the grounds that the *FCC Orders* violate competitive bidding and small business participation provisions of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), 47 U.S.C. § 257, respectively, the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(b), and the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 *et seq.*, and are otherwise contrary to law and arbitrary and capricious.

### **Jurisdiction**

As the Court is aware, this matter returns to this Court in an unusual procedural posture, having already been before it in connection with a June 6, 2006 Petition for Review that has been fully briefed and was argued on both June 28, 2006, with respect to a related Motion for Stay, and on May 23, 2007 on the merits (Docket 06-2943). Ultimately, in a September 28, 2007 Order, this Court concluded that it lacked jurisdiction to decide the merits because the Petitioners’ Petition for Reconsideration of the FCC’s *Second R&O* remained pending at that

---

<sup>1</sup> The FCC actions challenged herein have had a similar impact on DEs’ participation in the recently completed 700 MHz auction (“Auction 73”). Auctions 66 and 73 were the two largest spectrum auctions in history.

<sup>2</sup> FCC Public Notice, *Auction of 700 MHz Band Licenses Closes*, DA 08-595 (rel. March 20, 2008).

time before the Commission and because its initial Petition for Review of the *First Reconsideration Order*<sup>3</sup> was filed prior to the publication of a summary of that Order in the Federal Register. *Council Tree Communications, Inc., et al. v. FCC*, 503 F.3d 284 (3d Cir. 2007).

However, in a subsequently issued Order, the Court ordered the Commission pursuant to 5 U.S.C. § 706(1) “to file within 30 days an estimate of when it plans to grant or deny Council Tree’s petition for reconsideration.” *In re: Council Tree Communications, Inc., et al.*, No. 07-4124 (3d Cir., February 15, 2008). The Commission complied with this Order on March 17, 2008, reporting that it would issue an Order within the ensuing thirty days, and followed up shortly thereafter with the release of the *Second Reconsideration Order* on March 26, 2008. With the issuance of the *Second Reconsideration Order*, publication thereof in the Federal Register on April 4, 2008, and the timely filing of this Petition for Review, the jurisdictional barrier to the Court rendering a decision in this matter on the merits has been removed, and the entire record established in the *FCC Orders* is before the Court for review. *See* F.R.A.P. 16 and *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997) (in proceedings involving multiple reconsideration orders, “the court must consider the entire rulemaking record from the commencement of the proceeding”).<sup>4</sup> In the interest of conserving judicial resources, and consistent with precedent, Petitioners request that the Court proceed to render a decision on the

---

<sup>3</sup> In the *First Reconsideration Order*, the Commission stated that it was acting “on its own motion,” and did not either formally grant or deny any part of the Reconsideration Petition or Petitioners’ May 5, 2006 Motion for Expedited Stay Pending Reconsideration or Judicial Review as mandated by statute (47 U.S.C. § 405(a)) (“Stay Motion”). Instead, the FCC stated that, “[a]s the record on reconsideration has not yet closed,” it “may” deal with additional issues at an unspecified “later date.” *First Reconsideration Order*, 21 FCC Rcd at 6704 (¶ 1).

<sup>4</sup> In the *Second Reconsideration Order* that provides the immediate basis for this Petition for Review, the Commission reaffirmed its action in the *Second R&O* and the *First Reconsideration*

merits based on the arguments already briefed and argued before it. *See West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988) (declaring, under similar circumstances, that upon the filing of a new Petition for Review, “the case will proceed on original briefs and letter memoranda thus far received by the panel, supplemented by such additional submissions as may be appropriate.”).<sup>5</sup>

WHEREFORE, Petitioners respectfully request that this Court grant this Petition for Review, declare unlawful, reverse, vacate, and set aside the *FCC Orders*, vacate the results of spectrum auctions, including but not limited to Auction 66, conducted pursuant to the rules unlawfully adopted and affirmed in those *FCC Orders*, and grant such other and further relief as justice requires and this Court deems fair and proper.

Respectfully submitted,

  
\_\_\_\_\_  
S. Jenell Trigg  
Dennis P. Corbett  
David S. Keir

Leventhal Senter & Lerman PLLC  
2000 K Street, NW Suite 600  
Washington, DC 20006-1809

*Counsel to Council Tree Communications, Inc.  
Bethel Native Corporation and the Minority Media  
and Telecommunications Council*

April 7, 2008

---

*Order* and effectively incorporated the entirety of its earlier discussion of the Petitioners' arguments into the *Second Reconsideration Order*.

<sup>5</sup> Petitioners plan to file shortly a formal motion relating to the unusual procedural posture of this case.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Third Circuit Local Appellate Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Petitioners submit this Corporate Disclosure Statement:

Council Tree Communications, Inc., and Bethel Native Corporation are not publicly-owned corporations and have no parent companies, subsidiaries, or affiliates that have issued shares to the public. The Minority and Media Telecommunications Council is a non-profit organization having no parent corporation or stock.

Respectfully Submitted,



S. Jenell Trigg  
Leventhal Senter & Lerman PLLC  
2000 K Street, NW, Suite 600  
Washington, D.C. 20006  
(202) 429-8970

April 7, 2008

**CERTIFICATE OF BAR ADMISSION**

I, S. Jenell Trigg, certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

  
\_\_\_\_\_  
S. Jenell Trigg  
Leventhal Senter & Lerman PLLC  
2000 K Street, NW, Suite 600  
Washington, D.C. 20006  
(202) 429-8970

April 7, 2008

## CERTIFICATE OF SERVICE

I, S. Jenell Trigg, certify that on this 7th day of April, 2008, I have served copies of the Petition for Review of the *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 06-52, 21 FCC Rcd 4753 (2006), the *Order on Reconsideration of the Second Report and Order*, FCC 06-78, 21 FCC Rcd 6703 (2006), the *Second Order on Reconsideration of the Second Report and Order*, FCC 08-92 (rel. March 26, 2008), and the *Public Notice*, Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006, FCC 06-71, 21 FCC Rcd 5598 (2006), by causing it to be delivered via courier to the Federal Communications Commission and U.S. Department of Justice. As a courtesy, copies have also been delivered via electronic mail.

Matthew B. Berry, General Counsel  
Joseph R. Palmore, Deputy General Counsel  
Daniel M. Armstrong, Associate General Counsel  
Laurence N. Bourne, Litigation Division  
Office of General Counsel  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554  
[Matthew.Berry@fcc.gov](mailto:Matthew.Berry@fcc.gov)  
[Joseph.Palmore@fcc.gov](mailto:Joseph.Palmore@fcc.gov)  
[Daniel.Armstrong@fcc.gov](mailto:Daniel.Armstrong@fcc.gov)  
[Laurence.Bourne@fcc.gov](mailto:Laurence.Bourne@fcc.gov)

Michael Mukasey, Attorney General  
Robert J. Wiggers, Appellate Section, Antitrust Division  
Robert B. Nicholson, Appellate Section, Antitrust Division  
United States Department of Justice  
RFK Main Building, Room 3224  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
[Robert.Wiggers@usdoj.gov](mailto:Robert.Wiggers@usdoj.gov)  
[Robert.Nicholson@usdoj.gov](mailto:Robert.Nicholson@usdoj.gov)

  
S. Jenell Trigg

# **STATUTORY ADDENDUM**

5 U.S.C. § 706

28 U.S.C. § 2344

47 U.S.C. § 402(a)

47 C.F.R. § 1.106(f)

UNITED STATES CODE ANNOTATED  
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES  
PART I. THE AGENCIES GENERALLY  
CHAPTER 7. JUDICIAL REVIEW

**§ 706. Scope of review**

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

(1) compel agency action unlawfully withheld or unreasonably delayed;  
and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

United States Code Annotated  
Title 28. Judiciary and Judicial Procedure  
Part VI. Particular Proceedings  
Chapter 158. Orders of Federal Agencies; Review

**§ 2344. Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 402(a)

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

**§ 402. Judicial review of Commission's orders and decisions**

(a) Procedure

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

\* \* \* \* \*

CODE OF FEDERAL REGULATIONS  
TITLE 47. TELECOMMUNICATION  
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION  
SUBCHAPTER A. GENERAL  
PART 1. PRACTICE AND PROCEDURE  
SUBPART A. GENERAL RULES OF PRACTICE AND  
PROCEDURE  
RECONSIDERATION AND REVIEW OF ACTIONS TAKEN  
BY THE COMMISSION AND PURSUANT TO DELEGATED  
AUTHORITY; EFFECTIVE DATES AND FINALITY DATES  
OF ACTIONS

**§ 1.106 Petitions for reconsideration in non-rulemaking proceedings**

\* \* \* \* \*

(f) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules, and shall be served upon parties to the proceeding. The petition for reconsideration shall not exceed 25 double spaced typewritten pages. No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.

\* \* \* \* \*

## CERTIFICATE OF DIGITAL SUBMISSION

I, Laurence N. Bourne, hereby certify that with respect to the foregoing:

(1) there are no required privacy redactions to be made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection version 11.0.5002.333, and according to the program are free of viruses.

*/s/ Laurence N. Bourne*

Laurence N. Bourne

Counsel

Federal Communications Commission

Washington, D.C. 20554

(202) 418-1750

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

**Council Tree Investors, Inc. and Bethel Native Corporation, Petitioners**

**v.**

**Federal Communications Commission and United States of America,  
Respondents.**

**CERTIFICATE OF SERVICE**

I, Laurence N. Bourne, hereby certify that on July 23, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Tenth 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.

Dennis P. Corbett  
S. Jenell Trigg  
Lerman Senter PLLC  
2000 K Street, NW  
Suite 600  
Washington, D.C. 20006  
*Counsel for: Petitioners*

Robert Nicholson  
Robert J. Wiggers  
U.S. Department of Justice  
Antitrust Division, Appellate Section  
3228  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530  
*Counsel for: USA*

Michael E. Glover  
Verizon Communicaitons, Inc.  
1320 North Courthouse Road  
Ninth Floor  
Arlington, VA 22201  
*Counsel for: Cellco Partnership,  
DBA Verizon Wireless*

Andrew G. McBride  
Thomas R. McCarthy  
Brett A. Shumate  
Wiley Rein LLP  
1776 K Street, N.W.  
Washington, D.C. 20006  
*Counsel for: Cellco Partnership,  
DBA Verizon Wireless*

/s/ Laurence N. Bourne