

BRIEF FOR APPELLEE

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

No. 16-1118

WALKER BROADCASTING COMPANY, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

WILLIAM J. SCHER
COUNSEL

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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The appellant is Walker Broadcasting Company, Inc. The appellee is the Federal Communications Commission.

2. Ruling under review.

Walker B'casting Co., Inc., 31 FCC Rcd 2395 (rel. March 18, 2016) (JA __).

3. Related cases.

Before the Commission released the ruling under review on March 18, 2016, Walker Broadcasting Company, Inc. filed an emergency petition for a writ of mandamus to compel the Commission to act. On February 25, 2016, this Court denied that petition in an unpublished decision. *In re: Walker B'casting Co., Inc., Petitioner*, Case No. 16-1066 (Feb. 25, 2016).

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GLOSSARY

<i>Bureau Ruling</i>	Letter from Barbara A. Kreisman, FCC, to Walker Broadcasting, Aug. 31, 2015
Commission or FCC	Federal Communications Commission
Communications Act	The Communications Act of 1934, as amended, 47 U.S.C. §§ 1, <i>et seq.</i>
Incentive Auction	Broadcast television spectrum incentive auction
<i>Order</i>	<i>Walker B'casting Co., Inc.</i> , 31 FCC Rcd 2395 (rel. March 18, 2016)
Spectrum Act	Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156 (2012)
<i>Streamlining Order</i>	<i>1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes</i> , 13 FCC Rcd 23056 (1998)
<i>Streamlining Recon. Order</i>	<i>1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes</i> , 14 FCC Rcd 17525 (1999)
WFBT	WFBT, Bath, New York
Walker	Walker Broadcasting Company, Inc.

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BRIEF FOR APPELLEE

JURISDICTION

Walker Broadcasting Company, Inc. (“Walker”) seeks review of a Commission order released on March 18, 2016. Walker filed a timely notice of appeal within 30 days of that release. *See* 47 C.F.R. § 1.4(b)(1) Note. This Court has jurisdiction to review the order under 47 U.S.C. § 402(b)(6) and (c).

QUESTION PRESENTED

The Commission has a two-step licensing process for television stations: grant of a construction permit followed by grant of a license on timely completion of construction in accordance with the permit terms. Walker failed to meet its April 3, 2009 construction permit deadline for station WFBT, Bath, New York, by not

submitting a required showing that the station's operations would not interfere with another licensed service. By operation of the Communications Act and the Commission's rules, the permit was automatically forfeited, without the need for further Commission action.

Six years later, only after Congress authorized payments for eligible television stations that participate in the broadcast television spectrum incentive auction, Walker tried to revive its permit by submitting the overdue non-interference showing. Walker claimed that it had thereby satisfied the conditions of its permit and made WFBT eligible for the auction. The FCC disagreed.

The questions presented in this case are:

1. Whether the FCC reasonably determined that, because Walker's permit had automatically forfeited in 2009, WFBT was ineligible for the auction.
2. Whether the FCC constructively waived the automatic forfeiture by, among other things, not dismissing Walker's defunct license application until 2015.
3. Whether the FCC abused its discretion by not waiving the permit's automatic forfeiture.
4. Whether the Commission unjustifiably treated Walker differently than other permittees who violated the same permit condition.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory and Regulatory Background

The FCC is charged with licensing television stations under the Communications Act of 1934. *See, e.g.*, 47 U.S.C. § 301. Section 319 of the Act states that “[n]o license shall be issued ... for the operation of any station unless a permit for its construction has been granted by the Commission.” 47 U.S.C. § 319(a). The permit must specify, among other things, when “the actual operation of such station is expected to begin.” *Id.* § 319(b). A construction permit “will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.” *Id.*

For many years, the FCC required permittees to complete construction within relatively short periods: 24 months for a full-power television station and 18 months for other broadcast facilities. Notwithstanding section 319(b), a permit was not deemed forfeited at the end of the construction period unless the FCC acted affirmatively to effectuate a forfeiture. *See 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056, 23087-88 (¶¶ 77-78) (1998) (“*Streamlining Order*”), *recon. granted in part*

and denied in part, 14 FCC Rcd 17525 (1999) (“*Streamlining Recon. Order*”).

This approach proved problematic: many permittees failed to construct their stations within the applicable deadlines, leading to numerous extension requests and delays in new broadcast service. *Streamlining Order* ¶ 79. In 1998, therefore, the FCC revised its rules to lengthen the construction period, strictly limit extensions, and subject expired permits to automatic forfeiture. *Streamlining Recon. Order* ¶ 36 (intention of revised rules is “to bring to the construction process the same degree of urgency brought to other business endeavors.”).

The revised rules extend the construction deadline to three years after the grant of the permit. *See* 47 C.F.R. § 73.3598(a). “Any construction permit for which construction has not been completed and for which an application for a license has not been filed shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.” 47 C.F.R. § 73.3598(e). The construction deadline can be further extended, or “tolled,” but “only in limited circumstances directly preventing construction and not within the applicant’s control,” *Royce Int’l B’casting Co.*, 23 FCC Rcd 9010 (¶ 3) (2008), such as “natural disasters.” 47 C.F.R. § 73.3598(b). A waiver of the deadline may also be granted, but only in “rare and exceptional circumstances other than those delineated” in the Commission’s regulations. *See Streamlining Recon. Order*, 14 FCC Rcd at 17541 (¶ 42).

Generally, a television station may begin operating under “program test authority” as soon as construction is completed “in accordance with the terms of the construction permit.” 47 C.F.R. § 73.1620(a). A license application must be filed within 10 days thereafter. *Id.* “[T]he program test authority continues valid during FCC consideration of the application for license, and, during this period, further extension of the construction permit is not required.” *Id.* § 73.1620(c). But there are special rules for initiating operation on channel 14, which is allocated for assignment to land mobile radio¹ in a number of areas on a geographically shared basis with television. *Id.* § 90.303. Before initiating operation on channel 14, a permittee must “submit evidence” that its television station will not interfere with land mobile radio. *Id.* § 73.687(e)(4)(ii).

B. Walker’s Construction Permit

The Commission initially granted Walker a permit to construct WFBT as an analog television station on April 23, 2004. (JA __). The original April 23, 2007 deadline was extended to April 3, 2009 due to a challenge of the permit’s grant. (JA __). Walker later converted the WFBT permit to authorize a digital station, with the same April 3, 2009 deadline. (JA __). Because the permit was for channel

¹ Land mobile radio is a wireless communications system intended for terrestrial use (*e.g.*, two way radios in vehicles) by emergency first responder organizations, public works organizations, and dispatched services such as taxis.

14, it required Walker to submit “documentation that objectionable interference will not be caused to existing land mobile radio facilities along with a request for program test authority,” and prohibited Walker from initiating operation of the station without specific authority from the FCC. *Id.*

Walker filed a license application and a request for program test authority for WFBT on April 2, 2009, the day before the construction period was scheduled to expire. (JA ___). But Walker failed to submit the documentation regarding lack of interference with existing land mobile radio facilities required by the permit. Letter from Barbara A. Kreisman, FCC, to Walker Broadcasting, Aug. 31, 2015, at 2 (“*Bureau Ruling*”) (JA ___). Accordingly, the Commission did not grant program test authority, and the station never commenced operation. *Id.*

Subsequently, FCC staff contacted Walker’s counsel by telephone in June 2010 regarding the overdue non-interference showing. *Id.* Walker states that, “expecting further guidance,” its counsel in response sent three email messages to FCC staff between July 27 and September 21, 2010 with information related to land mobile radio interference. (Br. 5-6). But “no email was ever received by staff” from Walker’s counsel. *Bureau Ruling* at 2 (JA ___). Walker did not attempt “to verify that its message[s] had been received” by FCC staff or to “contact the Commission again regarding this matter until May 28, 2015.” *Walker B’casting*

Co., Inc., 31 FCC Rcd 2395, 2396 (rel. March 18, 2016) (“*Order*”) (JA ___)
(concurring statement of Commissioner Ajit Pai).

C. The Incentive Auction Order

In June 2014, the Commission issued an order adopting rules to implement the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, 126 Stat. 156 (2012) (“*Spectrum Act*”), which authorizes an incentive auction to “encourage” television broadcasters “to relinquish . . . some or all of [their] licensed spectrum usage rights” for the purpose of reallocating broadcast television spectrum for new uses (such as mobile broadband service). 47 U.S.C. §§ 309(j)(8)(G)(i), 1452; see *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6652 ¶ 185 (2014) (“*Incentive Auction Order*”), *pets. for review denied*, *National Ass’n of B’casters v. FCC*, 789 F.3d 165 (2015). Among other things, the *Incentive Auction Order* identified the types of television stations that would be eligible to participate in the auction and to be protected in the “repacking” process by which the spectrum will be reorganized to free up a portion for new uses. *Id.* ¶¶ 183-245.

The FCC found that it was required by the *Spectrum Act* to protect stations that were licensed or operating as of February 22, 2012 (the date of the statute’s enactment). *Id.* ¶¶ 185-89. The FCC also found that it had “discretion to protect additional facilities.” *Id.* ¶ 191. In exercising this discretion, the agency balanced

the benefits of protection (preserving existing television service, safeguarding broadcasters' investments) against the costs (increasing constraints on the repacking process and incentive payments for broadcasters). *Id.* ¶¶ 192-193. After carefully weighing these competing concerns, the FCC decided to protect the small number of “new full power television stations that were authorized by construction permits, but not yet licensed, as of February 22, 2012.” *Id.* ¶ 196. The *Incentive Auction Order* specifically identified the four stations in this category but made no mention of Walker's station. *Id.* n.647 (listing three stations—WACP, Atlantic City, New Jersey, WMWC, Galesburg, Illinois, and KUKL-TV, Kalispell, Montana—as “now licensed” and stating that the fourth, WMDE, Seaford, Delaware was the “one remaining station in this category”).

Following the *Incentive Auction Order*, the FCC established final procedures for eligible stations to qualify for repacking protection (and auction participation) in a series of public notices. On January 28, 2015, the FCC's Media Bureau announced that eligible stations must be licensed by May 29, 2015 in order to qualify. Public Notice, *Media Bureau Designates May 29, 2015 As Pre-Auction Licensing Deadline*, 30 FCC Rcd 393 (Med. Bur. 2015). On June 9, 2015, the Bureau released a provisional list of eligible stations that had qualified. Public Notice, *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, 30 FCC Rcd

6153 (Med. Bur. 2015) (“*Eligibility PN*”). That provisional list of eligible stations did not include WFBT.² The Bureau stated that “if a licensee believes that the [*Eligibility PN*] omits an eligible facility, it should file with the Commission a ‘Petition for Eligible Entity Status’ by July 9, 2015.” *Id.* at 6154.

D. The Proceedings Below

On May 28, 2015, over six years after its construction permit had expired, Walker amended its license application (which, though never granted, remained on file with the Commission) by submitting documentation to show non-interference with existing land mobile radio facilities. *See Order* ¶ 6 (JA ___). In addition, on June 12, 2015, Walker filed a Petition for Eligible Entity Status, arguing that WFBT should be eligible for participation and protection in the auction because Walker held a construction permit prior to February 22, 2012 and completed a license application by the May 29, 2015 Pre-Auction Licensing Deadline. *Id.*

1. The Bureau Ruling

On August 15, 2015, the FCC’s Media Bureau denied Walker’s Petition for Eligible Entity Status, and dismissed Walker’s license application. *Bureau Ruling*

² On October 15, 2015, the final list of eligible stations was made available on the FCC’s website, and the FCC’s Wireless Telecommunications Bureau released detailed information for qualified eligible stations to apply to participate in the auction. Public Notice, *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, 30 FCC Rcd 11034, 11037 (¶ 2) (2015) (“*Application Procedures PN*”). Neither document mentioned WFBT.

at 2 (JA __). The Bureau dismissed the license application based on the fact that Walker's construction permit had been automatically forfeited upon its expiration on April 3, 2009, due to Walker's failure to satisfy the permit terms by demonstrating non-interference with existing land mobile radio facilities. *Id.* at 3-4 (JA __). In response to Walker's May 28, 2015 amendment of the license application to submit a non-interference showing, the Bureau explained that "there is no longer an authorized facility to license." *Id.* at 4 (JA __).³

The Bureau then concluded that Walker was not eligible for repacking protection because it "has no authorization or license to be protected." *Id.* The Bureau explained that WFBT was not one of the four new stations authorized by construction permit as of February 22, 2012 that the FCC decided to protect in the *Incentive Auction Order*. *Id.* at 5 (JA __), and dismissed Walker's Petition as an untimely petition for reconsideration of that Order. *Id.* Alternatively, it found that WFBT was unlike the four protected stations because their permits expired *after*

³ The Bureau also dismissed Walker's license application as patently defective based on Walker's failure to timely submit the interference showing or request a waiver. *Bureau Ruling* at 3 (JA __). As a further alternative ground for dismissal, the Bureau found that Walker failed to submit the showing at the request of staff. The Commission did not address these rationales, reasoning that they were "irrelevant to our ultimate determination that the construction permit expired and was forfeited as a matter of law." *Order* n.35 (JA __).

the February 22, 2012 statutory cut-off date, whereas WFBT's permit expired on April 3, 2009. *Id.* at 5-6 (JA ___).

Walker filed an application for Commission review of the *Bureau Ruling* on September 30, 2015. (JA ___). On November 30, 2015, Walker also filed a petition for reconsideration of the *Application Procedures PN*, again arguing that it was eligible under the *Incentive Auction Order*. (JA ___).

2. The *Order* Under Review

In the *Order* under review, the Commission affirmed the Bureau's dismissal of Walker's license application on the ground that Walker's permit was automatically forfeited, so "there was no longer a valid authorization to license." *Order* ¶ 10 (JA ___).⁴ The FCC explained that "Walker's filing of an incomplete license application did not prevent or suspend the expiration of its construction permit," and that Walker's filing of documentation regarding the lack of interference to land mobile radio facilities in 2015 was inexcusably late. *Id.* ¶ 11 (JA___)

The Commission rejected Walker's contention that it was being treated unfairly compared to other stations that had been allowed by FCC staff to submit

⁴ Before the Commission issued the *Order* on March 18, 2016, Walker filed an emergency petition for a writ of mandamus to compel the Commission to act. On February 25, 2016, this Court denied that petition in an unpublished decision. *In re: Walker B'casting Co., Inc., Petitioner*, Case No. 16-1066 (Feb. 25, 2016).

land mobile radio interference documentation after the expiration of their construction periods. *Id.* n.43 (JA ___). The Commission explained that Walker had not raised the argument before the Bureau and, on the merits, the stations involved were different from Walker's station because they were already providing licensed analog television service (meaning that forfeiture of their digital permits would have deprived the public of existing service), whereas Walker's station "never provided broadcast service before its permit expired." *Id.* In addition, the FCC rejected Walker's argument that equitable considerations resulting from the license application's continued pendency compelled its grant, explaining that the permit had been automatically forfeited in 2009, and the "[f]ormal dismissal of the license application" by the Bureau "in 2015 was simply a response to Walker's belated efforts to revive a long-expired permit." *Id.* ¶ 12 (JA ___).

The Commission also affirmed the Bureau's denial of Walker's Petition for Eligible Entity Status. First, the Commission explained, Walker had missed by nearly nine months the deadline for seeking reconsideration of the *Incentive Auction Order*, which made clear that Walker's station was excluded from the auction. *Id.* ¶ 13 (JA ___). On the merits, Walker's station was unlike the four stations given discretionary protection, the FCC explained, because all four had valid permits on the February 22, 2012 statutory cut-off date, whereas Walker's permit had expired almost three years before. *Id.* ¶ 15 (JA ___). The FCC

recognized that Walker “had to take on ‘significant costs’ to construct WFBT,” but stated that “Walker could have avoided any stranded investments and had WFBT licensed and operational by timely filing the . . . interference study required under its construction permit.” *Id.* (JA ___).

Finally, the Commission dismissed Walker’s petition for reconsideration of the *Application Procedures PN* for failure “to identify any material error, omission, or reason warranting reconsideration.” *Id.* ¶ 17 (JA ___), quoting 47 C.F.R. § 1.429(l)(1). The *Application Procedures PN* “did not make any substantive determinations regarding broadcaster eligibility . . .; it merely provided a list of the broadcast facilities already deemed eligible.” *Id.*⁵

E. Subsequent Developments

The incentive auction began on March 29, 2016. *See Application Procedures PN*. The Commission announced the spectrum clearing target for the initial stage of the incentive auction on April 29. Public Notice, *Initial Clearing Target of 126 Megahertz Set For the Broadcast Television Spectrum Incentive Auction; Bidding in the Clock Phase of the Reverse Auction (Auction 1001) Will Start on May 31*,

⁵ On the merits, the FCC explained that Walker was not entitled to the provisional repacking protection provided in the *Incentive Auction Order* for stations “that previously held . . . licenses” but were subject to “a non-final license validity proceeding or downgrade order,” because Walker had never held a license for WFBT. *Order* ¶ 18 & n.58 (internal quotations and citations omitted) (JA ___).

2016, 31 FCC Rcd 3863 (rel. Apr. 29, 2016). Bidding in the “reverse auction” portion of the initial stage of the incentive auction commenced on May 31, *id.*, and has now concluded. *See* FCC Public Reporting System, available at <https://auctiondata.fcc.gov/public/projects/1000>. Bidder training in the “forward auction” portion of the incentive auction is now taking place, and bidding will commence on August 16. *See* Public Notice, *62 Applicants Qualified to Bid in the Forward Auction (Auction 1002) of the Broadcast Television Spectrum Incentive Auction; Clock Phase Bidding [in the Forward Auction Will] Begin on August 16, 2016*, DA 16-796 (rel. July 15, 2016).

SUMMARY OF ARGUMENT

There is no dispute that Walker failed to timely satisfy the express condition, contained in WFBT’s construction permit, that before commencing operations, Walker document that the station would not cause harmful interference with existing land mobile radio facilities. Because of its failure to submit such documentation, Walker was not ready to operate WFBT by the April 3, 2009 permit deadline. By statute and rule, therefore, the permit was automatically forfeited without the need for further Commission action.

Because Walker no longer held a valid permit as of February 22, 2012, the Spectrum Act enactment date, the FCC properly rejected Walker’s claim to be eligible for the FCC’s broadcast television spectrum incentive auction. The plain

and simple fact is that, long before the Spectrum Act directed the FCC to conduct the incentive auction, Walker had lost its authorization for station WFBT.

There is no basis to Walker's claim that the FCC implicitly waived the automatic forfeiture rule. The FCC was not required to dismiss Walker's pending license application in order to effectuate the automatic forfeiture, and no other FCC action or omission purported to waive the rule, or could have had that effect. Nor was waiver compelled on equitable or other grounds. Walker has never explained or justified its failure to meet the April 3, 2009 permit deadline. Walker did not attempt to revive its permit until six years later, after the Spectrum Act established financial rewards for eligible broadcasters to participate in the incentive auction.

Finally, even if Walker's disparate treatment argument can surmount its threshold flaws, Commission staff was justified in treating Walker differently than two other stations that failed to timely comply with a non-interference showing condition, since those stations, unlike Walker's station, were already providing service to the public at the time their construction periods expired.

STANDARD OF REVIEW

Walker maintains that the Commission abused its discretion by not waiving the automatic forfeiture rule and reinstating Walker's construction permit in 2015. "The abuse of discretion standard presents a heavy burden for a petitioner in this court." *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512, 522 (D.C. Cir. 1999).

The Court will vacate the denial of a waiver “only when the agency’s reasons are so insubstantial as to render that denial an abuse of discretion.” *Morris Commc’ns, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009) (internal quotations and citations omitted). The FCC must “provide adequate explanation before it treats similarly situated parties differently.” *Id.* “However, the agency’s strict construction of a general rule in the face of waiver requests is insufficient evidence of an abuse of discretion.” *Id.*, quoting *Mountain Solutions*, 197 F.3d at 517.

Walker also maintains that the Commission improperly denied eligibility for repacking protection to station WFBT under the *Incentive Auction Order*. The Court “accord[s] an agency’s interpretation of its own regulations a ‘high level of deference,’ accepting it ‘unless it is plainly wrong.’” *General Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995), quoting *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1988); see *United States Telecom. Ass’n v. FCC*, 2016 WL 3251234, slip op. at 83 (D.C. Cir. June 14, 2016).

ARGUMENT

I. THE FCC REASONABLY DETERMINED THAT WALKER’S CONSTRUCTION PERMIT WAS AUTOMATICALLY FORFEITED IN 2009 AND, THEREFORE, THAT WALKER’S STATION WAS INELIGIBLE FOR THE INCENTIVE AUCTION

1. By operation of law, a construction permit is automatically forfeited, “without any further affirmative cancellation by the Commission,” 47 C.F.R. §

73.3598(e), if the station is not “ready for operation” by the construction permit deadline. 47 U.S.C. § 319(b). There is no dispute that Walker’s construction permit required it to submit “documentation that objectionable interference will not be caused to existing land mobile radio facilities,” (JA ___), and that Walker failed to satisfy that condition by the April 3, 2009 construction permit deadline. *See, e.g.*, Br. 5, 23. As a result, Walker’s station was not “ready for operation within the time specified” by its construction permit. 47 U.S.C. § 319(b). The permit therefore forfeited automatically, without any need for affirmative action by the Commission. *Id.*; *see* 47 C.F.R. § 73.3598(e).

The Commission’s determination that Walker’s construction permit was automatically forfeited is firmly supported by its precedent. Thus, in *Tango Radio, LLC*, 30 FCC Rcd 10564 (2015), several radio stations filed license applications by their construction permit deadlines that did not contain the showings necessary to satisfy the operating conditions set forth in their permits. *See id.* n.8. The FCC held that the permits were automatically forfeited as of their expiration dates, and that the license applications were moot. *Id.* at 10566-67 (¶ 6). The FCC also concluded that the applicants’ “attempted use of the corrective amendment process to extend their construction deadlines” was “inappropriate and inconsistent with the Commission’s goals of prompt initiation of service and spectrum efficiency.” *Id.*; *see Timothy C. Cutforth*, 29 FCC Rcd 13066 (2014) (affirming staff dismissal of

license application filed by permit deadline that was incomplete because, *inter alia*, “two special operating conditions on the permit had not been met”); *see also Eagle B’casting Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009) (affirming FCC determination that station license expired and was automatically forfeited pursuant to 47 U.S.C. § 312(g) due to failure to broadcast at the station’s authorized facilities for one year); *Nat’l Science and Technology Found. v. FCC*, 397 F.3d 1013, 1014-15 (D.C. Cir. 2005) (affirming FCC determination that land mobile radio licenses were automatically cancelled due to nonconstruction where appellant “offered no valid excuse” for “simply ignor[ing] a clear procedural requirement” by not requesting an extension before expiration of the construction period).

Walker nonetheless contends that Commission precedent “disfavors automatic expiration.” Br. 28; *see id.* 28-31. As an initial matter, this argument is barred because Walker never presented it to the FCC. 47 U.S.C. § 405(a)(2). In any event, the Commission has approved automatic forfeiture rule waivers only “where the applicant conclusively demonstrates that it completed construction prior to the expiration of the construction period, notwithstanding the tardy filing of the [license application].” *Clear Channel B’casting Licenses, Inc.*, 26 FCC Rcd 7153, 7157 (2011) (¶ 11). Such a demonstration requires that an applicant have complied with all terms of the construction permit prior to the permit deadline. *See Tango Radio*, 30 FCC Rcd at 10567 (¶ 6) (permittee must “build in accordance with all

terms of the construction permit” by the permit deadline). Here, the permit required documentation regarding non-interference with land mobile radio that Walker did not file until six years after the construction permit expired.

Walker’s argument that it satisfied the permit deadline merely by completing construction has no merit. *See* Br. 16-17, 23. A permittee must “build in accordance with all terms of the construction permit” by the permit deadline. *Tango Radio*, 30 FCC Rcd at 10567; *see* 47 C.F.R. § 73.1620(a) (“Upon completion of construction of [a television] station *in accordance with the terms of the construction permit*, ... program tests may be conducted”) (emphasis added). Documentation of non-interference with land mobile radio was an express term of Walker’s permit, and a condition precedent to the station being “ready for operation.” 47 U.S.C. § 319(b); *see* (JA ___). Thus, Walker was required to submit the non-interference showing by the permit deadline in order to meet the deadline.

Walker also contends that the FCC was required to provide it with a written deficiency letter and an opportunity to correct the defect in its license application. Br. 31-34. This argument is also barred because it was not raised before the

Commission. 47 U.S.C. § 405(a)(2).⁶ On the merits, Walker relies principally on a rule that provides for written deficiency letters “[i]n the case of minor defects as to completeness.” 47 C.F.R. § 73.3564(a). But Walker’s failure to comply with the construction permit condition requiring a land mobile radio non-interference showing “can only be characterized as [a] major deficienc[y].” *Aerco B’casting Corp.*, 18 FCC Rcd 24417, 24419 (2003) (“patent omissions in the technically critical proofs of performance ...—which are essential for the staff to determine whether the terms and conditions of the construction permit have been satisfied and whether the constructed facilities will operate in conformance with the Commission’s rules—can only be characterized as major deficiencies.”).⁷

⁶ Walker did refer to the lack of a written deficiency letter in its application for review to the Commission, but only to argue that dismissal was unwarranted based on Walker’s failure to comply with the staff’s oral requests, an issue that the FCC did not reach. *See Order* n.35 (JA ___). Walker never presented to the FCC its current argument that a written deficiency letter is a prerequisite for dismissal.

⁷ Walker also relies on 47 C.F.R. § 73.1015 (FCC “may, in writing, require from any applicant, permittee, or licensee written statements of fact relevant to a determination whether an application should be granted or denied.”), and *Tango Radio*, in which FCC staff made written requests for “curative information” before dismissing a license application. Br. 32-34. But the Commission disavowed the staff’s actions in *Tango Radio*, 30 FCC Rcd at 10567 (¶ 6), directing it “to strictly enforce Section 73.3598(e) [the automatic forfeiture rule].” And section 73.1015 simply authorizes the Commission or its staff to request “written statements of fact” relevant to an application decision. 47 C.F.R. § 73.1015. Walker cites no basis for construing that rule to override the obligation to satisfy an express condition contained in a construction permit.

In the absence of a valid underlying permit, Walker's license application for WFBT was not grantable. The Communications Act prohibits the issuance of a license for any station "unless a permit for its construction has been granted by the Commission." 47 U.S.C. § 319(a); *see Fidelity Tel., Inc. v. FCC*, 515 F.2d 684, 688 n.2 (D.C. Cir. 1975) ("A construction permit is a necessary prerequisite to the licensing of a new station"). Walker no longer held a valid permit in 2015. Formal dismissal of the license application in 2015, therefore, "was simply a response to Walker's belated efforts to revive a long-expired permit." *Order* ¶ 12 (JA ___).

2. Because Walker's construction permit for WFBT was automatically forfeited prior to February 22, 2012, the Spectrum Act's cut-off date for protection of television stations in the incentive auction, the Commission reasonably determined that Walker was ineligible for participation in the incentive auction. Walker's station was not licensed or operating as of February 22, 2012, so it was not entitled to mandatory protection under the statute. *Incentive Auction Order* ¶¶ 185-89. And the station was no longer authorized by construction permit as of that date, so it was not entitled to discretionary protection either. *Id.* ¶¶ 194, 196.

Walker argues that the Commission misinterpreted the *Incentive Auction Order* in concluding that Walker's station was ineligible for discretionary

repacking protection. Br. 37-41.⁸ Walker relies on the Commission’s statement that it would protect “the small number of new full power television stations that were authorized, but not constructed or licensed, as of February 22, 2012.” *Incentive Auction Order* ¶ 194; *see id.* ¶ 196. But Walker’s station did not belong to this group, because it was not “authorized ... as of February 22, 2012”—Walker’s construction permit was automatically forfeited in 2009. And in case there were any doubt on that issue, the *Incentive Auction Order* specifically identified the four new stations—none of them WFBT—to be protected: “WACP, Atlantic City, New Jersey, WMWC, Galesburg, Illinois, and KUKL-TV, Kalispell, Montana” (which were “licensed” by the time of the *Incentive Auction Order*) and “WMDE, channel 5, Seaford, Delaware,” the “one remaining station in this category,” whose construction permit “was originally scheduled to expire in May 2014,” but had “been tolled” under Commission rules. *Id.* n.647. In sum, it was eminently reasonable for the agency to conclude that the *Incentive Auction Order*—which

⁸ Walker does not challenge the determinations in the *Incentive Auction Order* of the types of television stations to be protected, nor could it: the time for challenging that Order expired on September 15, 2014. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d). (It was published in the Federal Register on August 15, 2014. 79 Fed. Reg. 48442.) The FCC did not reopen those determinations in 2015 when it provided the opportunity to file petitions for eligible entity status: that opportunity was provided solely to ensure that no *eligible* station was inadvertently omitted from the final list of stations qualified for the auction. *Eligibility PN*, 30 FCC Rcd at 6154. The *Application Procedures PN* merely announced the final list.

excluded Walker's station from the list of those entitled to discretionary protection—provided no support for Walker's claim to eligibility for protection in the incentive auction. *See Gen. Elec. Co. v. EPA*, 53 F.3d at 1327.⁹

II. THE FCC DID NOT IMPLICITLY WAIVE THE AUTOMATIC FORFEITURE RULE

Walker argues that the FCC “implicitly” (Br. 18) waived the automatic forfeiture rule by (1) not dismissing the license application until 2015; (2) informally requesting an interference showing from Walker in 2010 after the construction period expired; (3) collecting annual regulatory fees from Walker after the construction period expired; and (4) other FCC actions. Br. 18-20, 23-24. These arguments lack merit. None of the actions that Walker identifies purported to waive the rule, or could reasonably be interpreted to have that effect given the overriding fact of Walker's failure to timely satisfy the permit condition.

⁹ The FCC also reasonably distinguished the four new stations to which it extended discretionary protection in the *Incentive Auction Order* from Walker's station. *Order* ¶ 14 (JA ___). *See* Br. 40. As of the Spectrum Act's cutoff date, Walker's station was no longer authorized, whereas the four stations held valid permits that did not expire until after that date. *Id.* In addition, Walker's station was located in an area with numerous constraints on the availability of spectrum, so that protecting the station would have unduly limited the FCC's flexibility in the repacking portion of the incentive auction. *Id.* ¶ 16 (JA ___). Finally, any concern with avoiding stranded costs did not apply to Walker because Walker's costs were stranded prior to the statutory cutoff date, due to Walker's lack of diligence in failing to satisfy a critical condition of its construction permit. *Id.* ¶ 15 (JA ___).

1. That Walker's license application remained on file until 2015, when the Bureau dismissed it, does nothing to undermine the reasonableness of the Commission's conclusion that the permit had been automatically forfeited in 2009 when it expired by its terms. The Commission's rule makes "any further affirmative cancellation by the Commission" unnecessary. 47 C.F.R. § 73.3598(e); *see* 47 U.S.C. § 319. If the FCC were required to dismiss affirmatively any applications associated with a permit in order to effectuate a forfeiture, then the rule's purpose—that forfeiture be automatic—would be defeated. And even had the continued pendency of the license application produced some genuine uncertainty as to its status (despite Walker's non-compliance with a critical permit condition), that would not have justified Walker's inaction for over six years. *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 864-65 (D.C. Cir. 2014) (affirming FCC denial of requests to waive deadline to comply with hearing-aid compatibility standards based on applicants' failure to exercise reasonable diligence).

Likewise, the fact that Walker filed a non-interference showing years after the construction permit's expiration, but before the license application was formally dismissed, did not constitute a waiver of the automatic forfeiture rule. The showing that Walker submitted after the construction permit deadline was too late to justify a waiver. *See Miami MDS Co. v. FCC*, 14 F.3d 658, 660-61 (D.C. Cir. 1994) (affirming FCC's refusal to allow a multipoint distribution service permittee

to rely on actions taken after a construction permit expired to justify extension of the permit); *Tango Radio*, 30 FCC Rcd at 10567 (¶ 6) (rejecting attempted use of corrective amendments to extend construction permit deadlines).¹⁰

Contrary to Walker's suggestion, *see* Br. 10, its non-interference showing was not timely because it was filed by the May 29, 2015 Pre-Auction Licensing Deadline. That deadline applied only to stations that were eligible for protection in the auction. *See Incentive Auction Order* ¶ 195. Walker's station was not eligible because it was no longer authorized as of the February 22, 2012 statutory cut-off date, Walker's permit for the station having been automatically forfeited in 2009.

2. The FCC staff's informal requests for an interference showing after the construction period expired also did not constructively waive the automatic forfeiture rule. There is no reason to conclude that mere inquiries about Walker's failure to provide the non-interference showing were intended to waive, or could have the effect of waiving, the construction permit's express condition. In any event, the Commission never endorsed the staff's actions and, therefore, is not bound by them. *Comcast Corp. v. FCC*, 526 F.3d 763, 770 (D.C. Cir. 2008); *see*

¹⁰ Walker claims that its license application was "letter perfect" after it was amended in 2015 to submit non-interference documentation. Br. 35. But the FCC did not pass upon the sufficiency of Walker's 2015 non-interference showing, having concluded that the license application was properly dismissed because the underlying construction permit had expired and been forfeited.

Tango Radio, 30 FCC Rcd at 10565 (directing the staff “to consistently enforce” the automatic forfeiture rule). And even if the staff requests could have been interpreted to extend the permit deadline into 2010, when they were made, Walker failed to submit the required documentation until 2015.

Walker complains that its counsel received no response from FCC staff to three email messages sent in 2010 that were intended to respond to the staff requests. Br. 5-6. But “no email was ever received by staff” from Walker’s counsel, *Bureau Ruling* at 2 (JA ___), and Walker made no attempt to follow up on the emails. Moreover, Walker does not even claim that the emails contained the required non-interference showing; only that they contained “information relevant to the land mobile interference issue” that it hoped “would avoid the need” for such a showing, notwithstanding the express permit condition. Br. 5 n.6; *see Order* n.41 (JA ___).

3. Nor did Walker’s payment of annual regulatory fees after the construction permit deadline constructively waive the automatic forfeiture rule. *See Morris*, 566 F.3d at 191 (FCC reasonably concluded that acceptance of post-default installment payments did not constructively waive rule providing for automatic cancellation of licenses due to late installment payments). The FCC’s automated filing and payment system generated bills for Walker after the construction permit deadline because the FCC’s Consolidated Database System did not reflect cancellation of

the permit.¹¹ But Walker cannot turn what was at best “a clerical error into a windfall of rights it would not otherwise enjoy.” *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 202 (D.C. Cir. 2003) (affirming automatic license cancellation for non-payment despite payment notice discrepancies) (internal quotations and citations omitted). The obvious remedy for Walker’s payment of fees relating to a station whose construction permit had been automatically forfeited is to request a refund. *See* 47 C.F.R. §§ 1.1160(a)(1), (d).

4. Likewise, the automatic forfeiture rule was not constructively waived by the FCC’s acceptance in 2015 of Walker’s amendment to the WFBT license application or the FCC’s grant of Walker’s application for a minor change in ownership of the station. Neither of these routine administrative actions by the FCC purported to, or could have had the effect of, waiving the automatic forfeiture rule. *See Morris*, 566 F.3d at 192 (for purposes of equitable estoppel, neither post-default processing of buildout notifications nor FCC approval of requests for special temporary authority to operate constituted “definite” representations regarding Morris’s request for waiver of automatic cancellation of its licenses). Indeed, Walker’s 2015 amendment expressly does not request a waiver of any

¹¹ The FCC does not mail bills, but the bills are available for viewing in the FCC’s automated system. *See, e.g., Payment Methods and Procedures for Fiscal Year 2015 Regulatory Fees*, 30 FCC Rcd 9941 (2015).

Commission rule. (JA __) (responding “no” to the question [d]oes this filing request a waiver of the Commission’s rules(s)?”).¹²

III. THERE WAS NO BASIS FOR WAIVER OF THE AUTOMATIC FORFEITURE RULE UNDER THE FCC’S RULES

The FCC may waive the automatic forfeiture rule where a station is not ready to operate by the construction permit deadline for reasons outside the permittee’s control. 47 C.F.R. § 73.3598(b); 47 U.S.C. § 319(b). There was no basis for such a waiver in this case, however. First, Walker never requested a waiver. And while the FCC may grant waivers on its own motion, the record does not reflect either that Walker missed the deadline for reasons outside of its control or due to “rare and exceptional circumstances.” *Streamlining Recon. Order*, 14 FCC Rcd at 17541 (¶ 42). On the contrary, Walker has never explained or justified

¹² Even more clearly, the FCC did not implicitly waive the automatic forfeiture rule by “includ[ing] Walker in the Greenhill Report.” Br. 19; *see id.* 36-37. The Report was prepared and released “for use in explaining and promoting” the auction to broadcasters. Incentive Auction Opportunities for Broadcasters (Feb. 2015) available at <http://wireless.fcc.gov/incentiveauctions/learn-program/docs/ia-opportunities-book1.pdf>. Although based on preliminary, non-public information regarding potential incentive payments for stations in the auction, the Report itself did not identify specific participating stations. Moreover, it disclaimed any independent significance regarding station eligibility for the auction. *Id.* 1 (“Disclaimer ... This presentation ... is subject in all respects to the detailed terms of the [*Incentive Auction Report and Order*]...”); *see id.* Note (“Should this summary vary from the [*Incentive Auction Order*] ... as released, the official documents govern.”). As discussed above, *see supra*, pg. 21-23, the *Incentive Auction Order* excluded Walker’s station from auction eligibility.

its failure to meet the April 3, 2009 permit deadline. Walker did not attempt to satisfy the construction permit by submitting an interference showing until six years later, after Congress authorized payments for eligible television stations that participate in the incentive auction. But that was inexcusably late. As the FCC reasonably concluded, “Walker alone is responsible for [its] lack of diligence.” *Order* ¶ 12 (JA ___). In addition, Walker’s station never provided service to the public—an “equitable consideration weighing decidedly against grant of the license application.” *Id.*¹³

Walker suggests that its lack of diligence is excusable because grant of the original construction permit application took a number of years. *See* Br. 35.¹⁴ But one thing has nothing to do with the other. The time that elapsed before Walker’s construction permit application was granted does not establish a basis for additional construction time after the construction permit was granted. *See* 47

¹³ Walker argues that the dismissal of its license application “denies the public from ever benefiting from television service.” Br. 37. But the FCC’s action does not prevent the future initiation of local television service on channel 14 in Bath, New York, should broadcast spectrum be available in that area after the incentive auction. And granting decisive weight to WFBT’s readiness to operate as of May 28, 2015, over six years late, would entirely defeat the purposes of the automatic forfeiture rule. *See Streamlining Recon. Order*, 14 FCC Rcd at 17539 (¶ 36).

¹⁴ Walker originally filed a construction permit application for WFBT on March 31, 1987, (JA ___) and requested permission to amend the application in 1989. (JA ___). The application was granted on April 23, 2004. (JA ___).

C.F.R. § 73.3598(b) (listing tolling events). And having accepted the permit subject to the condition that it timely submit a land mobile radio non-interference showing before commencing operations, Walker was required to fulfill that condition in order to retain the permit. *See Wentronics, Inc. v. FCC*, 331 F.2d 782 (1964) (holding that an applicant that accepts a construction permit subject to certain conditions may not retain the grant and be relieved of those conditions).

Walker also maintains that the Commission abused its discretion by declining to waive the automatic forfeiture rule based on the equities in this case, relying on the FCC actions or omissions that it claims constituted an implicit waiver of the automatic forfeiture rule, *see supra*, pg. 23; Br. 34-37. But these factors do not justify waiver on equitable grounds any more than they constituted an implicit waiver of the automatic forfeiture rule. *Cf. Morris*, 566 F.3d at 191-92 (FCC's post-default acceptance of installment payments, processing of buildout notifications, and approval of requests for special temporary authority to operate did not justify waiver of automatic license cancellation on equitable grounds).

IV. WALKER'S DISPARATE TREATMENT ARGUMENT SUFFERS FROM THRESHOLD DEFECTS, AND THE FCC DID NOT TREAT WALKER DIFFERENTLY THAN SIMILARLY SITUATED PARTIES

Walker argues that the FCC acted arbitrarily by treating it differently than similarly situated parties who violated the same permit condition. Br. 24-28. This argument suffers from threshold defects and, in any event, fails on the merits.

First, as the Commission found, Walker was barred from presenting this argument to it because Walker had failed to present the argument to the staff. *Order* n.43 (JA ___). The Commission's rules, as this Court has recognized, "do not permit the Commission to grant an application for review 'if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.'" *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting 47 C.F.R. § 1.115(c)).¹⁵ Moreover, the authority Walker relies on consists of two staff decisions that the Commission has not approved. *See* Br. 25-26; *WFTV-TV Holdings, Inc.*, 18 FCC Rcd 20056 (Med. Bur. 2003); Letter to Newport Television License LLC from Kevin Harding, Associate Chief, Video Division, Media Bureau (Mar. 24, 2011) (a copy of the Letter is attached to this brief). As we have discussed, unapproved FCC staff decisions are not decisions of the Commission that can support a claim of inconsistency under the Administrative Procedure Act. *Comcast Corp.*, 526 F.3d at 770.

¹⁵ Neither of the decisions that Walker relies on to challenge the FCC's procedural ruling involved a party's failure to present an argument to the staff before raising it before the Commission. *See* Br. n.28, discussing *Nat'l Assoc. for Better B'casting v. FCC*, 830 F.2d 270, 274 (D.C. Cir. 1987) (judicial review appropriate notwithstanding the failure to petition for reconsideration where "the Commission had full opportunity to resolve the Section 317 issues presented"), and *United Church of Christ v. FCC*, 465 F.2d 519, 523-24 (D.C. Cir. 1972) (judicial review appropriate where FCC had opportunity to consider the arguments, although they were presented to the FCC only in "letters from counsel" and "affidavits").

Aside from these defects, as the Commission found, *Order* n.43 (JA ___), Walker was not similarly situated to the parties in the two staff decisions. Those parties' stations were already providing licensed analog television service when they filed applications for licenses to operate digitally on channel 14. *Id.*

Accordingly, waiver of the automatic forfeiture rule furthered the longstanding FCC goal of maintaining existing service, *see, e.g., Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1956) ("That such a curtailment of service [eliminating existing service to some areas and people within a community and downgrading service to others] is not in the public interest is axiomatic."); *Incentive Auction Order* ¶ 186 (noting "the Commission's historical concern with avoiding disruption of service to existing viewers."), as well as ensuring an orderly transition to digital television ("DTV") service. *See Advanced Television Broadcast Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588, 14630 (¶ 90) (1997) ("match[ing analog television] stations with the [DTV] channel that best replicates their existing service areas ... will preserve both viewers' access to the existing stations in their market and stations' access to their existing populations of viewers, and thereby ensure an orderly transition to DTV service ...").

By contrast, Walker's station never provided service to the public, *Order* ¶ 12 (JA ___), so waiver of the automatic forfeiture rule would not have preserved service. Instead, it would have undermined the policies of ensuring prompt

initiation of service and discouraging abuse of FCC processes. *Id.* ¶ 11 (JA ___). *See Streamlining Recon. Order*, 14 FCC Rcd at 17539 (¶ 36).

CONCLUSION

At bottom, this is a straightforward case. Walker's construction permit expired because Walker failed to timely satisfy an express condition of the permit. As a result, the permit was automatically forfeited. Because Walker had no valid authorization as of the statutory cut-off date for the incentive auction, the Commission reasonably determined that Walker's station was not eligible for protection (or participation) in the auction. The appeal should be denied.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ William J. Scher

William J. Scher
Counsel

Federal Communications
Commission
Washington, D.C. 20554
(202) 418-1740

July 20, 2016

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

WALKER BROADCASTING COMPANY, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

No. 16-1118

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Appellee in the captioned case contains 7,741 words.

This brief also 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 Microsoft Word 2013 in 14-point Times Roman font.

/s/ William J. Scher

William J. Scher

Counsel

Federal Communications Commission

Washington, D.C. 20554

(202) 418-7399 (Telephone)

Attachment



Federal Communications Commission
Washington, D.C. 20554

March 24, 2011

1800E1-MHH

Newport Television License LLC.
460 Nichols Road
Suite 250
Kansas City, MO 64112

In Re: BLCT-20080622AFO
KOCW-TV
Kansas City, MO
Fac ID No:83181

Gentlemen:

This letter refers to the above-captioned application for license to cover construction permit (BPCDT-20080328ADY) for station KOCW-TV, Kansas City, MO.

The staff's initial review of your application revealed that the special operating condition attached to your construction permit has not been addressed. Specifically, this is a channel 14 and therefore, a land mobile analysis is required. The staff has requested in July 2010 that an amendment containing the land mobile analysis be filed. As of this date, an amendment has not been received. Thus, final processing of your application has been delayed since 2008.

It is not Commission policy, and we do not believe the public interest is served thereby, to allow a television station to operate on program test authority indefinitely. Therefore, you are directed to submit an amendment to your license application addressing the proof-of-performance condition. Your failure to provide the appropriate amendment within 15 days from the date of this letter may result in the dismissal of your pending license application. If the latter action is necessary, you will no longer have authority to operate station KOCW-TV and you will be required to cease operations. Hopefully, this action can be avoided by your prompt response to our request.

Sincerely,

Kevin R. Harding
Associate Chief
Video Division
Media Bureau

cc: Mace J. Rosenstein

Statutory Addendum

47 U.S.C. § 319(a)-(b)	2
47 U.S.C. § 1452(a)-(c)	3
47 C.F.R. § 73.687(e)(4)(ii)	9
47 C.F.R. § 73.1620(a)-(e)	11
47 C.F.R. § 73.3598	12

47 U.S.C. § 319(a)-(b)

§ 319 Construction permits

(a) Requirements

No license shall be issued under the authority of this chapter for the operation of any station unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(b) Time limitation; forfeiture

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

47 U.S.C. § 1452(a)-(c)

§ 1452 Special requirements for incentive auction of broadcast TV spectrum

(a) Reverse auction to identify incentive amount

(1) In general

The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding under subparagraph (G) of section 309(j)(8) of this title.

(2) Eligible relinquishments

A relinquishment of usage rights for purposes of paragraph (1) shall include the following:

- (A) Relinquishing all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel.
- (B) Relinquishing all usage rights with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel.
- (C) Relinquishing usage rights in order to share a television channel with another licensee.

(3) Confidentiality

The Commission shall take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction under paragraph (1), including withholding the identity of such licensee until the reassignments and reallocations (if any) under subsection (b)(1)(B) become effective, as described in subsection (f)(2).

(4) Protection of carriage rights of licensees sharing a channel

A broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section 338, 534, or 535 of this title on November 30, 2010, shall have, at its shared location, the carriage rights

under such section that would apply to such station at such location if it were not sharing a channel.

(b) Reorganization of broadcast TV spectrum

(1) In general

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission—

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada—

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

(2) Factors for consideration

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

(3) No involuntary relocation from UHF to VHF

In making any reassignments under paragraph (1)(B)(i), the Commission may not involuntarily reassign a broadcast television licensee—

(A) from an ultra high frequency television channel to a very high frequency television channel; or

(B) from a television channel between the frequencies from 174 megahertz to 216 megahertz to a television channel between the frequencies from 54 megahertz to 88 megahertz.

(4) Payment of relocation costs

(A) In general

Except as provided in subparagraph (B), from amounts made available under subsection (d)(2), the Commission shall reimburse costs reasonably incurred by—

- (i)** a broadcast television licensee that was reassigned under paragraph (1)(B)(i) from one ultra high frequency television channel to a different ultra high frequency television channel, from one very high frequency television channel to a different very high frequency television channel, or, in accordance with subsection (g)(1)(B), from a very high frequency television channel to an ultra high frequency television channel, in order for the licensee to relocate its television service from one channel to the other;
- (ii)** a multichannel video programming distributor in order to continue to carry the signal of a broadcast television licensee that—
 - (I)** is described in clause (i);
 - (II)** voluntarily relinquishes spectrum usage rights under subsection (a) with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel; or
 - (III)** voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee; or
- (iii)** a channel 37 incumbent user, in order to relocate to other suitable spectrum, provided that all such users can be relocated and that the total relocation costs of such users do not exceed \$300,000,000. For the purpose of this section, the spectrum made available through relocation of channel 37 incumbent users shall be deemed as

spectrum reclaimed through a reverse auction under subsection (a).

(B) Regulatory relief

In lieu of reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public.

(C) Limitation

The Commission may not make reimbursements under subparagraph (A) for lost revenues.

(D) Deadline

The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).

(5) Low-power television usage rights

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

(c) Forward auction

(1) Auction required

The Commission shall conduct a forward auction in which—

- (A) the Commission assigns licenses for the use of the spectrum that the Commission reallocates under subsection (b)(1)(B)(ii); and
- (B) the amount of the proceeds that the Commission shares under clause (i) of section 309(j)(8)(G) of this title with each licensee whose bid the Commission accepts in the reverse auction under subsection (a)(1) is not less than the amount of such bid.

(2) Minimum proceeds

(A) In general

If the amount of the proceeds from the forward auction under paragraph (1) is not greater than the sum described in subparagraph (B), no licenses shall be assigned through such forward auction, no reassignments or reallocations under subsection (b)(1)(B) shall become effective, and the Commission may not revoke any spectrum usage rights by reason of a bid that the Commission accepts in the reverse auction under subsection (a)(1).

(B) Sum described

The sum described in this subparagraph is the sum of—

- (i)** the total amount of compensation that the Commission must pay successful bidders in the reverse auction under subsection (a)(1);
- (ii)** the costs of conducting such forward auction that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title; and
- (iii)** the estimated costs for which the Commission is required to make reimbursements under subsection (b)(4)(A).

(C) Administrative costs

The amount of the proceeds from the forward auction under paragraph (1) that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title shall be sufficient to cover the costs incurred by the Commission in conducting the reverse auction under subsection (a)(1), conducting the evaluation of the broadcast television spectrum under subparagraph (A) of subsection (b)(1), and making any reassignments or reallocations under subparagraph (B) of such subsection, in addition to the costs incurred by the Commission in conducting such forward auction.

(3) Factor for consideration

In conducting the forward auction under paragraph (1), the Commission shall consider assigning licenses that cover geographic areas of a variety of different sizes.

47 C.F.R. § 73.687(e)(4)(ii)

§ 73.687 Transmission system requirements

(e) Operation.

(4) The requirements listed below apply to permittees authorized to construct a new station on TV Channel 14 or TV Channel 69, and to licensees authorized to change the channel of an existing station to Channel 14 or to Channel 69, to increase effective radiated power (ERP) (including any change in directional antenna characteristics that results in an increase in ERP in any direction), or to change the transmitting location of an existing station.

(ii) A TV permittee must take steps before construction to identify potential interference to normal land mobile operation that could be caused by TV emissions outside the authorized channel, land mobile receiver desensitization or intermodulation. It must install filters and take other precautions as necessary, and submit evidence that no interference is being caused before it will be permitted to transmit programming on the new facilities pursuant to the provisions of § 73.1615 or § 73.1620 of this part. A TV permittee must reduce its emissions within the land mobile channel of a protected land mobile facility that is receiving interference caused by the TV emission producing a vertically polarized signal and a field strength in excess of 17 dBu at the land mobile receiver site on the land mobile frequency. The TV emission should be measured with equipment set to a 30 kHz measurement bandwidth including the entire applicable land mobile channel. A TV permittee must correct a desensitization problem if its occurrence can be directly linked to the start of the TV operation and the land mobile station is using facilities with typical desensitization rejection characteristics. A TV permittee must identify the source of an intermodulation product that is generated when the TV operation commences. If the intermodulation source is under its control, the TV permittee must correct the problem. If the intermodulation source is beyond the TV permittee's control, it must

cooperate in the resolution of the problem and should provide whatever technical assistance it can.

47 C.F.R. § 73.1620(a)-(e)

§ 73.1620 Program tests

(a) Upon completion of construction of an AM, FM, TV or Class A TV station in accordance with the terms of the construction permit, the technical provisions of the application, the rules and regulations and the applicable engineering standards, program tests may be conducted in accordance with the following:

(1) The permittee of a nondirectional AM or FM station, or a nondirectional or directional TV or Class A TV station, may begin program tests upon notification to the FCC in Washington, DC provided that within 10 days thereafter, an application for a license is filed with the FCC in Washington, DC.

* * * * *

(b) The Commission reserves the right to revoke, suspend, or modify program tests by any station without right of hearing for failure to comply adequately with all terms of the construction permit or the provisions of § 73.1690(c) for a modification of license application, or in order to resolve instances of interference. The Commission may, at its discretion, also require the filing of a construction permit application to bring the station into compliance the Commission's rules and policies.

(c) Unless sooner suspended or revoked, the program test authority continues valid during FCC consideration of the application for license, and during this period further extension of the construction permit is not required. Program test authority shall be automatically terminated by final determination upon the application for station license.

(d) All operation under program test authority shall be in strict compliance with the rules governing broadcast stations and in strict accordance with representations made in the application for license pursuant to which the tests were authorized.

(e) Acceptance by the FCC of notification of the station of program tests, or the granting of program test authority by the FCC, is not to be construed by the permittee as approval by the FCC of the application for station license.

47 C.F.R. § 73.3598**§ 73.3598 Period of construction**

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

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

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

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

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

(1) Construction is prevented due to an act of God, defined in terms of natural disasters (e.g., floods, tornados, hurricanes, or earthquakes);

(2) The grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement; or

(3) A request for international coordination, with respect to an original construction permit for a new DTV station, has been sent to Canada or Mexico on behalf of the station and no response from the country affected has been received, or the licensee or permittee is challenging the response from Canada or Mexico on the grounds that the facility as approved would not permit the station to serve the population that is both approved by the Commission and served by the station's TV (analog) facility to be vacated by June 12, 2009.

(c) A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation. All notifications must be filed in triplicate with the Secretary and must be placed in the station's local public file.

(d) A permittee must notify the Commission promptly when a relevant administrative or judicial review is resolved. Tolling resulting from an act of God will automatically cease six months from the date of the notification described in paragraph (c) of this section, unless the permittee submits additional notifications at six month intervals detailing how the act of God continues to cause delays in

construction, any construction progress, and the steps it has taken and proposes to take to resolve any remaining impediments.

(e) Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.

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

WALKER BROADCASTING COMPANY, INC.,)	
)	
Appellant,)	
v.)	No. 16-1118
)	
FEDERAL COMMUNICATIONS COMMISSION,)	
)	
Appellee.)	

CERTIFICATE OF SERVICE

I, William J. Scher, hereby certify that on July 20, 2016, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Courts of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

A.Wray Fitch, III
Gammon & Grange, PC
8280 Greensboro Drive
7th Floor
McLean, VA 22102
*Counsel for: Walker Broadcasting
Company, Inc.*

/s/ William J. Scher



Federal Communications Commission
Washington, D.C. 20554

July 21, 2016

Hon. Mark J. Langer, Clerk
United States Court of Appeals
for the D.C. Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Walker Broadcasting Company, Inc. v. FCC*, Case No. 16-1118 (oral argument not yet scheduled)

Dear Mr. Langer,

In determining the contents of the deferred appendix in the aforementioned case, undersigned counsel for the Federal Communications Commission ("Commission") discovered an error in the Commission's brief. The following sentence is found in note 14 on page 29:

"Walker originally filed a construction permit application for WFBT on March 31, 1987, (JA __) and requested permission to amend the application in 1989. (JA __)."

That sentence should have said (deletions indicated by ~~strikeout~~, additions indicated by underline):

"Walker originally filed a construction permit application for WFBT on March 31, 1987, (JA __) and ~~requested permission to~~ amended the application in 2000 ~~1989~~. (JA __)."

The correction will be reflected in the final brief. I am also filing today with the Court a revised certified index that reflects the correction.

I apologize for any inconvenience this error might have caused.

Sincerely,

/s/ William J. Scher

William J. Scher, Counsel
Federal Communications Commission

cc: counsel of record per ECF