

BRIEF OF APPELLEE

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

\_\_\_\_\_  
No. 03-1082  
\_\_\_\_\_

ADVANCED COMMUNICATIONS CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.  
\_\_\_\_\_

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

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# TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUE PRESENTED.....	1
STATUTES AND REGULATIONS.....	3
JURISDICTION.....	3
COUNTERSTATEMENT.....	4
A.    The <i>1995 Order</i> .....	5
B.    Appellate Review of the <i>1995 Order</i> .....	12
C.    ACC’s Continued Litigation Attacking The Basis For the <i>1995 Order</i> .....	14
D.    The <i>2003 Order</i> .....	16
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	19
I.    APPLICABLE LEGAL STANDARD.....	20
II.   THE AFFIDAVITS OF FORMER COMMISSIONERS BARRETT AND QUELLO DO NOT PROVIDE A BASIS FOR RECALLING THE MANDATE TO REOPEN THE RECORD.....	22
A.    The Barrett And Quello Affidavits Make the Same Allegations Already Made in the Original Appeal.....	23
B.    The Barrett And Quello Affidavits Do Not Establish The Requisite Strong Showing To Invade The Agency’s Deliberative Process.....	25
III.  ACC’S REQUEST TO REOPEN THE RECORD CONFLICTS WITH THE DOCTRINE OF ADMINISTRATIVE FINALITY.....	33
CONCLUSION.....	38

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
* <i>Advanced Communications Corp. v. FCC</i> , 84 F.3d 1452 (D.C. Cir. 1996), <i>rehearing and suggestion for rehearing en banc denied</i> (D.C. Cir. June 27, 1996), <i>cert. denied</i> , 519 U.S. 1071 (1997) .....	2, 5, 12
<i>Advanced Communications Corp. v. MCI Communications Corp.</i> , 101 F.Supp.2d 1154 (E.D. Ark. 2000) .....	14, 25
<i>Advanced Communications Corp. v. MCI Communications Corp.</i> , 263 F.3d 793 (8 <sup>th</sup> Cir. 2001) .....	15, 25
<i>Bachow Communication, Inc. v. FCC</i> , 237 F.3d 683 (D.C. Cir. 2001) .....	30
* <i>Checkosky v. SEC</i> , 23 F.3d 452 (D.C. Cir. 1994) .....	14, 25, 31
* <i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971) .....	21, 25
<i>Commercial Drapery Contractors, Inc. v. United States</i> , 133 F.3d 1 (D.C. Cir. 1998) .....	21
<i>Communications Systems, Inc. v. FCC</i> , 595 F.2d 797 (D.C. Cir. 1978) .....	26
<i>DIRECTV, Inc. v. FCC</i> , 110 F.3d 816 (D.C. Cir. 1997) .....	11
* <i>Greater Boston Television Corp. v. FCC</i> , 463 F.2d 268 (D.C. Cir. 1971) .....	3, 17, 19, 22, 29, 34
<i>Hercules, Inc. v. EPA</i> , 598 F.2d 91 (D.C. Cir. 1978) .....	21, 27, 30
<i>In re Advanced Communications Corp.</i> , No. 01-1459 (D.C. Cir., Dec. 19, 2001) .....	5, 15
<i>In re: Envirodyne Indus., Inc.</i> , 29 F.3d 301 (7 <sup>th</sup> Cir. 1994) .....	36
<i>International Union of Mine, Mill, etc., Workers, Local No. 15 v. Eagle-Picher Min. &amp; Smelting Co.</i> , 325 U.S. 335 (1945) .....	37
<i>Kansas State Network Inc. v. FCC</i> , 720 F.2d 185 (D.C. Cir. 1983) .....	26
<i>Louisiana Ass'n of Indep. Producers v. FERC</i> , 958 F.2d 1101 (D.C. Cir. 1992) .....	14, 27
* <i>PLMS Narrowband Corp. v. FCC</i> , 182 F.3d 995 (D.C. Cir. 1999) .....	18, 26

*Railroad Commission of Texas v. United States*, 765 F.2d 221  
(D.C. Cir. 1985) ..... 26

\* *San Luis Obispo Mothers For Peace v. NRC*, 789 F.2d 26  
(D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1986)..... 21, 26, 27

*Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) ..... 29

*Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307 (D.C. Cir. 1999)..... 34

*United States v. Morgan*, 313 U.S. 409 (1941)..... 20, 34

*W. S. Butterfield Theatres, Inc., v. FCC*, 237 F.2d 552 (D.C. Cir.  
1956) ..... 22

*WMOZ, Inc. v. FCC*, 344 F.2d 197 (D.C. Cir. 1965)..... 22

**Administrative Decisions**

*Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995)..... 1, 3, 5, 12, 17

*Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991)..... 7, 8

*Advanced Communications Corp.*, 77 R.R.2d (P & F) 1160 (Int'l  
Bur. 1995) ..... 8

*CBS, Inc.*, 92 FCC 2d 64 (1983) ..... 6

*CBS, Inc.*, 99 FCC 2d 565 (1984) ..... 6

*Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989)..... 6

*Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982)..... 6, 12

*Eve Ackerman*, 8 FCC Rcd 4205 (1993)..... 20

*In re Revision Of Rules And Policies For The Direct Broadcast  
Satellite Service*, 11 FCC Rcd 1297 (1995) ..... 11

*In re Revision Of Rules And Policies For The Direct Broadcast  
Satellite Service*, 11 FCC Rcd 9712 (1995) ..... 11

*In re: Applications of New Radio*, 2 FCC Rcd 112 (1987)..... 4

*Portland Cellular Partnership*, 11 FCC Rcd 19,997 (1996) ..... 36

*RCA American Communications, Inc.*, 2 FCC Rcd 1204 (1987)..... 6

*Requests for Refunds of Downpayments Made in Auction No. 35,*  
18 FCC Rcd 6283 (2002)..... 36

*Tempo Enterprises Inc.*, 1 FCC Rcd 20 (1986) ..... 6

**Statutes and Regulations**

28 U.S.C. § 2342(1)..... 3

28 U.S.C. § 2344..... 3, 15

47 U.S.C. § 309(j)..... 11

47 U.S.C. § 309(j)(7)(A)..... 1, 10, 13, 23, 31

47 U.S.C. § 402(b) ..... 3

47 C.F.R. § 0.601(b) ..... 27

47 C.F.R. § 100.19(b)(1982)..... 6

*\*Cases and other authorities principally relied upon are marked with asterisks.*

## **GLOSSARY**

ACC	Advanced Communications Corp.
CONUS	Continental United States
DBS	Direct Broadcast Satellite
NPRM	Notice of Proposed Rulemaking

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ADVANCED COMMUNICATIONS CORPORATION,  
  
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BRIEF OF APPELLEE

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**STATEMENT OF ISSUE PRESENTED**

In October 1995, the Commission, by a 3-2 vote, issued an order (“1995 Order”)(JA 5)<sup>1</sup> canceling the DBS orbital locations and channels assigned to Advanced Communications Corporation (“ACC”) based on the Commission’s finding that ACC had failed to comply with the due diligence construction requirements in the FCC’s rules. On appeal, ACC contended that the majority decision violated Section 309(j)(7)(A) of the Communications Act because it was based, sub rosa, on the potential auction revenues that would accrue to the federal treasury if the cancelled facilities were later auctioned by the FCC. ACC relied principally on a post-decision

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<sup>1</sup> *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) (“1995 Order”).

statement by then-Commissioner Barrett (who had dissented in the *1995 Order*) that a member of the majority had asked him before the *Advanced* matter was decided whether a letter received from MCI proposing an opening bid of \$175 million if ACC's facilities were included in a future Commission auction would persuade him that auctioning the facilities was appropriate.

This Court affirmed the Commission order.<sup>2</sup> Responding to ACC's argument, the Court refused to search beyond the text of the 1995 Order to find some alleged illicit motivation on the part of the majority. The Court concluded that appellants pointed to nothing in the record sufficient to overcome the "strong presumption of agency regularity." After the Court's mandate issued, ACC's former orbital locations and channels were eventually acquired by EchoStar, which constructed the satellites and now uses the facilities as an integral part of its commercial DBS services.

In 2003, nearly seven years after the Court's mandate affirming the Commission's *1995 Order*, ACC petitioned the Commission to reopen the record for further proceedings, based on affidavits of former Commissioner Barrett and his fellow dissenter from the *1995 Order*, former Commission Quello. The affidavits – both using identical words – assert that, based on informal pre-decisional discussions among the Commissioners, it is the belief of the affiants that one unidentified member of the majority in the *1995 Order* cast his or her vote on the basis of the revenues that would accrue if the cancelled facilities were auctioned, which the affiants assert would constitute a violation of Section 309(j)(7)(A) of the Communications Act.

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<sup>2</sup> *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996)(table)(*per curiam* Judgment and Memorandum), *rehearing and suggestion for rehearing en banc denied* (D.C. Cir. June 27, 1996), *cert. denied*, 519 U.S. 1071 (1997).

In the Order on Review,<sup>3</sup> the Commission refused to reopen the matter. The Commission held that the proffered affidavits did not present new evidence, just a recast of the previously offered evidence and arguments made in the original appeal. The Commission further concluded that, because the mandate had issued, ACC's proffered evidence did not meet its extraordinarily high burden of establishing a reason to seek recall of the mandate, in view of the time that has passed since the *1995 Order*, and the use that has been made by others of the satellite orbital locations and channels.

In these circumstances, the question presented is:

Whether the Court should recall its mandate in the *1995 Order*, and require the Commission to reopen the record in order to permit ACC to investigate the motivations of the majority members voting for the *1995 Order*.

### **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set forth in the Statutory Appendix to Appellants' Brief.

### **JURISDICTION**

ACC asserts that the Court has jurisdiction under 47 U.S.C. § 402(b) and 28 U.S.C. §§ 2342(1) and 2344, to review an order of the Commission dismissing its petition to reopen the record of the *1995 Order*. App.Br. 1. That is not correct. The Court has jurisdiction ancillary to its mandate issued in affirming the *1995 Order*, and under that authority the Court may recall its mandate and require the Commission to reopen the record. *See Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971). *Greater Boston* makes clear that the Commission itself does not have the power to reopen proceedings for new evidence without first applying to the

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<sup>3</sup> *Advanced Communications Corp.*, Memorandum Opinion and Order, FCC 03-2 (rel. Feb. 21, 2003) (“*2003 Order*”) (JA 510).

Court to recall the mandate. 463 F.2d at 283. The Commission, in its *2003 Order*, declined to request the Court to recall the mandate (*Order* ¶ 8, JA 514), and that decision is non-reviewable, committed to the Commission's sound discretion.<sup>4</sup>

Thus, the Court's jurisdiction under Section 402(b) stems from its review of the original *1995 Order*, and its inherent power to recall its mandate and order further proceedings before the Commission if justice so requires. Although ACC has not invoked the Court's jurisdiction on this basis, the Commission has no objection if the Court treats the instant appeal as a *de novo* motion to the Court to remand the case (over the Commission's objection), but the Court lacks jurisdiction to entertain a direct appeal from the Commission's order dismissing ACC's petition to reopen.

### **COUNTERSTATEMENT**

As detailed below, ACC has already been before this Court twice, as well as the district court and Court of Appeals in the Eighth Circuit, alleging each time that the Commission's *1995 Order* was improperly based on the prospect of auction revenues, notwithstanding the actual text of the decision. ACC originally based its argument principally on a post-order statement of then-Commissioner Barrett, who had dissented to the *1995 Order*. More recently, ACC has relied on affidavits – in identical wording – from former Commissioner Barrett and his co-dissenter former Commissioner Quello. Both the 1995 Barrett statement and the current affidavits purport

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<sup>4</sup> See, e.g., *In re: Applications of New Radio*, 2 FCC Rcd 112 (1987) (“Pleadings filed with the Commission requesting that the Commission seek remand will be summarily dismissed. If, as a matter of courtesy, a party informs the Commission's General Counsel, as the Commission's litigation representative, that it desires to seek remand, any further action by the General Counsel is entirely discretionary.”).

to give recollections regarding informal discussions with unnamed members of the majority in the *1995 Order*.

The Barrett statement was highlighted in ACC's appeal from the *1995 Order*. In its decision affirming the *1995 Order*, this Court found that the materials submitted by ACC (including the Barrett statement) were not sufficient to overcome the "strong presumption of agency regularity."<sup>5</sup>

When ACC presented the Barrett and Quello affidavits to this Court in a petition for mandamus in 2001, this Court held that:

[T]he petition provides no reason why the court should grant this extraordinary relief. As petitioner acknowledges, this court has already affirmed the order it seeks to challenge anew.<sup>6</sup>

Having failed before this Court, ACC presented the same affidavits to the Commission as the sole basis for reopening the 1995 administrative record to permit an investigation into the motivation of the members of the majority in voting for the *1995 Order*. The Commission (entirely changed since 1995) unanimously determined that ACC had presented no grounds for reopening the 1995 record and refused to seek a recall of the mandate to permit reopening of the record.

**A. The 1995 Order.**

***The Commission's Due Diligence Requirement.*** The Commission's DBS service was instituted in the early 1980s as a means of providing television service by satellite. See *Direct*

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<sup>5</sup> *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996)(table), *rehearing and suggestion for rehearing en banc denied* (D.C. Cir. June 27, 1996), *cert. denied*, 519 U.S. 1071 (1997).

<sup>6</sup> *In re Advanced Communications Corp.*, No. 01-1459 (D.C. Cir., Dec. 19, 2001).

*Broadcast Satellite Service*, 90 FCC 2d 676 (1982)(“*DBS Order*”). Under international treaties, the United States is allotted eight orbital satellite locations for DBS service. Of these, full continental coverage (“full CONUS”) is available only from three locations: 101°W, 110°W, and 119°W. *Continental Satellite Corporation*, 4 FCC Rcd 6292, ¶ 39 (1989). “Half-CONUS” coverage is available from the other satellite locations.

At its inception in 1982, DBS service was unproven, both technically and financially. In lieu of requiring that DBS permittees demonstrate financial qualifications and imposing other regulatory restrictions applicable to broadcast licenses, the Commission required only that permittees “proceed with diligence” in constructing their DBS systems. *DBS Order* ¶ 114. *See also* 47 C.F.R. § 100.19(b)(1982) (the grant of a DBS license is “condition[ed]” on compliance with the due diligence requirements).

To give concrete content to the due diligence obligation, the Commission provided that: (1) within one year of construction permit grant, a permittee must complete contracting for the construction of its DBS satellites; and (2) within six years of construction permit grant, a permittee must begin operating its DBS system, “unless otherwise determined by the Commission upon proper showing in any particular case.” *DBS Order* ¶ 114. In *CBS, Inc.*, 92 FCC 2d 64 ¶ 64 (1983), the Commission emphasized that “[a]ll applicants are being required to proceed promptly in order to maintain the authority granted herein” and that ***any non-diligent permittee “will lose its authority.”*** (Emphasis added).<sup>7</sup>

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<sup>7</sup> Between 1984 and 1989, the Commission cancelled seven permits for failure to comply with the first due diligence requirement. *See CBS, Inc.*, 99 FCC 2d 565, 571-73 (1984); *Tempo Enterprises Inc.*, 1 FCC Rcd 20, 20 (1986); *RCA American Communications, Inc.*, 2 FCC Rcd 1204, 1205 (1987); *Continental Satellite Corp.*, 4 FCC Rcd 6292, 6296 (1989).

***ACC's Failure to Comply with the Due Diligence Requirement.*** ACC, among others, applied for, and was awarded a DBS construction permit in 1984, and ACC was eventually assigned channels at two orbital positions (at 110° and 148°). Because of difficulties in the development of DBS service in the late 1980s, ACC, like others in the same time period, sought additional time to build out its satellite system.

In *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991) (“*ACC 1991 Extension Order*”), the Commission granted ACC a four-year extension to its construction permit (to December 7, 1994). But, in that grant, the Commission expressly warned ACC that further extensions would not be as easily obtained:

There will soon come a time when the pioneering era of the development of DBS technology and service will come to an end. In the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization.

*ACC 1991 Extension Order* ¶ 31. The Commission emphasized that as advent of DBS service came closer to reality, resulting in an increased demand for DBS facilities, there would be “***a need for stricter enforcement of the construction progress requirements of the DBS rules.***” *Id.* (emphasis added).

During the four-year extension period, while other DBS providers were commencing commercial service, or on the verge of launching satellites, ACC failed to move forward to providing service. In its 1990 extension request, ACC had promised completion of its first satellite at the 110°W full-CONUS location by January 1994. However, instead of satellite construction, ACC focused on an attempted joint venture with EchoStar, a competing DBS permittee. While those negotiations were pending, ACC simply moved back its key construction

milestones – to after April 1995 – beyond the expiration of its extended construction permit.<sup>8</sup>

During its entire four-year extension, ACC did not make *any* payments for the construction of its satellites.

In August 1994, when its joint venture plans with EchoStar fell through, ACC requested a second four-year extension of time.<sup>9</sup> ACC later amended its extension request,<sup>10</sup> explaining that it now needed the extension to complete the planned sale of its business to a competing DBS provider, TEMPO and its corporate parent TCI.<sup>11</sup>

On April 26, 1995, the FCC's International Bureau denied the request for a second extension, finding that ACC had not fulfilled the requirements for an extension. *Advanced Communications Corp.*, 77 R.R.2d (P & F) 1160 at ¶ 19 (Int'l Bur. 1995) (“*Bureau Order*”).

***The 1995 Order.*** In addressing ACC’s Application for Review, the Commission made an independent review of ACC’s performance since the *1991 Extension Order*. In particular, the Commission noted ACC’s repeated delays in its construction schedule since the *1991 Extension Order* (*1995 Order* ¶ 35, JA 19), and concluded that “ACC has not achieved any concrete progress toward the actual construction and operation of its DBS system” which, the Commission held, is “the touchstone for our analysis of whether to grant an extension.” *Id.* ¶ 37

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<sup>8</sup>ACC Semi-Annual Report (April 27, 1994).

<sup>9</sup> ACC Request for Additional Time to Construct and Launch Direct Broadcast Satellites (August 8, 1994).

<sup>10</sup> Request for Consent to Assign DBS Authorizations, filed September 28, 1994.

<sup>11</sup> ACC’s present brief suggests that the proposed Advanced-TEMPO transaction was to be joint venture, in which ACC retained control over the operations of the DBS system. App.Br. 10. It would have been a joint venture in name only. Under the proposal ACC would dissolve and ACC's existing construction contracts with Martin Marietta would be cancelled; TCI’s affiliate, Primestar would use the orbital locations and frequencies assigned to ACC. *See 1995 Order* ¶ 41 (JA 21).

(JA 20). Although ACC cited its unsuccessful negotiations with EchoStar as an excuse for its failure to begin construction, the Commission found that ACC made a business decision to defer construction while these negotiations were pending, and that the Commission had previously warned ACC that poor business decisions and a failure to attract investors were not grounds for another extension. *Id.* ¶ 44-45 (JA 23).

Based on these factual findings, the Commission affirmed the Bureau's decision. *1995 Order* ¶ 28 (JA 17). The Commission recognized that it had not previously had reason to deny an extension request for failure to comply with the second prong of the due diligence standard, but observed that DBS service has entered a "new era" with the successful operation of two permittees DIRECTV and USSB, and the near advent of service by EchoStar and Directsat, and the Commission re-emphasized that in these circumstances "a permittee's inability or unwillingness to proceed with construction of its system weighs even more heavily against allowing it to retain its permit." *Id.* ¶¶ 24-26 (JA 15-16). The Commission concluded, "we do not consider it a departure from precedent to cancel a DBS construction permit based on the permittee's failure to demonstrate sufficient progress toward compliance with the second prong of the due diligence requirement." *Id.* ¶ 27 (JA 17). The Commission determined that the public interest required cancellation and reassignment of ACC's orbital locations/channels. *Id.* ¶ 64 (JA 29).

While the Commission was reviewing the *Bureau Order*, MCI Communications Corp. ("MCI") sent a letter (which was made public and included in the administrative record) stating that if the Commission were to auction the ACC's orbital slots and channels in the future, MCI would bid a minimum of \$175 million. *See 1995 Order* ¶ 67 n.127 (JA 30) (acknowledging the MCI letter). The *1995 Order*, however, did not base its cancellation decision on the prospect of

a new auction of reclaimed ACC orbital slots and channels. Instead, the Commission announced that it would make the decision on how to reassign reclaimed and unassigned DBS orbital locations and channels in a separate rulemaking proceeding. *Id.* ¶ 3 (JA 7).<sup>12</sup>

Commissioners Ness and Chong each filed separate statements joining in the Commission's decision. (JA 61, 63). Both concurring Commissioners agreed that ACC had failed to meet its due diligence obligations. Commissioners Ness and Chong also laid out the competing policy considerations that led them to conclude that the public interest would be best served by denying ACC's extension request.

Commissioners Barrett and Quello filed separate dissents (JA 51, 56). Both dissenters were not persuaded by the distinctions the Commission drew between the rejection of ACC's extension request and the decisions granting such extension requests to other permittees in prior years. Both Commissioners stated their belief that the public interest in rapid development of DBS service would be best served by permitting ACC to transfer its permit to TEMPO. Neither Commissioner Barrett nor Quello charged in their dissents that the *1995 Order* had been unduly influenced by the MCI letter; nor did either dissent assert that the majority decision constituted a violation of Section 309(j)(7)(A) of the Communications Act because it was based on the prospect of auction revenues from the reassignment of Advanced's orbital locations and channels.

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<sup>12</sup> The Commission had up to then assigned orbital positions and channels on a first come basis under rules adopted in 1989, before the amendment of the Communications Act permitting license assignment by auctions. In the *1995 Order*, the Commission observed that in recent years the demand for positions and channels exceeded the number available, and there was a backlog of applications. The Commission stated that “[o]ur thinking at this point is that opening a window for new applications for DBS authorizations for these channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest.” *1995 Order* ¶ 3(JA 7).

***The Post-1995 Order Adoption of Auctions As The New Method For Assignment of DBS Orbital Locations and Channels.*** After the issuance of the *1995 Order*, the Commission – in a separate proceeding – issued a Notice of Proposed Rulemaking regarding the method for assignment of unassigned orbital locations and channels for DBS service.<sup>13</sup> Commissioner Quello concurred in the result of the rulemaking, while Commissioner Barrett dissented. In his dissent (JA 122), Commissioner Barrett objected to the use of auctions for the reassignment of the orbital locations and channels reclaimed in the *1995 Order*, and further expressed his view that in setting a minimum opening bid, the Commission should look to other commenters in addition to MCI’s proposed \$175 million opening bid. 11 FCC Rcd at 1349, 1350. In that connection, Commissioner Barrett, in a footnote, added (*id.* at n.5) (JA 124):

I also note that prior to rendering a decision in the *Advanced Order*, one of my colleagues asked me whether [MCI’s] alleged opening bid would persuade me that auctioning the 27 channels was appropriate. Clearly, based on my position in the *Advanced Order*, my response was a resounding “no.”

During the rulemaking proceeding, the Commission received comments, many of which supported using auctions instead of the former assignment method. Ultimately, the Commission decided that it should exercise its auction authority pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), in making future assignments of DBS orbital locations and channels, including the facilities reclaimed in the *Advanced* case.<sup>14</sup> This Court affirmed the Commission’s new auction rules in *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

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<sup>13</sup> See *In re Revision Of Rules And Policies For The Direct Broadcast Satellite Service*, 11 FCC Rcd 1297 (1995) (“*DBS Auction NPRM*”) (JA 66).

<sup>14</sup> See *In re Revision Of Rules And Policies For The Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995).

The unassigned orbital locations and channels (including those reclaimed from ACC) were the subject of an auction in early 1996. The outcome of the auction was specifically conditioned on eventual judicial affirmance of the *1995 Order* and the *DBS Auction Order*. Several bidders bid on each of the available channels and orbital locations. Ultimately, MCI won 28 full-CONUS channels at 110° with a bid of \$682.5 million, and EchoStar Communications won 24 half-CONUS channels located at 148° with a bid of \$52.3 million.<sup>15</sup>

**B. Appellate Review of the 1995 Order.**

Before this Court, ACC challenged the *1995 Order* on three main grounds: (1) the decision constituted an arbitrary departure from agency precedent; (2) the FCC's decision would delay the initiation of new DBS service in contravention of the agency's stated goals; and (3) in deciding whether to grant ACC's extension request, the FCC improperly considered the revenues to be gained from the auction of ACC's orbital locations and channels. This Court, as previously noted, affirmed the Commission's decision. *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (table) (*per curiam* Judgment and Memorandum), *rehearing and suggestion for rehearing en banc denied* (D.C. Cir. June 27, 1996), *cert. denied*, 519 U.S. 1071 (1997) (JA 280).

Only the third ground raised by ACC in its original appeal – the alleged influence of the MCI letter and the prospect of substantial auctions revenues on the majority's decision – is relevant to the background of the instant proceeding. The MCI letter, and the Commission's purported financial interest in the outcome of the case, was a featured part of ACC's briefs. *See*

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<sup>15</sup> The *2003 Order* notes that in 1998, MCI assigned its authorization for the channels at 110° to EchoStar, which uses it, along with other assigned facilities to provide commercial DBS service. The Commission further stated that in 2003 EchoStar reported having over 7 million nationwide DBS customers. *2003 Order* ¶ 2 n.5 (JA 511).

ACC's 1995 Opening Brief at 23-27 (JA 164-168); 1995 Reply Brief at 3-8 (JA 254-59). For example ACC asserted, *inter alia*:

- “Commissioner Barrett revealed in the *Auction Rulemaking* that ‘prior to rendering a decision in the *Advanced Order*, one of my colleagues asked me whether [MCI’s] alleged opening bid would persuade me that auctioning [Advanced’s] channels was appropriate.’” 1995 Opening Br. 21 (JA 162).
- “[T]he expectation of Federal revenues played a large role in [the Commission’s] decision to deny Advanced’s application.” 1995 Opening Br. 24 (JA 165).
- “Commissioner Barrett stated on the public record that he was asked to weigh the possibility of raising hundreds of millions for the federal treasury in deciding what to do about Advanced’s applications.” 1995 Opening Br. 24 (JA 165).
- “In an interview . . . Chairman Hundt revealed that before learning of MCI’s bid, the Commission was considering a Bureau proposal that would have allowed Advanced to transfer its permit to [another carrier] . . . .” 1995 Opening Br. 26 n.12 (JA 167).
- “[T]hese facts confirm that the possibility of generating hundreds of millions of dollars for the federal treasury, not the merits of Advanced’s extension request . . . was decisive in the Commission’s cancellation of Advanced’s DBS permit . . . .” 1995 Opening Br. 27 (JA 168).
- “MCI’s winning bid of \$682.5 million . . . vindicates appellants’ contention that the FCC anticipated a substantial windfall from the denial of Advanced’s extension request.” 1995 Reply Br. 5 (JA 256).
- “[T]he prospect of a lucrative auction weighed heavily in the agency’s decision to cancel Advanced’s permit.” 1995 Reply Br. 5-6 (JA 256-57).

The Court considered these arguments fully in its *per curiam* Memorandum. The Court stated (*Advanced per curiam* Memorandum at 4) (JA 282-83):

Finally, we address appellants’ contention that the FCC violated 47 U.S.C. § 309(j)(7)(A) by allowing the “expectation of Federal revenues [to play] a large role in [the] decision to deny [Advanced’s] application.” Brief for Appellants at 24 (internal quotations omitted). While the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from [Advanced], see [*1995 Order*] at ¶ 67 n.127 (acknowledging the pledge by MCI to open bidding at \$175 million in the event an auction were held),

the Order does not base its denial of [Advanced's] renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on [Advanced's] failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period. *Id.* at ¶ 37.

Appellants are thus asking us to search beyond the text of the Order to find some alleged illicit motivation on the part of the FCC. This we are unwilling to do. "Agency opinions, like judicial opinions, speak for themselves," *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); and appellants have pointed to nothing in the record that is sufficient to overcome the "strong presumption of agency regularity." *Louisiana Ass'n of Indep. Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). Of course, we express no opinion as to whether the Commission was in fact barred by law from taking into account the expected impact on federal revenues.

This Court's mandate issued on August 2, 1996.

ACC renewed the same argument in its Petition for rehearing and its suggestion for rehearing en banc, both of which were denied. In seeking a writ of *certiorari*, ACC likewise claimed that the Commission's interest in the auction revenues from the future assignment of ACC's reclaimed DBS facilities deprived ACC of due process. The Supreme Court denied the writ. 519 U.S. 1071 (1997).

**C. ACC's Continued Litigation Attacking The Basis For the 1995 Order.**

*ACC's 8<sup>th</sup> Circuit Litigation.* After its defeat in this Court and the Supreme Court, ACC then attempted to litigate MCI's alleged role in the *1995 Order* by bringing an action for tortious interference with contract against MCI in Arkansas. The district court dismissed the complaint on collateral estoppel grounds. *Advanced Communications Corp. v. MCI Communications Corp.*, 101 F.Supp. 2d 1154, 1159-60 (E.D. Ark. 2000):

Although ACC argues that the D.C. Circuit did not have all the facts and did not address the merits of whether the expected revenues referenced in the MCI letter motivated the FCC's decision against an extension, the excerpts from the D.C. Circuit opinion quoted above clearly show that the claims about "whether MCI's promised opening bid of \$175 million caused the Chairman to

break the 2-2 tie between the other FCC commissioners, and deny Advanced's extension request" were raised before the D.C. Circuit and decided adversely to ACC. (Footnote omitted)

The Eight Circuit affirmed. *Advanced Communications Corp. v. MCI Communications Corp.*, 263 F.3d 793 (8<sup>th</sup> Cir. 2001).

***ACC's Mandamus Action in This Court.*** After losing in the Eighth Circuit, ACC returned to this Court, asking for a writ of mandamus or further judicial review to void the *1995 Order*.<sup>16</sup> ACC again relied on the MCI letter (Mandamus Pet. at 10 (JA 294); Amended Pet. at 10 (JA 369)), and proffered affidavits by then former Commissioners Quello and Barrett, the dissenters from the *1995 Order*. Both affidavits stated in identical language (Quello Aff'd ¶ 4 (JA 346); Barnett Aff'd ¶ 4) (JA 353):

Moreover based on my deliberations with the other Commissioners, at least one of the Commissioners in the majority based his or her decision in the *Advanced Order* on the expectation of Federal revenues that would result from the reassignment by auction of the channels and orbital locations previously assigned to ACC, which I believe violates 47 U.S.C. § 309(j)(7)(A).

Upon reviewing this purported new evidence, the Court denied the petition. *In re: Advanced Communications Corp.*, No. 01-1459 (D.C. Cir. Dec. 19, 2001) (JA 437). The Court held:

[T]he petition provides no reason why the court should grant this extraordinary relief. As petitioner acknowledges, this court has already affirmed the order it seeks to challenge anew.

The Court further rejected the petition as an "amended petition for review" on the ground that it was untimely since it was not filed within 60 days after entry of the order as required by 28 U.S.C. § 2344. *Id.*

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<sup>16</sup> Petition for Mandamus, filed Oct. 16, 2001 (JA 284); Amended Petition for Review or in the Alternative Petition for Mandamus, filed November 19, 2001 (JA 360).

**D. The 2003 Order.**

Having failed twice before this Court and also in the courts in the Eighth Circuit, ACC returned to the Commission, asking that the case be reopened based on the proffered Quello and Barrett affidavits that had already been presented to the D.C. Circuit on the failed mandamus petition. *See* “Petition to Reopen Case Based on Recently Obtained, Previously Unavailable Evidence,” filed in the 1995 case docket, April 8, 2003 (“Petition to Reopen”) (JA 438). The Commission found no reason to ask the Court to recall its mandate so that the Commission could reopen the case. The Commission observed that “[t]he new evidence that Advanced submits is nothing more than another attempt to re-argue the issue that it has presented in numerous prior court proceedings – *e.g.*, to the D.C. Circuit Court in 1996, to the Supreme Court in 1997, to the Arkansas courts in 1998 and 2000, and again to the D.C. Circuit Court in 2001.” *2003 Order* ¶ 5 (JA 513). The Commission further relied on the doctrine of administrative finality in concluding that ACC had not made a sufficient showing to obtain a reopening of the 1995 proceeding. *2003 Order* ¶ 8 (JA 514):

Given the public interest importance in orderliness and finality, however, a strong showing of sufficiency of evidence is required. In particular, given the time that has passed since the termination of the Advanced proceeding, and the use that has been made of the satellite orbital locations and frequencies, the burden is extraordinarily high in this case. That burden has not been met in this case. Indeed, with respect to this proceeding, the courts have already found that Advanced’s proffered evidence of affidavits by two prior Commissioners is not sufficient to overcome the prevailing doctrine of administrative finality. (Footnotes omitted.)

The Commission recognized that since the mandate of the Court had long ago issued, the Commission had no authority to grant the requested relief without a recall of the court's mandate. The Commission found no basis to request a recall of the Court’s mandate. *2003 Order*, ¶ 8 (JA 14).

### SUMMARY OF ARGUMENT

ACC asks the Court to require the FCC to reopen the 1995 record to permit ACC to investigate whether one or more members of the majority in the *1995 Order* secretly based his or her decision to cancel ACC's construction permit on the prospect of auction revenues as offered in the MCI letter, instead of relying on the reasons given in the text of the order. Although ACC shies away from discussing the contours of such a reopened proceeding, presumably ACC's counsel will insist on deposing each of the majority members about his or her motivation in voting on the *1995 Order*, with the ultimate goal of restoring the long-cancelled construction permits to ACC.

*ACC's brief misstates the applicable legal standard for reopening a case in the circumstances presented here.* Contrary to ACC's assertions, this is far from a standard "new evidence" case. Unlike the cases cited by in ACC's brief (where the proffered evidence was offered simply to correct an erroneous fact relied on by the Commission), the sole purpose for reopening the record here is to probe the motivations of agency decisionmakers. That type of inquiry is prohibited by the courts in the absence of a "strong showing" of agency misconduct. ACC's brief makes no reference to these cases or the higher standard of proof they impose.

Further, the reopening cases relied on by ACC do not involve a request to reopen a record long after the mandate has issued. As the Court recognized in *Greater Boston*, with the issuance of the Court's mandate, requirements of administrative finality become "dominant" (463 F.2d at 286), and reopening of the record is limited to "exceptional circumstances," strong enough to override the "strong policy of repose, that there be an end to litigation" (*id.* at 277-78) (internal quotes and citations omitted). The proffered evidence falls far short of providing any basis to recall the mandate to reopen the record in the *1995 Order*.

***The affidavits merely repackage the same allegations previously made by ACC and rejected by this Court.*** ACC has already had its day in court arguing that the majority in the *1995 Order* secretly based its decision on the prospect of auction revenues, and not on the bases stated in the written decision. In affirming the *1995 Order*, this Court reviewed Commissioner Barrett's disclosure of his pre-decisional discussion with a member of the majority, and ACC's claims surrounding it and the MCI letter, and the Court determined that the evidence was insufficient to justify going behind the *1995 Order*. Relying on Commissioner Barrett's affidavit in 2003, rather than his published statement in 1995, does not constitute new evidence, only re-argument of the same previously presented claims. Adding Commissioner Quello's identically worded affidavit offers nothing more.

Indeed, the conclusory suspicions of these two dissenters are not new *evidence* but only their *ipse dixit* statements of personal "belie[f]" about the state of mind of an unnamed member of the majority. The affidavits provide no details of any particular conversations with members of the majority, and most significantly they fail to link the pre-decisional conversations with the state of mind of the majority members when they actually voted on the *1995 Order* some time later. As this Court recognized in *PLMS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999), even if there were direct evidence that a Commissioner "flirted with an impermissible rationale" regarding auction revenues during their deliberations, that is not itself sufficient to show the state of mind of the Commissioners when they actually voted on the text of a decision.

***ACC's request to reopen the record conflicts with the doctrine of administrative finality.*** Since the issuance of the mandate in 1996, others in the industry, including MCI and EchoStar, have relied on the finality of the *1995 Order* in their own business affairs. Particularly

in these circumstances, as this Court emphasized in *Greater Boston*, there is a strong policy of repose and termination of litigation. 463 F.2d at 277-78. ACC has not shown how it will be possible to “unscramble” the various good faith third-party transactions that have relied on the finality of the *1995 Order*. Weighing the equities, the showing required here to reopen this long closed proceeding must be extraordinarily direct, relevant and powerful. The proffered evidence falls far short of the mark.

### **ARGUMENT**

If ACC’s theory is to be believed, one or more FCC Commissioners concocted a scheme to write an opinion in the *1995 Order*, based ostensibly on the ACC’s failure to comply with the due diligence rules, but actually based on the desire to raise more auction money for the federal treasury. App.Br. 4, 24. Specifically, ACC asserts that the schemer or schemers in the majority consciously veiled their decision in language that they did not actually support, and hid their true intentions from the public, knowing that the Court would give them the benefit of presumed agency regularity in affirming the decision. *Id.* at 4.

Based exclusively on conclusory affidavits by former Commissioners Barrett and Quello, who dissented from the *1995 Order*, ACC asks the Court to require the FCC to reopen the 1995 record to “permit further investigation to seek more facts” (App.Br. 29) – presumably, so that ACC’s counsel can conduct discovery against the three majority members, all of whom have left the Commission, to determine their motivations in voting for the *1995 Order*. *See* Petition to Reopen, Prayer for Relief (JA 452) (asking the Commission to “Reopen the case and permit evidence regarding the illegality of the *Advanced Order* to be developed and presented to the FCC”). *Cf. Saratoga Development Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994) (“appellant wants to examine why each Board member who voted for Delta did so”); *United*

*States v. Morgan*, 313 U.S. 409, 422 (1941) (disapproving of the questioning of the Secretary of Agriculture regarding “the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates,” Justice Frankfurter writing for the unanimous Court concluded “the short of the business is that the Secretary should never have been subjected to this examination”). ACC’s ultimate goal is to impeach the *1995 Order* and thereby restore to ACC the long-cancelled construction permits that are now the core of EchoStar’s successful commercial operations.

The Commission properly dismissed ACC’s request – both because the proffered evidence was not “new” (the same claims and essentially the same evidence had been fully litigated before this Court in the original appeal from the *1995 Order*), and because ACC’s proffered evidence did not meet the “extraordinarily high” showing of sufficiency required to recall the mandate to reopen the record many years after the Commission’s order was affirmed.

#### **I. APPLICABLE LEGAL STANDARD.**

Although ACC seeks to paint this case as a “narrow” case where a party has uncovered “new evidence” (App.Br. 2), the circumstances here are far different from the reopening cases cited in ACC’s brief. *Id.* at 21. In each of those cases, a litigant sought to reopen the record prior to commencing judicial review of the underlying order, and sought to present new evidence relating to a material fact found in the original order. In such cases, the Commission and the courts require that the evidence presented must be newly discovered and not available to the litigant at the time of the original proceeding through due diligence, and further that the proffered evidence relate to a fact that is of dispositive significance in the original order. *See, e.g., Eve Ackerman*, 8 FCC Rcd 4205 ¶ 6 (1993).

ACC rests its brief on a claim that the proffered affidavits meet the foregoing criteria for reopening stated in the case law. App.Br. 21. However, in focusing exclusively on the “narrow” reopening cases, ACC has misstated the legal standards applicable to the case here.

*First*, a much higher standard of proof is required before the courts will permit a litigant to probe the motivations and decisionmaking processes of agency members. ACC is not seeking to reopen the 1995 proceeding to present new facts regarding the subject of the *1995 Order* – the actions taken, or not taken, by ACC to construct and operate its DBS system with due diligence. Instead, ACC seeks to reopen the proceedings solely to impeach its entire legitimacy by probing into the decisionmaking process of the majority members. Such attempts to probe the motivations or mental processes of agency decisionmakers are rejected by the courts absent a “strong showing” of actual wrongdoing by the agency decisionmakers. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). Among the many cases in this Circuit demanding that higher standard of proof are: *Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Saratoga Development Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994); *San Luis Obispo Mothers For Peace v. NRC*, 789 F.2d 26, 44 (D.C. Cir. 1986)(*en banc*); *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). ACC’s brief fails to address this higher standard of proof, and does not even mention the extensive case law severely restricting judicial inquiries into agency deliberative processes.

*Second*, in addition to the “strong showing” required to probe the motivation of agency decisionmakers, ACC must also overcome a further evidentiary hurdle because the mandate has already issued, and third parties have relied upon the finality of the *1995 Order*. ACC’s “new evidence” cases do not involve this additional substantial circumstance. Although ACC’s brief acknowledges that the mandate has issued (App.Br. 30), it fails to come to grips with the effect

on the standard of proof necessary to reopen a long closed record. ACC's "new" evidence must be exceptionally relevant and direct to override the strong policy of repose, that there be an end to litigation. *See Greater Boston Television Corp. v. FCC*, 463 F.2d at 278.

In relying exclusively on the "new evidence" cases cited in its brief, ACC has, therefore, misstated the legal standard applicable in this case.<sup>17</sup> When assessed under the correct standards, the purported "new evidence" presented by ACC does not provide any basis to reopen the record to permit ACC to conduct discovery into the alleged motivations of the majority members in the *1995 Order*, and does not meet the requirements for such an extraordinary reopening of the record seven years after this Court's mandate.

## **II. THE AFFIDAVITS OF FORMER COMMISSIONERS BARRETT AND QUELLO DO NOT PROVIDE A BASIS FOR RECALLING THE MANDATE TO REOPEN THE RECORD.**

All that ACC offers in support of reopening the record for further discovery into the motives of the majority in the *1995 Order* are the identical affidavits of former Commissioners Barrett and Quello. The Commission (entirely changed from the membership at the time of the *1995 Order*) found that the proffered affidavits presented nothing new. That determination is fully supported when the affidavits are examined against the claims made by ACC in the original appeal from the *1995 Order*.

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<sup>17</sup> For example, ACC relies heavily on *W. S. Butterfield Theatres, Inc., v. FCC*, 237 F.2d 552 (D.C. Cir. 1956), and *WMOZ, Inc. v. FCC*, 344 F.2d 197 (D.C. Cir. 1965). Neither case has any resemblance to the circumstances here. In particular, neither case involved an effort to investigate the motives of the Commissioners entering the original order, and neither concerned a post-mandate reopening of a record. Although ACC cites *Butterfield* for the proposition that the need to reopen the record is especially compelling where the "new evidence goes to the foundation of the Commission's decision" (App.Br. 19, quoting *Butterfield*, 237 F.2d at 556), the context of that statement makes clear that the Court was speaking about factual findings regarding the plans of the winning applicant, which were contradicted by post-decision events, not the fundamental legitimacy of the agency's motives in issuing the order.

**A. The Barrett And Quello Affidavits Make the Same Allegations Already Made in the Original Appeal.**

The purported “new evidence” is merely a recast of the same allegations made in ACC’s original attack on the 1995 Order. In the original appeal, ACC highlighted Commissioner Barrett’s dissent in the DBS Auction NRPM (ACC 1995 Opening Br. 21 (JA 162), quoting Commissioner Barrett’s dissent). *See also* ACC 1995 Opening Br. 24 (JA 165) (“Commissioner Barrett stated on the public record that he was asked to weigh the possibility of raising hundreds of millions for the federal treasury in deciding what to do about Advanced’s applications”). ACC argued to the Court that Commissioner Barrett’s statement demonstrated that at least one member of the majority had based his or her decision on the prospect of the revenues from auctioning the cancelled facilities assigned to ACC, and asserted that such a rationale violated Section 309(j)(7)(A).<sup>18</sup>

The new affidavits by former Commissioners Barrett and Quello do not provide any more information than was already presented to the Court in the original appeal. Indeed, the new affidavits provide less information – not only is the colleague with whom the affiants had informal pre-decisional discussions unnamed, the matter discussed is also not detailed, and the Court is provided no means of determining for itself on what basis the affiants reached their conclusion regarding their colleague’s actual intent. Without more specific evidence, there is certainly no basis to conclude that the pre-decisional discussion referenced in the affidavits is

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<sup>18</sup> *See* ACC 1995 Opening Br. 27 (JA 168) (“[T]hese facts confirm that the possibility of generating hundreds of millions of dollars for the federal treasury, not the merits of Advanced’s extension request . . . was decisive in the Commission’s cancellation of Advanced’s DBS permit . . . .); ACC 1995 Reply Br. 5-6 (JA 256-257) (“[T]he prospect of a lucrative auction weighed heavily in the agency’s decision to cancel Advanced’s permit”).

different from the pre-decisional discussion mentioned in Commissioner Barrett's *DBS Auction NPRM* dissent and already presented by ACC to the Court in its initial appeal.

ACC has already had its day in court arguing that the majority in the *1995 Order* secretly based its decision on the prospect of auction revenues, and not on the merits of ACC's situation as stated in the written decision. The Court was fully aware of the MCI letter, and recognized that the Commissioners understood that substantial sums could be realized from the sale of any orbital slots and channels recovered from ACC. *Advanced per curiam* Memorandum at 4 (JA 282). Indeed, the Court's Memorandum specifically quoted from ACC's 1995 Opening Brief at 24 where ACC argued that the accumulated evidence showed that the "expectation of Federal revenues played a large role in [the] decision to deny [Advanced's] application" in violation of Section 3099j)(7)(A). *Id.*

With all of these issues already before it, the Court concluded that ACC's presentation was not "sufficient to overcome the 'strong presumption of agency regularity'" and the Court was unwilling to search beyond the text of the order to find some alleged "illicit motivation" on the FCC's part. *Advanced per curiam* Memorandum at 4 (JA 283).

Although ACC now argues that the Court's statement was not a conclusion on the merits of the evidentiary recorded presented in its original appeal,<sup>19</sup> it is clear from the Court's language that it did review the proffered evidence, and found that it was not "sufficient." *Advanced per curiam* Memorandum at 4 (JA 283).

The district court and court of appeals in the Eighth Circuit litigation likewise read the D.C. Circuit's affirmance as a decision on the merits of the evidentiary showing, not merely a

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<sup>19</sup> See ACC Br. 23 (JA 164) (arguing that "[no] reviewing court ever considered any evidence that the Commission acted illegally in the *October 1995 Order*").

procedural order, and dismissed ACC’s complaint as barred by collateral estoppel. *See Advanced Communications Corp. v. MCI Communications Corp.*, 101 F.Supp. 2d 1154, 1159-60 (E.D. Ark. 2000) (“the excerpts from the D.C. Circuit opinion quoted above clearly show that the claims . . . were raised before the D.C. Circuit and decided adversely to ACC”). The Eighth Circuit affirmed the application of collateral estoppel, specifically finding that “the [D.C. Circuit] concluded that the issue, raised without sufficient proof, was without merit.” *Advanced Communications Corp. v. MCI Communications Corp.*, 263 F.3d 793, 795 (8th Cir. 2001).

The Barrett and Quello affidavits provide no new facts regarding any of these points. Relying on the Barrett and Quello affidavits in 2003, rather than Commissioner Barrett’s published dissent in 1995, does not constitute new evidence, only re-argument of the same previously presented claims that the Commission’s 1995 Order was erroneous.

**B. The Barrett And Quello Affidavits Do Not Establish The Requisite Strong Showing To Invade The Agency’s Deliberative Process.**

Even if the Barrett and Quello affidavits were considered as “new” evidence, they do not provide the “strong showing” that the courts require before a litigant is permitted to probe the motivations of agency decisionmakers. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (“[a]gency opinions, like judicial opinions, speak for themselves” and thus, only in “the rarest of cases” where petitioners make a strong showing of bad faith or improper behavior will courts allow petitioners to search beyond the face of the opinion for evidence of improper motivation).

**(1) The Affidavits Are Conclusory and Provide No Specific Factual Information.**

ACC claims that the affidavits “provide an extraordinary glimpse into the Commission’s deliberative process.” App.Br. 28. Yet, the information provided in the affidavits is even less specific than the evidence rejected in other cases where the Court refused to probe into the motivations of agency decision makers by examining pre-decisional deliberations.

The Court has regularly rebuffed attempts by litigants to supplement the record on appeal with the entire transcript of open FCC meetings in an effort to demonstrate the motivations behind the final order. *See Kansas State Network Inc. v. FCC*, 720 F.2d 185, 190 (D.C. Cir. 1983) (striking from petitioner’s joint appendix a transcript of FCC meeting which petitioner alleged supported its claim that it was the victim of an unfair Commission policy); *PLMS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999) (rejecting petitioner’s assertion that a video tape of an FCC open meeting demonstrated that the Commission violated Section 309(j)(7)(A)). *See also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44-45 (D.C. Cir.) (*en banc*), *cert. denied*, 479 U.S. 923 (1986) (denying petitioners’ request to supplement the record with transcripts of agency deliberations to show that the decision was based on grounds not stated in the order).

Here, the affidavits offer far less information. The *1995 Order* was voted on by the Commission “on circulation” – where each Commissioner votes in his or her private office on the order, with no public meeting under the Sunshine Act.<sup>20</sup> The Sunshine Act allows informal discussions of no more than two members of the five-member Commission without the formality

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<sup>20</sup> *See Communications Systems, Inc. v. FCC*, 595 F.2d 797, 800 (D.C. Cir. 1978) (describing the “notational” voting system used by the FCC for orders not voted on in open Sunshine Act meetings). *See also Railroad Commission of Texas v. United States*, 765 F.2d 221, 230 (D.C. Cir. 1985).

of the Sunshine Act requirements. *See* 47 C.F.R. § 0.601(b) (defining “meeting” for purposes of the Sunshine Act as “deliberations among a quorum of the Commission . . .”). Thus, at most, all that is revealed in the affidavits is an informal pre-decisional discussion. And even then, no details of the discussion are provided in the affidavits.

Taken at face value, the affidavits contain no actual “evidence,” only *ipse dixit* conclusions based on suspicions and inferences from conversations during the informal pre-decisional discussions. The actual text of the conversation is not provided, or even described in any way. Either the affiants chose not to reveal the content of the discussion, or after the long passage of time, they could not remember the details, only their suspicions drawn from it.

Such conclusory suspicions alone (and nothing more is provided), even when offered by a dissenting Commissioner, do not constitute the requisite “strong showing” demanded by the courts. *See Hercules, Inc. v. EPA, supra*, 598 F.2d at 123 (“The speculative possibility that the Administrator accepted the staff view, not because he was persuaded by the evidence, but for some improper reason, fails to overcome the strong presumption of regularity”).

The fact that here there are two identical affidavits also does not add up to a “strong showing.” The identically worded affidavits were prepared by ACC’s counsel and executed by the affiants. ACC “cannot, by sheer multiplication of innuendo, overcome the strong presumption of agency regularity.” *Louisiana Association of Independent Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992).

This is not the first time that a litigant has relied on the statement of a dissenting Commissioner to support its position that an agency decision was based on grounds other than those set forth in the written decision. In *San Luis Obispo Mothers For Peace v. NRC*, 789 F.2d 26, 44-45 (D.C. Cir.) (*en banc*), *cert. denied*, 479 U.S. 923 (1986), the Court denied a request by

petitioners to supplement the record on review with a transcript of the agency's deliberations. Petitioners argued that the majority NRC members did not consider the earthquake potential at the Diablo Canyon nuclear power plant, not because the issue was "immaterial" as stated in the majority decision, but rather because the majority members were determined to accelerate the licensing of the nuclear facility notwithstanding any earthquake risk. Petitioners argued that the full transcript of the internal deliberations of the agency would support their contention that the majority reasoning was different from that reflected in the written order. In support of the motion to supplement the record with the full transcript, petitioner relied on a submission to the Court by dissenting NRC Commissioner Asselstine and a letter from Congressman Richard Ottinger, Chairman of the House Subcommittee on Energy Conservation and Power. Both Commissioner Asselstine and Congressman Ottinger informed the court, in conclusory fashion, that they had read the transcript of the agency's deliberations and they believed that the transcript supported the petitioner's argument.<sup>21</sup>

In its opinion in *San Luis Obispo Mothers For Peace* (vacated by virtue of the granting of rehearing *en banc*) the panel denied the motion to supplement the record with the transcripts, finding no basis for doing so from the "conjecture" of Commissioner Asselstine and Representative Ottinger about the actual motives of the majority. 751 F.2d 1327-28. The Court, *en banc*, also rejected the motion to include the transcripts. 789 F.2d at 44-45. A plurality of the *en banc* Court refused to supplement the record with the transcripts without some independent

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<sup>21</sup> The details of the submissions to the Court by Commissioner Asselstine and Representative Ottinger are set forth in the original panel decision in the case, 751 F.2d 1287, 1323 n.224 (summarizing Commissioner Asselstine's allegations of Commission misconduct based on his participation in the deliberations). *See also* 751 F.2d at 1327-28 (describing the submissions as "conclusory," "with no documentation, support, or explanation beyond their own *ipse dixit*").

evidence of misconduct apart from the transcripts themselves (and by implication found that the allegations of Commissioner Asselstine and Representative Ottinger regarding the deliberations reflected in the transcript were inadequate for that purpose). 789 F.2d at 44-45. Judge Mikva concurred in the result rejecting the transcripts because he concluded that “petitioners have not made nearly substantial enough a showing to warrant inclusion of the transcripts in the record,” and that “[n]either petitioners' allegations nor the portion of the transcripts disclosed to us suggests that the agency acted in bad faith in excluding earthquakes from its consideration of emergency planning at Diablo Canyon.” *Id.* at 46.

Accepting bare allegations such as those made in the Barrett and Quello affidavits as itself sufficient to make the initial “strong showing” required to open a proceeding to investigate the motives of an the majority would leave administrative agencies open to constant threats of bad faith allegations. “With the realities of Washington administrative policymaking, where rumors, leaks, and overreactions by concerned groups abound,” *Sierra Club v. Costle*, 657 F.2d 298, 397 (D.C. Cir. 1981), the courts have wisely steered clear of the rhetoric employed in such intra-agency disputes when assessing whether or not a strong showing of misconduct has been presented.

If given leeway by the courts, litigants, even without the active support of a dissenter, would comb dissenting decisions for charges that the majority’s deliberations were flawed, and seek further discovery to establish their claims. For example, in *Greater Boston*, 463 F.2d at 283 n.24, the Court described an earlier decision in the proceedings, Order of April 15, 1971, 21 R.R.2d 2061, rejecting a motion by appellant to remand and reopen the administrative record based on a press article quoting a former commissioner as giving a reason for concurring in the FCC’s decision that was different from that set forth in the decision itself. The litigant sought to

reopen the record to take testimony from the former Commissioner regarding whether or not he supported the actual decision of the Commission for which his vote had been cast. The FCC declined to join in the remand request (and its decision to do so was not itself reviewed by the Court). The Court rejected the remand request.

To accept petitioner's invitation to invade the agency's decisionmaking here based on the conclusory allegations by dissenting Commissioners, without an independent "strong showing" of actual misconduct, "would be to alter radically the nature of judicial review." *See Hercules Inc. v. EPA, supra*, 598 F.2d at 123.

**(2) The Affidavits Regarding Pre-Decisional Discussions Do Not Necessarily Reflect The State Of Mind Of The Majority When They Voted.**

As discussed *supra*, the voting on the *1995 Order* took place in the privacy of each individual Commissioner's office under the Commission's notational voting system. *See Communications Systems, Inc.*, 595 F.2d at 798. The affidavits utterly fail to link the pre-decisional discussions to the state of mind of the majority members when they actually voted on the *1995 Order* at a later date.<sup>22</sup> Specifically, the affidavits do not address the possibility that the discussion regarding the MCI letter was made at a time when the decision was still in its

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<sup>22</sup> In affirming the *1995 Order*, the Court found that it was not necessary to determine whether or not ACC was correct that a Commission vote on canceling a DBS construction permit would violate Section 309(j)(7)(A) if influenced by the prospect of future auction revenues from an auction of the reclaimed facilities. *Advanced per curiam Memorandum* at 4 (JA 283). Likewise, the Court need not decide the issue in the instant case. Nevertheless, by not addressing here the merits of ACC's statutory argument, the Commission does not imply that it accepts ACC's construction. *Cf. Bachow Communication, Inc. v. FCC*, 237 F.3d 683, 692 (D.C. Cir. 2001):

Title 47, U.S.C. § 309(j)(7) restricts consideration of the public fisc in certain of the Commission's decisions. As the introductory clauses of § 309(j)(7)(A) & (B) indicate, the restriction pertains only to three types of decisions, none of which is implicated here. (Footnote omitted.)

formative stages and the reasons for the decision changed as the voting on the matter neared. Nor do the affidavits take into account the possibility that the majority, while privately recognizing the potential for new auction funds upon reclaiming ACC's construction permit, nevertheless voted conscientiously on the merits of the matter before them.

As this Court recognized in *PLMS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999), even if there were direct evidence that a Commissioner "flirted with an impermissible rationale" regarding auction revenues during their deliberations, that itself is not sufficient to show the state of mind of the Commissioners when they actually voted on the text of a decision. In *PLMRS Narrowband Corp.*, as here, the petitioner claimed that a Commission decision was improperly based on the expectation of federal revenues contrary to 47 U.S.C. § 309(j)(7)(A). The litigant in *PLMRS Narrowband* offered a videotape of a Commission meeting at which two of the five Commissioners mentioned the expectation of federal revenues in their deliberations. However, when the final decision was issued, after a notice and comment rulemaking proceeding lasting a year and a half, the Commission did not base its decision upon the expectation of revenues.

Citing *Checkosky*, the *PLMRS Narrowband* Court rejected the invitation to probe behind the written opinion based on petitioner's submission (182 F.3d at 1001-02):

We do not think the evidence that two Commissioners initially flirted with an impermissible rationale suffices to demonstrate that the permissible rationale given a year and one-half later in the Commission's published opinion was a mere pretext. Otherwise, it would seem, almost any slip of the tongue during an agency's decisionmaking process could be fatal, contrary to the settled principle that "[u]p to the point of announcement, agency decisions are freely changeable, as are the bases of those decisions." *Checkosky*, 23 F.3d at 489.

ACC does not mention *PLMS Narrowband* in its Opening Brief, but in the earlier pleadings in this appeal, on the FCC's Motion for Summary Affirmance, ACC in its Opposition

attempted to distinguish the case on the ground that the deliberative comments occurred in *PLMS Narrowband* approximately eighteen months before the issuance of the Commission order, whereas in the *Advanced* proceeding the MCI letter was received and commented on within a week of the Commission's *1995 Order*. The distinction ACC draws is immaterial to the principle stated in the case and in *Checkosky*. Regardless of the lapse of time between an allegedly impermissible rationale and the Commission's final order, the fact that decisions are changeable (and indeed do change) makes it impossible as a matter of logic, as well as a matter of law, to presume that an earlier pre-decisional statement actually reflects a member's views at the time of the vote.

The link between the informal pre-decisional discussions and the vote on the *1995 Order* is further attenuated because it is not clear that the discussion was about the cancellation of ACC's permits in the *1995 Order* or the *DBS Auction NPRM* that followed closely behind it. In the *1995 Order*, the Commission recognized that the cancelled DBS permits would have to be reassigned, and stated its dissatisfaction with the existing assignment mechanism – the first-come, first-served policy adopted by the Commission in 1989, before the Commission had auction authority. *1995 Order* ¶¶ 66-71 (JA 30). Without deciding how the facilities would be reassigned, the Commission stated that it would soon commence a rulemaking proceeding to determine the appropriate means of future reassignment of unassigned DBS facilities. *Id.* at ¶ 72 (JA 32).<sup>23</sup>

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<sup>23</sup> The only reference to the MCI letter in the *1995 Order* is at *Order* ¶ 67 n.125, which is attached to a paragraph discussing the inadequacy of the Commission's existing reassignment policy. The fact that MCI would be interested in bidding at the auction is directly relevant to that assessment, and thus was appropriately referenced at that point. The Commission also discussed the views of EchoStar and other existing permittees favoring the continuation of the existing assignment scheme. *Id.* at ¶66.

Although the consideration of the two orders was related in time, the Commission's decision that ACC failed to comply with the due diligence requirements was not dependent on a successful outcome of its separate rulemaking proceeding, nor was the rulemaking proceeding outcome dependent on a successful appeal of the *1995 Order*. Notably, if the Court had affirmed the *1995 Order*, but reversed the Commission's subsequent decisions to use auctions to reassign DBS facilities, the Commission's *1995 Order* – and ACC's loss of its permits – would remain unchanged.

This procedural history makes even more significant the omission of the details of the pre-decisional discussion referenced in the affidavits. Since the Commission was beginning consideration of the DBS Auction NPRM in the same general period as the decision on cancellation of ACC's permits, it is entirely possible that the discussions had by Commissioners Barrett and Quello with a member of the majority of the *1995 Order* was related to whether reassignment by auction was "appropriate," and not directly related in the speaker's mind to the separate determination whether or not ACC had failed to comply with the Commission's due diligence requirements. The ambiguity of the situation belies the inference in the affidavits of alleged misconduct on the merits decision in the *1995 Order* that is at the heart of ACC's argument.

### **III. ACC'S REQUEST TO REOPEN THE RECORD CONFLICTS WITH THE DOCTRINE OF ADMINISTRATIVE FINALITY**

ACC's request to the FCC to reopen the case would first require this Court to recall its mandate, issued at the conclusion of the first Advanced litigation. ACC's brief makes no mention of this important procedural prerequisite to any reopening of the agency proceeding. Judge Leventhal comprehensively delineated the standards for recall of mandate in *Greater*

*Boston Television Corp. v. FCC*. As explained in *Greater Boston*, recall of the mandate is an extraordinary action, and is granted only “sparingly” in “exceptional circumstances,” in order to override the “strong policy of repose, that there be an end to litigation.” 463 F.2d at 277-78 (internal quotes and citations omitted). With respect to a mandate issued upon affirmance of an administrative agency decision, *Greater Boston* held that the requirements of administrative finality become “dominant.” *Id.* at 286. The *Greater Boston* Court recognized that the interest of administrative finality, although dominant, would not be conclusive. But the Court cautioned that it would not lightly permit a remand simply to probe the mental processes of a Commissioner based on allegations that his decision was based on a reason other than that set forth in the decision itself (*id.* at 283 n.24):

[I]n the absence of an indication of misconduct or bias, remand will not be granted in order to probe the mental processes of the commissioner—as we noted in our prior order in this proceeding, upholding the FCC’s decision not to join in a WHDH request for remand that was based on a press article quoting a former commissioner as giving a reason for concurring in the FCC’s decision that was different from that set forth in the decision itself. Order of April 15, 1971, 21 RR2d 2061. *See United States v. Morgan*, 313 U.S. 409 (1941).

This Court, when presented with the same affidavits in the 2001 mandamus petition, found no reason to grant extraordinary relief. Order, Case No. 01-1459 (D.C. Cir. Dec. 19, 2001). Under the similar standard set forth in *Greater Boston*, the affidavits do not warrant the extraordinary relief of recall of the mandate and reopening of the administrative record here.<sup>24</sup>

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<sup>24</sup> Contrary to ACC’s claim (Br. 30) *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999), is inapposite here. The issue in *Southwestern Bell* was simply review of a Commission decision refusing to reconsider a prior agency action where there had been no prior judicial review. That case, therefore, has no bearing on the standards established in *Greater Boston Television Corp.*, where the Court’s mandate on a prior affirmance has already issued.

The instant case is far more extreme than the recall of the mandate rejected in *Greater Boston*, where the mandate had only recently issued. In the 2003 Order, the Commission recognized the complicating factors of “the time that has passed since the termination of the Advanced proceeding, and the use that has been made of the satellite orbital locations and frequencies.” 2003 Order, ¶ 8 (JA 514). In particular, the former facilities assigned to ACC at the 110°W orbital location were assigned through the 1996 auction to MCI, and in 1999 were transferred from MCI to EchoStar, which had also directly acquired the permits for the facilities at 148°W in the 1996 auction. *Id.* at ¶ 2 n.5 (JA 511). The Commission acknowledged that these and other assigned facilities are now used by EchoStar to serve over seven million DBS customers nationwide as of June 2002. *Id.*

In light of the reliance by innocent third parties on the finality of the 1995 Order, the showing required here to reopen this long closed proceeding must be extraordinarily direct, relevant and powerful. For the reasons discussed above, the proffered evidence falls far short of that mark.

Finally, ACC has not shown how it will be possible to “unscramble” the various good faith third-party transactions that have relied on the finality of the 1995 Order. ACC blithely argues that administrative finality has not prevented the court from requiring restoration of cancelled licenses in other cases, and attempts to analogize its situation to that of NextWave. App Br. 32. ACC’s argument misses a crucial distinction between the situation in NextWave and here.

In NextWave, the Commission cancelled NextWave’s wireless licenses for failure to make timely payment on its auction winning bid. The Commission then conducted an auction (“Auction 35”) to reassign the spectrum. Just as in the case of ACC’s cancelled permits included

in the 1996 DBS auction, bidders at Auction 35 were warned that the issuance of licenses to winning bidders would have to wait until the outcome of the license cancellation litigation was known. The Commission withheld the grant of the licenses won in Auction 35 relating to NextWave pending final judicial review of NextWave's challenge to the cancellation, and the Commission refunded the down payments to the Auction 35 bidders after the Supreme Court upheld NextWave's position and voided the cancellation. *See Requests for Refunds of Downpayments Made in Auction No. 35*, 18 FCC Rcd 6283 (2002). Thus, in the NextWave litigation, there was never a grant of the licenses claimed by NextWave to any other party, and thus no grant to unwind.<sup>25</sup>

Here, in contrast, after this Court affirmed both the *1995 Order* (finalizing the permit cancellation) and the *DBS Auction Order* (finalizing the auction results), the Commission granted the re-assignment of the permits to the winning bidders, who completed the transaction and made payment in full on their bids. Now, years later – after not only the close of the auction and grant of the permits, but also the reassignment of MCI's construction permit to EchoStar and EchoStar's additional investments in the facilities in commencing service over them – there is no practical way for the Commission to restore the licenses to ACC without also causing a severe and inequitable disruption to the business of bona fide third parties that acted in innocent reliance on the finality of the 1995 Order. *See In re: Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7<sup>th</sup> Cir. 1994) (applying “the age-old principle that in formulating equitable relief a court must consider

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<sup>25</sup> Likewise, in *Portland Cellular Partnership*, 11 FCC Rcd 19,997 (1996), cited by ACC (App.Br. 33), the Commission emphasized that a license had never been granted in the proceeding. *Id.* at ¶ 2.

the effects of the relief on innocent third parties. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375, (1977)”).

\* \* \*

ACC’s third attempt to have this Court reverse the Commission’s *1995 Order* and reopen the proceedings should be rejected. As the Supreme Court recognized nearly sixty years ago:

Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction.

*International Union of Mine, Mill, etc., Workers, Local No. 15 v. Eagle-Picher Min. & Smelting Co.*, 325 U.S. 335, 340-341 (1945).

**CONCLUSION**

For the foregoing reasons, the Court should treat the instant appeal as a request for the Court to recall its mandate in Case No. 95-1551, *et al.*, issued on August 2, 1996, and the Court should not recall that mandate.

Respectfully submitted,

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November 6, 2003

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

ADVANCED COMMUNICATIONS CORPORATION, )  
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 APPELLANT, )  
 )  
 v. )  
 )  
 FEDERAL COMMUNICATIONS COMMISSION, )  
 )  
 APPELLEE. )  
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No. 03-1082

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 11530 words.

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December 8, 2003