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

CASE NO. 03-1186

THE CITY AND COUNTY OF SAN FRANCISCO

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Cal Water	California Water Service Company, the successful applicant for the disputed frequencies
MAS	A point-to-multipoint and multipoint-to-point microwave service that is used primarily by utility, petroleum, and security industries for various remote control and alarm operations.
The City	Appellant City and County of San Francisco

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

JURISDICTION

This Court has jurisdiction pursuant to 47 U.S.C. § 402(b).[1]

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the appellant's brief except 47 U.S.C. § 405 and 47 C.F.R. § 1.227(b)(4), which are attached hereto.

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[1] While appellant correctly invokes this statute (see appellant's brief at page 1) and commenced this action within the statutory deadline of 30 days, it mistakenly called its appeal a petition for review and named the United States as a statutory co-respondent in its typewritten brief. With appellant's concurrence, we denote this action as an appeal and delete the United States from the caption.

STATEMENT OF ISSUES PRESENTED

The Federal Communications Commission granted microwave applications over the objection of appellant City of San Francisco, dismissed the City's competing applications as untimely, disallowed a settlement agreement between the City and the successful applicant that would have violated Commission processing rules, and denied the City's request for waiver of the processing rules. The issues presented are:

1. Whether the City suffered a violation of its rights to due process, and

2. Whether the FCC's licensing decisions, the disapproval of the settlement agreement, and the denial of the waiver request were an abuse of agency discretion.

COUNTERSTATEMENT

On appeal is a decision of the Federal Communications Commission (1) to grant Multiple Address System microwave applications filed by California Water Service Company ("Cal Water") over the objection of appellant City of San Francisco ("the City"), (2) to dismiss untimely applications filed by the City, (3) to deny the City's request for a waiver of the Commission's processing rules, and (4) to dismiss a proposed settlement agreement between Cal Water and the City. *In re California Water Service Co.*, 18 FCC Rcd 11609 (2003) (J.A. 2).

A. Regulatory background

Contested in this case is the issuance of microwave radio licenses to provide Multiple Address System ("MAS") service. MAS is a point-to-multipoint and

multipoint-to-point communications service that is used primarily by utility, petroleum, and security industries for various remote control and alarm operations.[2]

Following notice and comment rulemaking,[3] the Commission designated some of the microwave frequencies in the MAS service to subscriber-based commercial operators and established rules to assign those frequencies through competitive bidding. Some MAS frequencies – those at issue in this case – were reserved for "private internal service" and were made available on a first-come, first-served basis. The Commission defines "private internal service" as "a service where licensees use their authorized frequencies purely for internal business purposes or public safety communications and not on a for-hire or for-profit basis." *Report and Order*, 15 FCC Rcd at 11958 ¶ 2, 11965 ¶ 20.

The Commission considered whether to limit the amount of MAS spectrum that might be awarded to a single entity and decided that no limit was warranted. "We continue to believe, as indicated in the *Notice*, that allowing licensees to aggregate MAS spectrum will not present a risk of competitive harm." *Report and Order,* 15 FCC Rcd at 11985 ¶ 74. The Commission explained that it had imposed aggregation limits in other radio services where the shortage of spectrum created the risk of warehousing or anticompetitive behavior. Here, the Commission said, given the number of MAS licenses that it was making available and the numerous

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[2] *Amendment of the Commission's Rules Regarding Multiple Address Systems,* 15 FCC Rcd 11956, 11959 ¶ 4 (2000) (hereinafter "*Report and Order"*).

[3] *Further Notice of Proposed Rulemaking,* 14 FCC Rcd 10744 (1999) ("*Further Notice*").

licensees that are currently operating, "we conclude that not adopting a spectrum cap is unlikely to result in a risk of competitive harm." *Ibid.*[4]

The Commission invited the "first-come, first-served" applications immediately upon Commission publication of the *Report and Order* (January 19, 2000) "provided that these applications are for public safety and/or private internal services as set forth herein." *Report and Order*, 15 FCC Rcd at 12011 ¶ 137.[5]

No one sought reconsideration or judicial review of the *Report and Order.*

B. The applications

Between February 2 and February 8, 2000, Cal Water filed a number of applications for MAS licenses for its service areas in California and Washington, including applications for 14 of the 20 available MAS frequencies in the San Francisco area. On May 16, 2000, the City of San Francisco objected to seven of those applications because they would conflict with applications the City was planning to file in the near future. The City contended that it would need those frequencies in order to monitor and supervise its water treatment, transmission and distribution system. Moreover, the City argued, granting so much of the spectrum

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[4] An additional safeguard against warehousing exists insofar as some of the frequencies will be assigned through competitive bidding, the Commission said. Those frequencies will be distributed efficiently to firms that have shown by their willingness to pay market value their intention to put the licenses to the highest valued uses. *Report and Order,* 15 FCC Rcd at 11986 ¶ 76.

[5] "Public safety radio services" is defined to include "private internal radio services" (*see* page 3 above) used by govermental and non-governmental entities to protect the safety of life, health, or property, and which are not made commercially available to the public. *Further Notice,* 14 FCC Rcd at 10755 ¶ 18.

available in the San Francisco area to one applicant would not be in the public interest.[6]

At the time of its objection, the City had not filed any applications of its own. Then, on May 24, 2000, the City filed three applications, and on September 20, 2000, it filed a fourth, even though it recognized that all four applications overlapped, and were thus electronically incompatible with, the seven Cal Water applications to which it had previously objected.[7]

Subsequent to the City's objections, the staff of the FCC's Wireless Telecommunications Bureau ordered Cal Water to submit a justification for each of its multiple applications by describing the technical requirements of its proposed communications facilities. The staff wished to be assured that Cal Water had a real and immediate need for all the spectrum it had requested. Specifically, the staff asked Cal Water to describe with respect to each disputed application:

- the digital bit rate,
- the time required to poll a single remote,
- overhead times, such as training the modem(s) and/or receivers, sending preambles, handshaking, etc.,
- data transmission at the specified bit rate, including redundant transmissions,

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[6] Objection of the City of San Francisco, dated May 16, 2000, at pages 2, 5-7 (J.A. 42, 45-47).

[7] *In re California Water Service Co.,* 17 FCC Rcd 12746 at ¶ 5 & n.19 (Wireless Bureau 2002) (J.A. 27, 34) (hereinafter "*Bureau Order*").

- maximum time permitted between polls of the same remote, with an explanation for this value,
- number of remotes in the system, and
- any other factors that warrant the use of a separate additional channel.

Cal Water supplied the technical information as requested.[8] The company elaborated that the requested frequencies would be used to monitor and support "critical water services" that include water collection, water treatment, general water storage and fire-fighting reserves, and water distribution to residential, commercial, manufacturing and agricultural customers. *Id.,* Exhibit B at page 1 (J.A. 62).

The company also explained why multiple radio licenses are required:

> It is anticipated that catastrophic acts of nature, earthquake, wide spread brush fires or severe weather storms would conceivably disable some master radio stations, but even the survival of one master station could prove critical in maintaining water service …. *Ibid.*

The City did not challenge the statements made in Cal Water's justification.

Instead, on April 9, 2001, the City and Cal Water filed a proposed settlement agreement. Among the terms of that agreement, (1) Cal Water would withdraw its request for some of the channels identified in the applications to which the City had objected, (2) the City would withdraw its objections to Cal Water's remaining requests, and (3) the parties would negotiate a short-spacing agreement that would permit both parties to be licensed to certain channels sought in Cal Water

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[8] *See, e.g.,* Exhibit B at pages 3-8, attached to amendment to application number 79079 filed by California Water Service Co., dated April 5, 2001 (J.A. 64-69). This application and amendment are typical of those at issue in this case.

applications. (Pursuant to this agreement, the City thereafter filed a fifth MAS application.) *See Bureau Order* at ¶¶ 6-7 (J.A. 28), *citing* "Proposed Settlement of Mutually Exclusive Applications for MAS Frequencies," dated April 9, 2001, at page 2 (J.A. 72).

C. The Commission's decision

The FCC's Wireless Bureau granted the seven disputed applications filed by Cal Water over the City's objection, it dismissed as untimely the five applications filed by the City, and it dismissed the proposed settlement agreement between Cal Water and the City. *Bureau Order* at ¶¶ 21-24 (J.A. 32). On application for review, the Commission affirmed the actions of the Bureau, and in addition it rejected the City's request for waiver of the Commission's processing rules. *In re California Water Service Co.*, 18 FCC Rcd 11609, 11622-24 ¶¶ 26-28, 31 (2003) (hereinafter "*Commission Order*") (J.A. 8-9, 10).

We now briefly describe the basis and rationale for those decisions.

1. The grant of Cal Water's applications over the City's objection.

The Commission observed that the City's objection to Cal Water's seven applications reduces to a claim that it has a better use for those channels than Cal Water has. *Commission Order* at ¶ 20 (J.A. 7). This was not a sound basis for objection given the facts: (1) Cal Water's applications pre-dated those of the City by at least three months under a first-come, first-served licensing scheme; (2) the rules place no limit or qualification on the amount of MAS spectrum that Cal Water could receive; and (3) Cal Water had submitted a clear justification,

unchallenged by the City, for its multiple applications. In that regard, the Commission noted that Cal Water plans to use the channels "to distribute reliable and safe water on a day-to-day and emergency basis," and that "each application represents the channel needs in a separate district, which will have its own independent [supervisory control and data acquisition] system." *Commission Order* at ¶¶ 20-24 (J.A. 7-8); *see Bureau Order* at ¶ 17 (J.A. 31).

2. The disapproval of the settlement agreement.

Section 1.935 of the Commission's rules, 47 C.F.R. § 1.935, permits parties that have filed applications that are mutually exclusive with one another to enter into an agreement to resolve the mutual exclusivity by withdrawing or amending the applications. Under the MAS first-come, first-served licensing scheme, however, in order to be considered "mutually exclusive," applications must be filed on the same day and must propose operations such that the grant of one application would effectively preclude by reason of harmful electrical interference the grant of the other. *Report and Order*, 15 FCC Rcd at 11976 ¶ 53; *Further Notice,* 14 FCC Rcd at 10758 ¶ 24; 47 C.F.R. §§ 1.227(b)(4), 101.45(a).

In this case, the City's applications were filed months after those of Cal Water, so those applications were not mutually exclusive. The Commission therefore declared that Cal Water and the City did not satisfy the threshold requirements to file a settlement agreement. *Commission Order* at ¶ 16 (J.A. 6); *see Bureau Order* at ¶¶ 13-14 (J.A. 30).

Moreover, the Commission said, approval of the settlement agreement would give the City an unfair advantage over other entities that had filed earlier than the City for the same frequencies that it would occupy pursuant to the agreement. The Commission identified a number of parties that had filed applications earlier than the City for those frequencies but whose applications were dismissed as late-filed in accordance with the rules. *Commission Order* at ¶ 18 (J.A. 6-7). Likewise, the Commission said, approval of the settlement agreement would give the City an unfair advantage over other entities that had an interest in filing but who refrained from filing in recognition of the Commission's first-come, first-served licensing rule. *Id.* *See Bureau Order* at ¶ 14 (J.A. 30).

The Commission thus rejected the agreement as contrary to fairness and the public interest. *Commission Order* at ¶ 19 (J.A. 7).

3. The denial of the request for waiver of the application processing rules.

The City sought a waiver of the first-come, first-served rule that resulted in a grant of Cal Water's applications and the dismissal of the City's applications. Addressing the merits of that request, the Commission noted that a waiver applicant must show either (1) that the underlying purpose of the rule would not be served or would be frustrated by application of the rule, or (2) that in view of unusual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest. *Commission Order* at ¶ 26, *citing* 47 C.F.R. § 1.925(b)(3) (J.A. 8-9). Here, the Commission said, the City failed to satisfy that burden.

Preliminarily, the Commission stated, "as against late-filers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in enforcement of the Commission's rules." *Commission Order* at ¶ 27, *citing McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) (J.A. 9). In this case, the Commission continued, the City failed to show that its need for the channels outweighs on the public interest scale Cal Water's need for the channels coupled with Cal Water's diligent compliance with the rules. Rather, the Commission observed, the City's "sole justification" for the waiver request is that "it *believes* it needs the channels more." *Commission Order* at ¶ 28 (emphasis supplied) (J.A. 9). "We decline to grant a waiver based on this rationale," the Commission declared. *Ibid.*

Finally, the Commission noted that the City has alternatives available. For instance, the Commission observed that Cal Water may implement the intent of the settlement agreement by assigning channels to the City. Similarly, other MAS licensees in the San Francisco area are free to assign channels, or portions of channels, to the City.[9] The Commission urged the City to approach these licensees "to determine whether a contractual arrangement to acquire spectrum is possible." *Commission Order* at ¶ 29 (J.A. 9). In addition, the Commission pointed to other frequencies outside the MAS band that may be available to satisfy the City's needs. *Ibid.*

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[9] *See* 47 C.F.R. §§ 1.948, 101.1321(b), 101.1323.

SUMMARY OF ARGUMENT

The Court does not have to reach the due process issues of whether the first-come, first-served rule violated the notice requirements of the APA or whether the City suffered discriminatory treatment compared to others whose applications were mistakenly granted in the face of the rule, because neither argument was presented to the Commission. 47 U.S.C. § 405.

In any event, the Commission did not violate the APA. The parties had more than ample notice, the Commission did not begin to process the applications until more than 30 days after the *Report and Order* had been published in the Federal Register, and the City never complained to the Commission that its violation of the rule was due to lack of notice or confusion as to the rule's requirements. As to the second argument, the City is not entitled to "equal treatment" with others whose applications should never have been granted.

The Commission's decision (1) to grant Cal Water's applications which were in accord with the rules, (2) to deny those of the City which violated the first-come, first-served rule, (3) to deny a waiver of the rules, and (4) to disallow a settlement agreement that violated the processing rule was a reasonable exercise of licensing discretion in the public interest. Cal Water's application for multiple channels was fully justified and was in accord with the FCC's licensing and processing rules. The City's application was no more meritorious, and it came too late. To waive the rules and grant the City's applications, or to approve the settlement agreement that sought to skirt the rules, would have been manifestly unfair to other parties who obeyed the rule or who relied on the rule to their

detriment. On the other hand, the City has other avenues available by which it may be able to get the spectrum it says it needs without abridging the processing or licensing rules that were upheld in this case.

ARGUMENT

I. THE DECISION TO DISMISS THE CITY'S APPLICATIONS FOR VIOLATION OF THE PROCESSING RULES DID NOT VIOLATE THE CITY'S RIGHT TO DUE PROCESS.

The City argues that the Commission's decision violates its right to due process in two respects. First, it claims that the first-come, first-served processing rule was unlawfully implemented immediately following the release of the *Report and Order* rather than on 30-days' notice as required by the APA. Second, it claims that it suffered discriminatory treatment as compared to others whose applications were granted despite their violation of the first-come, first-served rule.

A. The APA notice argument

The *Report and Order* invited MAS applications from parties that wished to provide public safety and/or private internal services immediately upon publication of the order, and it stated that the applications would be processed on a first-come, first-served basis. *Report and Order*, 15 FCC Rcd at 12011 ¶ 137. The City complains here that locking in the applicants' place in the processing line less than 30 days after the *Report and Order* had been released was unlawful under the APA's notice requirement. Brief at 16-17. The City also complains that it was

unfair to insist that parties file applications before they had an opportunity to learn of the new rules and the requirements for application. Brief at 17-18.

The argument is a lawyer's after-thought, for it was never raised below. Accordingly, the argument is not properly presented to the Court and should be ignored. Section 405(a) of the Communications Act, 47 U.S.C. § 405(a), prohibits a party from seeking judicial review of an issue on which the Commission has been afforded no opportunity to pass.[10]

In any event, the City suffered no violation of its due process rights. The Commission accepted applications immediately but it did not process them or grant any licenses until well after the requisite 30 days following publication in the *Federal Register* had expired. During the statutory 30-day period, the City had an opportunity to seek a stay, reconsideration, or review of the *Report and Order*, but it did not do so. Not until the *Report and Order* became final did the Commission begin processing the applications in accordance with the first-come, first-served priority that it had established in the lawfully promulgated rulemaking order.

The City contends that the Commission was entitled to *accept* the applications immediately following publication but that it was unlawful to *prioritize* the applications until after the *Report and Order* became final. Brief at 17. The argument makes no sense, given the first-come, first-served licensing method to which the City says it has no objection. Brief at 16. If the Commission

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[10] *See Freeman Engineering Assoc., Inc. v. FCC*, 103 F.3d 169, 182-85 (D.C. Cir. 1997); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 201-02 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

had allowed the incoming applications to pile up in random order until the *Report and Order* had become final, the concept of "first-come, first-served" would have been meaningless.

The critical feature of the licensing scheme in this case is that the Commission did not begin to process the applications or make any grants until the *Report and Order* had become final. Merely prioritizing the applications during the interim so they would be ready for processing at the earliest opportunity did not offend the APA.

Nor was this procedure unfair to the City. There is no suggestion whatever in the City's objection to Cal Water's applications or in its application for review of the Bureau's decision that the City had been taken unawares or that it was in any way unprepared for the announcement by the Commission that it would begin accepting public safety and private internal MAS applications immediately upon publication. Had the City been able to excuse its failure to file promptly on confusion or uncertainty regarding the application process, it would surely have said so in its objections to the Bureau or its application for review to the Commission.

But it did not, for good reason. Interested parties were alerted six months earlier in the latest notice of proposed rulemaking that with respect to public safety

radio services that are exempt from competitive bidding,[11] "we tentatively conclude that licensing on a first-come, first-served basis would be the most effective licensing approach."[12] Cal Water and several others took heed of that notice and stood ready when the time came to file their applications promptly. The City had the same opportunity, but it stood idle. It may not shift the blame for that inertia to others, nor can it now rely on an empty *post-hoc* claim of confusion.

B. The unequal treatment argument

Several of Cal Water's MAS applications were dismissed by the Wireless Bureau because the staff had already mistakenly granted applications for the same service area filed by San Diego Gas & Electric (SDG&E) and by Contra Costa Water District even though those applications were filed after those of Cal Water. For reasons of its own, Cal Water did not seek to have those grants set aside, and by the time the Commission discovered the error the time had expired for the Commission to correct this error on its own motion. Thus, grants issued in violation of the first-come, first-served rule became final. *See Bureau Order* at ¶¶ 8-11 (J.A. 28-29).

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[11] As mentioned above at pages 3-4, "public safety radio services" is defined to include "private internal radio services" used by governmental and non-governmental entities to protect the safety of life, health, or property, and which are not made commercially available to the public, and the Commission defines "private internal radio service" as "a service where licensees use their authorized frequencies purely for internal business purposes or public safety communications and not on a for-hire or for-profit basis." The City's proposed MAS service is clearly encompassed by these definitions.

[12] *Further Notice,* 14 FCC Rcd at 10758 ¶ 24.

The City now claims that because SDG&E and Contra Costa were awarded licenses in violation of the first-come, first-served rule, the Commission ought not rely on that rule as a basis for dismissing the City's applications. Brief at 20-21. "The Commission may not treat similarly situated parties differently without adequately explaining the differential treatment," the City observes. Brief at 21.

One must assume the City is unaware of the adage "two wrongs do not make a right." More to the point, the City, SDG&E, and Contra Costa are not "similarly situated parties" for the simple reason that the City's applications were found to be in violation of the first-come, first-served rule before it was too late, but those of SDG&E and Contra Costa were not. The handling of the SDG&E and Contra Costa applications was not a paradigm of agency licensing. The City was not entitled to benefit from the same mistake any more than an apprehended speeder may point to scofflaws whizzing by.

Unequal treatment is arbitrary and capricious only where it is unexplained or unjustified.[13] Here, the appearance of unequal treatment is easily explained and well justified.

II. THE COMMISSION'S GRANT OF CAL WATER'S APPLICATIONS, THE DISMISSAL OF THE CITY'S APPLICATIONS, AND THE DENIAL OF THE WAIVER REQUEST WERE A SOUND EXERCISE OF BROAD LICENSING DISCRETION.

The essential issue here is "where lies the public interest?" The City maintains that the public interest would best be served by abandoning, or at least

[13] *See, e.g., Melody Music, Inc. v. FCC,* 345 F.2d 730, 732 (D.C. Cir. 1965).

waiving, the first-come, first-served processing rule and distributing the available frequencies among all applicants. Granting so many Cal Water applications was not in the public interest, the City says, because the spectrum will not be used to its full potential. Brief at 22.

Before turning to the substance of the City's objections, we set the record straight. The City claims that the decision in the *Report and Order* not to limit the number of MAS licenses that may be awarded to a single entity applies only to the category of licenses that are awarded through competitive bidding. Brief at 23-24. That is not so. The Commission said in the *Report and Order* that economic incentives provide *additional* safeguards against warehousing those licenses that are awarded through competitive bidding, but the broader rationale for the decision – the number of MAS licenses that it was making available and the numerous licensees that are currently operating – applies to all MAS licenses. *See Report and Order,* 15 FCC Rcd at 11986 ¶ 76. *See also* 47 C.F.R. § 101.1323(b): "There is no limitation on the amount of spectrum that an MAS licensee may aggregate."

Turning now to the merits, the City's inability thus far to get the spectrum it seeks does not demonstrate that the Commission's rulemaking decision, or its adherence to that decision, was ill-advised or an abuse of discretion. Conspicuously, the City does not allege that the frequencies it wants, which were awarded to Cal Water, are critical to its utility operations. The City does not explain how those operations are presently performed, and it does not suggest that its existing communications facilities are antiquated or overloaded or that vital public services are threatened. Instead, as observed by the Commission, the City's

"sole justification" for its opposition to the Cal Water applications is that "it *believes* it needs the channels more." *Commission Order* at ¶ 28 (J.A. 9).

The City asserts that Cal Water's system could be configured so that its needs can be satisfied with fewer than the number of frequencies requested. Brief at 26-27. *See* Declaration of engineer David White, attached to City's Application for Review, dated July 31, 2002 (J.A. 75). Indeed, the City continues, Cal Water's willingness to share spectrum with the City as outlined in the settlement agreement "suggests that Cal Water might not need all the spectrum for which it had applied." Brief at 27.

The City's speculation on Cal Water's spectrum needs or how its communications system could be redesigned is irrelevant. Cal Water showed in response to a staff inquiry that it had a real and immediate need for all the spectrum for which it applied, and the City did not question the sufficiency of that showing. *See* pages 5-6 *supra.* Because the Commission had already made the rulemaking decision that engineering efficiency would not be a factor in its MAS licensing decisions, Cal Water's showing was sufficient.

After notice and comment, the Commission announced in the *Report and Order* that MAS licenses were to be awarded on a first-come, first-served basis without limits on spectrum aggregation, and that view of the public interest is entitled to judicial deference.[14] The Commission is not required to reexamine that

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[14] The Communications Act delegates the task of determining how the public interest will best be served to the Commission, and its judgment in this regard "is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

rulemaking decision each time it applies the rule, although the Commission is required to consider whether a waiver request could be granted consistent with the rulemaking decision.[15] Here, the City failed to make the requisite showing in support of its waiver that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, or that in view of unusual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest.[16] Instead, the Commission was faced with comparable requests in which the City and Cal Water both claimed that they needed the channels to monitor and control their remote facilities and thereby ensure a reliable supply of water to their customers on a day-to-day and emergency basis. *See Commission Order* at ¶ 21 (J.A. 7-8). There was only one notable difference between the proposals. Cal Water was diligent in preparing and filing its applications. The City was not.

Moreover, as the Commission correctly observed, denying Cal Water's applications and granting those of the City in contravention to the announced first-

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[15] *See WITN-TV, Inc. v. FCC*, 849 F.2d 1521, 1524 (D.C. Cir. 1988)("[I]t is a familiar principle of administrative law that an agency is not required to reconsider the merits of a rule each time it seeks to apply it," *citing Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987) (internal quotes omitted). *See also Hispanic Inform. & Telecom. Network, Inc. v. FCC,* 865 F.2d 1289, 1294 (D.C. Cir. 1989)("The Commission surely is not obligated to rethink its policies each occasion it applies them to a particular set of facts; this would eviscerate the agency's rulemaking authority.").

[16] *See* 47 C.F.R. § 1.925 (b)(3); *Keller Communications v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997); *Northeast Cellular Tel. Co. v. FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990). *See also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1408 (D.C. Cir. 1995) (Silberman, J., concurring in part and dissenting in part)("[W]e have traditionally afforded an agency determination whether to grant a waiver of a rule maximum deference.").

come, first-served processing rule would have been manifestly unfair to Cal Water. Likewise the decision would have been unfair to other entities whose applications were defeated by earlier applications, and unfair to entities that desisted from filing after discovering already-filed applications.

On the other hand, enforcing the rule and denying the waiver request did not necessarily foreclose the City from obtaining the spectrum it says it needs. As pointed out by the Commission, the City has alternatives. It can seek a contractual arrangement with Cal Water or other Bay Area licensees to obtain spectrum, or it can explore the use of other available spectrum. *Commission Order* at ¶ 29 (J.A. 9).

If the City's contractual overtures are rejected, if the other available spectrum is unsuitable, and if the City can show that additional spectrum is critical to the maintenance of vital public services, it can return to the Commission. But for now, (1) given the availability of apparently viable alternatives, (2) given the equally valuable uses to which the frequencies will be put by Cal Water, and (3) given the relative equities attending the parties, the City has not shown that the Commission abused its broad licensing discretion in adhering to its rules.

III. THE DISAPPROVAL OF THE SETTLEMENT AGREEMENT WAS A SOUND APPLICATION OF RULE AND POLICY.

Section 1.935 of the Commission's rules, 47 C.F.R. § 1.935, states that parties that have filed applications that are mutually exclusive with one another may seek Commission approval of a settlement agreement that removes the mutual

exclusivity by withdrawing or amending the applications. Under the MAS first-come, first-served licensing scheme, however, in order to be considered "mutually exclusive," applications must be filed on the same day and must propose operations such that the grant of one application would effectively preclude by reason of harmful electrical interference the grant of the other. *Report and Order*, 15 FCC Rcd at 11976 ¶ 53; 47 C.F.R. § 101.45(a).

In this case, the City's applications were filed months after those of Cal Water. Accordingly, the Commission held that the Cal Water and the City applications were not mutually exclusive, and so the parties did not satisfy the threshold requirements to file a settlement agreement. *Commission Order* at ¶ 16 (J.A. 6).

The City now argues that (1) the applications were in fact mutually exclusive, (2) the Commission had an obligation under Section 309(j) of the Communications Act to approve the settlement, and (3) in any event, the Commission abused its discretion in rejecting the agreement.

In support of its claim that the applications were mutually exclusive, the City points to section 101.45(a) of the rules, 47 C.F.R. § 101.45(a). That rule states that applications are mutually exclusive "if they seek to license the same spectrum in the same or overlapping geographic areas." Brief at 31. The City is correct insofar as it goes, but a temporal element is clearly implied. According to the City's view of the rule, if a party applies for the same frequency as another applicant months or even years after the deadline for filing, it is still entitled to receive comparative

consideration as a "mutually exclusive" applicant. The City's view would of course eviscerate the Commission's licensing policy and so must be rejected.

The Commission established a first-come, first-served licensing scheme in this case whereby mutual exclusivity is created only if both applicants seek to use the same spectrum *and* file on the same day. *See* 47 C.F.R. § 1.227(b)(4).[17] The City's applications satisfy only the first half of that requirement.

Moreover, the City's expansive view of mutual exclusivity undercuts the rationale for allowing applicants to settle. The point of the settlement rule is to establish a mechanism whereby parties may negotiate the removal of mutual exclusivity that stymies the grant of both applications. The rule does not apply where, as here, one of the "mutually exclusive" applications is untimely and may be dismissed without further ado, obviating the need for settlement.

Next, the City cites 47 U.S.C. § 309(j)(6)(E) for the proposition that the Commission is obliged to use negotiation as a means "to avoid mutual exclusivity in applications and licensing proceedings." Brief at 30. As just shown, the applications here are not mutually exclusive, so the provision does not apply. In addition, Section 309(j) by its terms addresses a licensing scheme in which competitive bidding is used to award licenses. The licenses at issue here are not awarded through competitive bidding, so for this additional reason the provision does not apply.

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[17] The rule states that, with respect to MAS applications that are not subject to competitive bidding procedures, "mutual exclusivity will occur if two or more acceptable applications that are in conflict are filed on the same day."

Finally, the City claims that the Commission abused its discretion because no one objected to the proposed settlement and no one would supposedly be injured by approval of the settlement. In addition, says the City, the Commission was wrong in declaring that the settlement would be unfair to other parties whose late-filed applications were dismissed or who refrained from filing in recognition of the first-come, first-served rule. *See Commission Order* at ¶ 18 (J.A. 6). Those parties, the City blithely asserts, had the same opportunity as the City to enter into a settlement agreement with Cal Water. Brief at 31-32.

The Commission is not obliged to identify a tangible harm that will be avoided each time it chooses to enforce its rules, nor is it entitled to enforce its rules only when someone objects to a proposed violation. No agency could operate under such constraints. To allow the City to jump to the head of the processing line via the settlement agreement, in violation of the first-come, first-served processing rule and in violation of the settlements rule, would undermine respect for the integrity of the licensing scheme and of the Commission's authority.

It is worth repeating in this context that avenues other than the settlement agreement are open to the City whereby it might obtain the spectrum it says it needs: It can seek a contractual arrangement with Cal Water or other Bay Area licensees to use some of the spectrum assigned to them, or the City can explore the use of other available spectrum. *See Commission Order* at ¶ 29 (J.A. 9).

The City is entitled to its view of the public interest and to its view that it will put the contested frequencies to better use than Cal Water. However, when the Commission implements its view of the public interest

- by enforcing lawfully adopted rules,
- by ensuring fairness to other parties that rely on or are affected by its rules, and
- by pointing out that the City may be able to fulfill its needs without resorting to a settlement agreement that violates Commission rule and policy,

the City may not seriously maintain that the Commission's decision to disallow the settlement agreement is arbitrary and capricious or an abuse of discretion.

CONCLUSION

The Commission's decision should be affirmed.

Respectfully submitted,

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January 5, 2004

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

THE CITY and County of San Francisco APPELLANT V. FEDERAL COMMUNICATIONS COMMISSION APPELLEE	)	CASE NO. 03-1186

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 6111 words.

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