

This copy will be filed in FCC docket  
09-205 on 6.14.10.

6.14.10. Skybridge post-filing note:  
The court denied the Skybridge  
emergency motion, essentially on  
issues of "finality," but set procedure/  
schedule for the case to proceed.  
Skybridge and other Petitioners will  
proceed with the case under the court  
arrangement in upcoming weeks and  
thereafter.  
- W. Havens for Petitioners.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Case No. 10-71808

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SKYBRIDGE SPECTRUM FOUNDATION, a Delaware Nonprofit  
Corporation, INTELLIGENT TRANSPORTATION & MONITORING  
WIRELESS LLC, a Delaware Limited Liability Company, V2G LLC, a  
Delaware Limited Liability Company, and WARREN HAVENS, an  
individual.

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent.*

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REPLY TO OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT  
RULE 27-3 FOR STAY OF AGENCY ACTION UNDER FRAP 18, OR, IN  
THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS

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## **A. Likelihood of Success On the Merits**

### **1. The FCC'S Interpretation of §1.2105 is Unfounded**

The FCC's position ignores three basic principles:

1. "A precept which lies at the foundation of the modern administrative state is that agencies must abide by their rules and regulations." *Reuters Limited v.*

*FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986).

2. In order to revise a regulation, the FCC must comply with the notice and comment procedures mandated by the Administrative Procedures Act. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9<sup>th</sup> Cir. 1999).

3. "Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation *only* when the plain meaning of the rule itself is doubtful or ambiguous... a court should be guided by an administrative construction of a regulation *only if the meaning of the words used is in doubt.*" *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (emphasis added).

The FCC does not quibble with these general principles of law. It does not contest that it is required to follow its own rules, including rules regarding prohibitions upon major amendments to short-form applications. As the FCC further concedes, §1.2105(b)(2) prohibits major application amendments and permits minor amendments, which, under the regulation, are in the nature of "typographical errors." The crux of the FCC's position is that prohibited major

amendments include *only* amendments that are associated with an actual change to an applicant's size.<sup>1</sup> By contrast, in the FCC's view, all other proposed amendments, regardless of their nature, are "non-major." Thus, according to the FCC, proposed application amendments which attempt to remedy material misrepresentations about an entity's designated entity status are never major amendments. Opposition, at 15-16 ("Silke's size remained the same, but it reported new information pertinent to its eligibility for a bidding credit....Two-Way also appears to have stayed the same size but the available information about its affiliates changed").

In suggested support of its position, the FCC cites to the following example of a disqualifying major amendment from the rule-making history of §1.2105:

For example, if Company A, an applicant that qualified for special provisions as a small business, merges with Company B during the course of an auction, and if, as a result of this merger, the merged company **would not qualify as a small business [*i.e.*, change and diminish eligibility as a small business]**, the amendment reflecting the change in ownership of Company A would be considered a **major amendment**.

(emphasis added)

This example, far from bolstering the FCC's position, actually proves how the FCC has implemented an unwarranted Rule Change (in Public Auction 87 and other auctions) that conflicts with §1.2105. In paragraph 43 of Public Notice DA 10-863 associated with Public Auction 87, the FCC states:

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<sup>1</sup> See, e.g., Opposition, at page 14.

Bidders must immediately report any change affecting their eligibility for a bidding credit. Bidders should clearly state the nature of the change in an amendment to their short-form application and in the summary letter referenced above. In cases of diminished bidding credit eligibility, the Commission will make appropriate adjustments in the bidding credit prior to the computation of any down and final payment amounts.

In other words, Paragraph 43 purports to authorize an amendment resulting in a diminished bidding credit eligibility—which (as shown in the above example) §1.2105 clearly prohibits (along with all other bidder-size amendments, including disclaiming a false certification of bidder size). Conversely, the FCC concedes, as it must, that the unambiguous language of §1.2105 bars major amendments defined as “*any change in an applicant’s size which would affect an applicant’s eligibility for designated entity [bidding credit] provisions*” (emphasis added) – a bar plainly at odds with the FCC’s current position that a party’s attempt to jettison a previously-claimed bidding credit is a permissible “minor amendment.” These inconsistencies doom the FCC’s position at the outset, and on this basis alone, the Motion should be granted.

Clearly, the FCC’s recently-concocted position also does violence to the plain language of §1.2105 itself and its rulemaking history, and to the articulated public policies underlying the auction process. “Major amendments” are defined in §1.2105 to “*include changes...in an applicant’s size which would affect eligibility for designated entity provisions*” (emphasis added). An applicant’s “change in size” must be viewed within the context of a claim for designated entity

status (otherwise, the statute could have simply been written to bar all “changes in size,” as opposed to “changes...in an applicant’s size *which would affect eligibility for designated entity provisions*”). Second, the use of the word “include” in the regulation (as opposed to the phrase “defined as,” as the FCC inaccurately claims in its Opposition) plainly connotes that the list of major amendments described in the regulation is intended to be non-exclusive.

Moreover, the prohibition on “major amendments” first and foremost bars misrepresentations as to bidding credit eligibility status. Contrary to the FCC’s position, the accuracy of bidding credit eligibility claims is central to the integrity of the auction process. The regulation reflects this fact, as it requires a certification under penalty of perjury that an entity claiming designated entity status is entitled to any bidding credit claimed. *See* 47 CFR 1.2105(a)(iv). Section 1.2105(b)(1) further provides that “Any short-form application...that does not contain all of the certifications required pursuant to this section is unacceptable for filing and **cannot be corrected** subsequent to the applicable filing deadline” (emphasis added). For a certification under the “penalty of perjury” to have any meaning and utility, it must not only be provided, but be *true* when made.

The FCC claims that “the regulation is concerned primarily with the applicant’s size and not with its request for a bidding credit per se” (Opposition, at page 14), as if to suggest that the major amendment ban has little to do with the bidding credit. In fact, the opposite is true. Within the wireless auction context,

an applicant's size has meaning *only* in connection with the designated entity bidding credit. Indeed, the concept of an applicant's "size" is not addressed anywhere in the FCC's regulations except within the context of the designated entity bidding credit. (See 47 CFR 1.2110(b)(1), discussing "size attribution" in determining designated entity status.). The FCC has itself admitted that "***the size criterion applies only to the small business bidding credit***, which is based upon the bidder's revenues." *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 161 (D.C. Cir. 2003) (emphasis added).

Section 1.2105(b)(2) could have been drafted to limit major amendments to those "effectuated by a change in applicant size." But the regulation isn't drafted this way. Instead, it indicates that any amendment which is not in the nature of a "typographical" change is a barred major amendment. Whatever grey area might exist between major amendments and minor amendments, neither false certifications of, nor actual changes in, an applicant's size that determine eligibility for bidding credits are within any grey area.

Finally, the FCC's interpretation of §1.2105 leads to absurd results. All parties agree that an entity that accurately certifies its entitlement to a designated entity bidding credit at the inception of the application process cannot amend its short-form application at later stages to either subsequently jettison, or subsequently claim, the bidding credit if its "size" (*i.e.*, its attributable gross revenue) increases or decreases during the course of the process. *A fortiori*, a

party that *misrepresents* its bidding credit eligibility status at the inception of the application process (either by overstating or understating attributable gross revenue) should not be permitted to subsequently cure this misrepresentation. Yet, according to the FCC, a party can compete with unlawful bidding credits, in excess of what it deserves, achieved by submitting false certifications, so long as the entity's actual "size" hasn't changed. There is no basis in the language of the regulation or in logic for such an untenable interpretation; *i.e.*, that a truthful certification cannot be amended, but a false one can. In fact, the regulation bars both.

## **2. The FCC's Reliance upon the *Biltmore* Decision**

Throughout its Opposition, the FCC relies upon *Biltmore*.<sup>2</sup> For several reasons, this is misplaced. Firstly, *Biltmore* involved a different certification than the one at issue in this case. The certification in that case (regarding the media interests of an applicant's immediate family members) was not a *required* certification under §1.2105(b) (or any regulation). *Id.*, at 176 ("Because the family certification was not required by §1.2105, the omission could be cured"). Here, by contrast, the certification at issue **was** required by §1.2105(a)(iv). Indeed, the *Biltmore* court itself noted that the omission of a *required* §1.2105(b) certification (such as those at issue in this case) "incurably disqualifies the

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<sup>2</sup> The FCC's attempt to rely on its own decisions is self-serving, particularly since certain of these decisions are still being challenged by Petitioners.

applicant as specified in §1.2105(b)(1).” *Id.*, at 161. Moreover, in the case of Silke and Two-Way, unlike in *Biltmore*, the required certification was not omitted but was *false when made*.

Admittedly, the Court in *Biltmore* also rejected the contention that the winning bidder’s disclosure of a loan from a third party was an incurable major amendment. *Id.*, at 161-63. However, the bidding credit at issue in *Biltmore* was the “new entrant bidding credit,” not the small business bidding credit at issue in this case. This is a crucial distinction. The Court in *Biltmore* reasoned that while it was clear under §1.2105(b)(2) that the prohibition on “major amendments” applied to changes in an applicant’s size that would affect eligibility for the *small business bidding credit*, it was unclear whether the prohibition applied equally to size changes that would affect eligibility for the *new entrant business credit*. *Id.*, at 162. The circumstances of this case (both the Rule Change and its application in the Two Bidder Decision) by contrast, clearly implicate §1.2105(b)(2)’s prohibition on “major amendments” affecting eligibility for the small business bidding credit.

Finally, although there is *dicta* in *Biltmore* (at page 163) suggesting that amendments which decrease an applicant’s eligibility for a bidding credit are not “problems” under the rationale of §1.2105(b)(2), Petitioners respectfully submit that this *dicta* should not be followed. Firstly, for the reasons discussed more fully

*supra* and in Petitioners' Motion, this suggestion regarding the scope and purpose of §1.2105(b)(2) does violence to the plain language of the regulation which prohibits any change in eligibility for a small business entity bidding credit, whether an "upgrade" or "downgrade." Secondly, this *dicta* ignores the rulemaking history of §1.2105(b)(2). As discussed in the Motion, in the course of enacting §1.2105(b)(2), the FCC considered and rejected a proposal that would have permitted short-form applicants to compete with, only to later jettison, unlawful bidding credits. 63 FR 2315, 2322 (January 15, 1998).<sup>3</sup>

As noted in the Motion, there are also sound public policy reasons articulated by Congress for establishing and protecting bidding credit eligibility,

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<sup>3</sup> "[C]ommenters' opinions differ on what types of amendments the Commission should categorize as major or minor... [some] argue that major amendments should include all changes in ownership that constitute a change in control, as well as **all** changes in size that would affect an applicant's eligibility for designated entity provisions. [Others contend] that all changes in ownership incidental to mergers and acquisitions, non-substantial pro forma changes, and involuntary changes in ownership should be categorized as minor. Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short form filing deadline (i.e., go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (i.e., exceed the threshold for eligibility as a small business). [W]e believe that a definition of major and minor amendments similar to that provided in our PCS rules is appropriate... [A]pplicants will be permitted to make minor amendments to their... applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline... Consistent with the weight of the comments addressing the issue major amendments will also include **any** change in an applicant's size which would affect an applicant's eligibility for designated entity provisions. . . In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects... ." (emphasis added).

including fostering competition, promoting new and small wireless businesses and protecting the integrity of the bidding process. *See* 47 U.S.C. §309(j).<sup>4</sup> By

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<sup>4</sup> “(3) Design of systems of competitive bidding

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

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall - (A) consider alternative payment schedules and methods of calculation . . . that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(C) . . . .prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

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

These policies cannot be promoted by the Rule Change, since it allows entities that are not small companies to obtain and use bidding credits Congress meant only for bona fide small companies. That obviously and substantially decreases the “economic opportunity,” and “bidding preferences” for small businesses.

contrast, as demonstrated in the Motion, under the Rule Change scheme practiced by the FCC, applicants are economically incentivized (or at minimum allowed) to misrepresent their bidding credit eligibility (thereby permitting them to outbid other bidders at auction).

### 3. Subject Matter Jurisdiction

The FCC contends that subject matter jurisdiction is lacking on the basis of finality because on May 28, 2010, Petitioners filed an informal request with the FCC to stay Public Auction 87. However, this contention has been rendered moot, since the FCC failed to respond in any way to Petitioners' informal request for reconsideration. *See Exhibit 1*<sup>5</sup>

More fundamentally, the FCC's finality argument ignores the fact (clearly articulated in Petitioners' Motion) that this appeal does not arise out of DA 10-863

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<sup>5</sup> The FCC also claims a lack of finality under 47 USC §155(c)(7), without providing any authority which supports its implicit contention that an *ultra vires* rule change (such as the Rule Change at issue in this case) is subject to the general rules regarding finality. Moreover, this contention ignores §405(a) of the FCA, which states: "(a) After an order, decision, report, or action has been made... in any proceeding by the Commission, or by any designated authority within the Commission... any party thereto... may petition for reconsideration... The filing of a petition for reconsideration *shall not be a condition precedent to judicial review* of any such order... except where the party seeking such review (1) was not a party to the proceedings resulting in such order... or (2) relies on questions of fact or law upon which the Commission, or designated authority... has been afforded no opportunity to pass..." (emphasis added). As discussed herein and in the Motion: (i) Petitioners, as Qualified Bidders in Public Auction 87, are parties to that auction; and (2) the FCC has had the opportunity to pass upon Petitioners' request that it reconsider the Rule Change implemented by DA 10-863, but has refused to do so.

*per se*, but rather from the longstanding FCC *ultra vires* Rule Change implemented in a series of FCC auctions culminating in Public Auction 87. This *ultra vires* FCC determination is independently appealable. See *Alvin Lou Media v. FCC*, 571 F.3d 1, 7 (D.C. Cir. 2009) (“This court permit[s] both constitutional and statutory challenges to an agency’s application or reconsideration of a previously promulgated rule, even if the period for review of the initial rulemaking has expired”). At best, the FCC’s Rule Change could be construed as a declaratory ruling which is likewise appealable under 47 U.S.C. §402(a). *Wilson v. E.H. Belo Corp.*, 87 F.3d 393, 398 (9<sup>th</sup> Cir. 1996) (Ninth Circuit concludes that it had jurisdiction over an FCC declaratory ruling, rejecting the contention “that an FCC order must be either a regulation or an adjudication in order to trigger reviewability by the court of appeals under [§402]”). In any event, the FCC cannot, on one hand, promulgate and apply an *ultra vires years-long* practice (meant to be relied upon by auction applicants) permitting parties to compete with unlawful bidding credits, while on the other hand disingenuously claiming that this practice is not “final.”

Alternatively, even assuming *arguendo* that a final appealable order has not been entered in this case, this Court would still have the authority to grant the relief sought by Petitioners pursuant to the All Writs Act (28 USC §1651) and this Court’s inherent authority to issue writs of mandamus. As discussed at pages 25-27 of Petitioners’ Motion, mandamus is particularly appropriate in this case given

the merits of Petitioners' position and the irreparable harm Petitioners face (as discussed in the Motion and below).

## **B. Irreparable Injury**

Petitioners are small businesses *legitimately* entitled to the designated entity small business bidding credit. (*See Exhibit 2*). Nonetheless, on pages 9-10 of its Opposition, the FCC claims that Petitioners have failed to demonstrate “irreparable harm,” because “even assuming that Silke and Two-Way should be excluded from the auction, petitioners have failed to explain how [their] participation, out of at least sixty other bidders, will have any actual effect on them.” Once again, the FCC's approach is myopic or disingenuous. As explained in the Motion, the principal harm engendered by the FCC's unwarranted Rule Change (to Petitioners and the entire auction) goes far beyond its application in accepting Silke and Two-Way as Qualified Bidders in Public Auction 87. This Rule Change, in fact, permits any applicant, in any auction, to compete with unlawful bidding credits, subject to the FCC's “adjustment” of the auction payment price (assuming these unlawful credits are ever disclosed). As such, the failure to apply the actual regulation to disqualify Silke and Two-Way from Public Auction 87 is simply symptomatic of the much larger problem created by the Rule Change. In short, even if Silke and Two-Way had never falsely certified their bidding credit eligibility status, the harm to Petitioners would persist.

Indeed, as discussed in the Motion, the Rule Change has not only been used in this case, but also in a myriad of other cases.<sup>6</sup> Clearly, the FCC intends to continue to rely upon the Rule Change both in this auction and in subsequent auctions. In this auction, for example, over thirty Qualified Bidders (including Petitioners) have claimed designated entity status in Public Auction 87 *other than* Silke and Two-Way. (*See Exhibit 2*). The FCC's Rule Change allows *any* of these entities a *carte blanche* to use unlawful bidding credits (to keep bidding credits unlawfully obtained by false certification, or unlawfully retained after an increase in the applicant's attributable gross revenues)

It also emboldens bidders to claim or retain bidding credits that they know they are not entitled to in order to drive the bids in an auction higher, only to then (after they have already won the auction and have been awarded a spectrum license) seek to cure this misrepresentation.<sup>7</sup> It is well-established that the FCC

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<sup>6</sup> *See In re: 16 Bidders Qualified To Participate In Auction 86*, 2009 FCC LEXIS 5271 at \*25 (Oct. 8, 2009); *In re Auction of Aws-1 & Broadband PCS Licenses*, 23 FCC Rcd 11850, 11858 (August 4, 2008); *Auction of 700 MHz Band Licenses - Auction 73*, 23 FCC Rcd 276, 281 (January 14, 2008); *In re Five Bidders Qualified to Participate in Auction No. 72*, 2007 FCC LEXIS 4124 at \*17 (June 5, 2007); *Auction Of Broadband PCS Spectrum Licenses; 23 Bidders Qualified to Participate in Auction No. 71*, 22 FCC Rcd 8347 \*17 (May 2, 2007); *Auction Of 1.4 Ghz Band Licenses; Nine Bidders Qualified to Participate in Auction No. 6922*, FCC Rcd 605 \*14 (January 23, 2007); *Auction Of Advanced Wireless Services Licenses; 168 Bidders Qualified to Participate in Auction No. 66*, 21 FCC Rcd 8585 n. 15 (July 28, 2006)

<sup>7</sup> Notably, bids can be artificially inflated in this fashion in an auction even if the entity falsely designated as entitled to a bidding credit doesn't actually win the

cannot alter the financial terms of an auction after the auction is concluded. *See U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000) (“There is no basis for suggesting, as NextWave seems to do, that ex post changes can never affect the validity of a government auction”). Yet this is precisely what will occur if entities are permitted to cure their reliance upon unlawful bidding credits post-auction.<sup>8</sup>

These policies are inefficient from an economic perspective in that they confer unfair advantages on bidders that misrepresent their status as a designated entity. As one example, misrepresented bidders may inflate their apparent resources and may thereby discourage rule-abiding firms from bidding for the same auction items. As another example, misrepresented bidders may bid in part with FCC credits that need to be replaced only if they win the auction, thereby

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auction, so long as the entity bid with money that it didn't have during the course of the auction.

<sup>8</sup> The FCC suggests (as did the Court in *Biltmore*) that “a post-short-form reduction in the bidding credit ‘would [not] depriv[e] the other auction participants of information as to [the bidder’s] valuation of the frequency, or would have otherwise influenced bidding strategies.’” Deprivation of information is secondary – the real problem presented here is bidding by large companies as if they were small companies (with small business bidding company credits), which violates both FCC regulations and the Congressional mandate set forth in 47 U.S.C. §309(j). In any event, bidding strategies consider both information relevant to supply, and information relevant to demand. Under the Rule Change, there is no telling to what degree other bidders will be using unlawful, undeserved bidding credits. Where critical information regarding designated entity status is false or unknown, it decreases reliable information, increases risk, and undermines bidder trust in the FCC in its role as unbiased auctioneer, license regulator and promoter of fair competition.

helping those bidders preserve the option of raising money only if they win the auction. *See Robert McDonald and Daniel Siegel, The Value of Waiting to Invest, Quarterly Journal of Economics*, November 1986, pp. 707-28. *See also Fischer Black and Myron Scholes, The Pricing of Options and Corporate Liabilities, Journal of Political Economy*, May-June, 1973, pp. 637-54.<sup>9</sup>

In the context of FCC auctions, United States Courts of Appeal have consistently rejected similar FCC contentions of speculative injury/lack of standing, particularly where the FCC attempts to change auction rules without statutory authority. *See, e.g., U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000) (“A bidder in a government auction has a right to a legally valid procurement process; a party allegedly deprived of this right asserts a cognizable injury... A disappointed bidder need not... demonstrate that it would be successful if the contract were let anew but only that it was able and ready to bid... and that the [rule] prevent[ed] it from doing so on an equal basis”); *High Plains Wireless, LP v. FCC*, at 605 (“High Plains complains that it was injured because the Commission awarded the license to Mercury, which had violated the anti-collusion rule, instead of holding a new auction in which High Plains could bid free of the

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<sup>9</sup> This principle applies even in auctions such as Auction 87 (where the bids of others are kept anonymous to each bidder at the end of each bidding round), since the *identities* of all bidders, and their bidding credit level, are disclosed to all bidders. This constitutes sufficient information to cause rule-abiding bidders to alter their bidding strategies in consideration of the bidding credit level of the other bidders.

illicit influence of reflexive bidding... High Plains 'contentions that Mercury tried to mislead the Commission and to influence the Commission through illicit ex parte contacts also assert a cognizable injury, that of deprivation to a valid, impartial administrative proceeding, which injury this court could redress by reversing the Commission... "). Finally, on the issue of irreparable harm, it is worth noting that while the FCC maintains on page 11 of its Opposition that auctions can be redone under circumstances where the winner has been disqualified, it fails to identify a single auction in which this has actually occurred.

### **C. Balance of Hardships**

Finally, Petitioners reiterate that no party will suffer any material adverse effect if Public Auction 87 is briefly stayed. As noted in the Motion, this auction has been proceeding slowly in pre-auction stages for over half a year (since November 30, 2009), and has already been postponed once by the FCC. The auction is also scheduled to take place electronically, therefore no party will be required to alter any travel plans in the event of a stay.

### **CONCLUSION**

As noted by the Court in *Reuters Limited*:

it is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned... for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those

to whom Congress has entrusted the regulatory missions of modern life.

*Id.*, at 950-51.

The FCC has yet to get its story straight. It has promulgated §1.2105(b), which unambiguously bars all major amendments to short form applications. By virtue of the Rule Change, the FCC unilaterally resolved to construe §1.2105(b) in a manner that conflicts with the unambiguous language of the regulation (by allowing parties to jettison bidding credits). Now, the FCC is attempting to shift the sands once again in its Opposition, by claiming that “major amendments” only include an actual change in bidder size, while ignoring the fact that this interpretation once again conflicts with the plain language of §1.2105(b). In an obstinate refusal to acknowledge the self-evident fact that an attempt by a license applicant to cure an unlawfully-claimed bidding credit cannot possibly be viewed in the nature of a “minor amendment” to a short-form application, the FCC has engaged in precisely the type of “*post hoc* rationalization” and “legal creativity” that the D.C. Circuit has correctly deemed “sadly misguided.” *Reuters Limited*, at 951. The Motion should be granted.

Respectfully submitted,

Dated: June 14, 2010

/S/ Patrick J. Richard

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**EXHIBIT 1**

[After filing below, the FCC ECSF Docket system provided this confirmation-- "ECFS Filing Receipt Confirmation number: 2010613612158"-- at 7:52 pm Pacific time, June 13, 2010.]

This is filed in the FCC Auction-87 docket, **09-205**,  
on Sunday June 13, 2010 (which will appear in the docket as received on June 14, 2010).

This copy of the below email was placed into Word and then PDF format for greater legibility.  
No change was made to the text or highlighting.

- Warren Havens (identified below).

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**From:** Warren Havens <warren.havens@sbcglobal.net>  
**To:** Marlene.Dortch@fcc.gov; auction87@fcc.gov  
**Cc:** Margaret.Wiener@fcc.gov; Scott Mackoul <scott.mackoul@fcc.gov>;  
jsilke@silkecom.com; lester@twowayusa.com; jstobaugh@telesaurus.com;  
warrenhavens@mac.com  
**Sent:** Sun, June 13, 2010 7:01:12 PM  
**Subject:** Auct. 87: Request for Correction, 9th Circuit motion for stay, and related

To: FCC Secretary

Attn: Margaret Wiener  
Chief, Auctions and Spectrum Access Division  
(at the "auction87" email listed for you in DA 10-863)

Cc: Scott Mackoul (at email of record)  
Auction Rules, Policies, Regulations, of the Auctions and Spectrum Access  
Division

James Silke, President, Silke Communications (using title and email on the its  
Form 175)

Lester Boihem, "Officer," Two Way Communications (using title and email on its  
Form 175)

Re: DA 10-863, footnote 2, and par. 43 which the footnote is based upon.  
Motion for Correction, submitted May 28, 2010, and related matters

Dear Auction 87 staff:

(i). Since the FCC did not respond to my request for reconsideration and correction  
submitted May 28, noted below, and thereafter my Qualified-Bidder companies\* filed the  
below-noted court action, *that request is moot*.

1. However, for reasons noted below, I make clear here that whether or not the court  
grants the stay requested by the motion, my companies plan to contest this auction on  
the basis stated in the request and the motion.

Thus, if the stay is not granted by the court and the auction commences as now  
scheduled, this Tuesday June 15, 2010, *it would be proper* (and I hereby request for my  
companies listed below)\* *to give public notice to all bidders, including in the secure*

*bidding system* (that each bidder must log into to bid) of the fact that the request and motion were filed, and that my companies intend to pursue the arguments therein at least after the auction is over, in one or more forms, before the FCC and/ or court, including to seek to vacate the auction results.

(Also, placement by my companies in the Auction 87 docket of such a notice will not be as effective as the one just suggested, since a notice by FCC staff will have more effect since it is from the authority in charge, and since it must be read by bidders, whereas they may not check that docket and if they do they may not open and read a notice by my companies.)

Said notice would be in the public interest since bidders can then take that into account before and while bidding, and not after the auction allege that the FCC had that information but did not provide it, and then assert prejudice on that basis. Also, I give this notice so that, after the auction, in said challenges my companies plan to bring, the FCC cannot assert prejudice on behalf of the high bidders and other bidders on the basis of lack of knowledge.

2. Of course, the FCC could have expected this challenge in the request and motion based on the Auction 61 proceeding involving the long-form of MCLM, where to defend MCLM and its owners the FCC first constructed the argument it uses in opposing the motion based on the *dicta* in the *Biltmore* court decision: that Section 1.2105(b) does not mean what it literally states and what the Commission explained it means when deciding upon its current form, but means something quite different. Since, from year 2005, my companies have been opposing that (and the predictable ramifications now shown in the Enforcement Bureau's investigation related to that long form) the FCC could have expected this current challenge in this auction.

In practical terms, I respectfully submit that the FCC should have previously noticed said Auction 61 proceeding in the Auction 87 Public Notices, *and it should at least provide that notice now, by the means and pre-auction time indicated above*, since the results of that proceeding could affect the validity of the subject FCC Auction-87 decisions in paragraph 43 and footnote 2 of DA 10-863, and the outcome of this Auction 87.

3. Further, the following should be clarified to the auction bidders prior to the auction. In the *Biltmore* court decision *dicta* relied upon by the FCC (as noted above), the court indicated that it saw no problem in allowing not only a decrease in designed entity size (bidding/ payment credit level) (which par. 43 of DA 10-863, noted above, allows), but also an increase, as compared to what a bidder certified on its short form application. It is confusing for the FCC to use--to justify said paragraph 43 and footnote 2--only one half of this *dicta* statement at this time: that leaves unclear as to whether the FCC means to employ the other part also at this time or some future point in time. Accordingly, *I respectfully request that this also be subject of a notice by the same means and pre-auction time indicated above.*

4. Also, the FCC General Counsel has, in its opposition to the motion, provided an example given by the Commission in formulating Section 1.2105(b)(2) that amendments changing and decreasing bidding-credit eligibility size are prohibited, disqualifying major amendments. However, that is what said par. 43 allows. Thus, DA 10-863 should be amended to explain this correction (if said prohibition is the current, changed position of the FCC and that also is not changed). (That is, in fact, part of the correction I requested

on May 28 request: but I don't believe that correction is effectively made in a court pleading: it should be made to the qualified bidders in a proper notice amending DA 10-863.) *I thus also respectfully request this correction.*

If you put out any of the above-requested notices, it is my understanding that under applicable law, you must provide ample time between the notice and actions that may be taken to comply with and use the information within said notice(s). Thus, please provide such ample time.

None of the above amends, other than to add further support of, the positions I have expressed for my qualified-bidder companies\* in the above-noted request and motion.

Thank you again for your work in Commission auction and licensing matters.

Sincerely,

*Warren Havens*  
President

\* Auction 87 Qualified Bidders --  
Skybridge Spectrum Foundation  
V2G LLC  
Intelligent Transportation & Monitoring Wireless LLC

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**From:** Warren Havens <warren.havens@sbcglobal.net>

**To:** auction87@fcc.gov

**Cc:** Margaret.Wiener@fcc.gov; Scott Mackoul <scott.mackoul@fcc.gov>;  
jstobaugh@telesaurus.com; warrenhavens@mac.com

**Sent:** Tue, June 8, 2010 4:10:37 PM

**Subject:** Auction 87: 9th Circuit Court - motion for stay and other relief

Dear FCC Auction 87 staff:

As reflected in the email below (of which Mr. Schlick confirmed receipt), attached is a court filing submitted today seeking a stay of and other relief related to Auction 87.

In my email to you dated May 28, 2010, I explained that my companies that are Qualified Bidders in Auction 87\* would prepare and submit this court filing if my request for correction submitted in that email was not granted by the end of June 3, 2010, which did not occur.

I will also file a copy of this email and the attachment in Docket 09-205 so that other Qualified Bidders have access.

Sincerely,

*Warren Havens*  
President

**EXHIBIT 2**

## Attachment A

**FCC Lower and Upper Paging Bands Auction****Auction ID: 87****Qualified Bidders**

(Sorted by Applicant)

Date of Report: 05/27/2010 11:27 AM ET

The following applicants have been determined to be "Qualified."



FRN	Name	Bidding Credit Revenue Range	Waiver Requested
0004159901	A BEEP, LLC	3,000,000 - 15,000,000	
0003008968	A. V. Luttamus Communications, Inc.	3,000,000 - 15,000,000	
0001571686	Advanced Paging & Communications Inc	0 - 3,000,000	
0019662865	AFIFEH, OMAR M		
0019131390	AMS Spectrum Holdings, LLC		
0005224027	Bay Electronics, Inc.		
0004246849	Big Rivers Electric Corporation		
0019642420	Blue Ridge Electric Cooperative, Inc		
0004899530	Burlington Communications Service Center Inc.	0 - 3,000,000	
0005901954	Busby, Christine M	0 - 3,000,000	
0004643466	Buttner Holdings, LLC	3,000,000 - 15,000,000	
0004098562	Central Vermont Communications, Inc.	0 - 3,000,000	
0003984119	Centre Communications, Inc.	3,000,000 - 15,000,000	
0017992058	Chesapeake Operating, Inc.		
0001634724	Clark Communications	0 - 3,000,000	
0001961903	Communication Specialists Company of Wilmington, L		
0003910213	Communications Equipment		
0002771897	Consumers Energy		
0001724590	Cook Telecom, Inc.	3,000,000 - 15,000,000	

## Attachment A

**FCC Lower and Upper Paging Bands Auction****Auction ID: 87****Qualified Bidders**

(Sorted by Applicant)

Date of Report: 05/27/2010 11:27 AM ET

The following applicants have been determined to be "Qualified."



FRN	Name	Bidding Credit Revenue Range	Waiver Requested
0001673979	Dallas County Community College District		
0001553585	Day Management Corporation		
0005834197	DiLorenzo, Ermanno	0 - 3,000,000	
0001857747	Diverse Power Inc		
0002588085	Electronic Engineering Corporation		
0002898633	Emergency Radio Service, Inc.		
0003944527	Fisher Wireless Services, Inc.		
0015179831	FLA LIC, LLC		
0004250114	FleetTalk Partners, Ltd		
0005278601	Futronics Paging, Inc.	3,000,000 - 15,000,000	
0001732387	Gabriel Wireless, LLC	0 - 3,000,000	
0019646421	Guller, Steven J		
0001783935	HARLAN 2-WAY INC.	0 - 3,000,000	
0002157071	Holesworth, William A	0 - 3,000,000	
0005901301	Howard Communications, Inc.	0 - 3,000,000	
0002896041	Indiana Paging Network, Inc.	3,000,000 - 15,000,000	
0012930582	Intelligent Transportation & Monitoring Wireless	0 - 3,000,000	
0001617034	Intermountain Rural Electric Association		
0005861034	Itron, Inc.		

## Attachment A

**FCC Lower and Upper Paging Bands Auction****Auction ID: 87****Qualified Bidders**

(Sorted by Applicant)

Date of Report: 05/27/2010 11:27 AM ET

The following applicants have been determined to be "Qualified."



FRN	Name	Bidding Credit Revenue Range	Waiver Requested
0003918539	Jenkins, Micheal H		
0001702562	KAMO Electric Cooperative, INC.		
0001794403	KENTUCKY UTILITIES COMPANY		
0008646440	KTI, Inc.	0 - 3,000,000	
0003647021	Lincoln Communications Inc		
0004921219	MacIntyre, Scott C	0 - 3,000,000	
0004444105	Minnesota Mobile Telephone Company	0 - 3,000,000	
0000012625	Mountain Communications and Electronics, Inc.		
0004127932	New York State Electric & Gas Corporation		
0010716645	P&R Spectrum Resources		
0001566660	PacifiCorp		
0018679357	PHI Service Company		
0001840347	ProPage, Inc.	3,000,000 - 15,000,000	
0003474715	Repeater Network, LLC	3,000,000 - 15,000,000	
0005007141	Saia Communications, Inc.	3,000,000 - 15,000,000	
0001673599	SAT Radio (DBA-Industrial Communications)	3,000,000 - 15,000,000	
0003256666	Schuylkill Mobile Fone, Inc.	3,000,000 - 15,000,000	
0016179707	Serv-Quip LP	0 - 3,000,000	
0005027701	Sherman, Arthur N	3,000,000 - 15,000,000	

## Attachment A

**FCC Lower and Upper Paging Bands Auction****Auction ID: 87****Qualified Bidders**

(Sorted by Applicant)

Date of Report: 05/27/2010 11:27 AM ET



The following applicants have been determined to be "Qualified."

FRN	Name	Bidding Credit Revenue Range	Waiver Requested
0001551480	Silke Communications	3,000,000 - 15,000,000	
0016374563	Skybridge Spectrum Foundation	0 - 3,000,000	
0018424986	TBA Communications, Inc.	0 - 3,000,000	
0001637990	Texas Bigfoot Communications	0 - 3,000,000	
0006499669	Tittle, Thomas W	0 - 3,000,000	
0001615863	Tri-State Generation and Transmission Association,		
0003245768	Triangle Communications, Inc.		
0014039101	TTP Licenses, Inc.		
0001718543	Two Way Communications		
0019661297	V2G LLC	0 - 3,000,000	
0010067395	Wireless Ventures LLC	3,000,000 - 15,000,000	
0002689628	Wisconsin Department of Transportation		

**CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2010 a copy of the foregoing document has been served on the following:

**Via electronic mail and Federal Express (Overnight Delivery)**

Austin Schlick, General Counsel  
Daniel M. Armstrong, Associate General Counsel  
Office of General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, DC 20554

**Via Federal Express**

United States Department of Justice  
Civil Division, Appellate Staff  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Marlene Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
9300 East Hampton Drive  
Capital Heights, Md. 20743

Lester L. Boihem  
Two Way Communications, Inc.  
1704 Justin Road  
Metairie, LA 70001

Frank W Ruth  
Two Way Communications, Inc.  
2819 East Simcoe Street  
Lafayette, LA 70501

James D. Silke  
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680 Tyler Street  
Eugene, Oregon 97402

Robert Schwaninger, Esq.  
6715 Little River Turnpike, Suite 204  
Annandale, Va. 22003  
Attorney for Silke Communications, Inc.

/S/

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Tamir Damari