
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,) WT Docket No. 10-112
95, and 101 To Establish Uniform License)
Renewal, Discontinuance of Operation, and)
Geographic Partitioning and Spectrum)
Disaggregation Rules and Policies for Certain)
Wireless Radio Services)
)
Imposition of a Freeze on the Filing of)
Competing Renewal Applications for Certain)
Wireless Radio Services and the Processing of)
Already-Filed Competing Renewal)
Applications)

COMMENTS OF N.E. COLORADO
CELLULAR, INC., D/B/A VIAERO WIRELESS

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August 6, 2010

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GLOSSARY

Act	Communications Act of 1934, as amended
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
ATN	Atlantic Tele-Network, Inc. & Tisdale Telephone Co., LLC

ATN Petition	Petition for Partial Reconsideration and/or Clarification of Order Regarding the Processing of Pending, Cut-Off Cellular Applications, WT Docket No. 10-112 (June 24, 2010)
ATN Supplement	Supplement to Petition for Partial Reconsideration and/or Clarification of Order Regarding the Processing of Pending, Cut-Off Cellular Applications, WT Docket No. 10-112 (July 27, 2010).
Bureau	Wireless Telecommunications Bureau
D.C. Circuit	United States Court of Appeals for the District of Columbia Circuit
Ex.	Exhibit
Kankakee Cellular	Kankakee Cellular L.L.C.
Kankakee MSA	Kankakee, Illinois MSA
MSA	Metropolitan Statistical Area
Nebraska 1	Nebraska 1 - Sioux RSA
Part 22	Part 22 of the Rules
Rules	Rules and Regulations of the Commission
RSA	Rural Service Area
Sagir	Sagir, Inc.
Tisdale	Tisdale Telephone Company, LLC
ULS	Universal Licensing System
Viaero Petition	N.E. Colorado Cellular, Inc., Petition to Deny, File No. 000021286 (Mar. 19, 2001)
Wireless Services	Wireless Radio Services as defined by 47 C.F.R. § 1.907

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CELLULAR, INC., D/B/A VIAERO WIRELESS

N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless (“Viaero”), by its attorneys, hereby submits its comments in response to paragraph 116 of the Commission’s Notice of Proposed Rulemaking and Order, FCC 10-86, released May 25, 2010 (“NPRM”), in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Viaero is an independent wireless carrier, providing commercial mobile wireless services in Colorado, Nebraska, Wyoming and Kansas.¹ Viaero began operating a wireless network in Colorado in 1990, and has grown its business to become a regional carrier with over 75,000

¹In Colorado, Viaero is licensed in substantial rural areas in the eastern and southern portions of the state. In Nebraska, Viaero is licensed in almost all of the state, except for the cities of Omaha and Lincoln and some southeastern counties. In Wyoming, the company operates in the southeastern part of the state. In Kansas, Viaero is licensed in northwestern and northeastern areas of the state.

customers. Headquartered in Fort Morgan, Colorado, Viaero has roughly 400 employees in Colorado and Nebraska, including sales, marketing, network operations, and customer service representatives, as well as tower crews that construct, upgrade and maintain Viaero's network.²

By September 2000, Viaero was serving two RSAs in Colorado and one in Nebraska. Viaero had demonstrated its qualifications by providing substantial and economical service to the public during its ten-year term as a licensee. It elected to expand its successful operations by challenging Sagir's application to renew its Nebraska 1 authorization. *See* NPRM at 39 (¶ 104). Viaero made that election in reliance both on the Commission's existing rules for comparative cellular renewal proceedings and its obligation to abide by those rules.

In January 2001, Viaero's right to be included in a renewal filing group with Sagir had been confirmed by the Bureau. By no later than late September 2004, the Bureau had concluded its pre-designation review of Viero's Nebraska 1 application. By that time, Viaero had accrued a right to a comparative hearing with Sagir under the *Ashbacker* doctrine,³ which was codified in the full-hearing requirement of § 309(e) of the Act⁴ and implemented by §§ 22.131 and 22.935 of the Rules.⁵

The Commission was obliged to designate the competing Nebraska 1 applications for a comparative renewal hearing and to conclude it within a reasonable time.⁶ Nevertheless, Viaero and Sagir have been waiting for the issuance of a hearing designation order for nearly six years.

² Viaero does not employ outside contractors to engineer or construct towers.

³ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

⁴ 47 U.S.C. § 309(e). *See Florida Institute of Technology v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992) (§ 309(e) codifies "*Ashbacker's* hearing requirement").

⁵ *See* 47 C.F.R. §§ 22.131(c)(4)(i) & 22.935(c).

⁶ *See* 5 U.S.C. § 555(b) (each agency shall proceed to conclude a matter presented to it "within a reasonable time").

Now, the Commission is proposing to ban the filing of competing renewal applications prospectively and to apply the ban retroactively to dismiss the Nebraska 1 application that Viaero filed nearly ten years ago. *See* NPRM at 38-30 (¶ 100). In effect, the Commission is proposing to compound its failure to adjudicate the Nebraska 1 case in accordance with its existing rules by disposing of the case entirely by retroactively applying new rules.

If it carries through with its proposal, the Commission will engage in invalid retroactive rulemaking under *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) since Congress has not expressly empowered the Commission to promulgate retroactive rules. The Commission’s prohibition on competing renewal applications would be subject to *Bowen*’s categorical ban on unauthorized retroactivity since its application of the prohibition to Viaero would extinguish the *Ashbacker* rights upon which Viaero has relied for the past ten years.

BACKGROUND

A. The Cellular Renewal Rulemaking

In the Commission’s words, §§ 22.935 and 22.940 of the Rules “established a detailed, two-step comparative hearing process for addressing a timely-filed renewal application and all timely-filed mutually exclusive applications.” NPRM at 4 (¶ 9). Those rules were the product of a notice-and-comment rulemaking that began on September 19, 1990 and finally concluded on July 7, 1994.⁷

At the outset of the *Cellular Renewal Rulemaking*, the Commission recognized that § 309 of the Act required it “to conduct a comparative hearing in the event that one or more mutually

⁷ *See Amendment of Part 22 of the Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunication Service*, 5 FCC Rcd 5593 (1990), *rules adopted*, 7 FCC Rcd 719 (1991), *modified on reconsideration*, 8 FCC Rcd 2834 (1993), *enforcement suspended in part*, 8 FCC Rcd 8135 (1993), *reconsideration denied*, 8 FCC Rcd 6288 (1993), *clarified and revised on further reconsideration*, 9 FCC Rcd 4487 (1994) (“*Cellular Renewal Rulemaking*”).

exclusive applications are filed in accordance with [its] Rules against a renewal applicant.” 5 FCC Rcd at 5593. Under the Commission’s two-step renewal hearing procedure, however, a competing applicant would lose its *Ashbacker* right to a “full hearing” under § 309(e) if an ALJ determined at step one that the cellular renewal applicant was “basically qualified and due a renewal expectancy.” 47 C.F.R. § 22.935(c).

The Commission knew throughout its *Cellular Renewal Rulemaking* that a two-step renewal procedure had been found to violate § 309(e) of the Act and the *Ashbacker* doctrine. See *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1211-12 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir 1972) (the proposition that the two-step procedure violates § 309(e) and *Ashbacker* “is so obvious it need not be labored”). Indeed, recognizing that a two-step procedure could run afoul of § 309(e) as interpreted in *Citizens*, the Commission declined to adopt a bifurcated cellular renewal process in 1991. *Cellular Renewal Rulemaking*, 7 FCC Rcd at 725.

Believing that it could distinguish *Citizens*, or persuade the D.C. Circuit *en banc* to overrule its decision, the Commission reversed course in 1993 and adopted its legally suspect two-step comparative hearing procedure. See *Cellular Renewal Rulemaking*, 8 FCC Rcd at 2838-39. Obviously not confident that the procedure could pass muster before an appeals court, the Commission hedged its bet by staying the effectiveness of its new two-step renewal rule until it was no longer subject to judicial review. See *id.* at 2840. However, the rule was never subjected to such review.

B. The Nebraska 1 Proceeding

During the fifteen years that the cellular renewal rules have been in effect, only two applications were filed that were mutually exclusive with applications for the renewal of cellular

authorizations.⁸ The first was the Nebraska 1 application that Viaero filed on September 29, 2000. *See* NPRM at 39 (¶ 104) & n.278.

The Commission's first comparative renewal proceeding was hotly contested from the outset. Over a less-than-three-month period in 2001, Sagir and Viaero filed more than 20 pleadings with the Commission.⁹ One of the issues that came to the fore during that period was whether the Commission's two-step comparative hearing process was lawful.

Viaero argued that the two-step procedure violated § 309(e) and the *Ashbacker* doctrine, as they were applied by the D.C. Circuit in *Citizens*.¹⁰ It vowed to take the issue to the D.C. Circuit if it was deprived of its *Ashbacker* right to a full hearing by a step-one determination that Sagir was due a renewal expectancy.¹¹

By September 21, 2004, the competing applications for the Nebraska 1 authorization had been processed and were ripe for designation for a comparative hearing under § 22.935(c) of the Rules.¹² Six years later, the Commission proposed to deprive Viaero of its *Ashbacker* right to a hearing, and it confirmed the obvious fact that a freeze had been imposed on the long-pending, mutually-exclusive Nebraska 1 applications. *See* NPRM at 3 (¶ 3), 4 (¶ 6), 39-40 (¶¶ 102, 104).

C. The Kankakee Proceeding

Nearly nine years after Viaero filed its competing application for Nebraska 1, Tisdale triggered the only other cellular comparative proceeding when it filed a competing application

⁸ *See* NPRM at 39-40 (¶¶ 104, 105); ATN Petition at 8 n.6.

⁹ *See infra* Ex. 1 at 3; Ex. 2 at 4.

¹⁰ *See* Viaero Petition at 2-7.

¹¹ *See id.* at 7.

¹² According to the ULSD, the Bureau completed its substantive review of Sagir's application on April 3, 2001. *See infra* Ex. 1 at 2. Review of Viaero's application was completed on September 21, 2004. *See infra* Ex. 2 at 3.

against Kankakee Cellular’s application for the renewal of its authorization to serve the Kankakee MSA.¹³ The Commission placed a freeze on the Kankakee proceeding despite Kankakee Cellular’s record statement that it intended to withdraw its renewal application. *See* NPRM at 40 (¶ 105). True to its word, Kankakee Cellular withdrew its renewal application on June 29, 2010.¹⁴

Assuming the withdrawal of the Kankakee renewal application is effective,¹⁵ Viaero is prosecuting the lone application that is mutually exclusive with a cellular renewal application. If the Commission abides by § 22.935(c) of its Rules, the Nebraska 1 applications will be designated for the first and only cellular comparative renewal hearing. If that is the case, one and only one of the 1,400 cellular renewal applications filed will undergo a comparative hearing.¹⁶

ARGUMENT

I. THE COMMISSION IS WITHOUT AUTHORITY TO RETROACTIVELY DEPRIVE VIAERO OF ITS STATUTORY RIGHT TO A FULL HEARING

The Commission’s proposed prohibition on competing renewal applications cannot be applied retroactively to cause the dismissal of Viaero’s Nebraska 1 application. To do otherwise would constitute invalid retroactive rulemaking, since Congress has not given “the power to promulgate retroactive rules” to the Commission “in express terms.” *Bowen*, 488 U.S. at 208. The prohibition would be subject to the *Bowen* categorical ban on unauthorized retroactivity, because application of the prohibition to Viaero would deprive the company of its statutory right

¹³ *See infra* Ex. 3 at 1. *See also* NPRM at 40 (¶ 105) & n.284.

¹⁴ *See infra* Ex. 4 at 1, 5. *See also* ATN Supplement at 2.

¹⁵ It does not appear that the withdrawal of a renewal application could be subject to the Commission’s ban on filing “any additional pleadings or correspondence” regarding the currently pending renewal applications or mutually exclusive applications. NPRM at 39 (¶ 102).

¹⁶ *See* ATN Petition at 8 n.6.

to a full comparative renewal hearing under § 309(e) and *Ashbacker*. See *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (a statute’s effects would be retroactive if it “would impair rights a party possessed when he acted”). As we show below, Viaero’s right to a comparative hearing accrued no later than September 21, 2004.

A. Viaero Has an Accrued Right to an *Ashbacker* Hearing under § 309(e) of the Act and §§ 22.131 and 22.935 of the Rules

Ashbacker and its progeny have been recognized as “perhaps the most important series of cases in American administrative law.” *Citizens*, 447 F.2d at 1210-11. The Supreme Court’s “watershed decision” in *Ashbacker* has required cellular comparative hearings in the past.¹⁷ And it still calls for comparative hearings in connection with mutually exclusive applications that are not subject to competitive bidding.¹⁸

In *Ashbacker*, the Supreme Court reconciled two provisions of § 309(a): one that granted the Commission the authority to grant an application without a hearing and the other that gave applicants a right to a hearing before their applications are denied. See 326 U.S. at 329-30. The Court found that § 309(a) did not authorize the Commission to “grant one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress accorded applicants before denials of their applications becomes an empty thing.” *Id.* at 330. Thus, the Court held that “where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.” *Id.* at 333.

Congress has amended § 309(a) on multiple occasions since the Court decided

¹⁷ *Cellular Mobile Systems of Pennsylvania, Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985). See *Cellular Communications Systems*, 86 F.C.C. 2d 469, 499-500, *on reconsideration*, 89 F.C.C. 2d 58 (1981), *on further reconsideration*, 90 F.C.C. 2d 571 (1982).

¹⁸ See 47 U.S.C. § 309(j)(1) (competitive bidding applies to mutually exclusive applications for “any initial license or construction permit”).

Ashbacker, but the doctrine remains in full force. Section 309(a) still authorizes the Commission to grant applications without a hearing if it finds, upon examination of the application, that the public interest, convenience and necessity will be served by such a grant. See 47 U.S.C. § 309(a). But the *Ashbacker* hearing requirement now codified in § 309(e) affords an applicant the right to a full hearing before its application is denied:

If, in the case of any application to which subsection (a) of this section applies ... the Commission for any reason is unable to make the finding specified in such subsection, it *shall* formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * * *Any hearing subsequently held upon such application shall be a full hearing* in which the applicant and all other parties in interest shall be permitted to participate.¹⁹

Under the current version of § 309, the *Ashbacker* doctrine provides that a § 309(a) grant of one of two mutually exclusive applications without a hearing deprives the second applicant of its § 309(e) right to a full hearing. See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 438 (D.C. Cir. 1991). Therefore, the doctrine holds that under § 309(e), “where two or more applications ... are mutually exclusive, the Commission must conduct one full comparative hearing of the applications.” *Citizens*, 447 F.2d at 1211.

The statutory right to a full hearing “materialize[s]”²⁰ when a non-auctionable application subject to § 309(e) is timely filed, accepted for filing by the Commission, and is mutually exclusive with another application.²¹ In this case, Viaero’s statutory right to a hearing accrued no later than September 21, 2004, the day on which the Commission’s staff completed its review

¹⁹47 U.S.C. § 309(e) (emphasis added).

²⁰*Kessler v. FCC*, 326 F.2d 673, 685 (D.C. Cir. 1963).

²¹See *id.* at 687-88.

of Viaero’s Nebraska 1 application.²² By that time, the staff had determined that Viaero had taken the steps necessary to have its Nebraska 1 application included in the Sagir renewal filing group and “designated for comparative consideration in a hearing.” 47 C.F.R. § 22.131(c)(4)(i). The Commission cannot employ a notice-and-comment rulemaking now to divest Viaero of the statutory right to a hearing that accrued six years ago.

B. The Proposed Ban on Mutually Exclusive Applications Will Have a Retroactive Effect If Applied to Viaero’s Nebraska 1 Application

The Commission has tentatively concluded that it has the rulemaking authority not only to ban competing renewal applications prospectively, but to apply the ban to dismiss the Nebraska 1 application that Viaero filed nearly ten years ago. *See* NPRM at 38-30 (¶ 100). The Commission finds its authority in three D.C. Circuit cases,²³ none of which support its tentative conclusion.²⁴ In this rulemaking, the Commission is proposing to retroactively nullify the “*Ashbacker*-mandated right to a comparative hearing”²⁵ that has been codified in § 309(e) and conveyed by §§ 22.131 and 22.935 of the Rules. To adopt such a proposal would constitute retroactive rulemaking that is unauthorized under *Bowen* and unlawful under the APA.

For its rulemaking authority, the Commission relies on §§ 1, 2, 4(i), 301, 303, 308, 309 and 332 of the Act. *See* NPRM at 46 (¶ 123). However, only §§ 4(i) and 303(r) expressly authorize the Commission to engage in rulemaking. They empower the Commission to “make such rules and regulations” that it deems necessary to carry out the provisions of the Act, provided that such rules and regulations are not inconsistent with the Act or law. 47 U.S.C. §§

²² *See infra* Ex. 2 at 3.

²³ *See* NPRM at 39 n.273 (citing *Hispanic Information & Telecommunications Network, Inc.*, 865 F.2d 1289 (D.C. Cir. 1989), *Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998) and *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997)).

²⁴ *See* ATN Petition at 11-16.

²⁵ *Reuters Limited v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986).

154(i) & 303(r). While it is authorized to make rules and regulations by the Act, the Commission nevertheless must comply with the rulemaking requirements of the APA. *See, e.g., Sprint Corp. v. FCC*, 315 F.3d 369, 376-77 (D.C. Cir. 2003).

The APA distinguishes between a “rule” that is formulated, amended, or repealed by a rulemaking and an “order” formulated in an adjudication. *See* 5 U.S.C. § 551(4)-(7). The former is defined as “an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy.”²⁶ Thus, under the APA, rules adopted by notice-and-comment rulemakings “are prospective in application only.” *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972). *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992, *cert. denied*, 509 U.S. (1993) (a rulemaking “operates only prospectively”). Because the APA bans the retroactive application of a legislative rule, the Commission cannot promulgate retroactive rules unless the power to do so “is conveyed by Congress in express terms.” *Bowen*, 488 U.S. at 208.

The Supreme Court in *Bowen* adopted no explicit definition of the sort of retroactivity that would trigger its requirement of explicit Congressional authorization. But the rule in

²⁶ 5 U.S.C. § 551(4) (emphasis added). In his concurring opinion in *Bowen*, Justice Scalia noted that the 1947 Attorney General’s Manual on the APA (to which the Supreme Court has “repeatedly given great weight”) stated that all rules “must be of *future effect*, implementing or prescribing future law.” 488 U.S. at 218 (emphasis in original). The Manual explained that the APA is entirely “based upon a dichotomy between rule making and adjudication” and that rulemaking is “agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.” *Id.* at 218-19. Justice Scalia reasoned that the “entire dichotomy” on which the APA is based would be destroyed if the APA’s definition of a “rule” could be read to mean that “merely *some* of their legal consequences must be for the future.” *Id.* at 216 (emphasis in original). He agreed with the D.C. Circuit’s decision in *Bowen*. *See id.* That court held that the agency violated the APA by retroactively applying a legislative rule adopted in a notice-and-comment rulemaking. *See Georgetown University Hospital v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987).

question in *Bowen* indicates one form of retroactivity. It involved the allocation, between the government and hospitals, of the costs of past medical services. *See Bowen*, 488 U.S. at 205-6. As described by the D.C. Circuit, “The rule in force at the time hospitals performed their services gave them a legal right to reimbursement at one rate; the ... later rulemaking extinguished that right, replacing it with a right to reimbursement at a lower rate.”²⁷ Hence, “the rule change was retroactive ‘in the sense of altering the past legal consequences of past actions.’”²⁸

In *Landgraf*, the Supreme Court recognized that it has used various formulations to describe a “functional” concept of legislative retroactivity. 511 U.S. at 269. *See Hughes Aircraft Co. v. United States*, 520 U.S. 939, 947 (1997). One such formulation is that a statute would have retroactive effect if it “would impair rights a party possessed when he acted.” *Landcraft*, 511 U.S. at 280. But to be retroactive, statutes need not impair “vested rights.” *See id.* at 275 n.29. Moreover, even statutory changes in procedural rules can have a retroactive effect. *See id.* Hence, “[a] new rule concerning the filing of a complaint would not govern an action in which the complaint had already been properly filed under the old regime.” *Id.*

The impairment-of-a-right test for statutory retroactivity is among those that are applied to determine whether the retroactive application of a Commission rule would trigger the *Bowen* explicit authorization requirement. *See Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001). Under that test, the Commission would engage in retroactive rulemaking if it enforced its proposed ban on the filing of competing renewal applications by dismissing Viaero’s long-pending Nebraska 1 application. As was the case in *Bowen*, the application of the ban to Viaero would *extinguish* — not impair — rights upon which it has relied for nearly ten years.

²⁷ *Bergerco Canada v. U.S. Treasury Department*, 129 F.3d 189, 192 (D.C. Cir. 1997).

²⁸ *Id.* (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)).

Regardless of the judicial pronouncements to the effect that the filing of an application does not vest rights in an applicant, the Commission cannot dispute that it has long recognized that the timely filing of a bona fide, mutually exclusive application does convey what it recently characterized as “the due process rights established in *Ashbacker*.” *Scott R. Flick, Esq.*, 24 FCC Rcd 9064, 9066 (Audio Div. 2009). When it crafted its current comparative cellular renewal procedures, the Commission took care not to “deny timely-filed challenging applicants their *right* to a hearing guaranteed by [*Ashbacker*].” *Cellular Renewal Rulemaking*, 7 FCC Rcd at 725-26 (emphasis added). Suffice it to say, the proposed divestiture of the “well-established and vital rights conferred by *Ashbacker*”²⁹ on Viaero would constitute retroactive rulemaking under the Supreme Court’s impairment-of-a-right test.

C. Congress Has Not Authorized the Commission to Eliminate the Comparative Cellular Renewal Process by the Promulgation of a Retroactive Rule

Again, the procedural rights conferred by *Ashbacker* encompass the right to a full hearing under § 309(e). From the time it filed its competing Nebraska 1 application under § 22.113 of the Rules in September 2000 to the present, Viaero has had a § 309(e) right to a hearing, and the Commission was under the corresponding statutory duty to provide that basic procedural right. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 223 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (when a statute dictates that a party receive notice and a hearing, the provision of those “basic procedural rights” is not left to administrative discretion). The Commission cannot escape its statutory duty to afford Viaero a full hearing by the retroactive application of one of its own rules, any more than it can deprive Viaero of its right to a hearing by retroactive rulemaking. Congress must expressly authorize the Commission to employ a rulemaking to retroactively abrogate both its duties under the Act and the procedural rights the statute affords private parties.

²⁹ *Reuters*, 781 F.2d at 951.

Congress expressly gave the Commission the authority to grant a mutually exclusive application for an “initial license” by lottery rather than by comparative hearing. *See* 47 U.S.C. § 309(i)(1). Congress subsequently directed the Commission to grant such applications by auction, *see id.* § 309(j)(1), and it expressly authorized the retroactive use of auctions in pending comparative licensing cases involving applications for initial licenses for radio and television stations. *See id.* § 309(l). Congress also amended the Act to eliminate the comparative renewal process for broadcast stations. *See id.* § 309(k). *See also* NPRM at 17 n. 115. But Congress has not amended the Act to eliminate the comparative renewal process for cellular authorizations (or for any other authorizations for Wireless Services). Nor has it authorized the Commission to eliminate the comparative cellular renewal process by the promulgation of a retroactive rule. Consequently, implementation of the Commission’s proposal to apply a ban on competing cellular applications to Viaero’s pending Nebraska 1 application would be unauthorized and invalid. *See Bowen*, 488 U.S. at 215-16.

II. THE RETROACTIVE APPLICATION OF A BAN ON COMPETING CELLULAR RENEWAL APPLICATIONS IS PROHIBITED BY THE ACCARDI DOCTRINE

The *Accardi* doctrine holds that federal agencies are bound to follow their own rules, even self-imposed rules that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954). The doctrine has its constitutional roots in due process jurisprudence and the “founding, constitutional principle that the Government is bound by law.” *Wilkinson v. Legal Services Corp.*, 27 F.Supp.2d 32, 60 (D.D.C. 1998). But the *Accardi* principle that “an agency must adhere to its own rules and regulations” has become a “basic tenet” of administrative law. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (quoting *Reuters*, 781 F.2d at 950). The *Accardi* doctrine requires the Commission to adhere not only to its properly-promulgated procedural rules, but also to its “established and announced

procedures” because their publication creates a “reasonable expectation” in parties to the agency’s proceedings that the procedures will be followed. *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir.1976).

From 1994 until today, the procedures for mutually exclusive applications set forth in § 22.131 of the Rules allowed renewal applications and “all timely-filed mutually exclusive competing applications” to be included in a “renewal filing group” for concurrent consideration by the Commission. 47 C.F.R. § 22.131(b)(1). The rule explicitly provided that “[a]ll mutually exclusive applications in a renewal filing group are designated for comparative consideration in a hearing.” *Id.* § 22.131(c)(4)(i).

Since 1994, the procedures that apply to cellular “comparative renewal proceedings” were contained in § 22.942 (subsequently § 22.935), which was properly promulgated in the *Cellular Renewal Rulemaking*. See 9 FCC Rcd at 4491. The Commission’s comparative cellular renewal procedures have provided that a renewal application and any competing application would be designated for a two-step evidentiary hearing conducted by an ALJ, see 47 C.F.R. § 22.935(c), using “expedited hearing procedures.” *Id.* § 22.935(f). Under the *Accardi* doctrine, as well as the APA,³⁰ the Commission has been bound to adhere to the expedited hearing procedures now contained in § 22.935 throughout the decade that Viaero’s Nebraska 1 application has been pending before it.

The Commission has not explained why it failed to obey its own procedural rules by

³⁰ Section 22.935 is a legislative rule because it was formally adopted by the Commission in a notice-and-comment rulemaking conducted under authority delegated to it by §§ 4(i) and 303(r) of the Act. See *Syncor International Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (a legislative rule modifies or adds to a legal norm based on the agency’s own authority). Thus, the Commission is subject to the rule that, “unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such rule or regulation.” *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

conducting the requisite two-step hearing on the competing Nebraska 1 applications. That failure seems inexplicable considering that the Commission did not even begin the process by issuing a hearing designation order during the ten years that the parties have been waiting for their expedited evidentiary hearing.

The Commission's failure to abide by § 22.935 may be explained by the conclusion it reached in 1998, when it declined to adopt a two-step renewal procedure believing that it would not serve the public interest to expend resources to litigate "the lawfulness of a procedure previously found to be unlawful when the new procedure would apply to only a handful of cases ... and would have no future applicability."³¹ Perhaps anticipating that Sagir would prevail at step one of a comparative hearing, and that Viaero would fulfill its promise to appeal the resulting loss of its right to a full comparative hearing, the Commission decided not to expend any resources on a two-step procedure that would only apply in one cellular case³² and would likely require it to persuade the D.C. Circuit, sitting *en banc*, to overrule *Citizens*.

Of course, the Commission's desire to avoid judicial review of its suspect two-step comparative hearing procedure does not justify its failure to adhere to its own rules any more than the agency can justify its failure to adjudicate the Nebraska 1 proceeding in accordance with § 309(e) of the Act. *See AT&T Co.*, 978 F.2d at 732. The obvious remedy for the Commission's violation of the *Accardi* doctrine would be for it to comply with § 22.935 by designating the competing Nebraska 1 applications for a long-overdue comparative hearing. By requiring

³¹ *Implementation of § 309(j) of the Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licensees*, 13 FCC Rcd 15920, 16004-05 (1998).

³² On April 26, 2005, when the competing Nebraska 1 applications were ripe for designation for hearing, Kankakee Cellular had not filed its renewal application. The Kankakee renewal application was filed on November 5, 2008. *See infra* Ex. 4 at 3. Tisdale did not file its competing application until May 22, 2009. *See infra* Ex. 3 at 3.

compliance with § 22.935, the *Accardi* doctrine prohibits the Commission from expunging its rule violation by the retroactive rulemaking contemplated by the NPRM.

CONCLUSION

Viaero agrees with ATN that the Commission has utterly failed to: (1) justify the freeze it apparently imposed on the two pending cellular comparative renewal proceedings, or (2) articulate a reasoned basis for retroactively dismissing the two competing applications in the event it adopts the rules and policies proposed in the NPRM.³³ Viaero is at a loss to understand how the Commission’s goal of creating “consistent requirements” for license renewals going forward necessitated either the imposition of the freeze or the proposed retroactive rulemaking. NPRM at 2 (¶ 1). But we are astonished that the Commission is “concerned about the uncertainty that a long-standing ‘pending’ renewal application can create.” *Id.* at 44 (¶ 113). The Commission can ameliorate that concern by simply acting on any long-standing renewal application.

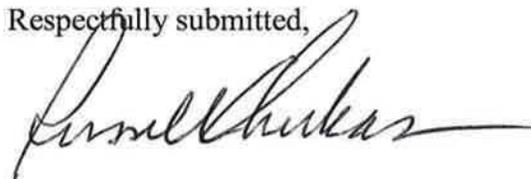
Setting aside the fact that Sagir’s renewal is still standing going into its second decade, the Nebraska 1 proceeding has been at a standstill for six years waiting for a designation order. Under the current standards of the D.C. Circuit, the Commission’s six-year delay in issuing a designation order would be sufficiently egregious to warrant the issuance of a writ of mandamus. *See In re Core Communications, Inc.*, 541 F.3d 849, 850 (D.C. Cir. 2008). In fact, the only reported fully-litigated comparative renewal proceeding under Part 22 took less than six years — from the issuance of the designation order to a final Commission decision on the merits — to complete a three-party trial-type hearing involving potentially disqualifying issues.³⁴ Considering

³³ *See* ATN Petition at 5-6, 16-18.

³⁴ *See Baker Protective Services, Inc.*, 78 F.C.C. 2d 373 (1980), *motion to consolidate granted*, 84 F.C.C. 2d 432 (1981), *initial decision granting application*, 97 F.C.C. 2d 580 (ALJ 1983),

the delay factor, rather than freezing the Nebraska 1 applications, the Commission should give the competing applicants the “expedited hearing” to which they are entitled. Sagir may not want such a hearing. But under § 309(e) and the *Ashbacker* doctrine, Viaero “must be given a chance” to demonstrate in a hearing that its application is “comparatively better.” *Citizens*, 447 F.2d at 1213.

Respectfully submitted,



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McLean, Virginia 22102
(702) 584-8678

*Attorneys for N.E. Colorado Cellular, Inc. d/b/a
Viaero Wireless*

August 6, 2010

application granted, 97 F.C.C. 2d 570 (Rev. Bd. 1984), *application for review denied*, 59 Rad. Reg. 2d (P&F) 1141 (1986).

EXHIBIT 1



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ULS Application

Cellular - 0000212826 - SAGIR, INC.

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File Number	0000212826	Radio Service	CL - Cellular
Call Sign	KNKN383	Application Status	2 - Pending

General Information

Application Purpose	RO - Renewal Only	Emergency STA	
Existing Radio Service		Action Date	06/13/2001
Authorization Type	Regular	Requested Expiration Date	
Receipt Date	08/31/2000	Number of Rules	
Entered Date	08/31/2000	Grandfathered Privileges	
Waiver	No	Regulatory Fee Exempt	No
Attachments		Major Request	

Market Data

Market	CMA533 - Nebraska 1 - Sioux	Channel Block	A (View Frequencies)
Submarket Designator	0	Phase	2

Applicant Information

FRN	0001808179 (View Ownership Filing)	Type	Corporation
Name	SAGIR, INC. 18 BEECHNUT TERRACE ITHACA, NY 14850 ATTN John C. Rigas		P:(607)277-4117 F:(607)277-4118 E:johnis@twcnny.rr.com
Real Party in		FRN of Real	



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Call Sign	KNKN383	Application Status	2 - Pending

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History

Date	Event
04/03/2001	Offlined for Petition to Deny Review
09/08/2000	Payment Confirmed
09/06/2000	Accepted for Filing PN Generated
08/31/2000	Renewal Only Received

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Call Sign	KNKN383	Application Status	2 - Pending

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Pleading Type	Description	Date Entered
Pleading	Reply to Opposition to Motion to Consolidate	06/07/2001
Pleading	Motion for Leave to file Corrected Reply to Opp to Motion...	06/07/2001
Pleading	Consent Motion for Extension of Time	05/30/2001
Pleading	Reply to Opposition to Motion to Strike	05/23/2001
Pleading	Opposition to Motion to Consolidate	05/18/2001
Pleading	Opposition to Motion to Strike	05/11/2001
Pleading	Further Consent Motion for Extension of Time	05/10/2001
Pleading	Consent Motion for Extension of Time	05/02/2001
Pleading	Motion to Strike	05/01/2001
Pleading	Request for Official Notice	04/26/2001
Pleading	Motion to Consolidate	04/23/2001
Pleading	Supplement to Petition to Deny	04/11/2001
Pleading	Supplement to Petition to Deny	04/05/2001
Pleading	Petiton to Deny- Exhibit 8 Part 9 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 7 Part 8 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 6 Part 7 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 5 Part 6 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 4 Part 5 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 3 Part 4 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 2 Part 3 of 9	03/19/2001
Pleading	Petiton to Deny- Exhibit 1 Part 2 of 9	03/19/2001
Pleading	Petiton to Deny part 1 of 9	03/19/2001



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Call Sign	KNKN383	Application Status	2 - Pending

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Letters

Letters Type	Description	Date Entered
Letter	Response to Correspondence dated 10/29/02	07/14/2003
Letter	Response to Correspondence of July 3, 2003	07/08/2003
Letter	Response to Irrelevant and Unauthorized	07/07/2003
Letter	LETTER	07/07/2003
Letter	Letter from N.E. Colorado Cellular	10/29/2002

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Cellular - 0000230425 - N.E. Colorado Cellular Inc.

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MAIN	ADMIN	TRANS LOG	SERVICE SPECIFIC	LOCATIONS
File Number	0000230425		Radio Service	CL - Cellular
Call Sign			Application Status	2 - Pending
General Information				
Application Purpose	AM - Amendment		Original Application Purpose	NE - New
Existing Radio Service				See Full Filing History
Authorization Type	Regular		Emergency STA	
Receipt Date	04/06/2001		Action Date	02/22/2006
Entered Date	04/13/2001		Requested Expiration Date	
Waiver	Yes		Number of Rules	
Attachments	Yes		Grandfathered Privileges	No
Application Fee Exempt	No		Regulatory Fee Exempt	No
Major Request	No			
Applicant Information				
FRN	0001607225 (View Ownership Filing)		Type	Corporation
Name	N.E. Colorado Cellular Inc. 1220 West Platte Avenue Fort Morgan, CO 80701			P:(970)867-6767 F:(970)867-3589 E:KevDelaney@aol.com
Real Party in Interest			FRN of Real Party in Interest	
Contact Information				
Name	Lukas, Nace, Gutierrez and			P:(202)828-9458

Sachs
Allison M Jones , Esq
1111 19th Street, NW, Suite
1200
Washington, DC 20036

F:(202)828-8403
E:ajones@fcclaw.com

Qualifications, Ownership

Radio Service Fixed, Mobile
Type

Regulatory Common Carrier Interconnected Yes
Status

Alien Ownership

The Applicant answered "No" to each of the [Alien Ownership](#) questions.

Basic Qualifications

The Applicant answered "No" to each of the [Basic Qualification](#) questions.

Demographics

Race

Ethnicity

Gender

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File Number	0000230425	Radio Service	CL - Cellular
Call Sign		Application Status	2 - Pending

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History

Date	Event
04/26/2005	Granted Application Reversed
04/26/2005	Application Granted
04/26/2005	Redlight Review Completed
09/21/2004	Petition to Deny Review Completed
09/21/2004	Mutually Exclusive Review (rules) Completed
09/21/2004	Major Amendment Review Completed
09/21/2004	Wavier Review Completed
04/14/2001	Offlined for Waiver Review
04/14/2001	Offlined for Major Amendment Review
04/13/2001	Internal Correction Applied
04/06/2001	Amendment Received
03/29/2001	Offlined for Petition to Deny Review
01/16/2001	Offlined for Mutually Exclusive Review (rules)
12/20/2000	Accepted for Filing PN Generated
10/06/2000	Payment Confirmed
09/30/2000	Offlined for Waiver Review
09/30/2000	Offlined for Review of Phase 2 application
09/29/2000	New Application Received

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File Number	0000230425	Radio Service	CL - Cellular
Call Sign		Application Status	2 - Pending

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Pleading

Pleading Type	Description	Date Entered
Pleading	REply to Opposition to Motion to Consolidate	06/07/2001
Pleading	Motion for Leave.....	06/07/2001
Pleading	Consent Motion for Extension of Time	05/30/2001
Pleading	Reply to Opposition to Motion to Strike	05/23/2001
Pleading	Opposition to Motion to Strike	05/11/2001
Pleading	Further Consent Motion for Extension of Time	05/10/2001
Pleading	Consent Motion for Extension of Time	05/02/2001
Pleading	Motion to Strike	05/01/2001
Pleading	Request for Official Notice	04/26/2001
Pleading	Request for Waiver	04/06/2001
Pleading	Supplement to Reply to Petition to Deny	04/06/2001
Pleading	Erratum to Reply to Petition to Deny	04/05/2001
Pleading	Opposition to Petition to Deny	04/03/2001
Pleading	Reply to Opposition to Petition to Deny	04/03/2001
Pleading	Supplement to Petition to Deny	03/30/2001
Pleading	Petition to Deny Exhibit 8 Part 9 of 9	03/19/2001
Pleading	Petition to Deny Exhibit 7 Part 8 of 9	03/19/2001
Pleading	Petition to Deny Exhibit 6 Part 7 of 9	03/19/2001
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Pleading	Petition to Deny Exhibit 2 Part 3 of 9	03/19/2001
Pleading	Petition to Deny Exhibit 1 Part 2 of 9	03/19/2001
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Call Sign		Application Status	2 - Pending

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Letters Type	Description	Date Entered
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Letter	Response to Correspondence of July 3, 2003	07/08/2003
Letter	Response to Irrelevant and Unauthorized	07/07/2003
Letter	LETTER	07/07/2003
Letter	LETTER	07/07/2003

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EXHIBIT 3



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ULS Application

Cellular - 0003848206 - Tisdale Telephone Company, LLC

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Application

MAIN	ADMIN	TRANS LOG	SERVICE SPECIFIC	LOCATIONS
------	-------	-----------	------------------	-----------

File Number	0003848206	Radio Service	CL - Cellular
Call Sign		Application Status	2 - Pending

General Information

Application Purpose	AM - Amendment	Original Application Purpose	NE - New
Existing Radio Service			See Full Filing History
Authorization Type	Regular	Emergency STA	
Receipt Date	07/01/2009	Action Date	07/02/2009
Entered Date	07/01/2009	Requested Expiration Date	
Waiver	No	Number of Rules	
Attachments	Yes	Grandfathered Privileges	No
Application Fee Exempt	No	Regulatory Fee Exempt	No
Major Request	No		

Applicant Information

FRN	0018115550 (View Ownership Filing)	Type	Limited Liability Company
Name	Tisdale Telephone Company, LLC 400 Northridge Road, Suite 130 Atlanta, GA 30350 ATTN Lou Tomasetti		P:(678)338-5960
Real Party in Interest		FRN of Real Party in Interest	

Contact Information

Name	Rini Coran, PC David J Kaufman 1140 19th Street, NW Suite 600 Washington, DC 20036	P:(202)955-5516 F:(202)296-2014 E:dkaufman@rinicoran.com
------	---	--

Qualifications, Ownership

Radio Service Type	Fixed, Mobile	
Regulatory Status	Common Carrier	Interconnected Yes

Alien Ownership

The Applicant answered "No" to each of the [Alien Ownership](#) questions.

Basic Qualifications

The Applicant answered "No" to each of the [Basic Qualification](#) questions.

Demographics

Race	
Ethnicity	Gender

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Call Sign		Application Status	2 - Pending

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History

Date	Event
07/02/2009	Offlined for review of SID
07/02/2009	Redlight Review Completed
07/01/2009	Amendment Received
06/04/2009	Offlined for review of SID
06/04/2009	Redlight Review Completed
06/03/2009	Amendment Received
05/27/2009	Accepted for Filing PN Generated
05/23/2009	Offlined for Review of Phase 2 application
05/23/2009	Redlight Review Completed
05/23/2009	Payment Confirmed
05/22/2009	New Application Received

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ULS Application

Cellular - 0003637485 - KANKAKEE CELLULAR L.L.C.

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Application

MAIN **ADMIN** **SERVICE SPECIFIC**

File Number	0003637485	Radio Service	CL - Cellular
Call Sign	KNKA668	Application Status	2 - Pending

General Information

Application Purpose	WD - Withdrawal of Application	Original Application Purpose	RO - Renewal Only
Existing Radio Service			See Full Filing History
Authorization Type	Regular	Emergency STA	
Receipt Date	06/29/2010	Action Date	06/30/2010
Entered Date	06/29/2010	Requested Expiration Date	
Waiver	No	Number of Rules	
Attachments		Grandfathered Privileges	
Application Fee Exempt	No	Regulatory Fee Exempt	No
Major Request			

Market Data

Market	CMA273 - Kankakee, IL	Channel Block	A (View Frequencies)
Submarket Designator	0	Phase	2

Applicant Information

FRN	0001648849 (View Ownership Filing)	Type	Limited Liability Company
Name	KANKAKEE CELLULAR L.L.C. 18630 Withey Road Monte Sereno, CA 95030 ATTN Raveesh K. Kumra		P:(408)395-0562 F:(408)395-0412 E:rkumra@yahoo.com

Real Party in Interest

FRN of Real Party in Interest

Contact Information

Name BLOOSTON, MORDKOFKY,
DICKENS, DUFFY &
PRENDERGAST
ROBERT M JACKSON
2120 L STREET, N.W., SUITE
300
WASHINGTON, DC 20037

P:(202)828-5515
F:(202)828-5568
E:rmj@bloostonlaw.com

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Call Sign	KNKA668	Application Status	2 - Pending

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History

Date	Event
06/30/2010	Offlined for Alert List Review
06/30/2010	Offlined for Alert List Review
06/29/2010	Withdrawal of Application Received
04/22/2009	Accepted for Filing PN Generated
11/13/2008	Payment Confirmed
11/06/2008	Offlined for Alert List Review
11/06/2008	Offlined for Alert List Review
11/06/2008	Redlight Review Completed
11/05/2008	Renewal Only Received

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File Number	0003637485	Radio Service	CL - Cellular
Call Sign	KNKA668	Application Status	2 - Pending

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Pleading

Pleading Type	Description	Date Entered
Pleading - Petition for Reconsideration	Supp. To Petition For Partial Recon. and/or Clarification	07/27/2010
Pleading - Reply	Reply Pleading Filed 9/21-09 -- Unredacted	07/21/2010
Pleading - Petition for Reconsideration	Petition For Partial Reconsideration and/or Clarification	06/24/2010
Pleading - Reply	Reply to Petition to Dismiss or Deny	09/21/2009
Pleading - Petition to Deny	Petition To Dismiss or Deny	09/04/2009
Pleading - Motion for Extension of Time	Second Supplement to Motion for Extension of Time	06/02/2009
Pleading - Motion for Extension of Time	Supplement to Motion for Extension of Time	05/29/2009
Pleading - Motion for Extension of Time	Motion for Extension of Time	05/26/2009
Pleading - Reply	Reply to Opposition to Request for Extension of Time	05/06/2009
Pleading - Opposition	Opposition to Request for Extension	05/05/2009
Pleading - Motion for Extension of	Request for Extension of Time	05/04/2009

Withdrawal of License Renewal Application and Surrender of License

The applicant, Kankakee Cellular L.L.C., hereby withdraws and dismisses its pending application (FCC ULS File No. 0003637485) for renewal of the license for Cellular Radiotelephone Service Station KNKA668, Frequency Block A, Kankakee, Illinois MSA (CMA No. 273), and hereby surrenders its operating license for that station.

This action is taken pursuant to the provisions of Section 1 of the final “*Qui Tam Settlement Agreement*,” dated June 16, 2010 (the “Settlement Agreement”), in the False Claims Act case styled *Stephen Kaffee, et al. v. Raveesh K. Kumra, et al*, Case No 07-00857 (United States District Court for the District of Columbia). The Settlement Agreement was approved by the United States Department of Justice and the Commission on or around June 25, 2010. The Commission has in its possession a copy of the Settlement Agreement.

This action is unrelated to the pending application of Tisdale Telephone Company, LLC (“Tisdale”) (FCC ULS File No. 0003848206) for a new Frequency Block A cellular license for the Kankakee, Illinois MSA. The applicant has no settlement agreement, written or oral, with Tisdale, its parent corporation or any person or entity controlling or affiliated with Tisdale. Instead, this action is being taken exclusively and unilaterally pursuant to the terms of the Settlement Agreement. Therefore, in view of these considerations, the provisions of Rule Section 1.935 do not apply.

A copy of this filing is being sent by e-mail to counsel for Tisdale.

Accordingly, the applicant requests that this request be granted.

CERTIFICATE OF SERVICE

I, Russell D. Lukas, hereby certify that on this 6th day of August 2010, copies of the forgoing COMMENTS OF N.E. COLORADO CELLULAR, INC. D/B/A VIAERO WIRELESS were transmitted by email, in pdf format, to the following:

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A handwritten signature in black ink, appearing to read "Russell D. Lukas", written over a horizontal line.

Russell D. Lukas