

## Appended Materials to Application for Review and Petition for Reconsideration

If the text of either of these pleadings, without counting the following material, exceeds 25 pages (excluding text that is not counted toward page length determination), then the following materials should only be considered if the FCC grants the request hereby made to consider them for a more full and complete record. If said text does not exceed 25 pages, but would reach that page limit by including some, but not all, of the following text, then the above request is made with regard to that extra text.

## Appendix 1: Application for Review

## Appendix 1: Petition for Reconsideration

The following supplements the portions in the two above-referenced pleadings regarding the issue of legal interest and standing.

Petitioner(s)<sup>1</sup> also have standing based on the criteria applied in US courts under Article II of the Constitution, *see Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (“*Lujan*”),<sup>2</sup> not an artificially narrow standard that the FCC has suggested. Article III standing is obtained among other ways, where—as in the instant petition for reconsideration proceeding (Section 1.106(f) allows for petitions of applications approved under immediate approval procedures) deals with petitions of —unfair competition antitrust law violation claims are asserted (and until disproven or dismissed), even where the existence of an matter or action that offends or arguably offends said law is the sole basis for standing, and where the challenger asserting standing is among the parties entitled to protection under said law (where, without said protection, injury in fact to the party asserting standing, and to the markets involved, is assumed, as it is under said antitrust law).<sup>3</sup> It is also clear that, to the degree (as the Petitions asserted) that Silke and Two Way and their applications did not comply with the rules, that Petitioners suffer competitive harm, and also that subject wireless markets are harmed:<sup>4</sup> noncompliance with rules that are the basis of fair competition is obviously particularly harmful.

It is well- known and –established FCC policy to allow and promote competition

---

<sup>1</sup> As that term is defined in each appeal being filed of DA 12-676. “Petitioners” is used herein whether there is one petitioning entity or several.

<sup>2</sup> Federal administrative proceeding standing criteria, as summarized in the APA, is derived from Article III standing. Regarding *Lujan*, a well known case on Article III standing, Justice Scalia, who wrote for the majority in *Lujan*, later asserted that even a plane ticket to the affected geographic areas would have been enough to satisfy the future injury requirement. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982).

<sup>3</sup> See, e.g., *Ross v. Bank of Am., N.A.*, No. 06-4755, 2008 WL 1836640 (2d Cir. Apr. 25, 2008).

<sup>4</sup> For example, Skybridge Spectrum Foundation as a nonprofit Foundation legally must and does solely serve public-interests and no private interests. It has standing on that basis also: to pursue protection for the wireless markets involved.

in the marketplace and remove regulatory barriers and for this purpose to allow in each radio service applications or services that may compete with those of other radio services (at least to the extent permitted under technical rules providing for radio interference protection). All of Petitioners' licenses (whether they be AMTS, M-LMS, Part 22 paging in 35, 43, and 900 MHz) clearly may compete with the Silke and Two Way licenses in this regard, and the FCC properly seeks cross-service competition.<sup>5</sup>

Petitioners' licenses provide the ability to compete nationwide in wireless focused on smart transport, energy, environmental protection, and emergency situations. They are pursuing this in large part on a nonprofit basis, which is unique in the nation on this scale. See, e.g., various documents at: [www.scribd.com/warren\\_havens/shelf](http://www.scribd.com/warren_havens/shelf) . This further demonstrates standing in that it further demonstrates Petitioners' ongoing major actions and expenditures to be competitive in the market, which includes all services that may be provided by the Silke and Two Way licenses.

That points to unique additional standing also: which is that Petitioner Skybridge Spectrum Foundation, a nonprofit corporation recognized by the IRS as a tax exempt scientific, educational and charitable organization, has as part of its core nonprofit purposes, to oppose cheating and waste in FCC licensing and license use.<sup>6</sup> That is in direct support of Congress' goals of the Communications Act, FCC goals, and stated goals of many other federal agencies.

---

<sup>5</sup> It is clear technically that it is not the frequency range that determines the services that may be the same or similar for effective competition, but it is other things such as the data rates, coverage, permitted uses, etc. Indeed, the industry is moving gradually but surely to software-defined radio and other technology to allow one radio unit to use many bands, and many protocols, such that the service provided is agnostic to the frequency band employed at a particular time and place. In short, to deny standing based on this technical progress and this good policy of competition among radio services would undercut the public interest in both.

<sup>6</sup> References to Skybridge Spectrum Foundation in this Appendix 1 not only directly support Skybridge's petition appeals, but are also provided here on behalf of the petition appeals being filed by other entities because they illustrate that standing and interest can be obtained for many reasons, and therefore are relevant to all of the petition appeals being filed today of MO&O, DA 12-676.

Standing is based on injury to lawful interests of a person including a corporate person. A nonprofit has standing where its nonprofit goals are interfered with, and to pursue those goals. Thus, Skybridge has this additional standing in this case. See: Priscilla Summers, et al., Petitioners v. Earth Island Institute, et al., No. 07-463, Supreme Court of the United States, 129 S. Ct. 1142; 173 L. Ed. 2d 1; 2009 U.S. LEXIS 1769; 67 ERC (BNA) 1961; 39 ELR 20047; 21 Fla. L. Weekly Fed. S 670. This case discusses Article III standing applied to nonprofit organizations in court claims they file and pursue.<sup>7</sup>

In addition, see the *Sherley* case, discussed below. It is clear Petitioners have standing, since to begin with they have demonstrated violations by Silke and Two Way of major FCC rules required for fair competition by Petitioners against them, including in FCC auctions applications and participation.

*New World Radio v. FCC*, 294 F.3d 164 (“*New World*”) is also further support that Petitioners have standing to file their Petitions. *New World* and its progeny support Petitioners. *New World supports* Petitioners, as do all other court cases on standing. In this case before the FCC, Petitioners assert standing due to competitive reasons they presented at length in the dismissed petitions, with regard to Silke and Two Way’s rule violation of Section 1.2105, not only due to Petitioners holding license(s) in the same areas as the Silke and Two Way licenses.

*New World* has been followed once, by the same court in *Sherley v. Sebelius*, 610 F.3d 69, DC Circuit Court, 2010 (“*Sherley*”). The court in this more recent *Sherley* case explains the controlling broad and complex competitive standing standard, that applied here clearly establishes standing for Petitioners. For convenience, Petitioners refer to Attachment (ii) below

---

<sup>7</sup> While in this case the court found the nonprofit that initiated the case, Earth Island Institute to lack standing to pursue the expanded case after it entered a settlement in the initial challenge, the court majority and dissent agreed as to standing of this nonprofit where it pursued its nonprofit purposes the court case when faced with and challenging specific actions by others that were contrary to its purposes: actions by others that Earth Island settled favorably. Applied to Skybridge, Skybridge has standing on the basis asserted in this section above.

that contains substantial text from this case with certain items underlined or highlighted to demonstrate this, including (emphasis added, brackets in original):

The doctrine of competitor standing ... economic actors "suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition" against them. ... ("basic law of economics" that increased competition leads to actual injury); ... a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors". ... Because increased competition almost surely injures a seller in one form or another, he need not wait until "allegedly illegal transactions ... hurt [him] competitively" before challenging....

.... We see no reason any one competing for a governmental benefit should not be able to assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically. ...

.... The Doctors invoke our ... holdings ... that plaintiffs may "establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with [their] own sales," *id.* at 1259, and argue they are injured because "[a]s a result of the new Guidelines, [they] now face more competition for [NIH] research grants than they did before." ...

... "it is ... entirely conjectural whether an application submitted by [one of the plaintiffs] would actually 'compete' with proposals involving [ESCs]" because the doctor's project would both have to "be ranked low enough to fall below the [IC's] funding capacity and be outranked by an [ESC] project." In other words, according to the Government, there is no certainty that an application for research involving ESCs will arrive at an IC in the same funding cycle as an application from one of the Doctors; even if the two applications do compete in the same funding cycle, there is no guarantee the one for research involving ESCs will get funding that would otherwise have gone to one of the Doctors....

... Regardless how we have phrased the standard in any particular case, however, the basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition....

.... "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition". ...

The Doctors have met the basic requirement for competitor standing ... There can be no doubt the Guidelines will elicit an increase in the number of grant applications involving ESCs....

...., the Doctors face a substantial enough probability to deem the injury to them imminent. *See, e.g., DEK Energy Co.*, 248 F.3d at 1195 ("substantial (if unquantifiable) probability of injury" shifts injury from "conjectural" to "imminent").

In *Sherley*, the same *New World* court makes clear Petitioners' standing, including since they are competitors of Silke and Two Way; the subject Silke and Two Way licenses will

increase competition; the FCC has taken steps (challenged in this Petition) to benefit Silke and Two Way by action that authorizes impermissible actions, including unlawful modifications of their auction applications; the FCC is lifting regulatory restrictions; and all these cause probability of injury-- rather cause clear injury if any semblance of economic reality is applied.

The FCC in the past has decided on petitions in auction context where the party did not have standing to file. See e.g. the Paging Systems, Inc. petitions and appeals of Auction No. 57. Therefore, the FCC is estopped from asserting a different standing standard now and refusing to address the dismissed petitions' facts and arguments. See, e.g., *Brand v. Farmer's Mut. Protective Assoc of Texas*, Tex. App 95 S.W.2d 994, 997.

Equal treatment requires decision on the substance. For reasons noted in the preceding paragraph, in as much as the FCC processed and decided on the substance of the Paging Systems, Inc. Auction No. 57 petitions and appeals, and since Petitioners show more basis for standing to file and prosecute the dismissed petitions and instant appeal than Paging Systems, Inc. showed or had in its Auction No. 57 pleadings (whose dismissal was upheld by the DC Circuit and is now final), the FCC must process and decide upon the substance of the dismissed petitions and the instant appeal, under the principal of fair and equal treatment under the law (even apart from whether or not legal standing is found).

Petitioners also had standing to file the dismissed petitions and have standing to file the instant appeal based on the public interest test described in *Valley v FCC*, 336 F.2d 914 including by "pleading of facts which, if shown to be true, clearly point to an injury to the public sufficient to outweigh considerations of administrative orderliness." The ultra vires rule change itself is a sufficient injury to the public interest to have warranted grant of the dismissed petitions in spite of any alleged procedural errors.

Attachment (ii)

---

The following is form *Sherley v. Sebelius*, 610 F.3d 69, DC Circuit Court, 2010 (“*Sherley*”). The preliminary sections below, not indented, are from the Lexis notes on this case. Underlining added.

---

PROCEDURAL POSTURE: Plaintiffs, including two doctors, sued defendants, including the National Institutes of Health (NIH), alleging that the issuance of new guidelines regarding the funding of stem cell research violated the Administrative Procedure Act (APA). The United States District Court for the District of Columbia dismissed the suit for lack of standing and dismissed as moot plaintiffs' motion for a preliminary injunction. Plaintiffs appealed.

OVERVIEW: The NIH became authorized to fund embryonic stem cell (ESC) research in 2001, subject to the limitation that only ESCs derived from then-extant stem cell lines be used. In 2009, the Guidelines for Human Stem Cell Research (Guidelines), 74 Fed. Reg. 32170 (July 7, 2009), removed that limitation on ESCs. Plaintiffs alleged that the issuance of the Guidelines violated the APA because they violated the Dickey-Wicker Amendment. The appellate court determined that the doctors had Article III standing because they met the basic requirement for competitor standing since (1) the Guidelines would elicit an increase in the number of grant **applications** involving ESCs and the Guidelines intensified the competition for a share in a fixed amount of money, and (2) the doctors would suffer an additional injury whenever a project involving ESCs received funding that, but for the broadened eligibility in the Guidelines, would have gone to fund a project of theirs. The doctors had prudential standing because the Dickey-Wicker Amendment could plausibly be interpreted to limit research involving ESCs and they had an interest in preventing the NIH from funding such research.

OUTCOME: The appellate court reversed the order of the district court dismissing plaintiffs' claims for lack of standing insofar as it applied to the doctors and affirmed that order in all other respects. ....

\* \* \* \*

The doctrine of competitor standing addresses the first requirement by recognizing that economic actors "suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition" against them. *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367, 329 U.S. App. D.C. 401 (D.C. Cir. 1998); *accord New World Radio, Inc. v. FCC*, 294 F.3d 164, 172, 352 U.S. App. D.C. 366 (D.C. Cir. 2002) ("basic law of economics" that increased competition leads to actual injury); *see also Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) (doctrine of competitor standing "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors"). The form of that injury may vary; for example, a seller facing increased competition may lose sales to rivals, or be forced to lower its price or to expend more resources to achieve the same sales, all to the detriment of its bottom line. Because increased competition almost surely injures a seller in one form or another, he need not wait until "allegedly illegal transactions ... hurt [him] competitively" before challenging the

regulatory (or, for that matter, the deregulatory) governmental decision that increases competition. *La. Energy*, 141 F.3d at 367.

In considering whether the Doctors have Article III standing, we address only the question whether they allege a legally adequate injury-in-fact. That is the only element of constitutional standing upon which the parties focus, for it is clear the alleged injury is traceable to the Guidelines and redressable by the court.

[HN3] We do not agree with the district court's suggestion that only a "participant[] in [a] strictly regulated economic market[]" may assert competitor standing. *Sherely*, 686 F. Supp. 2d at 7. **[\*\*8]** We see no reason any one competing for a governmental benefit should not be able to assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically. In this vein, we have applied the doctrine of competitor standing to the political "market," holding incumbent congressmen had standing to challenge new campaign finance regulations that made it easier for rival candidates to compete against them for election. *Shays*, 414 F.3d at 87.

The district court also concluded the doctrine of competitor standing applies only where the "particular statutory provision ... invoked" reflects a purpose "to protect a competitive interest." *Sherely*, 686 F. Supp. 2d at 6 (quoting *Hardin*, 390 U.S. at 6). [HN4] The requirement of a protected competitive interest, however, "goes to the merits" of a plaintiff's claim, not to his Article III standing. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

In order to bring themselves within the scope of the doctrine of competitor standing, the Doctors invoke our holding in *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 283 U.S. App. D.C. 265 (1990), and similar holdings in other cases, that [HN5] plaintiffs may **[\*\*9]** "establish their constitutional standing by showing that the challenged action authorizes allegedly **[\*73]** illegal transactions that have the clear and immediate potential to compete with [their] own sales," *id.* at 1259, and argue they are injured because "[a]s a result of the new Guidelines, [they] now face more competition for [NIH] research grants than they did before." For context, we note it is uncontested that, at least in the short run, the amount of money available from NIH for research grants is fixed notwithstanding the greater range of stem cell research projects made eligible for funding by the Guidelines.

The Government has two responses. First, it maintains the Doctors have not shown "an increase in funding for embryonic stem cell research ... require[s] a diminution in funding for adult stem cell research." To that we say: Nor need they do so. The Doctors need show only that they themselves will suffer some competitive injury, not that the NIH will spend less overall to fund projects involving ASCs.

Second, the Government argues the specific process by which the NIH awards grants makes it "entirely conjectural" whether the Doctors will face increased competition for funding. Each **[\*\*10]** funding cycle proceeds in two stages. In the first, a peer-review committee assigns a preliminary score to each grant application. Each application with a score above the median then goes to one or

more of the 24 Institutes and Centers (ICs) at the NIH. Each such component has its own budget and awards grants to projects that address its particular mission; for instance, the National Cancer Institute funds research relating to cancer. In the second stage of the process, each IC decides which grant applications to fund.

The Government reasons that the Guidelines will not cause an increase in competition at the first stage because the NIH will always pass along to the ICs half the applications it receives. Therefore, each application, regardless how many there are, will still have a 50% chance of reaching the second stage of the process.

At the second stage, moreover, "it is ... entirely conjectural whether an application submitted by [one of the plaintiffs] would actually 'compete' with proposals involving [ESCs]" because the doctor's project would both have to "be ranked low enough to fall below the [IC's] funding capacity and be outranked by an [ESC] project." In other words, according [\*\*11] to the Government, there is no certainty that an application for research involving ESCs will arrive at an IC in the same funding cycle as an application from one of the Doctors; even if the two applications do compete in the same funding cycle, there is no guarantee the one for research involving ESCs will get funding that would otherwise have gone to one of the Doctors. This mere possibility of injury does not establish competitor standing, argues the Government, which, as did the district court, reads our cases to require that a plaintiff asserting competitor standing show a challenged agency action will "almost surely cause [him] to lose business." *El Paso*, 50 F.3d at 27.

As the parties' arguments demonstrate, our cases addressing competitor standing have articulated various formulations of the standard for determining whether a plaintiff asserting competitor standing has been injured. Regardless how we have phrased the standard in any particular case, however, [HN6] the basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact.

\* \* \* \*

... "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition"....

The Doctors have met the basic requirement for competitor standing. This is not a situation like that in *El Paso*, in which it was uncertain whether a new seller would enter the market. 50 F.3d at 27. There can be no doubt the Guidelines will elicit an increase in the number of grant applications involving ESCs; indeed, the Government never suggests otherwise.

...., the Doctors face a substantial enough probability to deem the injury to them imminent. *See, e.g., DEK Energy Co.*, 248 F.3d at 1195 ("substantial (if unquantifiable) probability of injury" shifts injury from "conjectural" to "imminent").