ORAL ARGUMENT NOT YET SCHEDULED

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

No. 04-1359

AMERICAN ASSOCIATION OF PAGING CARRIERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Petition for Review from a Decision of the Federal Communications Commission

REPLY BRIEF FOR PETITIONER

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May 12, 2005

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GLOSSARY

AAPC	American Association of Paging Carriers
Act	Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*
CMRS	Commercial Mobile Radio Service
FCC	Federal Communications Commission
kHz	Kilohertz
MHz	Megahertz
MOO	Memorandum Opinion and Order, *Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band*, 19 FCC Rcd 18501 (FCC 2004)
OBRA	Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI, §6002(b)(2)-(e), 107 Stat. 392-397

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INTRODUCTION

In this proceeding, the American Association of Paging Carriers (AAPC) has challenged the Federal Communications Commission's (FCC's) interpretation and application of Section 6002(d)(3) of the Omnibus Budget Reconciliation Act of 1993[1] when it issued a decision in a rulemaking proceeding in WT Docket No. 01-

[1] Pub. L. 103-66, Title VI, §6002(d)(3), 107 Stat. 397 (the "1993 OBRA").

146[2] refusing to prohibit the licensing new, itinerant mobile stations on a nation-wide, non-coordinated basis on eight so-called "offset" frequencies[3] only 12.5 kHz separated from eight Part 90 paging-only frequencies[4] in the 462 MHz band. AAPC is a newly formed trade association that did not exist when the comment cycle was concluded in WT Docket No. 01-146, and the impact of 1993 OBRA on the proposed new stations was not raised by any other party to the proceeding. Therefore, when the FCC issued its initial decision in WT Docket No. 01-146,[5] AAPC timely petitioned the FCC for reconsideration.[6]

AAPC made two basic and distinct arguments in its petition: First, AAPC argued that licensing the new mobile stations only 12.5 kHz separated from the 462 MHz paging-only frequencies, at the same time traditional common carrier paging frequencies in the same frequency band continued to be licensed with a full

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[2] *Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band (Memorandum Opinion and Order),* 19 FCC Rcd 18501 (FCC 2004) (the "MOO") (J.A. ___) (References herein to the Joint Appendix will be designated "J.A. ___")..

[3] The eight "offset" frequencies are 462.7625 MHz, 462.7875 MHz, 462.8125 MHz, 462.8375 MHz, 462.8625 MHz, 462.8875 MHz, 462.9125 MHz and 462.9375 MHz. *See* MOO at ¶2 & n. 3. (J.A. __).

[4] The eight paging-only frequencies are 462.7500 MHz, 462.7750 MHz, 462.8000 MHz, 462.8250 MHz, 462.8500 MHz, 462.8750 MHz, 462.9000 MHz and 462.9250 MHz. *See* MOO at ¶2 & n. 3. (J.A. __).

[5] *Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band (Report and Order),* WT Docket No. 01-147, 18 FCC Rcd 3948 (FCC 2003) (the "Low Power R&O").

[6] Petition for Reconsideration, WT Docket No. 01-146, May 21, 2003 (the "PFR"). (J.A. ___).

25 kHz separation, violated the 1993 OBRA mandate that the FCC take all "necessary and practical" steps "to assure that [Part 90 and Part 22 paging] licensees . . . are subjected to technical requirements that are comparable".[7]

Second, AAPC argued that wholly apart from the specific 1993 OBRA mandate, licensing the new stations only 12.5 kHz separated from the paging-only frequencies violated the general public interest standard of the Communications Act, because doing so poses an unacceptable risk of harmful interference to paging receivers operating on the 462 MHz paging-only frequencies.[8]

In the MOO herein under review, the FCC reached and addressed the merits of both of AAPC's arguments. The FCC's entire discussion of the meaning and effect of the 1993 OBRA is contained solely in ¶11 of the MOO. (J.A. ___). The FCC provided a somewhat more extended discussion of AAPC's general public interest argument in ¶¶12-14 of the MOO (J.A. ___), but its conclusion was the

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[7] PFR at pp. 3-5. (J.A. ___). By way of clarification, the Part 90 paging-only stations in the 462 MHz band operate with a 25 kHz bandwidth (as do Part 22 paging stations in the UHF band). *See e.g., Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies (Third Memorandum Opinion and Order; Third Further Notice of Proposed Rule Making and Order),* 19 FCC Rcd 25045, 25058-9 & ¶¶31-34 (FCC 2004) (the "*Part 90 Narrowbanding TR&O*") (affirming that Part 90 paging stations may continue to operate with a channel bandwidth of 25 kHz). It is operation with a 25 kHz bandwidth when interfering stations are licensed with only a 12.5 kHz separation that causes the harmful interference AAPC seeks to avoid.

[8] PFR at pp. 5-8. (J.A. ___). 47 U.S.C. §303 generally directs the FCC "as public convenience, interest, or necessity requires" to, *inter alia,* "[c]lassify radio stations; . . . [p]rescribe the nature of the service to be rendered . . . ; [a]ssign bands of frequencies to the various classes of stations . . . [and m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations".

same, *viz.*, that it was "not persuaded that we should prohibit licensing of stations on frequencies 12.5 kHz removed from the eight Part 90 450-470 MHz band paging frequencies as requested by AAPC." (MOO at ¶15). (J.A. ___).

AAPC timely petitioned for review of the MOO on October 14, 2004. Both in its Statement of Issues filed on November 15, 2004, and in its opening brief filed March 30, 2005, AAPC made abundantly clear that the ***sole*** issue it has raised in this proceeding is the FCC's interpretation and application of the 1993 OBRA. AAPC did ***not*** seek review of the FCC's ruling under the general public interest standard of the Act, because it is obvious that until and unless the FCC properly applies the more narrow and specific mandate of the 1993 OBRA, the paging industry has no realistic hope of obtaining relief from adjacent channel interference in the 462 MHz band.

AAPC's position, in summary, is that the FCC unlawfully failed to comply with its *Chevron* obligation to "give effect to the unambiguously expressed intent of Congress" in the 1993 OBRA,[9] and with its *Iowa Utilities Board* obligation to "giv[e] some substance" to OBRA's mandate.[10] Accordingly, AAPC requests that the MOO be reversed and remanded to the FCC with instructions to revise its rules

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[9] *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-843, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984).

[10] *AT&T v. Iowa Utilities Board,* 525 U.S. 366, 392, 119 S. Ct. 721, 736, 142 L. Ed. 2d 834 (1999) (FCC reversed for failing to "giv[e] some substance" to the "necessary" and "impair" statutory requirements for requiring telephone companies to unbundle network elements).

governing the frequencies in question so as the properly implement Congressional intent as expressed in the 1993 OBRA.

In response, the FCC[11] first mounts a threshold challenge, arguing that the MOO is not reviewable under the rule established in *Sendra Corp.*,[12] because the MOO denied reconsideration of an earlier order that is not before the Court for review. (FCC Br. at pp. 13-18). Assuming that the MOO is reviewable, the FCC contends that the 1993 OBRA is ambiguous and, therefore, the FCC's interpretation should be upheld under the second prong of the *Chevron* formulation. (*Id*. at pp. 19-25). Finally, the FCC makes a passing attempt to defend the MOO's ruling that AAPC's PFR was an untimely challenge to earlier rulemaking decisions (FCC Br. at pp. 25-26), while studiously ignoring altogether AAPC's refutation of the MOO's claim that AAPC's PFR is barred by doctrines of untimeliness or collateral estoppel. (*See* AAPC Brief at pp. 18-22). All of the FCC's arguments are without merit and should be rejected.

REPLY ARGUMENT

I. The Memorandum Opinion and Order Is Reviewable

As an initial matter, AAPC is puzzled by the FCC's argument that the MOO is not reviewable. As noted above, the FCC's interpretation and application of the

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[11] The brief for respondents is filed on behalf of both the United States and the FCC. For ease of reference, however, AAPC will refer to respondents hereinafter only as the "FCC".

[12] *Sendra Corp. v. Magaw*, 111 F.3d 162 (DC Cir. 1997).

1993 OBRA is contained entirely within the MOO; the issue was never raised or addressed in the earlier Low Power R&O, and reviewing the Low Power R&O therefore would be an idle act. As a result, having the Low Power R&O itself before the Court for review would not add anything to the issues or arguments made by AAPC, and the FCC does not explain what other interests of justice reviewing the Low Power R&O could possibly serve in this proceeding.[13]

At least equally importantly, adopting the FCC's argument would mean as a practical matter that AAPC is without **any** remedy for its claim that the FCC has misapplied the 1993 OBRA. As also noted above, AAPC did not exist when the comment cycle was completed in WT Docket No. 01-146 and no other party raised as an issue the impact of the 1993 OBRA on the rules adopted in the Low Power R&O. Accordingly, if AAPC is precluded from obtaining review of the MOO in this proceeding, AAPC has no redress whatsoever for its claim of error.[14]

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[13] The FCC makes much of the point that no intent to review the underlying Low Power R&O can be inferred from the papers filed by AAPC (FCC Br. at pp. 13-16), which AAPC does not dispute. Conspicuously absent from its argument, however, is any explanation of why the Low Power R&O properly *should be* before the Court in order to assess AAPC's claim of error by the FCC.

[14] The FCC suggests in another context, perhaps with tongue in cheek, that AAPC could file a petition for rulemaking with the FCC to ventilate the 1993 OBRA or other general public interest issues. (FCC Br. at 26-27). As the FCC well knows, the FCC's decision *vel non* to initiate a rulemaking proceeding is largely committed to its discretion and is, therefore, subject to only very narrow judicial review. *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (DC Cir. 1981) ("the decision to institute rulemaking is one that is largely committed to the discretion of the agency" and "the scope of review of such a determination must, of necessity, be very narrow"). Given the obvious antipathy of the FCC to AAPC's arguments in this case, the FCC's putative "remedy" is entirely illusory.

AAPC does not read *Sendra* or the other precedents of this Court applying the *BLE* decision[15] as sanctioning such a harsh result. Quite to the contrary, AAPC believes that this case is analogous to other cases where this Court has recognized an exception to the principles of nonreviewability outlined in *Sendra*.[16]

For example, in *Transportation Intelligence, Inc. v. FCC,* 336 F.3d 1058 (DC Cir. 2003) (*TransIntel*), which was decided after *Sendra,* this Court held that the "principle that agency denials of reconsideration are generally nonreviewable is inapplicable" where the FCC decision being reviewed "were dispositions of TransIntel's *first filings* at each level of the agency." (336 F.3d at 1062). (Emphasis added). The MOO was the disposition of AAPC's first filing in WT Docket No. 01-146, a filing which was entirely proper under the FCC's rules and indeed *required* under the Communications Act;[17] thus the principle of nonreviewability urged by the FCC should be deemed "inapplicable" in this case.

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[15] *ICC v. Brotherhood of Locomotive Engineers,* 482 U.S. 270, 107 S. Ct. 2360, 96 L. Ed. 2d 222 (1987).

[16] AAPC submits that considerable caution is warranted in any event when applying *Sendra,* and most particularly so in this case. *Sendra* was an informal adjudication by the Treasury Department where the petitioner repeatedly asked for reconsideration of the Department's refusal to "grandfather" the manufacturing of a firearm, tendering substantially duplicative affidavits each time, and then filed suit against the Department to overturn its decision more than six years after the initial denial. Those facts are very different than in this case. Moreover, the quoted passages from the decision largely relied on by the FCC were a survey of applicable principles gleaned from prior decisions rather than the holding of the case itself.

[17] 47 U.S.C. §405 expressly requires persons "whose interests are adversely affected" by an FCC order to seek reconsideration as a condition precedent to Court review when such person "(1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2)

In a similar vein, in *Jost v. Surface Transp. Bd.,* 180 F.3d 314 (DC Cir. 1999), also decided after *Sendra,* this Court held that where as a practical matter a petitioner was denied a prior opportunity to protest a rail abandonment application, the information contained in the petition to reopen the proceeding (alleging "'inaccurate, incomplete and misleading, information'" provided by the original applicant) would be considered "new evidence" for purposes of reviewing the ICC decision not to reopen the proceeding. (194 F.3d at 84-85).[18] In doing so the Court expressly noted that "we cannot fault petitioners for the lack of information in the record" which lead to the petition to reopen, relying upon this Court's statement in *Southwestern Bell Tel. Co. v. FCC,* 180 F.3d 307, 311 (DC Cir. 1999) (quoting *BLE, supra,* 482 U.S. at 279) that the "test for new evidence is whether the evidence identified by petitioner are facts which through no fault of [the petitioner's], the original proceeding did not contain." (Internal quotations omitted). (Alterations in original).

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relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass". Accordingly, AAPC was required by the statute to seek the reconsideration order which the FCC now argues is not reviewable.

[18] *Accord Fritsch v. ICC,* 59 F.3d 248, 251-252 (DC Cir. 1995) (allegation that petitioner was "denied the opportunity to submit protests" of original application was deemed to be "new material accompanying the petition to reopen" for purposes of upholding reviewability. Court held that *BLE* permits "merits review of a refusal to reopen where the motion to reopen was based on *non-pretextual new matter* or changed circumstances, and not merely on material error in the original agency decision.") (Emphasis added).

So, here, through no fault of AAPC the original FCC decision did not consider the impact of the 1993 OBRA on the rules adopted in the underlying Low Power R&O, and AAPC's petition for reconsideration may be, and properly should be, deemed to have alleged "new information" for purposes of sustaining review of the MOO.

Such an interpretation also would be consistent with the decision of this Court in *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (DC Cir. 1997), also decided after *Sendra*. In *Graceba* this Court held that the FCC exercised its discretion to entertain a supplemental "Emergency Petition" for reconsideration filed out of time "by going on to consider, though briefly, Graceba's claim that it was entitled to a 25 percent reduction in its license price." (115 F.3d at 1041). Accordingly, the Court held that "[b]ecause the Commission had a fair opportunity to consider Graceba's constitutional challenge, and because it did consider whether Graceba was entitled to the relief sought, we have jurisdiction to decide the issue ourselves". (*Id).*

While the context of *Graceba* was somewhat different than the case at bar, AAPC believes that *Graceba* fairly stands for the proposition that an agency can be deemed to have "reopened" a proceeding for purposes of sustaining reviewability when it considers on the merits a new legal argument not previously raised in the proceeding through no lack of due diligence by the petitioner. Again, that is ex-

actly the situation in this case, because AAPC had no opportunity to participate in the initial rulemaking proceeding and no other party raised the 1993 OBRA issue.

Additionally, AAPC points out that one thread of *Gracebo* relies on the principle that "we permit . . . 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." 115 F.3d at 1040, citing, among other cases, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (DC Cir. 1959). A similar consideration also has been recently cited to avoid the *BLE* principle relied upon by the FCC in this case.[19] AAPC believes the continuing nature of rules adopted in a rulemaking proceeding, in contrast to adjudications in which there is an explicit evidentiary record on which the agency must base its decision, is relevant to a proper evaluation of when a proceeding should be considered "reopened" under the *BLE* doctrine, or arguments properly should be considered "new information," for purposes of analyzing the reviewability of an order denying reconsideration.

In summary, and contrary to the FCC's claim, under this Court's precedents the reviewability of the MOO in this case should be sustained either on the theory that the FCC did in fact "reopen" WT Docket No. 01-146 for the purpose of addressing AAPC's 1993 OBRA claim or, alternatively, on the theory that AAPC's

[19] *Cellco Partnership v. FCC*, 357 F.3d 88, 99-100 (DC Cir. 2004) (FCC reliance on *BLE* "is misplaced; that case involved a claimed material error in a single adjudication, not an agency regulation capable of continuing application," citing *Functional Music, supra,* 274 F.2d at 546).

1993 OBRA claim should be considered "new information" which through no fault of AAPC the original proceeding did not contain. In either case the Court should reject the FCC's threshold challenge and should review the MOO.[20]

II. The FCC's *Chevron* Arguments Are Barred Because They Were Not Made in the Memorandum Opinion and Order

Responding to the merits of AAPC's *Chevron* analysis, the FCC claims that this is a "Chevron Step II" case because "comparable" does not mean "identical," thus rendering the notion of "comparable technical requirements" ambiguous; and therefore "[p]lainly, Congress has left that technical determination to the Commission's reasonable judgment". (FCC Br. at pp. 19-21). The FCC then goes on to argue that its discussion at ¶¶12-14 of the MOO is a reasonable construction of the statute to which this Court should defer under Step II of *Chevron*. (FCC Br. at pp. 22-25).

The short answer to the FCC is that these arguments may not properly be considered by the Court because they are the invention of counsel and do not ap-

[20] None of the other cases in which this Court has applied the *BLE* nonreviewability principle to FCC decisions is to the contrary. *See Advanced Communications Corp. v. FCC,* 376 F.3d 1153, 1158 (DC Cir. 2004); *AT&T Corp. v. FCC,* 363 F.3d 504, 508-510 (DC Cir. 2004); *United States Cellular Corp. v. FCC,* 254 F.3d 78, 88 (DC Cir. 2001); *Schoenbohm v. FCC,* 204 F.3d 243, 250 (DC Cir. 2000); *Entravision Holdings, LLC v. FCC,* 202 F.3d 311, 313 (DC Cir. 2000); *Beehive Telephone Co. v. FCC,* 180 F.3d 314, 319-320 (DC Cir. 1999); *Southwestern Bell Tel. Co. v. FCC,* 180 F.3d 307, 312 (DC Cir. 1999). In all of these cases the petitioner had participated in the underlying FCC proceeding, and had sought review only of the order denying reconsideration without proferring any genuinely new information or changed circumstances at all, or information that could have been adduced earlier with the exercise of due diligence. The *Sendra* case, relied upon so heavily by the FCC, may be similarly characterized. However, that is *not* true of AAPC's 1993 OBRA claim in this case.

pear in the MOO. *E.g., Burlington Northern Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962) (Court must consider reasons given by agency in its order, not by agency counsel); *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) (Court is "powerless to affirm" agency action on "inadequate or improper" grounds).[21]

As noted above, the FCC's *entire* discussion of the 1993 OBRA is contained in ¶11 of the MOO, which does *not* claim that the concept of "technical requirements that are comparable" is ambiguous.[22] Rather, the MOO construes the 1993 OBRA to mean that the FCC has essentially *unfettered discretion*, such that in practice the 1993 OBRA is no more of a limitation on its powers than the general "public interest" standard otherwise applicable under Section 303 of the Act. That goes to the core of AAPC's objection to the MOO's analysis – the FCC has unlawfully refused to "giv[e] some substance" to the limitations on its discretion in fash-

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[21] *Accord Graceba Total Communications, Inc. v. FCC, supra*, 115 F.3d at 1041. There is a longer answer to the FCC's arguments, but the appropriate place for that discussion is before the FCC after remand of this case with instructions from the Court on how the FCC should interpret and apply the 1993 OBRA. Suffice it to say at this point that the FCC has made it abundantly clear that Part 90 paging-only stations in the 462 MHz band will *not* be protected from interference from the nationwide, non-coordinated itinerant mobile stations operating on the "offset" frequencies 12.5 kHz separated from the paging-only stations. *Part 90 Narrowbanding TR&O, supra*, 19 FCC Rcd at 25050 & n. 99 (explicitly eschewing FCC intent to "protect[] paging from low power operations on 12.5 kHz," notwithstanding its decision authorizing paging to continue operating with 25 kHz bandwidth).

[22] More specifically, the MOO substitutes the notion that the FCC "is not compelled to modify existing rules if such modification is unnecessary to achieve regulatory symmetry or is otherwise impractical" (MOO at ¶11) (J.A. ___) for the statutory language instructing the FCC to make all "necessary and practical" rule changes to "assure" the establishment of "technical requirements that are comparable".

ioning technical regulations applicable to Part 22 and Part 90 paging carriers that Congress intended the 1993 OBRA to provide.

Moreover, the FCC's attempt to transmogrify the MOO's discussion in ¶¶12-14 into a "Chevron Step II" analysis is a flagrant mischaracterization of that portion of the MOO. In ¶¶12-14 of the MOO the FCC was responding to AAPC's argument that, wholly irrespective of the 1993 OBRA mandate, the risk of harmful interference from 12.5 kHz separation violated the general public interest standard of the Act. Contrary to the FCC's argument now, the MOO did not offer that discussion as a "Chevron Step II" analysis, and, therefore, the Court properly may not reinvent and recast it for purposes of review.

III. Review of the Memorandum Opinion and Order Is Timely

Finally, the FCC makes a passing defense of the MOO's attempt to characterize AAPC's PFR as time-barred, arguing that it was "a challenge to existing rules that had been in place prior to this proceeding and went well beyond the issues this proceeding," and that "the Commission properly rejected [the PFR]". (FCC Br. at pp. 25-26).

In this regard, AAPC would remind the Court that the MOO actually made two procedural rulings concerning AAPC's PFR: (1) that it was "untimely filed" and (2) that it is "an impermissible collateral attack* on final Commission decisions*". (MOO at ¶10). (J.A. ___). (*Footnotes omitted). AAPC refuted both of

those rulings in its opening brief. (AAPC Br. at pp. 18-22). Tellingly, the FCC is totally silent concerning the collateral attack issue and presumably concedes the point.

The FCC's "untimely" argument should fare no better. The argument first and foremost mischaracterizes both AAPC's position and the effect of the Low Power R&O. Up until the time the Low Power R&O was issued, the effect of the prior FCC rulings had been twofold: (1) to clear out the prior licensees (primarily the medical telemetry stations) from the eight "offset" frequencies at issue by moving them to new frequency bands, and (2) to prevent any new stations from being licensed on the frequencies by imposing a "freeze" on new stations which will last through December 31, 2005. Had the FCC stopped at that point, there would have been no reason for AAPC to take further action, because the existing stations would have cleared off the "offset" frequencies in due course and no new stations would have taken their place.

But the FCC did *not* stop at that point; instead, in the Low Power R&O the FCC authorized *new* mobile stations to be licensed on the eight "offset" frequencies on a nationwide, itinerant, non-coordinated basis. It is the licensing of the *new* stations authorized by the Low Power R&O that threatens the harm to paging carriers complained of by AAPC, and *not* the clearing out of the frequencies as a re-

sult of the FCC's prior orders. Therefore, since the PFR was a timely challenge to the Low Power R&O, it cannot be an untimely challenge to prior FCC rulings.

Moreover, the general rule is that "the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule," and "does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it."[23] More recently, this Court stated the principle as being that "statutory challenges to an agency's application or reconsideration of a previously promulgated rule [is permitted], even if the period for review of the initial rulemaking has expired."[24] Even if the FCC (and the MOO) were correct that AAPC is challenging the FCC's actions in prior rulemaking proceedings, which they are not, they neither cite nor attempt to explain why the principle permitting subsequent review of rules when they are applied (as in the Low Power R&O) should not govern in this case.

CONCLUSION

For the reasons stated above and in its initial brief, AAPC respectfully submits that the Federal Communications Commission unlawfully failed and refused to implement the unambiguous intent of Congress in Section 6002(d)(3)(B) of the

[23] *Functional Music, Inc. v. FCC, 274 F.2d 543, 546 (DC Cir. 1959).*

[24] *Graceba Total Communications, Inc. v. FCC, supra,* 115 F.3d at 1040, citing *Public Citizen v. NRC,* 901 F.2d 147, 152 (DC Cir. 1990); *NLRB Union v. FLRA,* 834 F.2d 191, 195-97 (DC Cir. 1987); *Geller v. FCC,* 610 F.2d 973, 978 (DC Cir. 1979).

Omnibus Budget Reconciliation Act of 1993 when the Commission refused to prohibit the licensing of nationwide, non-coordinated, itinerant mobile stations on eight "offset" frequencies that are 12.5 kHz separated from the Part 90 paging-only frequencies in the 462 MHz band, and accordingly that the Memorandum Opinion and Order should be reversed and remanded to the Commission.

Respectfully submitted,

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	)	
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	)	
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	)	
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because:

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