

BRIEF FOR APPELLEE

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

No. 11-1343

GRESHAM COMMUNICATIONS, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

PAMELA L. SMITH
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici in this case are listed in the Brief of Appellant.

2. Rulings under review.

Gresham Communications, Inc., Memorandum Opinion and Order, 26 FCC Rcd 11895 (2011) (JA)

3. Related cases.

The order on appeal has not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
GLOSSARY	iv
JURISDICTION.....	1
QUESTION PRESENTED	1
STATUTES AND REGULATIONS	2
COUNTERSTATEMENT	2
I. STATUTORY AND REGULATORY BACKGROUND.....	2
II. FACTUAL BACKGROUND	4
A. The State Court Collection Action.....	4
B. The Bureau’s Letter Decision.	7
C. The Commission Order on Appeal.	10
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL.....	14
II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN CONSENTING TO THE ASSIGNMENTS OF THE WPAL-FM LICENSE.....	15
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000)14

Bowman Transp. Inc. v. Arkansas-Best Freight Sys.,
419 U.S. 281 (1974)15

Harrison v. Morris, 370 F. Supp. 142 (D.S.C. 1974)5

Kidd Communications, Inc. v. FCC, 427 F.3d 1
(D.C. Cir. 2005).....22

Listeners’ Guild, Inc. v. FCC, 813 F.2d 465 (D.C.
Cir. 1987).....25

MLQ Investors, L.P. v. Pacific Quadracasting, Inc.,
146 F.3d 746 (9th Cir. 1998).....24

*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto.
Ins. Co.*, 463 U.S. 29 (1983).....14

* *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120
(1945) 15, 16

ADMINISTRATIVE DECISIONS

* *Arecibo Radio Corp.*, 101 FCC 2d 545 (1985)..... 8, 15, 16, 18, 20, 21

D.H. Overmyer Telecasting Co., 94 FCC 2d 117
(1983) 19, 21, 25

In re Cheskey, 9 FCC Rcd 986 (1994) 17, 24

KDEW(AM), DeWitt, Arkansas, 11 FCC Rcd 13683
(1996)25

Kirk Merkley, 94 FCC 2d 829 (1984), *recon.
denied*, 56 RR 2d 413 (1984), *aff’d mem. sub
nom. Merkley v. FCC*, 776 F.2d 365 (D.C. Cir.
1985)..... 15, 16, 19, 23

Letter to Percy Squire, Esq., 24 FCC Rcd 10669
(MB 2009)19

Letter to Richard A. Helmick, 26 FCC Rcd 10715
(MB 2011)26

O.D.T. International, 9 FCC Rcd 2575 (1994)..... 19, 25

Radio KDAN, 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd on procedural grounds sub nom. W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969).....17

STATUTES AND REGULATIONS

5 U.S.C. § 706(2)(A).....14

47 U.S.C. § 301 2, 16

* 47 U.S.C. § 310(d)..... 3, 16, 17

47 U.S.C. § 402(b).....1

47 U.S.C. § 402(c).....1

47 U.S.C. 151 *et seq.*.....2

47 C.F.R. § 73.35403

47 C.F.R. § 73.35413

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

Bureau	Media Bureau, Federal Communications Commission
Caswell	Caswell Capital Partners, LLC (intervenor)
Commission or FCC	Federal Communications Commission (appellee)
<i>February 21, 2007 Order</i>	<i>Beach v. Gresham Commc'ns, et al.</i> , Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Feb. 21, 2007) (JA)
Gresham	Gresham Communications, Inc. (appellant)
<i>Letter Decision</i>	<i>Letter to Charles W. Cherry, II, Receiver for Gresham Communications, Inc.</i> , 24 FCC Rcd 2894 (MB 2009) (JA)
<i>License Attachment Order</i>	<i>Beach v. Gresham Commc'ns, et al.</i> , Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Sept. 22, 2006) (JA)
<i>Order on Appeal</i>	<i>Gresham Communications, Inc.</i> , Memorandum Opinion and Order, 26 FCC Rcd 11895 (2011) (JA)
<i>Receiver Appointment Order</i>	<i>Beach v. Gresham Commc'ns, et al.</i> , Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Mar. 26, 2007) (JA)

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

No. 11-1343

GRESHAM COMMUNICATIONS, INC.,
APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

ON APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

JURISDICTION

The Federal Communications Commission (“FCC” or “Commission”) order that is the subject of this appeal was released on August 25, 2011. The notice of appeal was timely filed on September 23, 2011. *See* 47 U.S.C. § 402(c). The Court has jurisdiction under 47 U.S.C. § 402(b).

QUESTION PRESENTED

This appeal arises from the FCC’s authorization of an assignment of a radio station license from Gresham Communications, Inc. (“Gresham”) to a court-appointed receiver for Gresham, and a subsequent assignment of the license from the receiver to Caswell Capital Partners, LLC (“Caswell”), a

third-party creditor. After Gresham failed to pay a debt due on a promissory note, a South Carolina state court attached Gresham's station license to satisfy an unpaid money judgment that Gresham owed to Caswell.

The question presented is whether, given its unchallenged finding that the state court's attachment of the radio license was "void *ab initio*," the Commission acted within its discretion in nevertheless consenting to the assignment of the license to the court-appointed receiver for Gresham, and to the subsequent assignment of that license to Caswell.

STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the appendix to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

The Communications Act of 1934 (the "Act"), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. To "maintain the control of the United States over all the channels of radio transmission" and "to provide for the use of such channels, but not the ownership thereof," the Act requires all persons seeking to use the electromagnetic spectrum, including those wishing to engage in radio broadcasting, to obtain a license from the FCC. 47 U.S.C. § 301. The Act further provides that FCC-issued

radio licenses cannot be “transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such . . . license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.” 47

U.S.C. § 310(d).

An application for FCC consent to a voluntary assignment or transfer of control of a license (except for certain pro forma changes in ownership) is filed on FCC Form 314. 47 C.F.R. § 73.3540. An application for FCC consent to an involuntary assignment or transfer of control of a license, such as one resulting from the death or “legal disability” of the licensee, “to a person or entity legally qualified to succeed to the [licensee’s] interests under the laws of the place having jurisdiction over the estate involved,” is filed on FCC Form 316. 47 C.F.R. § 73.3541. FCC Form 316 is specifically used where “[t]here is an involuntary assignment or transfer of a controlling interest in a licensee/permittee to a court-appointed . . . receiver” (in state court receivership proceedings). Instructions for FCC Form 316, General Instruction A.8. *See* <http://transition.fcc.gov/Forms/Form316/316.pdf>.

II. FACTUAL BACKGROUND

A. The State Court Collection Action.

In 1988, Gresham executed a promissory note with Nancy R. Beach, a creditor. Because the amount due on the note “remained unpaid” (Initial Brief of Appellant (“Gresham Br.”) at 9) for several years, Beach filed suit against Gresham in August 1992 to collect the outstanding debt. *Beach v. Gresham Commc’ns, et al.*, Complaint, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Aug. 18, 1992). In June 1998, Beach obtained a \$56,276.10 judgment against Gresham on the note. *See Beach v. Gresham Commc’ns, et al.*, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. June 6, 2008) at 2 (JA). In August 2006, after purchasing the judgment, Caswell brought an action in the South Carolina Court of Common Pleas for Colleton County (the “state court”) to collect on the outstanding judgment. *Id.* at 3 (JA).

On September 22, 2006, after hearing testimony that Gresham’s sole asset was an FCC license to operate radio station WPAL-FM in Ridgeville, South Carolina,¹ the state court ordered the attachment and judicial sale of the

¹ On November 4, 2010, the station’s call sign was changed to WAYA-FM. Consistent with the pertinent agency orders and Gresham’s brief, we refer to the station by its prior call sign – WPAL-FM – throughout this brief.

license to satisfy the judgment held by Caswell against Gresham.² *See Beach v. Gresham Commc'ns, et al.*, Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Sept. 22, 2006) (the “*License Attachment Order*”) (JA). In a later order (the “*February 21, 2007 Order*”), the state court denied Gresham’s motion for a stay of the judicial sale and ordered that upon the sale of the license, “[the] judgment debtor, as assignee, and the Successful Bidder, as assignor,” shall “promptly and without delay apply for FCC approval of the assignment of [the] License to the Successful Bidder.” *Beach v. Gresham Commc'ns, et al.*, Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Feb. 21, 2007) at 2 (JA). In doing so, the state court emphasized that the sale of the license “will be final” only “upon FCC grant of consent to the assignment.” *Ibid.*

At the same time, the state court denied Caswell’s request to “facilitate the application for transfer” by appointing a receiver who would seek FCC consent to the transfer of the license to the successful bidder at the judicial sale. *February 21, 2007 Order* at 3 (JA). Instead, the court ordered Gresham to “fully and timely cooperate with the preparation and filing of the application for FCC approval of the assignment of the license to the successful bidder.” *Ibid.* (emphasis omitted) (JA). The court warned,

² Under South Carolina law, the effect of an attachment is to create a lien or encumbrance on the property attached. *Harrison v. Morris*, 370 F. Supp. 142, 148 (D.S.C. 1974).

however, that “should the judgment debtor fail or refuse to sign any forms, provide any information necessary to complete or file the application for FCC consent to assignment of the License, . . . this Court will immediately appoint a receiver to take those actions on behalf of the judgment debtor.” *Ibid.* (JA).

The judicial auction took place on February 15, 2007, with Caswell the successful bidder. *See February 21, 2007 Order* at 1 (JA). After Gresham refused to cooperate in seeking FCC consent to assign the WPAL-FM license to Caswell, the court appointed a receiver (Charles W. Cherry, II) for Gresham. *Beach v. Gresham Commc’ns, et al.*, Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. Mar. 26, 2007) (“*Receiver Appointment Order*”) (JA).

The state court instructed the receiver to promptly seek the FCC’s consent for involuntary assignment of the WPAL-FM license, and upon obtaining the FCC’s consent, to operate the station “as he in his discretion shall deem appropriate to conserve the business and assets of the station as is consistent with the FCC’s rules and policies until a sale of the stations [sic] assets is confirmed.” *Id.* at 2 (JA). The court also provided that the receiver’s appointment would end once “a purchaser is found for the station acceptable to the Receiver and the FCC has granted its consent for transfer of the FCC licenses [sic] to such purchaser.” *Id.* (JA).

On March 27, 2007, the receiver filed an application for the FCC's consent to the involuntary assignment of the license from Gresham to receiver (the "Involuntary Assignment Application"), which the staff of the FCC's Media Bureau (the "Bureau") granted on April 3, 2007. *See* Public Notice, *Broadcast Actions*, Report No. 46459 (Apr. 6, 2007) (JA). Then, on April 6, 2007, the receiver filed an application for the FCC's consent to the voluntary transfer of control of station WPAL-FM, including assignment of the station's license, from the receiver to Caswell (the "Voluntary Assignment Application"). *See* Public Notice, *Broadcast Applications*, Report No. 46462 (Apr. 11, 2007) (JA).

B. The Bureau's Letter Decision.

On May 7, 2007, Gresham petitioned the Bureau to reconsider its grant of the application for involuntary assignment to the receiver, and on May 11, 2007, petitioned the Bureau to deny the application for voluntary assignment to Caswell. *Letter to Charles W. Cherry, II, Receiver for Gresham Communications, Inc.*, 24 FCC Rcd 2894, 2895 (MB 2009) ("*Letter Decision*") (JA).³

³ On April 7, 2008, a year later, Gresham sought to satisfy the judgment by depositing \$106,268.78 (representing the original amount due, along with attorneys' fees, plus interest) with the clerk of the state court, but the state court rejected this late-filed tender. *Beach v. Gresham Commc'ns, et al.*, Order, C.A. No. 92-CP-15-508 (S.C. Ct. Com. Pl. June 6, 2008) (JA).

On March 3, 2009, the Bureau granted in part and denied in part each petition. *Id.* at 2899 (JA). The Bureau explained that the Commission’s “long-standing policy is to accommodate the actions of state courts, thereby avoiding conflicts between state and federal authority, unless a public interest determination under the Act would compel a different result.” *Id.* at 2896 (JA) (citing, *inter alia*, *Arecibo Radio Corp.*, 101 FCC 2d 545 (1985) (“*Arecibo*”). This deference, the Bureau explained, is subject to an important limitation. Because “a broadcast license does not confer a property right,” *ibid.*, the “Commission has repeatedly observed that a ‘license, as distinguished from a station’s physical assets, is not subject to a mortgage, security interest, or lien, pledge, *attachment*, seizure, or similar property right.’” *Id.* at 2987 (emphasis in original) (citation omitted) (JA).

The Bureau found that the state court’s *License Attachment Order* was, by its “plain language,” “facially inconsistent with the Commission’s policy prohibiting attachment of a Station license.” *Id.* at 2897 (JA). It accordingly ruled that, notwithstanding “the Commission’s general deference to state court orders, . . . the Court’s attachment of the WPAL-FM license exceeded its authority and to this extent its order” was “void *ab initio* as violative of the Act and Commission policy.” *Id.* at 2897-98 (JA).

“[N]otwithstanding the invalidity of the State Court Order *vis-à-vis* attachment of the Station’s license,” the Bureau found “no reason to overturn the staff’s action granting the Involuntary Assignment Application” to the receiver. *Id.* at 2898 (JA). As the Bureau explained, “in cases of bankruptcy or receivership, the Commission does permit trustees or receivers to hold licenses on a temporary basis pending disposition of station assets.” *Id.* at 2898 (JA). This policy serves the public interest, the Bureau stated, because the station assets “would be of comparatively little value if the Commission did not permit the operating authorization to accompany them pending ultimate passage of all [assets] to a qualified buyer.” *Ibid.* (citation omitted) (JA).⁴

In addition to finding “no error in the staff’s grant of the Involuntary Assignment Application,” the Bureau examined the application for voluntary assignment of the station from the receiver to Caswell. *Id.* at 2899 (JA). Finding “Caswell to be fully qualified to be the licensee of Station WPAL-FM” – a fact that Gresham did not dispute – “and that grant of the [Voluntary

⁴ The Bureau noted that the receiver held some of the station’s non-license assets, including “the local public inspection file and its advertiser lists,” and that Caswell acquired other station assets, “including ‘the WPAL-FM tower, antenna and most of the station’s furniture fixtures and equipment,’” through separate transactions. *Ibid.* (JA).

Assignment] Application will further the public interest, convenience, and necessity,” the Bureau accordingly granted the application. *Ibid.* (JA).

C. The Commission Order on Appeal.

Gresham filed an application for review of the *Letter Decision*, which the Commission denied. *Gresham Communications, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 11895 (2011) (“*Order on Appeal*”) (JA).

The Commission first agreed with the Bureau that the “plain language” of the state court’s *License Attachment Order* “improperly sought to attach the [WPAL-FM] Station License in violation of Commission policy.” 26 FCC Rcd at 11900 ¶ 11 (JA). Thus, although the Commission’s general policy “is to accommodate the actions of state courts” wherever possible, the Commission explained that it “is neither bound by nor need approve a state court decision that is contrary to the Commission’s rules or policies.” *Id.* at ¶ 10 (JA).

In contrast, the Commission concluded that the state court’s separate *Receiver Appointment Order* “does not conflict with Commission policy.” *Id.* at ¶ 13 (JA). As the Commission observed, “[t]here is nothing unique, or violative of the Commission’s policies, in the Court appointing a receiver to facilitate the orderly disposition of the Station’s license for the benefit of the judgment holder and assignee, Caswell.” *Id.* at ¶ 14 (JA). Thus, the

Commission explained, “Gresham misconstrues the Commission’s Rules and policies when it argues that the Commission should not honor the *Receiver Appointment Order* because that order facilitates the ultimate assignment of the Station License to Caswell.” *Id.* at ¶ 13 (JA). On the contrary, the Commission agreed with the Bureau that “the *Receiver Appointment Order* furthers the public interest by ultimately uniting the Station License with the assets necessary to enable the licensee to operate the Station.” *Id.* at ¶ 14 (JA). “[C]onsistent with our long-standing precedent of accommodation of state court actions compliant with the Commission’s rules and policies,” the Commission concluded that it should “defer to the Court’s appointment of a Receiver.” *Id.* at ¶ 13 (JA).

The Commission made clear that “[c]ompliance with Commission policy is the critical distinction in our decision to defer to the *Receiver Appointment Order*, but not the *License Attachment Order*.” *Ibid.* (JA). Because it found that “the Receiver’s appointment and the transfer of the Station through the Involuntary Assignment Application were in accord with Commission policy,” the Commission “affirm[ed] the [Bureau’s] decision to give effect to the *Receiver Appointment Order*.” *Id.* at ¶ 14 (JA). The Commission likewise affirmed the Bureau’s decision to approve the Voluntary Assignment Application, finding “that the Receiver’s actions in

operating and assigning the Station to Caswell were consistent with the Commission's Rules and practice." *Ibid.* (JA).⁵ This appeal followed.

SUMMARY OF ARGUMENT

The Commission acted within its broad discretion over spectrum licensing determinations when it consented to the involuntary assignment of the WPAL-FM license from Gresham to the state court-appointed receiver, as well as the subsequent voluntary assignment of that license from the receiver to Caswell. The agency's decision therefore should be affirmed.

It is undisputed that the state court exceeded its authority in attaching WPAL-FM's license to ensure that Gresham satisfied the money judgment resulting from its unpaid debt to Caswell. It has long been settled that FCC radio station licenses are not property subject to attachment or mortgage – a rule designed to preserve the agency's exclusive jurisdiction over licensing matters. The Commission accordingly, and correctly, upheld the Bureau's

⁵ The Commission also rejected two other challenges asserted by Gresham to the *Letter Decision*: (1) that grant of the application for voluntary assignment to Caswell violated the Commission's "prohibition on the transfer of a bare license," and (2) that Caswell was not qualified to be a Commission licensee because "Caswell made material misrepresentations to the Commission." *Order on Appeal* at ¶¶ 15-19 (JA). Gresham does not contest these determinations on appeal. *See* Gresham Br. at 12 n.4; *accord id.* at 14 n.5.

determination that the state court's *License Attachment Order* was "void *ab initio*."

The state court's procedural misstep with regard to attachment did not, however, compel the Commission to refuse its consent to the subsequent assignment of the license to Gresham's receiver under the agency's routine procedures for processing such applications. The Commission ordinarily acts to accommodate state law where doing so will not impermissibly undermine federal policies. Accordingly, it routinely defers to state court determinations to appoint receivers to conserve, operate, and facilitate the transfer of radio station licenses and assets to qualified buyers. That is what happened here. The state court appointed a receiver after Gresham refused to cooperate in seeking FCC consent to the sale of the station to satisfy an outstanding judgment, and nothing in the record suggests that the court would not have done so if it had refrained from attaching the station license. It was thus perfectly appropriate for the Commission to treat the state court's *Receiver Appointment Order* as distinct from the *License Attachment Order*, which was a nullity from the outset.

Once the Commission properly refused to defer to the state court's attachment, this case presented a garden-variety request for consent to the involuntary assignment of a radio station license occasioned by the

appointment under state law of a receiver for a debtor-licensee. As the Commission explained, such consent comports with settled Commission policy while at the same time accommodating state law by ensuring, among other things, that the station's operating authority travels with the rest of the station assets. The Commission also acted within its discretion in authorizing the ensuing voluntary assignment from the receiver to Caswell. The record shows that the Commission reasonably found that Caswell has the technical assets necessary to operate the station and that transfer of the station license was in the public interest.

ARGUMENT

I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL.

The Court must affirm the *Order on Appeal* unless Gresham demonstrates that the challenged agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This “[h]ighly deferential” standard of review “presumes the validity of agency action.” *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). Moreover, in determining whether the agency articulated a “rational connection between the facts found and the choice made,” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted), the courts are bound to “uphold a decision of less than

ideal clarity if the agency's path may reasonably be discerned," *ibid.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

II. THE COMMISSION ACTED WITHIN ITS DISCRETION IN CONSENTING TO THE ASSIGNMENTS OF THE WPAL-FM LICENSE.

In this case, Gresham relies on a principle designed to *preserve* the FCC's broad discretion over licensing determinations as grounds to *deprive* the agency of discretion. The fact that the state court's attachment order was a nullity because it violated the FCC-protective principle against allowing a security interest in an FCC license, did not deprive the Commission of discretion to approve the subsequent assignments that enabled Caswell to collect its unpaid money judgment against Gresham.

1. The FCC and the courts have long applied a "principle of fair accommodation" to avoid conflict between a state's authority over contract disputes and the Commission's authority over radio station licensing. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 132 (1945) ("*Radio WOW*"); *Arecibo*, 101 FCC 2d at 548; *Kirk Merkley*, 94 FCC 2d 829, 838 (1984) ("*Merkley*"), *recon. denied*, 56 RR 2d 413 (1984), *aff'd mem. sub nom. Merkley v. FCC*, 776 F.2d 365 (D.C. Cir. 1985). Applying that principle, and recognizing that "the Commission does not possess the

resources, expertise, or jurisdiction to adjudicate [state law contract] questions fully,” the Commission “normally defer[s] to judicial determinations regarding the interpretation and enforcement of contracts for the sale of broadcast stations.” *Arecibo*, 101 FCC 2d at 548 ¶ 8. Indeed, the Supreme Court has instructed that “the principle of fair accommodation between State and federal authority . . . *should be* observed” where the state’s laws “can be effectively respected while at the same time reasonable opportunity is afforded for the protection of [the] public interest” that undergirds the FCC’s licensing decisions. *Radio WOW*, 326 U.S. at 132 (emphasis added).

It is equally well established, however, that a broadcast license confers no right of “ownership,” 47 U.S.C. § 301, and that such a license may not “be transferred, assigned, or disposed of in any manner” without the Commission’s prior determination that such disposition will be in the public interest, 47 U.S.C. § 310(d). Accordingly, “a broadcast license, as distinguished from a station’s plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right.” *Merkley*, 94 FCC 2d at 830 ¶ 3. *See also Radio KDAN*, 11 FCC 2d 934, 934 n. 1 (1968) (rejecting as “untenable” “[t]he extraordinary notion that a station license issued by this

Commission is a mortgageable chattel in the ordinary commercial sense”), *recon. denied*, 13 RR 2d 100 (1968), *aff’d on procedural grounds sub nom. W.H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969) (“*Radio KDAN*”).

This bedrock principle preserves the FCC’s exclusive control over licensing allocations: “[T]he Commission’s statutory mandate requires it to approve the qualifications of every applicant for a license” and, “[i]f a security interest holder were to foreclose on the collateral license, by operation of law, the license could transfer hands without the prior approval of the Commission.” *In re Cheskey*, 9 FCC Rcd 986, 987 ¶ 8 (1994) (“*Cheskey*”) (citing 47 U.S.C. § 310(d)); *see also Radio KDAN*, 13 RR 2d at 102 (“such a hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust”).

2. In this case, the Bureau recognized, and the Commission affirmed, that the state court’s *License Attachment Order* was “facially inconsistent with the Commission’s policy prohibiting attachment of a Station license.” *Letter Decision*, 24 FCC Rcd at 2897 (JA). *Accord Order on Appeal*, 26 FCC Rcd at 11900 ¶ 11 (JA) (the state court “improperly sought to attach the Station License in violation of Commission policy.”). As the Bureau declared, the state court’s attachment of the WPAL-FM license was “void *ab*

initio.” *Letter Decision*, 24 FCC Rcd at 2897-98 (JA). Thus, far from “approving [an] illegal attachment” (Gresham Br. at 19) by endorsing the notion that the transfer of an FCC license is permissible without the agency’s consent, the Commission underscored that the state court’s attachment was a nullity from the outset, and determined that it should give no weight to it.

Having done so, the Commission reasonably exercised its discretion in concluding that it nevertheless would be in the public interest to consent to the involuntary assignment of the license to the state-appointed receiver. As the Commission explained, the “critical distinction” was that, unlike the *License Attachment Order*, the *Receiver Appointment Order* “compli[ed] with Commission policy.” *Order on Appeal* at ¶ 13 (JA). See *Arecibo*, 101 FCC 2d at 550 ¶ 11 (“Our responsibility to reach fair accommodation between federal and nonfederal interests compels us to take into account those aspects of the [state] Court’s decrees which do not usurp the Commission’s exclusive authority over licensing matters.”).

Here, the state court issued a separate appointment order that in no way “usurp[ed] the Commission’s exclusive authority over licensing matters.” *Ibid.* The receiver’s appointment, the Commission explained, not only served to “facilitate the orderly disposition of the Station’s license for the benefit of the judgment holder and assignee, Caswell,” but “further[ed] the public

interest by ultimately uniting the Station License with the assets necessary to enable the licensee to operate the Station.” *Order on Appeal* at 14 (JA).

Indeed, the Commission noted, the agency “routinely grants trustees or receivers consent to acquire broadcast licenses on a temporary basis pending disposition of station assets.” *O.D.T. International*, 9 FCC Rcd 2575, 2576 ¶ 7 (1994).⁶ In doing so, the Commission recognizes that the assets associated with a station license “would be of comparatively little value if the Commission did not permit the operating authorization to accompany them pending ultimate passage of all to a qualified buyer.” *Ibid. Accord Merkley*, 94 FCC 2d at 837 ¶ 16 (recognizing that “the operating authorization must usually accompany the physical assets, pending ultimate passage of all to a qualified applicant.”).

Given the Commission’s proper – and uncontested – determination not to defer to the defective license attachment, the facts of this case closely parallel those in *Arecibo*, where the FCC similarly approved a license

⁶ See also *Letter to Percy Squire, Esq.*, 24 FCC Rcd 10669, 10673 (MB 2009) (“it is well-established that the Commission will accommodate court decrees, such as the appointment of the Receiver for the Stations, unless a public interest determination compels a different result”); *D.H. Overmyer Telecasting Co.*, 94 FCC 2d 117, 123 ¶ 9 (1983) (“*Overmyer*”) (“we have consistently held that the Commission will not generally question the appointment of a bankruptcy trustee or receiver where a court is seeking to protect the creditors of a financially disabled licensee”).

transfer. In *Arecibo*, the Superior Court of Puerto Rico ordered the court's Marshall to sign applications to obtain FCC consent to the involuntary transfer of two radio station licenses so that the licenses could accompany the sale of station assets that had been disposed of at a judicial sale to satisfy a money judgment. *See* 101 FCC 2d at 546-47 ¶¶ 2-3. The Commission rejected the licensee's argument that the agency was barred from deferring to the Puerto Rico court's action by consenting to the involuntary transfer. As the Commission explained, the Puerto Rico court, which had jurisdiction to adjudicate the underlying contractual dispute, had properly given the Commission the opportunity to determine whether the licenses should be assigned to the purchaser of the rest of the station's assets. *Id.* at 549 ¶ 9. The Commission found that the mechanism by which the Puerto Rico court did so – having the Marshall sign the applications – was a permissible consequence of the licensee's defiance of the court's prior order to sign them itself. *Ibid.* In so concluding, the Commission emphasized that the court left the licensee free “to assert before the Commission any argument regarding the assignment applications,” and “specifically left to the Commission the determination of all public interest issues which might be raised by the applications.” *Id.* at 549 ¶ 10.

Similarly here, upon Gresham's failure to cooperate, the state court appointed a receiver for Gresham (rather than directing a court employee to sign the necessary papers) to obtain the FCC's consent to transfer of its license, but left the Commission free to determine whether the proposed assignment would be in the public interest. *Compare Receiver Appointment Order* at 1 (JA) *with Arcibo*, 101 FCC 2d at 549 ¶ 10 ("the court did not infringe federal licensing responsibilities in any way" by having a court employee sign the assignment application in place of the licensee).⁷

3. Gresham contends on appeal that the Commission unlawfully allowed Caswell to "foreclose upon" Gresham's license (Gresham Br. 24), and improperly approved a license transfer "by operation of law," *id.* at 25. That is incorrect. The Commission unambiguously declared the *License Attachment Order* to be void, and refused to defer to it as inconsistent with Commission policy. *Order on Appeal*, 26 FCC Rcd at 11900-01 ¶ 11 (JA); *see Letter Decision*, 24 FCC Rcd at 2897-98 (JA). Unlike the defective *License Attachment Order*, the appointment of the receiver did not intrude

⁷ In determining whether the public interest is served by the appointment of a receiver, "as opposed to proceedings where a new, fully independent licensee is being reviewed, the Commission is only considering a party who will be operating the facility on a *temporary basis; i.e.*, only until the bankruptcy estate is settled" (or, as in this case, until supplemental collection proceedings can be concluded) "and a new licensee can be approved by the Commission." *Overmyer*, 94 FCC 2d at 124 (emphasis added).

into the Commission's licensing authority. On the contrary, the state court specified that the judicial sale would be "final" *only* "upon the FCC grant of consent to the assignment" *February 21, 2007 Order* at 2 (JA), and appointed the receiver "*subject to* issuance by the FCC of consent to the involuntary assignment of the Gresham license[]," and in order to permit the receiver to obtain FCC consent to the license assignment. *Receiver Appointment Order* at 1 (JA) (emphasis added). Similarly, the Commission and the Bureau consented to the involuntary transfer of Gresham's license to the receiver (and the subsequent voluntary transfer to Caswell) only after determining that those transfers comported with Commission policy and were in the public interest. *Order on Appeal*, 26 FCC Rcd at 11901-02 ¶¶ 13-14 (JA); *Letter Decision*, 24 FCC Rcd at 2898-99 (JA). These Commission actions are within its core discretion over licensing allocations, and did not result in any license transfers "by operation of law" or otherwise without FCC consent.

Gresham's reliance on *Kidd Communications, Inc. v. FCC*, 427 F.3d 1 (D.C. Cir. 2005), and *Merkley* is thus misplaced. In *Kidd*, the Court found that the Commission erred in failing to explain how its consent to the assignment of a license to a predecessor licensee did not give effect to the assignee's impermissible reversionary interest in the license. 427 F.3d at 4-6.

In *Merkley*, the Commission refused to approve license transfers because to do so would have recognized the receiver's rights based on an agreement that impermissibly provided for the former licensee to "regain control automatically of the station and [the] license" and thus was "tantamount to a . . . vested security interest in the license itself." *Merkley*, 94 FCC 2d at 839 ¶ 20. Here, consistent with *Merkley*, the Commission declined to give effect to the attachment – declaring it a nullity from the outset – and evaluated the subsequent assignment applications on their own merits.

Gresham also speculates that "[b]ut for" the state court's "illegal attachment" of its license, "there would have been no appointment of a receiver to force [its] assignment" to Caswell. Gresham Br. 34. Gresham's theory is unsupported by the record. The receivership order was adopted in supplemental proceedings to aid in the satisfaction of an unpaid judgment under South Carolina law. *See* S.C. Code § 15-39-430 (authorizing appointment of a receiver in such proceedings). Throughout the proceedings, the state court made clear that its ultimate goal was to ensure satisfaction of the substantial money judgment that Gresham owed to Caswell. *See, e.g., February 21, 2007 Order* at 1 (JA) (ordering judicial sale "to satisfy the judgment"). There is no reason to think that if the state court had refrained

from attaching the license itself (as opposed to the proceeds thereof) it would not have appointed a receiver to facilitate satisfaction of the unpaid judgment.

In contrast with the license itself, “proceeds from the sale [of a radio license] *are* subject to attachment and may be used to satisfy a judgment.” *Order on Appeal*, 26 FCC Rcd at 11900 ¶ 11 (JA) (emphasis added). *See MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746, 749 (9th Cir. 1998). As the Commission explained in *Cheskey*, 9 FCC Rcd at 987 ¶ 9, “[w]hen a licensee gives a security interest in the proceeds of the sale of [the station], including the license, . . . [t]he creditor has no rights over the license itself, nor can it take any action under its security interest until there has been a transfer which yields proceeds subject to the security interest.” In short, the state court could have attached the proceeds of the sale of the WPAL-FM license, rather than the license itself, without running afoul of the Communications Act or Commission policies. The Commission was thus entirely justified in analyzing the license assignment applications before it without reference to the defective license attachment, which it appropriately declined to honor.

In any event, Gresham’s speculation about what the state court might have done if it had not attached the license itself (but instead only the proceeds thereof) is effectively an objection to the receiver’s authority under

state law, a matter into which the Commission does not inquire. *See, e.g., KDEW(AM), DeWitt, Arkansas*, 11 FCC Rcd 13683, 13686-87 ¶¶ 9-11 (1996); *Overmyer*, 94 FCC 2d at 123-24 ¶ 9. The Commission has “consistently indicated that controversies which do not reflect upon the qualifications of a Commission licensee are best left to the local courts for resolution.” *O.D.T. Int’l*, 9 FCC Rcd at 2576 ¶ 9. *Cf. Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting “the Commission’s longstanding policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts”).

Finally, Gresham contends that whatever the basis for the Commission’s approval of the involuntary transfer of its license to the receiver, the FCC provided “no justification . . . whatsoever” for the approval of the voluntary transfer of the license from the receiver to Caswell. Gresham Br. 36. Gresham is wrong. Examining evidence that Caswell had acquired, among other things, “the WPAL-FM tower, antenna, and most of the station’s furniture fixtures and equipment,” the Commission agreed with the Bureau that Caswell “possess[ed] the technical assets required to assure continuation of broadcast service.” *Order on Appeal*, 26 FCC Rcd at 11903 ¶ 15 (JA); *accord Letter Decision*, 24 FCC Rcd at 2898-99 (JA). In addition, the Commission explained, “[a] review of the Station’s record in the

Commission's database reveals that it has been fully operational under Caswell's stewardship." *Order on Appeal*, 26 FCC Rcd at 11903 ¶ 15 (JA).⁸ The Bureau specifically examined the application for voluntary transfer and found "Caswell to be fully qualified to be the licensee of Station WPAL-FM and that grant of the Application will further the public interest, convenience and necessity." *Letter Decision*, 24 FCC Rcd at 2899 (JA). The Commission likewise concluded that the receiver's actions in "assigning the Station to Caswell were consistent with the Commission's Rules and practice." *Order on Appeal*, 26 FCC Rcd at 11902 ¶ 14 (JA).⁹ Those determinations were reasonable and supported by the record. Indeed, Gresham did not argue to the Commission (nor does it argue on appeal) that Caswell is not otherwise qualified to hold the WPAL-FM license. The Commission's decision accordingly should be upheld.

⁸ Gresham asserts that the station went off the air "on April 8, 2007, almost immediately after the Receiver assumed control of the station, and the station remained off the air until February 25, 2008." Gresham Br. 40. The receiver was in control of the station during this entire period, as the station license assignment to Caswell was not approved by the Bureau until March 3, 2009. *See Letter Decision*, 24 FCC Rcd at 2899 (JA).

⁹ For this reason, the Bureau's decision in *Letter to Richard A. Helmick*, 26 FCC Rcd 10715 (MB 2011) ("*KJOX(AM)*"), cited in Gresham Br. at 28, is inapposite. In *KJOX(AM)*, unlike this case, the Bureau found that the proposed transaction was "against the public interest because it [was] patently not in accord with [Commission] policy." 26 FCC Rcd at 10720.

CONCLUSION

For the foregoing reasons, the *Order on Appeal* should be affirmed.

Respectfully submitted,

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

/s/ Pamela L. Smith

PAMELA L. SMITH
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

March 15, 2012

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

GRESHAM COMMUNICATIONS, INC.,

APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

No. 11-1343

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 5,818 words.

/s/ Pamela L. Smith
Pamela L. Smith
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

March 15, 2012

STATUTORY APPENDIX

Communications Act Provisions:

47 U.S.C. § 301

47 U.S.C. § 310(d)

FCC Rules:

47 C.F.R. § 73.3540

47 C.F.R. § 73.3541

47 U.S.C.**§ 301. License for radio communication or transmission of energy**

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

§ 310. License ownership restrictions**(d) Assignment and transfer of construction permit or station license**

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

47 C.F.R.

§ 73.3540 Application for voluntary assignment or transfer of control.

- (a) Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.
- (b) Application should be filed with the FCC at least 45 days prior to the contemplated effective date of assignment or transfer of control.
- (c) Application for consent to the assignment of construction permit or license must be filed on FCC Form 314 "Assignment of license" or FCC Form 316 "Short form" (See paragraph (f) of this section).
- (d) Application for consent to the transfer of control of a corporation holding a construction permit or license must be filed on FCC Form 315 "Transfer of Control" or FCC Form 316 "Short form" (see paragraph (f) of this section).
- (e) Application for consent to the assignment of construction permit or license or to the transfer of control of a corporate licensee or permittee for an FM or TV translator station, a low power TV station and any associated auxiliary station, such as translator microwave relay stations and UHF translator booster stations, only must be filed on FCC Form 345 "Application for Transfer of Control of Corporate Licensee or Permittee, or Assignment of License or Permit for an FM or TV translator Station, or a Low Power TV Station."
- (f) The following assignment or transfer applications may be filed on FCC "Short form" 316:
 - (1) Assignment from an individual or individuals (including partnerships) to a corporation owned and controlled by such individuals or partnerships without any substantial change in their relative interests;
 - (2) Assignment from a corporation to its individual stockholders without effecting any substantial change in the disposition of their interests;
 - (3) Assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one;
 - (4) Corporate reorganization which involves no substantial change in the beneficial ownership of the corporation;
 - (5) Assignment or transfer from a corporation to a wholly owned subsidiary thereof

or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests; or

(6) Assignment of less than a controlling interest in a partnership.

§ 73.3541 Application for involuntary assignment of license or transfer of control.

(a) The FCC shall be notified in writing promptly of the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee.

(b) Within 30 days after the occurrence of such death or legal disability, an application on FCC Form 316 shall be filed requesting consent to involuntary assignment of such permit or license or for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved.

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

Gresham Communications, Inc., Appellant

v.

Federal Communications Commission, Appellee.

CERTIFICATE OF SERVICE

I, Pamela L. Smith, hereby certify that on March 15, 2012, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

Dan J. Alpert
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201
*Counsel for: Gresham
Communications, Inc.*

Richard B. Beckner
*Erwin G. Krasnow
Garvey Schubert Barer
1000 Potomac Street, N.W.
Flour Mill Building, 5th Floor
Washington, D.C. 20007-3501
*Counsel for: Caswell Capital
Partners, LLC*

/s/ Pamela L. Smith