

No. 14-1130

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

BOB LAW, *ET AL.*

APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE

ON APPEAL FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

C. GREY PASH, JR.
COUNSEL

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

STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in appellants' brief.

2. Rulings Under Review

Urban Radio I, L.L.C., 29 FCC Rcd 12240 (2014) (JA --).

3. Related Cases

The order on review has not previously been before this Court or any other court. We are not aware of any related cases pending before this Court or any other court.

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GLOSSARY

AFR

application for review

FCC

Federal Communications Commission

MB

Media Bureau

MO&O

Urban Radio I, L.L.C., 29 FCC Rcd 12240
(2014) (JA --)

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BRIEF FOR APPELLEE

INTRODUCTION

This case arises from a challenge to the Federal Communications Commission's grant of an application to assign the licenses of two New York City radio stations pursuant to an agreement approved by a bankruptcy court.

Appellants, four residents of the New York City area, filed a petition to deny the license application pursuant to 47 U.S.C. § 309(d) on the grounds that it (1) would lead to a reduction of radio programming "geared toward Black and local audiences" and (2) would promote further consolidation of media into the hands of

the “corporate elite” to the detriment of Black ownership. On appeal to the Commission, appellants contended for the first time that grant of the application would also violate their Fifth Amendment right to equal protection of the laws.

The Commission concluded that appellants had failed to raise substantial and material questions of fact regarding the qualifications of the applicants or to present other evidence that the license assignments would be contrary to the public interest. *See* 47 U.S.C. §§ 310(d); 309(d)(2).

The Commission dismissed appellants’ equal protection argument because it had not been presented to the Media Bureau, as Commission rules require. The Commission then explained that (1) under Section 310(d) of the Communications Act the sole question for the agency is whether the public interest would be served by assigning the license to the applicant proposed in the application, and not whether the public interest might be better served by assigning the license to another person or entity, and (2) long-established Commission policy precludes consideration of possible program format changes in ruling on assignment applications. The Commission also found that grant of the application was consistent with the agency’s local radio ownership rules.

Appellants have failed to demonstrate standing to challenge the Commission’s decision before this Court; but even if standing were present, the Commission’s determination in this matter was reasonable and should be affirmed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether appellants have demonstrated that they have standing to appeal the FCC order that is before the Court.
2. Whether the FCC acted appropriately when it dismissed certain of appellants' arguments because they had not first been raised before the FCC's Media Bureau, as required by agency rule.
3. Whether the FCC acted reasonably in denying appellants' petition to deny the application to assign the licenses for these two radio stations.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 47 U.S.C. § 402(b)(6), which gives this Court exclusive jurisdiction to hear appeals from persons who are "aggrieved or whose interests are adversely affected by" an FCC order granting or denying an FCC radio license assignment application. The Commission's order was released on June 10, 2014. The notice of appeal was timely filed within 30 days of the applicable date established by 47 U.S.C. § 402(b) and 47 C.F.R. § 1.4(b)(1). As discussed below, appellants have not demonstrated standing, and thus this Court lacks jurisdiction to hear this matter.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

1. Statutory Background

Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), provides that “[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, ... 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.”

Section 309(d) of the Communications Act permits any “party in interest” to file with the Commission “a petition to deny any application,” but requires that such petition “contain specific allegations of fact, sufficient to show that ... a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity].” 47 U.S.C. § 309(d)(1). Those allegations must be “supported by affidavit of a person or persons with personal knowledge thereof.” *Id.* “If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience and necessity],” then the Commission “shall make the grant” and “deny the petition.” *Id.* 47 U.S.C. § 309(d)(2).

The Communications Act expressly states that in acting on applications to assign or transfer a license, “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 U.S.C. § 310(d); *see MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968), *overruled in part on other grounds, Coalition for the Preserv. of Hispanic Broadcasting*, 931 F.2d 73, 79 (D.C. Cir. 1991); *St. Louis Amusement Co. v. FCC*, 259 F.2d 202, 204 n.1 (D.C. Cir. 1958).

2. Factual Background

Inner City Media Corp. (ICMC) is the parent company of Urban Radio I, LLC, the licensee of radio stations WLIB(AM) and WBLS(FM) in New York City. On August 19, 2011, ICMC (along with its wholly-owned subsidiaries) was placed into involuntary bankruptcy because it had defaulted on its loan obligations. In February 2012, the bankruptcy court entered an order authorizing the sale to YMF Media, LLC, of substantially all of the ICMC’s assets, including (subject to FCC consent) the two radio licenses.¹ Pursuant to that order and 47 U.S.C. § 310(d), on April 30, 2012 Urban Radio I filed with the FCC an application for

¹ *See Inner City Media Corp., et al.*, Case No. 11-13967 (Bankr. S.D.N.Y, Feb 23, 2012), attached to FCC Form 314, File No. BAL-20120430ADH, Exh. 5 (Sale Approval Order) (https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101488103&qnum=5040©num=1&exhnum=1) (March 19, 2015).

consent to the assignment of the licenses to YMF Media's wholly-owned subsidiary, YMF Media New York Licensee, LLC.²

a. The Petition to Deny. On May 29, 2012, appellants Bob Law, Betty Dopson, Michael D. North and Charles Barron, filed, pursuant to 47 U.S.C. § 309(d), a petition to deny the application to assign ICMC's licenses, including those of WLIB and WBLS. Appellants stated that they were filing the petition "in their individual listener capacities and as representatives of a class of New York City listeners" who they later describe as "the class of New York listeners who are disgruntled by the Application here." [PD 1, 3] (JA --). Among other things, the petition argued that the applications should be denied because the license assignments would (1) "result in an unlawful reduction of programming geared toward Black and local audiences," and (2) "promote further consolidation of media into

² FCC Form 314, File No. BAL-20120430ADH (https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.htm?context=25&appn=101488103&formid=314&fac_num=28204) (March 19, 2015). At the time of the sale, YMF Media was controlled by Los Angeles investor Ronald Burkle and governed by a Board of Managers consisting of Ted Bartley, Zemira Jones, Carlton Jenkins, Jeff Johnson, and former professional basketball player Earvin Johnson. FCC Form 314, File No. BAL-20120430ADH, Exh. 14 (https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101488103&qnum=5130©num=1&exhcnm=1) (March 19, 2015). YMF later sold WLIB and WBLS to an entity controlled by Emmis Communications Corporation, a large, publicly-traded media company. *See Broadcast Actions, Public Notice*, Report No. 48254 (FCC June 5, 2014) (https://apps.fcc.gov/edocs_public/attachmatch/DOC-327446A1.pdf) (March 19, 2015); *see also* Br. at 20 n. 1. The sale of the stations to Emmis is not at issue in this appeal.

the hands of corporate elite” that “threatens to undermine democracy and public ownership of the airwaves.” [Pet. 1-2] (JA --).³ In their reply in support of the petition, appellants sought to clarify that they were “not concerned with programming,” but instead “object[ed] to the misallocation of the airwaves into the hands of a ... small corporate elite and the resulting loss of airwaves for Blacks, regardless of the particular programming utilized.” [Reply 4] (JA --); *see also* [PD 3] (JA --) (“The transaction represents another step in the Media Bureau’s treatment of radio licenses as mere chattel instead of a unique species of publicly owned assets envisioned by the Communications Act of 1934.”).

b. The Media Bureau Decision. In a September 2012 letter, the FCC’s Media Bureau denied appellants’ petition to deny. *Letter to Urban Radio I, LLC, Debtor-in-Possession from Peter H. Doyle* (MB Sept. 12, 2012) (*Media Bureau Decision*) (JA --). With regard to the petition’s claims that assigning the licenses would lead to a decline in Black-owned radio stations and would result in an unlawful reduction in programming geared to Black and local audiences, the Bureau pointed out that Section 310(d) of the Communications Act “specifically prohibits the Commission from considering any entity other than the assignee proposed in

³ The remainder of the petition focused entirely on a variety of other claims related to the ownership, financing and operations of Urban Radio and YMF Media arising from the interests of Fortress Investment Group. [Pet. 2, 12-31] (JA --). Appellants have now abandoned those claims in their appeal to this Court.

the application before it.” [*Id.* at 6] (JA --). In addition, the Bureau noted that, pursuant to longstanding Commission policy, upheld by the Supreme Court, “the Commission does not take potential changes in programming formats into consideration in reviewing assignment applications.” *Id.*, citing *WNCN Listeners Guild v. FCC*, 450 U.S. 582 (1981). Finally, with respect to the claims that grant of the applications would “lead to further consolidation in the broadcast industry,” the Bureau stated that the Commission staff had “reviewed the Application and find that it complies with the Commission’s local radio ownership rules,” citing 47 C.F.R. § 73.3555(a)(1). [*Media Bureau Decision* at 6] (JA --).

c. The Application For Review. Appellants filed an application for review by the full Commission. (JA --). In that pleading, appellants contended for the first time that the “Commission has a duty under the Equal Protection Clause ... to assure that its actions do not result in the perpetuation of racial discrimination against Blacks” and that the Bureau had “failed to act in a manner to avoid racial discrimination.” [AFR 3] (JA --). Appellants also claimed that the Media Bureau had “ignore[d] the Third Circuit’s mandate [in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004)] ... to better consider how its rulings affect broadcast ownership by people of color.” [AFR 4] (JA --). Finally appellants asserted, without elaboration, that the “racially discriminating implications of the Media Bureau Order” violated the “Sherman Anti-trust Act.” [AFR 3] (JA --).

d. The Commission Decision. The Commission dismissed appellants' application for review in part and denied it in part. The Commission dismissed the application insofar as it claimed that consenting to the assignment of the license violated the Equal Protection Clause of the Fifth Amendment to the Constitution and the decision of the Third Circuit in *Prometheus* because those arguments had not been raised previously before the Bureau, in contravention of Section 1.115(c) of the agency's rules, 47 C.F.R. § 1.115(c). *Urban Radio I, L.L.C.*, 29 FCC Rcd 6389, 6390 ¶ 3 (2014) (*MO&O*) (JA --).

As to appellants' complaints that grant of the application would promote further consolidation of media into the hands of the "corporate elite" to the detriment of Blacks and an unlawful reduction in programming geared to Black and local audiences, the Commission upheld the Bureau's determination that the scope of agency review was "statutorily limited to the transaction before it." *MO&O* ¶5 (JA --). The Commission acknowledged that "promoting broadcast ownership diversity is an important Commission goal," but explained that the statute bars it from "consider[ing] whether the public interest, convenience, and necessity might be served by the assignment or transfer of the station license to any other than the proposed assignee or transferee." *Id.* In this case, the Commission concluded, the Bureau "properly found ... on the basis of the Applications and pleadings, that grant of the Applications is in the public interest, *i.e.*, that the parties are qualified

under, and the proposed transactions do not violate, the Act, the Rules or Commission policy.” *Id.* The Commission also noted that the transactions “carry out the determination of the bankruptcy court [and] involve steps taken in accordance with longstanding Commission policies of protecting creditors’ interests.” *Id.* citing *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

SUMMARY OF ARGUMENT

The appeal should be dismissed for lack of standing; in the alternative, the Commission’s order should be affirmed on the merits.

1. Appellants have failed to demonstrate that they have standing to appeal the Commission’s order. This Court has made clear that mere generalized and conclusory assertions that a party is a member of the listening audience of a radio station is inadequate, standing alone, to demonstrate standing. Instead, a listener must provide a specific showing of injury from grant of a radio station assignment application to have standing. But these appellants—who do not even state that they listen to the two stations at issue, or offer more than speculation that the programming would change—have not come close to making such a showing.

2. In the alternative, the Court should affirm the Commission’s order. The Commission properly dismissed appellants’ attempt to raise an entirely new set of constitutional objections to the license transfers that had not been raised – or even mentioned – before the Media Bureau. FCC rules clearly preclude raising issues

with the Commission if they have not been raised first with the underlying Bureau. Appellants failed to comply with this basic requirement of the agency's processes.

3. The Commission reasonably upheld the Media Bureau's denial of appellants' petition to deny under Section 309 of the Communications Act.

a. The petition to deny argued that granting the application would be contrary to the public interest because it would result in a diminution of Black ownership of broadcast stations, which (assertedly) would lead to a reduction of radio programming directed to Blacks and local audiences. In effect, the petition to deny argued that the licenses should have been assigned to some other party. But as the Commission pointed out, Section 310(d) of the Communications Act precludes the sort of comparative evaluation of assignment applications that appellants urged – the statute expressly limits the scope of FCC review of such applications to the transaction before it. By the terms of the statute, it is not open to the Commission to consider whether some other assignee would be more qualified or whether assignment of the license to some other party would better serve the public interest.

b. The Commission also reasonably rejected appellants' claims that the application should be denied because its grant would lead to a change in the stations' programming. The Commission has maintained for nearly four decades a policy of not considering actual or potential program changes when considering radio station assignment or transfer applications on the ground that it would deter innovation

and ultimately would be contrary to the public interest. This policy has been upheld by the Supreme Court.

Thus, the Commission reasonably concluded that the parties to the assignment application were qualified and that the transaction complied with all applicable statutes and regulations, and reasonably granted the application as serving the “public interest, convenience and necessity.”

STANDARD OF REVIEW

The Court reviews FCC orders “under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission’s decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004).

The Commission’s interpretation “of its own rules is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Star Wireless, LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008); *see also Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (“Reviewing courts ac-

cord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms.”).

ARGUMENT

I. APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE STANDING.

Appellants lack standing under Article III to appeal the Commission’s decision because they have not alleged a personal injury-in-fact that is fairly traceable to the FCC’s decision and redressable by the relief requested. *See Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). Under *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002), appellants whose standing is not self-evident must establish standing by the submission of affidavits or other evidence “at the first appropriate point in the proceeding.” *See* D.C. Cir. Rule 28(a)(7). Appellants, who are not themselves subject to the order on appeal, have submitted no evidence, nor have they asserted plausible claims, that they have suffered any injury that would give them standing to appeal this order. Indeed, appellants’ claims to standing here are essentially identical to the claims to standing rejected in *Rainbow/PUSH*.⁴

⁴ Article III restrictions do not apply to administrative agencies like the FCC. The fact that the FCC chooses to allow parties such as appellants to participate in its proceedings is not sufficient to confer judicial standing on appeal from those proceedings. *California Ass’n of the Physically Handicapped v. FCC*, 778 F.2d (footnote continued on following page)

Appellants assert that they are “aggrieved” by the Commission’s order (Br. at 8), but their claims to injury fall woefully short:

- Appellants Dopson and Barron make no claims of injury at all related to FCC grant of these applications. *See* Br. at 3-4, 5-6.

- Appellant Law asserts only that he is “an advertiser with WLIB and WBLS.” Br. at 3. While he claims that he “will experience direct personal economic injury if these transactions are approved” (*id.*), he nowhere explains why the license assignments would be likely to have a detrimental impact on his ability to advertise on the stations or otherwise adversely affect his economic interests.

- Appellant North asserts only that he “has been an avid listener of New York City radio” – though not specifically of WLIB or WBLS – and “is personally harmed by this transaction by the reason of the reduction of outlets for fair and accurate reporting.” Br. at 5.

In short, although appellants assert that they “own or operate businesses or are employed in the affected market” or are “listeners in the affected market” (Br. at 8), none of the appellants explain how the assignment of these licenses will negatively affect them.

(footnote continued from preceding page)

823, 826 n.8 (D.C. Cir. 1985); *American Legal Foundation v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987).

This Court has made clear that conclusory and conjectural alleged injuries that rely, at best, on no more than a generalized claim of listener standing will not suffice to demonstrate the concrete and actual or imminent injury that Article III requires in the context of FCC license proceedings. In *Rainbow/PUSH*, the Court rejected the concept of “automatic audience standing,” *i.e.*, the idea that “a person has standing to protect the ‘public interest’ by challenging any decision of the Commission regulating ... a broadcaster in whose listening audience the person lives.” 330 F.3d at 542. The Court held that the appellant there had not made a sufficiently detailed and specific showing of alleged harm, and that claims “that ‘[s]everal’ of its members ‘live and watch television in the markets that are at issue in this appeal’” and that appellants were “‘committed to furthering social, racial and economic justice’ and that ... communities have access to diverse broadcasting sources’” was inadequate to demonstrate an injury sufficient to support standing. *Id.* at 543. A claim that an appellant would be deprived of “‘program service in the public interest,’” this Court held, “is not sufficiently ‘concrete and particularized’ to pass constitutional muster.” *Id.* at 544; *accord id.* at 546.

In this regard, the *Rainbow/PUSH* decision emphasized that the appellants did not “offer evidence that programming after [the license assignment] grant would be any different than it was before, or even “plausible predictions about [the] likely programming decisions’ of the applicants.” *Id.* at 546. Absent a show-

ing that the license transaction would “result in some actual effect upon the programming” of the stations in the market, the “fears of decreased diversity remain purely speculative.” *Id.* at 545; accord *Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235, 1243 (D.C. Cir. 2005).

The broad and conclusory claims of injury in this case are likewise inadequate to pass constitutional muster. An appellant “‘must demonstrate,’ not merely allege, ‘that there is a “substantial probability” it will suffer injury if the court does not grant relief.’” *Rainbow/PUSH Coalition*, 396 F.3d at 1239, quoting *Sierra Club*, 292 F.3d at 900. Here, while appellants claim that the assignment would cause a “reduction in Black-oriented programming” (Br. at 10; *see also id.* at 12), they offer only speculation unsupported by evidence that the license assignments would affect the programming of the stations. And their allegations that they are listeners or business owners in the New York radio market, by themselves, fail to demonstrate “‘injury that is sufficiently unique as to distinguish [appellants] from any other public-minded potential litigant interested in ensuring the faithful enforcement of the [Communications] Act.’” *KERM, Inc. v. FCC*, 353 F.3d 57, 62 (D.C. Cir. 2004).

II. THE COMMISSION APPROPRIATELY DISMISSED APPELLANTS' CONSTITUTIONAL EQUAL PROTECTION CLAIM.

Appellants contend that “the sole issue on appeal” is whether it was arbitrary and capricious for the Commission to have refused to consider their “equal protection argument that the transfer would decrease Black ownership in New York City with a corresponding reduction in Black-oriented programming and therefore not be in the public interest.” Br. at 12.⁵

However, appellants did not claim in their petition to deny that granting the application would constitute a denial of equal protection under the Fifth Amendment. Without elaboration, the petition “object[ed] to the impact the transaction will have upon Black and locally owned media in the United States,” and claimed that “access to over the air radio focused on local and Black concerns will be diminished” by approval of the license assignments (PD 3) (JA--). The petition’s claims, which were filed “pursuant to Section 309(d) of the Communications Act of 1934” [PD 1] (JA --), gave no indication that they were not grounded on the contention, which is after all the primary focus of section 309, that the license as-

⁵ Appellants hint at a First Amendment argument. *See* Br. at 17 (“Currently Whites own, control, and program nearly 100% of the nations media. These media monopolies deny Blacks our First Amendment rights to speak and be heard.”). That argument was never presented to the Commission or the Media Bureau other than in a passing reference to the First Amendment in a quotation. *See* [Reply to PD 5] (JA --). It may not be raised for the first time on judicial review. 47 U.S.C. § 405(a); *see Environmental LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011).

signment would not serve the “public interest, convenience and necessity.” 47 U.S.C. § 309(a). Nowhere in the petition did appellants contend that their opposition to the assignment applications was based on the contention that approval would violate the Fifth Amendment or its Equal Protection Clause. Indeed, neither the petition nor the reply in support makes any reference to the Fifth Amendment at all. (JA --). In short, the Bureau had no reason to suspect that the petition to deny sought to raise constitutional claims.

As this Court has squarely held, “the Commission’s rules do not permit the Commission to grant an application for review ‘if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.’” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting 47 C.F.R. § 1.115(c)). *See also Spectrum IVDS, L.L.C.*, 25 FCC Rcd 10457, 10463 (2010); *Fireside Media*, 25 FCC Rcd 7754, 7757 (2010). That the issue sought to be raised involves a constitutional question does not relieve appellants from complying with such procedural obligations. *See Northwestern Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470-71 (D.C. Cir. 1989). Here, as the Commission found, appellants “improperly raise[d] for the first time” the argument that the assignments

would “violate[] the United States Constitution’s Equal Protection Clause [and] the Fifth Amendment.” *MO&O* ¶ 3 (JA--).⁶

The Commission thus appropriately dismissed appellants’ equal protection claims.

III. THE COMMISSION REASONABLY DENIED APPELLANTS’ PETITION TO DENY THE ASSIGNMENT APPLICATION.

Finally, the Commission properly affirmed the Media Bureau’s determination that grant of the license assignment application “would further the public interest, convenience and necessity,” *Media Bureau Decision*, at 7 (JA--), despite appellants’ allegations that approval would “result in the further decline in the number of Black-owned radio stations,” and reduce “programming geared toward Black and local audiences.” *Id.* at 6 (JA--).

As the Commission explained, “the scope of [its] review of an assignment application . . . is statutorily limited to the transaction before it.” *MO&O* ¶ 5 (JA--). Under section 310(d) of the Act, 47 U.S.C. § 310(d), “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

⁶ The Commission also dismissed appellants’ claim that the *Media Bureau Decision* violated the Third Circuit’s holding in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004). See *MO&O* ¶3 (JA --). As with the equal protection argument, appellants’ *Prometheus* argument was never presented to the Media Bureau, and thus was not properly raised before the Commission.

than the proposed transferee or assignee.” Thus, as this Court has recognized, “where permission is sought to assign a valid existing permit, the *only question* is whether the proposed assignee possesses the minimum qualifications consistent with the ‘public interest, convenience and necessity.’” *MG-TV Broadcasting Co.*, 408 F.2d at 1263. *Id.* (emphasis added). As a result, even though the Commission recognizes “that promoting broadcast ownership diversity is an important Commission goal,” *MO&O* ¶ 5 (JA--), it is statutorily barred from implementing that goal by denying radio station license assignments.⁷

The Commission also properly rejected appellants’ claim (unsupported by evidence), that “the requested transfer will result in what we feel is an unlawful reduction of programming geared to the Black community.” Br. at 12. As the Media Bureau pointed out, for nearly forty years the Commission has maintained a policy of not taking “potential changes in programming formats into consideration in reviewing applications,” based on its determination that such consideration “would not benefit the public, would deter innovation, and would impose substantial administrative burdens on the Commission.” *Media Bureau Decision* at 6 (JA --), citing *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858

⁷ Even if section 310(d) of the Communications Act did not bar the consideration of alternative license holders in license assignment proceedings, it is highly doubtful whether the Constitution would permit the Commission to deny a license assignment application on the basis of the assignee’s race. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

(1976). That policy was upheld by the Supreme Court, which found that “[t]he Commission’s position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion.” *WNCN Listeners Guild v. FCC*, 450 U.S. 582, 596 (1981).⁸

Before the Media Bureau, appellants acknowledged that the Supreme Court in *WNCN* “upheld the FCC policy that . . . a change in programming is not a material factor that should be considered in ruling on applications for license transfer.” [Reply at 4] (JA --). Indeed, at that time they disavowed any concern with programming, *id.* (JA --) (“[t]he Petition is not concerned with programming”), and they do nothing to engage or challenge the Commission’s programming policy in their brief on appeal. Accordingly, appellants provide no basis to question the approval of the license assignments on the grounds that it would have an adverse impact on programming “geared to the Black community.” Br. at 12.

* * * * *

⁸ The Commission does require a broadcast station to provide programming addressed to the needs and interests of its community of license. *See, e.g., In the Matter of Expansion of Online Pub. File Obligations*, 29 FCC Rcd 15943, 15944 ¶2 & n.4 (2014). In their pleadings below, however, appellants made no reference to that requirement and made no claim that these applicants had failed or would fail to comply with that requirement.

The Commission affirmed the Bureau's determination "that the parties [to the assignment] are qualified under, and the proposed transactions do not violate, the Act, the Rules or Commission policies." *MO&O* ¶ 5 (JA --). Having found no substantial and material question as to the assignee's qualifications and having concluded that the application complied with all applicable statutory and regulatory requirements and would further the public interest, the FCC properly granted the application. Thus, the FCC's denial of appellants' petition to deny was not arbitrary, capricious or otherwise not in accordance with law.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal for lack of standing, or in the alternative, affirm the Commission's order.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
Fax (202) 418-2819

March 27, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7)(B), I hereby certify that the accompanying “Brief for Appellee” was prepared using a proportionally spaced 14 point typeface and contains 4944 words as measured by the word count function of Microsoft Office Word 2010.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

March 27, 2015

STATUTORY ADDENDUM

47 U.S.C. § 309(a)	1
47 U.S.C. § 309(d)	1
47 U.S.C. § 310(d)	2
47 C.F.R. § 1.115(c)	2
47 C.F.R. § 73.3555(a)	3

47 U.S.C. § 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial

and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

47 U.S.C. § 310(d). 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. § 1.115(c). Application for review of action taken pursuant to delegated authority.

* * *

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

NOTE: Subject to the requirements of §1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(a)(1) *Local radio ownership rule.* A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

* * *

14-1130

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

BOB LAW, ET AL.,)	
)	
Appellants,)	
)	No. 14-1130
v.)	
)	
FEDERAL COMMUNICATIONS COMMISSION,)	
Appellee.)	

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr, hereby certify that on March 27, 2015, 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 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.

Bob Law
14 Greentree Circle
Westbury, NY 11590

Betty Dopson
13505 Rockaway Blvd.
South Ozone Park, NY 11420

Michael D. North
136-35 219th Street
Laurelton, NY 11413

Charles Barron
New York City Councilman,
District 42
718 Pennsylvania Ave.
Brooklyn, NY 11207

/s/ C. Grey Pash, Jr.