

**In the  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

***Argued March 14, 2003  
Decided June 10, 2003***

RAINBOW/PUSH COALITION,	)	
	)	
Appellant	)	
	)	
v.	)	<b>No. 02-1020</b>
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Appellee	)	

**FCC RESPONSE TO PETITION FOR PANEL REHEARING**

Pursuant to the Court's order of August 4, 2003, the Federal Communications Commission hereby responds to the petition for panel rehearing filed by appellant Rainbow/PUSH Coalition. Rainbow contends that the Court's decision, dismissing its appeal for lack of standing, would have serious adverse consequences for viewer participation in the licensing process for broadcast radio and television stations and is inconsistent with decisions of the Supreme Court and this Court as well as FCC policy. As we will show below, this is an entirely unwarranted characterization of the Court's decision in this case with respect to the issue of viewer/listener standing. Contrary to Rainbow's extreme description, nothing in the Court's opinion imperils the public's right to participate in the FCC licensing process. Moreover, the opinion is consistent with both other decisions of this Court and with Supreme Court standing doctrine. There is no basis for Rainbow's claims that the decision will have the consequences Rainbow predicts. Moreover, Rainbow does not even seriously attempt to argue that the Court erred in applying the established principles of constitutional standing to Rainbow and concluding that the test for constitutional standing was not met here. The petition should be denied.

## **BACKGROUND**

This case arises from a decision by the FCC conditionally granting applications to assign or transfer control of the licenses of a number of television broadcast stations, imposing forfeitures on two of the applicants after finding limited violations of relevant statutory and rule provisions and denying petitions to deny the applications filed by Rainbow. *Edwin L. Edwards, Sr., et al.*, 16 FCC Rcd 22236 (2001) (JA 831). Rainbow, which stated that it was representing the interests of two of its members in Oklahoma City and San Antonio, first petitioned the Commission to deny the transfer applications for the stations in those communities. After the applicants revised their applications, Rainbow filed petitions to deny the revised applications and also asked the agency to revoke all of the existing licenses held by the applicants, Sinclair Broadcast Group, Inc. and Glencairn, Ltd.

The Court dismissed Rainbow's appeal, concluding that it had "failed to produce evidence that it (or one of its members) had suffered the injury-in-fact required for standing." *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 546 (D.C.Cir. 2003). The Court rejected Rainbow's "argument that a member of a station's audience can establish her standing merely by alleging that if the Commission were to grant a particular license application then she 'would be deprived of ... program service in the public interest.'" *Id.*

## **ARGUMENT**

This case turns on the fundamental requirement of Article III of the Constitution that a litigant establish that it has standing. Rainbow had a burden, as the party challenging an administrative decision in court, "to show a substantial probability that it has been injured, that the defendant caused its injury, and that the court could redress that injury." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C.Cir. 2002); *see Rainbow/PUSH*, 330 F.3d at 542. Notwithstanding the

numerous claims in its petition, which we discuss below, the crucial consideration that Rainbow cannot avoid is that it failed to meet its burden to demonstrate, in the circumstances of this case, that it, or its members that it represented, had suffered the requisite injury-in-fact required for standing under Article III of the Constitution. The Court's conclusion that Rainbow had not made an adequate showing of injury, "indeed, it has not even tried," was correct. *Id.* at 543.

Rainbow contends that the Court failed to understand the FCC's licensing process and that the decision in this case establishes a requirement "for standing that practically speaking can never be satisfied in appeals from FCC license transfer decisions." According to Rainbow, the Court's opinion "would effectively prevent viewers from establishing standing to challenge license transfers, ... is in tension with the FCC's reliance on Petition to Deny license transfers to ensure that such transfers do not contravene the public interest ... [and] conflicts with Supreme Court precedent and FCC policy recognizing that viewers have an interest in maintaining access to as large and diverse a number of local broadcasters as possible." Pet. at 3. These claims have no foundation.

First, Rainbow's broad assertions concerning the opinion's alleged impact on the public's right to participate in the licensing process confuses statutory and constitutional standing. The Communications Act provides that any "party in interest" may file a petition to deny an application to transfer a broadcast license (47 U.S.C. 309(d)). The FCC has construed the term "party in interest" to include any party who is a resident in the service area of the station in question or who regularly listens to or views the station, such as Rainbow's members in this case. *See, e.g., Chet-5 Broadcasting, L.P.*, 14 FCC Rcd 13041, 13042 ¶¶3-4 (1999). *See also* JA 838 n.8 (pointing out that Rainbow based its standing on its members' residence in San Antonio and Oklahoma

City). Nothing in the Court's opinion affects this established policy governing public participation in the agency's licensing process.

That a party has a statutory right to participate in agency proceedings does not, of course, answer the question whether it has standing under the Constitution to challenge the administrative decision by invoking the jurisdiction of an Article III court. *See Sierra Club*, 292 F.3d at 899. Rainbow's discussion of Article III standing simply misconstrues the Court's opinion. Rainbow's claim, for example, that the opinion requires viewers to "present evidence of a license transfer applicant's prospective programming intentions" (Pet. at 3) in order to show standing is nowhere to be found in the Court's decision. What the Court said was that "Rainbow does not attempt to show" that either its allegations regarding Sinclair's illicit control of Glencairn or Glencairn's misrepresentation "had a direct effect upon the programming available to its member-viewers." 330 F.3d at 544. The opinion repeatedly makes clear that the Court's decision was based on Rainbow's failure to make, or even attempt, any specific showing of injury. The Court, for example, pointed out that "[a]bsent a showing that Sinclair's assumption of control of KOKH or KRRT resulted in some actual effect upon programming of those or of the commonly controlled stations in their markets, Rainbow's fears of decreased diversity remain purely speculative." *Id.* at 545. Rainbow's rehearing petition points to no such showing.

Earlier in this litigation, Rainbow advanced the theory "that a person has standing to protect the 'public interest' by challenging any decision of the Commission regulating (or, as in this case, declining to regulate) a broadcaster in whose listening or viewing area the person lives." *Rainbow/PUSH*, 330 F.3d at 542. The Court correctly described this as "automatic audience standing," and properly rejected it because "[i]f there were no more to standing than that, ... then the 'irreducible constitutional minimum' would be irreducible only because it could not be any

smaller and still said to exist.” *Id.* Even after receiving the panel’s guidance, Rainbow’s petition never indicates how its argument for standing in this case differs from a claim of “automatic audience standing.”

Rainbow contends that the Court “was wrong to conclude that viewers could only establish injury from a change in station control by showing how the program content would change in the future” and that “[s]uch a view ignores other types of possible injury that were not before the Court as well as the injury caused by the loss of diversity in local programming raised by Rainbow/PUSH’s members.” Pet. at 15. However, we understand the Court’s decision simply to hold that when a party bases standing on his or her status as a viewer of a television station, that party must demonstrate some concrete, particularized injury to it as a viewer arising from the Commission’s grant of the application in dispute in order to establish standing to seek judicial review of the Commission’s action.

We do not understand the Court’s decision to limit such a party to a showing of injury arising from prospective changes in program content following the Commission’s grant of the application in question. It was Rainbow that chose to focus on claims that its member would be “deprived of program service in the public interest.”<sup>1</sup> *See Rainbow/PUSH*, 330 F.3d at 544. Rainbow’s claims now that it had no way to demonstrate with greater specificity how its two members would be harmed because the applicants here furnished no information in their application about their planned programming is particularly unpersuasive in the circumstances of this case. *See* Pet. at 4. Sinclair Broadcast Group, which is acquiring stations in the two communities

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<sup>1</sup> The declarations submitted by Rainbow also claimed that the declarants would be “deprived of job opportunities” if the applications were granted. *See* J.A. 256-57, 671-72. Rainbow, however, never explained how grant of the applications would have such an effect. As the Court pointed out, “Rainbow’s briefs say nothing at all about job opportunities ....” 330 F.3d at 544.

in which Rainbow's members reside, is a long established broadcaster that has been operating television stations in these and other communities for many years. Sinclair was already the licensee of a single station each in San Antonio and Oklahoma City and had been programming, through local marketing agreements, KRRT-TV and KOKH-TV in those two markets prior to acquiring them.

Thus, there was ample opportunity for Rainbow to present evidence, if such evidence existed, as to how Sinclair's past programming practices operating stations in these two communities had been contrary to the public interest and how its members would likely thus be harmed if Sinclair became the licensee of a second station in these communities. Rainbow acknowledges that Sinclair had already provided some programming on KRRT-TV and KOKH-TV, but dismisses the significance of that fact because, it asserts, Sinclair did not supply all of the stations' programming and thus its past programming practices at the stations it is now acquiring "provides only a speculative basis for guessing Sinclair's future programming intentions." Pet. at 4 n.1<sup>2</sup>

It is difficult to take seriously the claim that an applicant's past operation of existing stations of which it was either already the licensee or over which it offered programs pursuant to a local marketing agreement could not provide a basis for a party like Rainbow to argue that granting the applicant a license for another station in the same community would be contrary to the public interest. Indeed, in contrasting unfavorably Rainbow's showing in this case with that of the appellants in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C.Cir. 1966) ("*UCC*"), the Court noted that the *UCC* appellants' injury was based on a his-

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<sup>2</sup> By contrast, in its filings with the Commission, Rainbow claimed that Sinclair "broker[ed] all or virtually all of the time on Glencairn's stations ...." JA 625; *see also* JA 242.

tory of inadequate or improper past programming at the station and arguments that “the licensee could be expected to continue programming in the same vein.” *Rainbow/PUSH*, 330 F.3d at 543. “Rainbow,” the Court held, “has not made a comparable showing; indeed, it has not even tried to do so.” *Id.*

In this case, either there was no evidence from Sinclair’s past operation of stations in San Antonio or Oklahoma City (or in other communities) to plausibly predict that its acquisition and subsequent operation of KRRT or KOKH would be contrary to the public interest, or Rainbow failed to provide such evidence. In either case, the Court properly found Rainbow’s claims “purely speculative” (330 F.3d at 545) and thus inadequate to meet its burden to demonstrate standing. The Court indicated that if Rainbow had made “plausible predictions about [the] likely programming decisions’ of the applicants” (*id.* at 546) demonstrating why its member would be harmed by grant of the applications, it may have met its burden to demonstrate standing.

There obviously is no basis for Rainbow’s suggestion that no petitioner to deny would ever be able to provide such evidence. As Rainbow notes, the Commission indicated in its recent modifications to its media ownership rules, that it is “obligated” to consider petitions to deny arguing that license transfers are not in the public interest. Pet. at 9, *citing*, 2002 *Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules*, FCC 03-127, ¶85 (July 2, 2003), *pets. for rev. pending*, *Media General, Inc. v. FCC*, No. 03-1231, *et al.* (D.C.Cir., filed Aug. 6, 2003). If evidence from Sinclair’s past operations in Oklahoma City and San Antonio, or from its operation of television stations in a number of other communities supported such predictions, Rainbow could have presented “plausible predictions” to the Commission that grant of the applications would have an effect upon programming that would harm Rainbow’s members. Rainbow, however, presented no such evidence.

The Court's decision does not "effectively prevent viewers from establishing standing to challenge license transfers." Pet. at 3. The Court's decision prevents viewers who rely on a claim of automatic viewer standing and thus fail to show how they are injured by the FCC's grant of a license application from challenging the Commission's action on judicial review. A requirement to show such "injury-in-fact" that is "concrete and particularized" is, of course, a requirement for Article III standing to invoke the jurisdiction of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Rainbow's reliance on the holding in *UCC* misreads that case as well as the Court's opinion in this case. *See* Pet. at 5. Indeed, as the Court noted here, *UCC* holds that audience members "may have standing to challenge a decision of the Commission because they may bring to the Commission's attention matters relating to a broadcaster's programming." *Rainbow/-PUSH*, 330 F.3d at 543. The Court added, however, that it did not in *UCC* "purport to apply a more relaxed standard to audience members than to other litigants seeking to demonstrate their standing under Article III." *Id.* And Rainbow's rehearing petition makes clear that it continues to seek a more relaxed standard for viewer standing than would apply to other litigants.

We do not dispute Rainbow's claim (Pet. at 6) that there may be a relationship between diversity of ownership and diversity of viewpoints. *See, e.g., 2002 Biennial Regulatory Review*, FCC 03-127, ¶¶ 26-35. However, it does not follow that the public interest is always disserved, as Rainbow suggests, by a reduction in the number of local station owners. *See* Pet. at 7-8. The Commission has already concluded by rule that in the two communities at issue in this case, San Antonio and Oklahoma City, it is not contrary to the public interest to allow one entity to be the

licensee of two television stations.<sup>3</sup> Rainbow does not claim to challenge in this case the validity of that rule. Thus, unless it shows some particular facts demonstrating that its members will be harmed in these cases beyond the mere fact that two stations will be commonly owned, it cannot demonstrate the requisite injury-in-fact to give it standing to seek judicial review.

Rainbow's criticism of the Court's discussion of *Llerandi v. FCC*, 863 F.2d 79 (D.C.Cir. 1988) as "flawed" (Pet. at 3, 10-11) ignores the effect of changes in the Commission's rules since that case was decided. In *Llerandi* appellants, who asserted standing as listeners to the radio stations in dispute there, claimed that grant of the applications would result in a violation of the Commission's "duopoly" rule, which at that time prohibited ownership of two AM radio station in the same or nearby communities. On review, the Court held that the appellants had standing as residents of the city of license and members of the listening public, concluding that "[l]isteners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule." 863 F.2d at 85.

The Court properly distinguished *Llerandi* in the opinion here, pointing out that the Commission had revised its duopoly rule after concluding that it was in the public interest for this rule to allow the common ownership of two television stations in markets of the type at issue here. Thus, unlike the petitioner to deny in *Llerandi*, Rainbow could "not allege that granting the applications at issue here would actually violate the current rule." *Rainbow/PUSH*, 330 F.3d at 545. Contrary to Rainbow's assertions, however, the Court did not hold that a party like Rainbow

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<sup>3</sup> See *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999), *reconsid. granted in part*, 16 FCC Rcd 1067 (2001), *aff'd in part and remanded in part*, *Sinclair Broadcast Group v. FCC*, 284 F.3d 148 (D.C.Cir. 2002). In its recent review of broadcast ownership rules, the Commission modified its local television ownership rule, but such modification does not affect the applications at issue in this case. See *2002 Biennial Regulatory Review*, FCC 03-127, ¶¶132-234.

could never have standing to seek review in such circumstances – only that Rainbow could not meet its burden simply by relying on a “general, and vague, claim that Sinclair’s acquisition of the licenses ‘would reduce the diversity’ of programming in San Antonio and Oklahoma City” without explaining why Rainbow’s members “believe that a grant of the application would deprive them of ‘program service in the public interest.’” Indeed, they do not offer evidence that programming after a grant would be any different that it was before, or even ‘plausible predictions about [the] likely programming decisions’ of the applicants.” *Id.* at 545-46, *quoting Huddy v. FCC*, 236 F.3d 720, 722 (D.C.Cir. 2001).

Rainbow unwittingly acknowledges this when it asserts that although a party “must identify the nature of his or her injury to establish standing, there is no need to explain at length what the FCC itself has viewed as common sense and what the courts have long accepted as true.” Pet. at 13. As noted above, however, whatever the FCC may have thought in the past, the FCC no longer “view[s] as common sense” that a harm to the public interest arises automatically from the mere common ownership of two television stations in markets such as San Antonio and Oklahoma City. Thus, unlike the appellants in *Llerandi*, Rainbow cannot satisfy its burden to show injury by reference to a rule, but must make a specific showing that notwithstanding the Commission’s revised duopoly rule its member will be harmed by grant of these applications. The bare claims in the declarations upon which it relies plainly are inadequate to meet this burden and were properly rejected by the Court.

It was rational for the Court to conclude that where the claim, as in *Llerandi*, is that grant of an application would violate an ownership rule adopted by the Commission to protect viewers, a plausible claim that grant of an application would violate the rule was sufficient injury for a viewer or listener to have Article III standing. However, where, as in this case, there is no asser-

tion of such a rule violation, a party cannot demonstrate standing simply by relying on “general, and vague, claim[s]” that it would be aggrieved by a speculative decrease in diversity. This is fundamental standing analysis articulated in the Supreme Court’s well-known language that “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself....” *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also United States v. Western Electric Co.*, 900 F.2d 283, 310 (D.C.Cir.), *cert. denied*, *MCI Communications Corp. v. United States*, 498 U.S. 911 (1990) (unparticularized consumer argument too vague to confer standing).

Rainbow’s contention (Pet. at 13) that the “evidence in the record establishes injury from Sinclair’s control of two stations” in these two communities amounts to little more than a reiteration of its “automatic audience standing” argument. The Court correctly concluded that viewers are not automatically injured by a reduction of the number of television station owners in a market that is consistent with the Commission rules, and there must instead be offered some specific evidence or plausible prediction that that action will have an effect on the station’s programming that will harm viewers.

Moreover, even if there were basis for Rainbow’s additional allegations (Pet. at 14) that Sinclair was able to acquire these two stations by some sort of unfair competition and by misrepresentations to the Commission, it still fails to demonstrate injury. The Court has already held in *Huddy* that, for purposes of showing standing, viewers ordinarily are not injured by licensee misrepresentations to the FCC.<sup>4</sup> Similarly, absent a link to predictions about a station’s program-

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<sup>4</sup> In *Huddy*, the Court noted that the appellant had raised concerns about a license applicant’s integrity with respect to its compliance with certain FCC rules but had made “no effort to link those business behavior issues with plausible predictions about [the applicant’s] likely programming decisions.” 236 F.3d at 722. The Court added that “in the interests of ‘preserv[ing] the

ming, a generalized claim that a station has been acquired in some unfair manner does not in itself demonstrate harm to viewers.

***CONCLUSION***

In consideration of the foregoing, the petition for rehearing should be denied.

Respectfully submitted,

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integrity' of its operations, ... the Commission is entitled to consider a would-be licensee's deceptive behavior as grounds for rejecting an application ...," and the FCC has a well-established policy against misrepresentation. *See* FCC Br. at 33. However, the *Huddy* opinion found that it didn't necessarily follow that FCC underenforcement of policies against deceptive behavior in a licensee's contact with the agency "is likely to cause the sort of 'material impairment of [a viewer's] hopes or expectations' that is needed to support standing." *Id.* at 723-24.