

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

NATIONAL HISPANIC POLICY INSTITUTE, INC.,)	
APPELLANT)	
)	
v.)	No. 03-1358
)	
FEDERAL COMMUNICATIONS COMMISSION,)	
APPELLEE)	

MOTION TO DISMISS

Appellee Federal Communications Commission moves to dismiss the notice of appeal in the captioned case. Neither in its Notice of Appeal, its Docketing Statement nor in its Statement of Issues has appellant National Hispanic Policy Institute, Inc. (NHPI) made any claim of injury from the Commission action for which it seeks review that would indicate that it has standing to bring this appeal. NHPI’s standing is not self-evident, and there is no evidence in the record before the Commission that would support a finding that NHPI meets the requirements for Article III standing. To the contrary, NHPI’s pleadings before the FCC call into doubt, rather than support, any claim that it would have Article III standing to seek judicial review of the FCC’s order. Accordingly, the Court lacks jurisdiction, and the notice of appeal must be dismissed.

BACKGROUND

This case arises from the Commission’s order of September 22, 2003, granting applications to transfer control of the licenses of a number of radio stations from Hispanic Broadcasting Corporation (HBC) to Univision Communications Inc. *Shareholders of Hispanic Broadcasting Corporation*, 18 FCC Rcd 18834 (2003)(App. 1). NHPI filed a petition to deny the applications pursuant to Section 309(d) of the

Communications Act, 47 U.S.C. 309(d), arguing that the ownership structure of the companies following the merger would violate the Communications Act because of the *de facto* control that would be exercised by or over third-party corporations. The Commission fully considered NHPI's allegations and concluded that it had not raised substantial and material questions of fact regarding the post-merger ownership structure that warranted exploration in an evidentiary hearing. *See* 18 FCC Rcd at 18839 ¶12 (App. 7).

NHPI stated in its petition to deny that it possessed “standing to file this formal petition to deny under 47 C.F.R. §309(d) of the Communications Act of 1934” *See* 47 U.S.C. 309(d)(1) (“Any party in interest may file with the Commission a petition to deny any application ...”). App. 54. It attached to its petition a three-paragraph declaration of Efrain Gonzalez, Jr. stating that he is a resident of New York City and resides within the service area of one of the stations involved in the proceeding. He added that he is “a New York State Senator and President of the National Hispanic Policy Institute, Incorporated, an organization created to address issues that relate to the Hispanic American population and to devise policy to advance the interests of that population.” App. 56. He stated that he and NHPI “believe that the proposed merger should be disapproved” and that the “merger will prove anti-competitive to other Spanish-language radio stations nationally.” *Id.*

HBC argued in its opposition to the petition to deny that NHPI lacked standing under Section 309(d): “NHPI has provided no explanation of its alleged interest in this matter. NHPI has not stated, for example, where it is located, who its principals are (other than its alleged ‘president’) or what it does.” App. 57-58. In its reply, NHPI provided little additional information other than to assert that it is a “tax-exempt corporation” and a

“tax-exempt publicly supported foundation.” App. 63. It stated, without further explanation, that “Mr. Gonzalez has standing as an individual or alternatively as Efrain Gonzalez, Jr. d/b/a NHPI.” *Id.*

ARGUMENT

The Court has held that “[t]he burden is on the party seeking judicial review ‘clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s powers.’” *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C.Cir 2002), quoting *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1388 (D.C.Cir. 1996). NHPI bears the burden of establishing the three elements of constitutional standing in this Court: injury in fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). NHPI has yet to allege facts in any of its filings with the Court that would establish that it, or anyone it can legitimately represent, has suffered injury in fact and is thus a proper party to seek judicial review here.

NHPI appeared to rest its standing before the Commission on two grounds: (1) its role as an organization that “addresses issues that relate to the Hispanic American population and seeks to advance the interests of that population,” and (2) the fact that the “President of NHPI, resides within the service area of” one of the radio stations involved in the transfer. *See* App. 54. The Commission found that the latter ground was adequate to demonstrate that NHPI was a “party in interest” under Section 309(d) of the Communications Act and thus entitled to file a petition to deny these applications. *See* App. 2 n. 4. However, it is well-established that a party’s participation in proceedings before the agency does not demonstrate that party’s standing to seek judicial review of the resulting

agency order. *See, e.g., California Ass'n of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 n.8 (D.C.Cir. 1985).¹

As noted, NHPI relied below on the fact that the organization's president Mr. Gonzalez "resides in the service area of HBC owned station WADO(AM) and is a regular listener" (App. 63) as the basis for its standing before the agency. Such a claim would provide the organization with Article III standing to maintain this appeal only if, at a minimum, Mr. Gonzalez would have standing to sue in his own right. *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 343 (1977); *see Rainbow/Push Coalition v. FCC*, 330 F.3d 539, 542 (D.C.Cir. 2003).

However, the Court recently has made clear that a similar but more specific claim of injury by a petitioner to deny a license transfer was inadequate to demonstrate Article III standing. In *Rainbow/Push Coalition* the petitioner claimed to represent members who lived in the station's service area and were regular viewers. They asserted that if the applications in question were granted they "would be deprived of job opportunities and program service in the public interest." 330 F.3d at 544. The Gonzalez declaration, upon which NHPI relied, alleged no injury to Gonzalez at all, but simply claimed that he "reside[d] within the service area of" and listened to a station involved in the HBC-

¹ An organization like NHPI may demonstrate standing to litigate either on its own behalf or on behalf of members. NHPI's filings with the Commission evidenced no intent to be acting in its institutional capacity, and there is nothing in the record below to suggest that NHPI has suffered any injury in its institutional capacity that would provide it standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)(organization seeking standing must allege more than "simply a setback to [its] social interests" but a "concrete and demonstrable injury to the organization's activities"). The record before the FCC contains no claim by NHPI that it has suffered a concrete injury to its activities as an organization as a result of the Commission grant of these applications.

Univision transaction and asserted his belief that “the proposed merger will prove anti-competitive to other Spanish-language radio stations nationally.” App. 56.

Residents of a station’s service area who are listeners may be able to assert possible injuries to a legally protected interest sufficient to establish standing before an Article III court, and an organization such as NHPI may possess standing to represent the interests of such members. However, the mere fact of residency and listenership does not automatically support standing to raise any question – petitioners who rest their standing on their, or their members’, status as listeners to radio stations still must demonstrate an injury to a legally protected interest. The Court in *Jaramillo v. FCC*, 162 F.3d 675 (D.C. Cir. 1998), held that listener standing depends on a “causal link” between the licensee’s alleged misconduct and a “possible material impairment of the [litigants’] hopes or expectations as listeners.” 162 F.3d at 676-77. For instance, the Court said, listener standing exists where the Commission has countenanced “some arguably program-impairing circumstance” such as a violation of the duopoly rule or the Fairness Doctrine. *Id.* at 677. *See also Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1002 (D.C.Cir. 1966); *Llerandi v. FCC*, 863 F.2d 79 (D.C.Cir. 1988).

In *Rainbow/Push* the Court found that a claim that a listener would be deprived of “‘program service in the public interest’ ... is not sufficiently ‘concrete and particularized’ to pass constitutional muster.” 330 F.3d at 544. The more generalized claims in the Gonzalez declaration rely on the same theory of “automatic audience standing” rejected in *Rainbow/Push* (*id.* at 542) and are plainly inadequate to demonstrate that Gonzalez would have Article III standing to bring this appeal in his own name, much less that NHPI can established standing as his representative.

As to NHPI's claim to be a representative of the Hispanic American population, NHPI has not demonstrated that it is a legitimate representative of any individuals other than, at most, Gonzalez. The Court has held that an organization claiming to represent others must have some indicia of a traditional membership organization – that it must serve a “discrete, stable group of persons with a definable set of common interests” who play some “role in selecting [the organization's] leadership, guiding [its] activities, or financing those activities.” *American Legal Foundation v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987); *see also Hope, Inc. v. County of DuPage*, 738 F.2d 797, 814-15 (7th Cir. 1984)(declining to extend associational standing “to entities other than associations which actually represent interests of parties whose affiliation with the representational litigant is that of membership with the representative or substantial equivalent of membership.”).

There is no evidence in the record below that NHPI has any members other than Mr. Gonzalez. NHPI nevertheless claimed that it seeks to “advance the interests of” the Hispanic American population (App. 54). In *American Legal Foundation*, the Court refused to credit affidavits of “supporters,” who had no membership relation with the Foundation. *See* 808 F.2d at 88. NHPI's far more general claims, unsupported by an affidavit from any individual other than Mr. Gonzalez much less someone with a membership relation to NHPI, eliminates the possibility that NHPI can demonstrate standing as a representative of the “Hispanic American population.”

CONCLUSION

In consideration of the foregoing, the Court should dismiss NHPI's notice of appeal for lack of jurisdiction.

Respectfully submitted,

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APPENDIX

<i>Shareholders of Hispanic Broadcasting Corp.</i> , 18 FCC Rcd 18834 (2003)	1
NHPI Petition to Deny (excerpt)	53
HBC Consolidated Opposition to Petitions to Deny (excerpt)	57
NHPI Consolidated Reply to Oppositions (excerpt)	61