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U.S. TELECOM ASSOCIATION V. FCC

825 F.3d 674 (D.C. Cir. 2016)

by Austin Mooney *

In the FCC's ongoing attempt to establish open internet rules, an old adage rings true: "the third time's the charm." In *U.S. Telecom Ass'n v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's most recent effort at enforcing net neutrality.[2] The D.C. Circuit ruled on the FCC's authority to impose net neutral rules twice before;[3] this case marks the first time the Court upheld the FCC's plans.[4]

I. BACKGROUND

Net neutrality, a term coined in 2002,[5] has been on the FCC's radar since at least 2005, when it announced its intent to "preserve and promote the open and interconnected nature of the public Internet."[6] Since the passage of the Telecommunications Act of 1996,[7] the FCC had struggled to place broadband internet access services within the Communications Act's statutory framework. If a service is categorized as a "telecommunications service,"[8] the provisions of Title II of the Telecommunications Act apply, allowing the FCC to, for example, enforce the nondiscrimination provisions of Section 202 that it sees as the heart of a net neutrality policy.[9] Until the implementation of the 2015 Open Internet Order[10] at issue in this case, the

* J.D. candidate, The George Washington University Law School, May 2017. Associate, Federal Communications Law Journal, 2016-17.

1. U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).
2. *Id.* at 689 ("[N]et neutrality [is] the principle that broadband providers must treat all [I]nternet traffic the same regardless of source.").
3. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
4. *Compare U.S. Telecom*, 825 F.3d 674 *with Comcast Corp.*, 600 F.3d 642 *and Verizon*, 740 F.3d 623.
5. *See* TIM WU, A PROPOSAL FOR NETWORK NEUTRALITY (2002), http://www.timwu.org/OriginalNNProposal.pdf.
6. Appropriate Framework for Broadband Access to the Internet Over Wireline Facils., *Policy Statement*, 20 FCC Rcd 14986, para. 4 (2005).
7. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.
8. *See* 47 U.S.C. § 153(53) (2012).
9. 47 U.S.C. § 202 (2012) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").
10. Protecting & Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter 2015 Open Internet Order].

FCC had largely classified these services instead as "information services,"[11] to which the provisions of Title II do not apply.[12]

The FCC made good on its goal of creating an open Internet framework when it took action in 2008 against Comcast for allegedly throttling broadband access speeds to certain Internet-enabled applications.[13] Invoking its "ancillary jurisdiction"[14] under 47 U.S.C § 154(i),[15] the FCC ordered Comcast to, among other things, "submit a compliance plan . . . that describes how it intends to transition from discriminatory to nondiscriminatory network management practices . . . ."[16] The D.C. Circuit vacated this decision, finding that the FCC's ancillary jurisdiction justification was insufficient authority for such an order.[17] Crucially, that court found that the FCC "failed to tie its assertion of ancillary authority over Comcast's Internet service to any 'statutorily mandated responsibility.'"[18]

In 2010, the FCC renewed its efforts to preserve net neutrality, imposing a regulatory framework that, in part, prohibited blocking and discriminatory pricing by Internet service providers.[19] Maintaining its previous classification of broadband as an "information service," the FCC "relied primarily on [S]ection 706 of the Telecommunications Act,"[20] a provision that requires the FCC to "encourage the deployment" of telecommunications capability "on a reasonable and timely basis."[21] This Order was largely vacated by the D.C. Circuit, which held that both the anti-blocking and anti-discriminatory requirements of the FCC's framework provisions strayed too close to the common carrier provisions in the Communications Act to be permissible under the FCC's classification of ISPs as "information services."[22]

Subsequent to these repeated failed attempts to enforce net neutrality principles against ISPs, in March 2015, the FCC promulgated its 2015 Open Internet Order,[23] which enforces these principles by reclassifying broadband as a "telecommunications service," which would trigger the common carrier

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11. *See* 47 U.S.C. § 153(24).

12. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 691-92 (D.C. Cir. 2016).

13. *See* Formal Complaint of Free Press and Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, 23 FCC Rcd 13028 (2008) [hereinafter Comcast Order].

14. *See id.* (statement of Comm'r Adelstein); *see also* Verizon v. FCC, 740 F.3d 623, 632 (2014).

15. Such authority would grant the FCC authority to "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (2012).

16. Comcast Order, *supra* note 13, at para. 54.

17. *See* Comcast Corp. v. FCC, 600 F.3d 642, 658 (D.C. Cir. 2010).

18. *Id.* at 661 (quoting Am. Library Ass'n v. FCC, 406 F.3d 689 (D.C. Cir. 2005)).

19. *See* Preserving the Open Internet Broadband Indus. Practices, *Report and Order*, 25 FCC Rcd 17905 (2010); *see also Verizon*, 740 F.3d at 633.

20. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 694 (D.C. Cir. 2016); Preserving the Open Internet Broadband Indus. Practices, *supra* note 19, at para 117.

21. *See U.S. Telecom*, 825 F.3d at 694 (citing 47 U.S.C. § 1302(a) (2012)).

22. *See* Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014).

23. 2015 Open Internet Order, *supra* note 10.

provisions of Title II of the Communications Act.[24] First, the Order imposes three "bright line" rules that prohibit blocking, throttling, and paid prioritization.[25] The Order also established a "General Conduct Rule," which prohibits certain "unreasonable interference" with Internet service, and an enhanced transparency rule.[26]

II. ANALYSIS

The petitioners in this case consisted mainly of broadband providers and their related trade associations. The petitioners' main substantive arguments challenged the FCC's statutory authority to classify broadband as a telecommunications service and to reclassify mobile broadband in order to regulate it as a common carrier.[27] Petitioners also argued that the FCC did not adequately explain its reclassification decision.[28] Finally, some of the petitioners challenged the Order on First Amendment grounds.[29] In the end, the Court denied the petitions and upheld the Order.[30]

First and foremost, petitioners objected to the FCC's authority to reclassify broadband as a "telecommunications service." The Court cited the Supreme Court's 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[31] which held that the term "telecommunications service," the language at issue in this case, was ambiguous with respect to broadband services and thus triggered judicial deference to the FCC.[32] Here, the Court found that the FCC's acted within the limits of its delegated authority,[33] that the FCC had "good reason[s]" to change its previous broadband classification, and, based on deferential review, found the FCC's reclassification reasonable.[34]

After finding in the FCC's favor in its reclassification of mobile broadband service,[35] the Court majority then addressed objections to the specific rules in the 2015 Open Internet Order.[36] Specifically, petitioners challenged the FCC's authority to issue the paid prioritization rule under

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24. 2015 Open Internet Order, *supra* note 10, at para. 5.

25. *Id.* at para. 111.

26. *See id.* at para. 138; *U.S. Telecom*, 825 F.3d at 696.

27. *See U.S. Telecom*, 825 F.3d at 689, 695. One of the petitioners also challenged the Commission's decision to forbear from applying parts of the Communications Act. The Court denied both the substance and procedural challenges to the Commission's forbearances. *See id.* at 727.

28. *See id.* at 735.

29. *See id.* at 739.

30. *See id.* at 744.

31. *See id.* at 702-04 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

32. *See id.* at 702-05. In his partial dissent, Judge Stephen F. Williams focuses primarily on this part of the opinion, arguing that the FCC failed to properly weigh the facts in its justification for the reclassification. *See id.* at 744-55.

33. *See id.* at 733.

34. *Id.* at 707.

35. *See generally id.* at 711-25.

36. *See id.* at 733.

Section 706 of the Telecommunications Act.[37] Another challenge dealt with the language of the General Conduct Rule, which some petitioners claimed violated constitutional Due Process by being impermissibly vague.[38] Regarding the bright-line rule against paid prioritization, the majority found that *Verizon* had made clear the FCC's authority to promulgate rules under Section 706.[39] With respect to due process concerns, the Court found that the FCC's rules provide sufficient warning of what it perceives as prohibited conduct.[40]

Finally, the Court rejected the argument that the rules impinged on the petitioners' First Amendment rights "by forcing broadband providers to transmit speech with which they might disagree."[41] A common carrier, the majority found, is restrained only with respect to their "neutral transmission of *others'* speech, not . . . communication of its own message."[42]

III. CONCLUSION

The FCC may have achieved its longstanding goal of creating enforceable net neutrality rules. Petitioners, for their part, have promised to appeal the decision to the Supreme Court.[43] In the meantime, the FCC's most recent net neutrality rules have survived their first major court decision.

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37. *See id.* at 733. According to the 2015 Open Internet Order, "[p]aid prioritization occurs when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices." 2015 Open Internet Order, *supra* note 10, at para. 18.

38. *See id.* at 734.

39. *See id.* at 733 (citing Verizon v. FCC, 740 F.3d 623, 633 (D.C. Cir. 2014)).

40. *See id.* at 736.

41. *Id.* at 740.

42. *Id.*

43. *See* Alina Selyukh, *U.S. Appeals Court Upholds Net Neutrality Rules in Full*, NPR (June 14, 2016, 10:42 AM ET), http://www.npr.org/sections/thetwo-way/2016/06/14/471286113/u-s-appeals-court-holds-up-net-neutrality-rules-in-full ("'We have always expected this issue to be decided by the Supreme Court, and we look forward to participating in that appeal,' AT&T General Counsel David McAtee said in a statement.").

TENNESSEE V. FCC

832 F.3d 597 (6th Cir. 2016)

by Laura K. Hamilton *

In *Tennessee v. FCC*,[1] the United States Circuit Court of Appeals for the Sixth Circuit dealt a major setback to the FCC's attempt to preempt state laws that restricted expansion of municipal broadband service networks. The Court reversed the FCC's preemption order, holding that Section 706 of the Telecommunications Act of 1996 ("the Act") did not contain the requisite clear statement of congressional intent to delegate preemption authority to the agency.

I. BACKGROUND

Section 706(a) of the Act grants the FCC authority to encourage the deployment of advanced telecommunications capability by removing barriers to infrastructure investment.[2] Section 706(b), similarly directs the Commission to "take immediate action" to accelerate deployment of such capability by removing barriers and promoting competition if the Commission finds that the capability is not being deployed to in a reasonable and timely fashion.[3]

In Tennessee, a Chattanooga-operated municipal broadband provider (the Electric Power Board, or EPB) petitioned the FCC to preempt a state law that barred Chattanooga from offering Internet service to any areas not served by the municipality's electric plant.[4] In North Carolina, the City of Wilson asked the FCC to preempt the entirety of Session Law 2011-84,[5] which contained a number of restrictions on municipal broadband providers.[6] In relevant part, the law (1) confined service offerings to the municipality's corporate limits;[7] (2) required municipalities to impute the costs of private providers when pricing municipal services;[8] and (3) amended the state's definition of "public utility" to include municipal broadband providers, thereby exposing them to additional regulation by the state utilities commission.[9]

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* J.D. candidate, The George Washington University Law School, May 2017. Senior Publications Editor, Federal Communications Law Journal, 2016-17.

1. Tennessee v. FCC, 832 F.3d 597 (6th Cir. Aug. 10, 2016).
2. *See id.* at 605-06 (citing 47 U.S.C. § 1302 (2012)).
3. *See id.*
4. *See id.* at 599-600.
5. *See id.* at 601 (citing N.C. GEN. STAT. §§ 160A-340 to -340.6 (2011)).
6. *See id.* at 601-02.
7. *See id.* at 601 (citing to N.C. GEN. STAT. § 160A-340.1(a)(3)).
8. *See id.* (citing to N.C. GEN. STAT. § 160A-340.1(a)(8)).
9. *See id.*

The FCC granted both petitions and preempted most of the laws at issue.[10] In the resulting Order,[11] the FCC argued that Sections 706(a) and (b) of the Act granted it implicit authority to preempt state telecommunications laws that conflict with federal communications policy.[12] Further, it concluded that Section 706 also allowed it to preempt "state laws regulating municipal subdivisions" when the laws stand as a barrier to broadband infrastructure investment or an impediment to competition.[13] The FCC, therefore, could preempt Tennessee's territorial restriction by categorizing it as a "state law communications policy regulation, as opposed to a core state function in controlling its political subdivisions . . . ."[14] As to North Carolina's Session Law, the Commission preempted only those sections deemed to constitute such "barriers."[15]

This case dealt with the consolidated petitions for review of the Order by the states of Tennessee and North Carolina.[16] Tennessee argued that the Order unconstitutionally interfered with a state's right to determine the boundaries of its political subdivisions.[17] Tennessee, North Carolina, and the National Association of Regulatory Utility Commissioners (NARUC) argued that even if Congress could pass such a law, Section 706 did not provide the required "clear statement" of legislative intent to delegate preemption authority over state laws regarding municipal subdivisions.[18] Although preemption authority need not be explicit,[19] the authority to preempt a state's allocation of powers between itself and its subdivisions "must be delegated by way of a clear statement."[20]

II. ANALYSIS

The Sixth Circuit ruled against the FCC, reversing the preemption order.[21] First, the Court held that the clear statement rule did apply.[22] Finding binding precedent in *Nixon v. Missouri Municipal League*, the court held that the clear statement rule should apply here, where federal preemption results

10. *See id.* at 602-03.
11. City of Wilson, N.C. Petition for Preemption of N.C. Gen. Statute Sections 160A-340 *et seq.*, *Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015) [hereinafter *Preemption Order*].
12. *See Tennessee*, 832 F.3d at 606-07 (citing *Preemption Order*, *supra* note 11, at paras. 142, 144-45).
13. *Id.* at 607-08 (citing *Preemption Order*, *supra* note 11, at paras. 146-47).
14. *Id.* at 609.
15. *See id.*; *see also id.* at n.2.
16. *See id.* at 609. Also noteworthy is the fact that the court granted motions to intervene by the National Association of Regulatory Utility Commissioners (NARUC), the Electric Power Board (EPB) of Chattanooga, Tennessee, and the City of Wilson, North Carolina. The United States was also a named party, but the Antitrust Division of the Department of Justice filed a letter disclaiming any particular position in either case. *See id.*
17. *See id.* at 609-10.
18. *See id.* at 610.
19. *See id.* at 613; *see also* Gregory v. Ashcroft, 501 U.S. 452, 467 (1991).
20. *See Tennessee*, 832 F.3d at 613.
21. *See id.* at 600.
22. *See id.* at 611.

in "interposing federal authority between a State and its municipal subdivisions . . . ."[23] As in *Nixon*, where the Supreme Court upheld the FCC's determination that it needed a clear statement to preempt a Missouri state statute barring its municipalities from entering the telecommunications market, here federal preemption threatened "to trench on the States' arrangements for conducting their own governments."[24] Because both Tennessee and North Carolina made "discretionary determinations for their political subdivisions," the *Nixon* case was therefore analogous, and the clear statement rule applied.[25] Importantly, the Sixth Circuit clarified that the Tennessee and North Carolina statutes at issue in this case implicated both interests in state sovereignty and regulation of interstate communications services.[26] But because *Nixon* also interpreted a section of the Telecommunications Act that dealt with the same competing interests,[27] the Court essentially implied that state sovereignty interests will trump federal regulatory telecommunications interests (absent explicit statutory directives).

Therefore, Section 706 could only grant the FCC authority to preempt state laws regarding municipal subdivisions if it contained a clear statement of congressional delegation of that power. Because the statutory language was unclear as to whether "remov[ing] barriers to infrastructure investment" encompassed both public *and* private investment, or only private, and because "promot[ing] competition in the telecommunications market" did not specifically direct the agency to preempt a state's allocation of powers between it and municipalities, the court held that Section 706 could not be read to authorize federal preemption.[28] The Order was reversed.[29]

III. CONCLUSION

It is difficult not to sympathize with the FCC here if one believes that the state laws at issue clearly presented "barriers" of some sort to infrastructure and competition. North Carolina's statute is especially illustrative: requiring municipal broadband providers to impute costs of private providers when pricing municipal services, as in Section 340.1(a)(8), does not appear to serve a sovereign state interest. Instead, as the dissent highlights, "it is an expression of [North Carolina's] telecommunications policy that private providers must be protected from a municipal provider's unfair advantage."[30] If the clear statement rule only applies where federal preemption threatens to interfere with a state's authority to govern its subdivisions, perhaps Section 706 arguably implied delegation of preemptory

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23. *Id.* at 610 (citing Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004)).
24. *Id.* (citing *Nixon*, 541 U.S. at 140-41).
25. *Id.* at 610-11.
26. *See id.* at 612 ("These effects are not mutually exclusive.").
27. *See id.* at 610-11.
28. *Id.* at 613.
29. *Id.* at 614.
30. *See id.* at 615 (White, J., concurring in part and dissenting in part).

authority should have been enough to save at least one victory for the FCC and consumers in the City of Wilson.

NATIONAL ASSOCIATION OF BROADCASTERS V. FCC

789 F.3d 165 (D.C. Cir. 2015)

by Warren Kessler *

In *National Ass'n of Broadcasters v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit denied petitions for review of the FCC's orders instituting its incentive auction and corresponding channel repackaging of radiofrequency spectrum.[2]

I. BACKGROUND

Title VI of the Middle Class Tax Relief and Job Creation Act of 2012[3] authorizes the FCC to reallocate portions of radiofrequency spectrum from television broadcasters to mobile broadband providers.[4] The incentive auction is, in part, Congress's response to the American public's voracious demand for mobile broadband service.[5] Ultra-high frequency spectrum is valuable to broadband providers because its characteristics make it particularly "well-suited for mobile broadband use."[6]

Title VI, also known as the Spectrum Act, establishes a three-part reallocation process.[7] First, the FCC will initiate a reverse auction to incentivize broadcasters to hand over spectrum in return for payment.[8] The Spectrum Act's second step authorizes the FCC to repackage spectrum belonging to broadcasters that did not participate in the incentive auction and to then reassign smaller spectrum bands to those broadcasters.[9] Finally, the FCC will facilitate a forward auction for broadband providers to purchase newly-released spectrum.[10]

In the instant case, National Association of Broadcasters and Sinclair Broadcast Group, Inc. filed petitions for review of an order from the FCC[11] that laid out the FCC's implementation of the Spectrum Act. In particular, the petitioners challenged the FCC's proposed use of certain tools and data in the repackaging process.[12] The FCC was required to use "all reasonable efforts" to preserve the "coverage area" and "population served" of broadcasters as

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* J.D. candidate, The George Washington University Law School, May 2017. Editor-in-Chief, Federal Communications Law Journal, 2016-17.

1. Nat'l Ass'n of Broads. v. FCC, 789 F.3d 165 (D.C. Cir. 2015).
2. *See id.*
3. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub.L. No. 112–96, tit. VI, 126 Stat. 156, 201-55.
4. *See* 789 F.3d at 168-69.
5. *See id.* at 169.
6. *Id.* at 170
7. *Id.* at 168.
8. *See id. at* 169-70.
9. *See id.* at 169
10. *See id.*
11. Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order*, 29 FCC Rcd 6567 (2014).
12. *See id.* at 170.

they were being assigned new spectrum.[13] These metrics are important because the new repackaged stations are supposed to generally serve the same viewers as they did before the incentive auction.[14] To accomplish these goals, the Spectrum Act requires the FCC to "make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology" (OET) of the FCC.[15]

The petitioners argued that in applying this methodology, known as the "Longley-Rice Methodology," the FCC should have been limited to using the computer software and population data available as of the 2012 date referenced in the Spectrum Act.[16] Instead, the FCC was using more recent TVStudy software and recent census results, rather than the older software and decade-old census data to which they were limited in 2012.[17]

The petitioners also raised a procedural challenge by arguing that the FCC's corresponding Notice of Proposed Rulemaking did not mention the use of the new software or new data sets.[18] Additionally, the petitioners pressed claims that the FCC did not sufficiently protect reassigned stations against loss of coverage in its attempts to replicate each station's previous coverage area.[19] Petitioners further argued that the FCC's approach would leave some unpopulated areas within a station's territory susceptible to unacceptable radio interference.[20]

II. ANALYSIS

With regard to the methodology claim, after a *Chevron* analysis the Court found that the Spectrum Act did not unambiguously foreclose the use of these new practices because the methodology it referenced did not also refer to the actual data or tools to be used by the FCC.[21] The Court found it "counterintuitive" to require the FCC to use outdated tools or census information.[22] Further, the use of modern and faster software and data satisfied the "all reasonable efforts" directive.[23]

For the procedural challenge, the Court found that this was harmless error and non-prejudicial because the petitioners were aware of the changes by way of a Public Notice submitted by the FCC's Office of Engineering Technology and because use of the modern software and data were not a

13. *Id.* at 170 (citing 47 U.S.C. § 1452(b)(2) (2012)).
14. *Id.* at 170.
15. 47 U.S.C. § 1452(b)(2).
16. 789 F.3d at 173.
17. *See id.* at 174.
18. *See id.* at 176
19. *See id.* at 177-78
20. *See id.* at 178-79.
21. *See id.* at 175.
22. *Id.* at 174.
23. *See id.* at 176.

significant enough departure from the NPRM to run afoul of the Administrate Procedure Act.[24]

In response to the petitioner's claim that the FCC did not sufficiently protect reassigned stations against loss of coverage, the Court found that though there were methods by which the FCC could have reduced loss in coverage area or radio interference, the FCC's chosen methods were reasonable because they provided the FCC with "flexibility in connection with the reverse auction and repacking process," per its mandate.[25] The Court also denied a claim that dealt with which types of broadcast stations were within the Spectrum Act's repackaging mandate.[26]

The Court finished its opinion by denying Sinclair Broadcast Group's challenges relating to (i) the FCC's creation of a 39-month post-repackaging deadline (after which broadcasters are prohibited from using their pre-auction stations), and (ii) the FCC's requirement that participation in the reverse auction requires at least two competing licensees (not of common ownership).[27] The Court found that the FCC acted with appropriate discretion with the purpose of advancing its goal of operating an effective forward auction.[28]

III. CONCLUSION

In sum, the Court denied both the substantive and procedural aspect of the petitions.[29] The FCC began implementing the auction procedures; stage two began in mid-September 2016.[30]

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24. *See id.* at 177; 5 U.S.C. § 553(b) (2012).
25. *Id.* at 178.
26. *See id.* at 179.
27. *See id.* at 180.
28. *See id*. at 183
29. *See id.* at 184.
30. Gary Epstein et al., *Incentive Auction Second Stage: Same as the First? Not Exactly*, FCC BLOG (Sept. 12, 2016, 1:45 PM), https://www.fcc.gov/news-events/blog/2016/09/12/incentive-auction-second-stage-same-first-not-exactly.

TENNIS CHANNEL, INC. V. FCC

827 F.3d 137 (D.C. Cir. 2016)

by Chasel Lee [*]

In *Tennis Channel v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit rejected a petition by Tennis Channel, Inc. to review the FCC's dismissal of their complaint against Comcast Corporation regarding alleged violations of Section 616 of the Communications Act, relating to multichannel video programming distributors (MVPD).[2] This was the second time the D.C. Circuit considered this case; the first round was in 2013.[3]

I. BACKGROUND

Section 616 of the Communications Act of 1934[4] prohibits MVPDs such as Comcast from discriminating against unaffiliated content providers and networks such as Tennis Channel.[5] Among other provisions, MVPDs may not "engag[e] in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."[6]

In 2010, Tennis Channel filed a complaint to the FCC against Comcast for the latter's discrimination against them based on affiliation,[7] which is prohibited by the Communications Act.[8] It was alleged that Comcast offered the Tennis Channel only at select premium tiers of service, while sports networks affiliated with Comcast such as the Golf Channel were offered on a broader scale.[9] Tennis Channel wanted to require Comcast to carry its content "on each of its systems on a programming tier that is no less distributed than the most highly-penetrated tier on which it carries one or more of its affiliated sports networks."[10]

The administrative law judge (ALJ) ruled in favor of Tennis Channel,[11] finding that while the unaffiliated Tennis Channel was similarly situated to the affiliated Golf Channel and Versus (a multisport cable channel),[12] the

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* J.D. candidate, The George Washington University Law School, May 2017. Senior Managing Editor, Federal Communications Law Journal, 2016-17.

1. Tennis Channel, Inc. v. FCC, 827 F.3d 137 (D.C. Cir. 2016).
2. *See id.* at 139.
3. Comcast Cable Comm., LLC v. FCC, 717 F.3d 982 (D.C. Cir. 2013).
4. 47 U.S.C. § 536 (2012).
5. *See id.*; *see also Tennis Channel*, 827 F.3d at 139.
6. *Id.* § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c) (2015).
7. Tennis Channel, Inc. v. Comcast Cable Comm., LLC, *Initial Decision*, 26 FCC Rcd 17160, para. 1 (2011) (ruling by A.L.J. Richard L. Sippel) [hereinafter Tennis Channel ALJ Decision].
8. 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c).
9. Tennis Channel ALJ Decision, *supra* note 7, at para. 1; *cf. id.* at para. 7 (noting that Comcast has an equity interest in the Golf Channel).
10. *Id.* at para. 1.
11. *Id.* at para. 55.
12. *Id.* at para. 24.

Golf Channel and Versus were given preferential treatment as "siblings" rather than "strangers" like the Tennis Channel,[13] a dynamic acknowledged by top Comcast executives and implemented in practice.[14] As a result, the ALJ found Comcast in violation of the Communications Act and ordered it to pay a $375,000 monetary forfeiture and to prohibit further discrimination against Tennis Channel.[15] A split Commission substantially upheld the ALJ's decision in 2012.[16]

Comcast subsequently appealed the FCC's decision to the D.C. Circuit. In 2013, the Court granted Comcast's petition for review and, after reviewing the record, reversed the FCC's decision.[17] The Court found that the FCC failed to take into account "valid business considerations" as a potential reason why Comcast declined to include the Tennis Channel on more tiers of service.[18] In short, there was insufficient evidence substantiating the FCC's conclusions.[19] The Court vacated the entire ruling and remanded it back to the FCC for reconsideration.[20] Tennis Channel petitioned for an en banc hearing before the D.C. Circuit and for certiorari before the Supreme Court, but was turned down in both.[21]

On remand before the FCC, Tennis Channel sought to have the ALJ's decision reaffirmed under the supposedly "new" standard set out by the D.C. Circuit, or alternatively to reopen the record to allow submission of further evidence to bolster Tennis Channel's case.[22] The FCC declined to do either and reversed the ALJ's verdict,[23] finding that the D.C. Circuit had merely reaffirmed a longstanding standard of evaluating evidence and that the Court did not require the FCC to reevaluate the record for evidence substantiating its and Tennis Channel's assertions.[24] The FCC also declined to reopen the record for further briefing,[25] noting that Tennis Channel already had an opportunity for a full and fair hearing and that "the interest in bringing the proceeding to a close outweighs any interest in allowing Tennis Channel a

13. *Id.* at para. 55.

14. *See id.* at paras. 55-61.

15. *Id.* at paras. 125-26.

16. *See generally* Tennis Channel, Inc. v. Comcast Cable Comm., LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 8508 (2012).

17. Comcast Cable Comm., LLC v. FCC, 717 F.3d 982 (D.C. Cir. 2013).

18. *See id.* at 985, 987 ("[I]f the MVPD treats vendors differently based on a reasonable business purpose . . . , there is no violation." "Neither Tennis nor the Commission has invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose.").

19. *Id.* at 987 ("On this issue the Commission has pointed to no evidence, and therefore obviously not to substantial evidence.").

20. *Id.*; *see* Tennis Channel, Inc. v. FCC, 827 F.3d 137, 140 (D.C. Cir. 2016).

21. Comcast Cable Comm., LLC v. FCC, No. 12-1337 (D.C. Cir. Sept. 4, 2013) (per curiam); Tennis Channel, Inc. v. Comcast Cable Comm., LLC, 134 S. Ct. 1287 (2014).

22. Tennis Channel, Inc. v. Comcast Cable Comm., LLC, *Order*, 30 FCC Rcd 849, para. 6 (2015).

23. *Id.* at paras. 9-11.

24. *Id.* at para. 7.

25. *Id.* at para. 8.

second opportunity" to pursue its case.[26] The entire case was therefore dismissed.[27]

Faced with a reversal of fortunes, Tennis Channel turned back to the D.C. Circuit to reopen the proceeding.[28] Tennis Channel alleges that the FCC was required by the D.C. Circuit in 2013 to review the record following the remand, that it would have found evidence in favor of Tennis Channel, and that its decision against doing so was arbitrary and capricious.[29] Tennis Channel also petitioned to require a reopening of the record for further briefing.[30]

II. ANALYSIS

The Court found Tennis Channel's allegations to be lacking. Regarding the FCC's decline to review the record again, the Court noted that Tennis Channel had misconstrued its ruling, stating that it merely decided that the evidence in the record could not substantiate the FCC's claims and decision rather than requiring the FCC to do further fact finding.[31] In fact, the Court had already done the re-review Tennis Channel was seeking and found nothing.[32] Therefore, there was "no room for [the FCC] to find discrimination" on the record; the FCC would have to directly contradict the Court in order to do so.[33]

The Court also found that the FCC had wide discretion on reopening the record absent new evidence or changed circumstances.[34] A court may overturn such a decision only after a "showing of the clearest abuse of discretion."[35] Tennis Channel offered no new evidence and showed no such abuse of discretion.[36] The Court also upheld the FCC's weighing of interests in determining whether to reopen the record, finding its reasoning sufficiently persuasive.[37]

III. CONCLUSION

The Court reviewed the FCC's actions in the wake of the Court's prior ruling and found that they were well within the discretion of the agency.

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26. *Id.*
27. *Id.* at para. 13.
28. Tennis Channel, Inc. v. FCC, 827 F.3d 137, 140-41 (D.C. Cir. 2016).
29. *See id.* at 141.
30. *See id.*
31. *See id.* at 141-42.
32. *See id.* at 143.
33. *Id.* at 142-43.
34. *See id.* at 143.
35. *Id.* at 144 (citing ICC v. Bhd. Of Locomotive Eng'rs, 482 U.S. 270, 278 (1987)).
36. *See id.* at 143-44.
37. *See id.* at 144.

Finding no "arbitrary, capricious, [and] an abuse of discretion," the Court upheld the dismissal and termination of Tennis Channel's complaint.[38]

38. *Id.* at 142.

PROMETHEUS RADIO PROJECT V. FCC (*PROMETHEUS III*)

824 F.3d 33 (3d Cir. 2016)

by Bryan Schatz *

In *Prometheus Radio Project v. FCC*,[1] petitioners challenged the FCC's definition of the "eligible entity," a status bestowed upon certain applicants for broadcast ownership to promote female and minority ownership. Petitioners also challenged the entirety of the FCC's quadrennial review of ownership broadcast rules, as well as the FCC's rule regarding television joint sales agreements.

I. BACKGROUND

The FCC is directed to promote minority and female broadcast ownership[2] and attempts to promote this goal by providing preferences for "eligible entities."[3] This is the third in a line of cases[4] in which the Third Circuit has analyzed FCC ownership rules and the Telecommunications Act's mandate for the Commission to perform quadrennial reviews of these rules.[5]

In this case, several broadcasters and a non-profit organization individually filed petitions for review of a 2014 FCC Further Notice of Proposed Rulemaking,[6] challenging the agency's delay in defining an eligible entity and a related attribution rule for television joint sales agreements.[7] Petitioners argued that the current eligible entity definition has failed to provide any benefit to ownership groups of women or minorities.[8] The FCC had employed revenue-based criteria to help classify eligible entities.[9]

II. ANALYSIS

The Court first discussed how the previous *Prometheus* decisions had affected the eligible entity definition.[10] For example, in *Prometheus II*, the Court had found that the FCC's revenue-based criteria for categorizing

* J.D. candidate, The George Washington University Law School, May 2017. Executive Editor, Federal Communications Law Journal, 2016-17.

1. Prometheus Radio Project v. FCC (*Prometheus III*), 824 F.3d 33 (3d Cir. 2016).
2. *See* 47 U.S.C. § 309 (2012).
3. *See Prometheus III*, 824 F.3d at 40.
4. *See* Prometheus Radio Project v. FCC (*Prometheus I*), 373 F.3d 372 (3d Cir. 2004); Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431 (3d Cir. 2011).
5. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12.
6. *See* 2014 Quadrennial Reg. Rev., *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371 (2014).
7. *See Prometheus III*, 824 F.3d at 39.
8. *See id.*
9. *Id.* at 49.
10. *See id.* at 42.

"eligible entities" was insufficient.[11] The Court then applied the its test for determining whether an agency's action has been "unreasonably delay[ed]"[12] and found that because (1) it has taken the FCC over a decade to settle on new criteria to define eligible entity;[13] (2) the statutory importance of minority and female broadcast ownership is very high;[14] (3) without a set eligible entity definition, several other FCC initiatives cannot occur;[15] and (4) because the FCC does not have a strong reason for its continued delay,[16] there has been an unreasonable delay in the FCC's finalization of its eligible entity definition.[17] After agreement from both parties, the court determined that a mediation will occur, which will set a schedule for when the FCC must finalize its eligible entity definition with no further delays.[18]

Next, the court analyzed the FCC's (in)actions under its statutorily required quadrennial review of broadcast ownership rules.[19] A quadrennial review has not been completed since 2006, and the 2010 quadrennial review was incorporated into the subsequent 2014 review, which also has yet to see a finalized decision.[20]

While some of the petitioners sought to have the Court eliminate all the standing broadcast ownership rules as a result of the delay, the Court refused to do so, as this "would lead to a degree of deregulation that is unprecedented in the modern broadcast industry[],"[21] and there is no other "instance when a court has ordered mass vacatur in similar circumstances."[22] Further, because the petitioners sought only this relief, they had no other form of relief for the Court to grant.[23] Therefore, while the court admonished the FCC for its continued delays and failures to hold an effective quadrennial review, there was no sanction or order against the FCC.[24]

Finally, the Court addressed the petitioners' challenge of an FCC rule on television joint-sales agreements.[25] The FCC promulgates attribution restrictions related to its local TV broadcast ownership rules in order to prevent circumvention of common ownership rules.[26] In 2014, the FCC applied a new attribution rule to television joint sales agreements.[27] A previous attribution rule that applied to radio joint sales agreements had been

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11. *Id.* at 43 (citing Prometheus Radio Project v. FCC (*Prometheus II*), 652 F.3d 431, 469-71 (3d Cir. 2011)).
12. *See id.* at 39.
13. *See id.* at 49.
14. *See id.* at 48.
15. *See id.*
16. *See id.* at 48-49.
17. *See id.* at 48.
18. *See id*. at 52.
19. *See id.* at 50; Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12.
20. *See Prometheus III*, 824 F.3d at 50.
21. *Id.* at 52.
22. *Id.*
23. *See id* at 53-54.
24. *See id.*
25. *See id.* at 54.
26. *See id.* at 54 (citing 2014 Quadrennial Reg. Rev., *supra* note 6).
27. *See id.*

upheld in Court.[28] However, the FCC applied its new attribution rule to TV broadcast ownership without incorporating this determination into the quadrennial review and without addressing whether the local television ownership caps are in the public interest, as is required under the quadrennial review.[29] FCC Commissioner Ajit Pai lamented this in a dissent to the 2014 rulemaking procedure.[30] Because Commissioner Pai brought up this issue in his dissent, the Court determined that the issue had been sufficiently raised before the FCC and the petitioners were not required to have brought the issue up before the FCC themselves due to the language of the exhaustion statute at issue.[31] Further, the FCC had addressed this issue in part in its Order, again providing evidence that the issue had been sufficiently raised before the FCC.[32] The Court held that "[a]ttribution of television [joint sales agreements] modifies the Commission's ownership rules by making them more stringent. Unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that an expansion is in the public interest," as is the required standard under the quadrennial review.[33]

III. CONCLUSION

The Court ordered joint mediation to address the question of eligible entities. Additionally, the joint sales agreement ownership rule was accordingly vacated and remanded to the FCC to sufficiently justify "in the public interest."[34] Judge Anthony Scirica dissented and argued that he would order the FCC to complete its 2010/2014 quadrennial review and hold the FCC to a strict timeline until the completion.[35]

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28. *See id.* at 55.
29. *See id.* at 56.
30. *See id.* at 56 (citing 2014 Quadrennial Reg. Rev., *supra* note 6 (Comm'r Pai, dissenting).
31. *See id*. at 57-58.
32. *See id.*
33. *See id.* at 58.
34. *Id.* at 60.
35. *See id.* at 60-62.

ADX COMMUNICATIONS OF PENSACOLA V. FCC

794 F.3d 74 (D.C. Cir. 2015)

by Seo ho Lee *

In *ADX Communications of Pensacola v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's decision not to deviate from its current market definition methodology for radio station markets when it assigned radio licenses to one of ADX's local competitors in the Mobile, Alabama and Pensacola, Florida markets. The D.C. Circuit also found that the FCC did not act arbitrarily when it did not submit the competitor to a two-year waiting period.[2]

I. BACKGROUND

Pursuant to Section 307 of the Communications Act,[3] the FCC regulates radio stations by awarding licensing or approving license transfers.[4] The FCC awards licenses or approves license transfers based on public interest, convenience, and necessity.[5] To these ends, the FCC caps the number of stations a licensee may own in a given market.[6]

The FCC's method for determining the size of a local market has changed since 2003.[7] Previously, the FCC used the "contour overlap method," which based the boundaries of a radio station's market on certain geographic considerations and the station's signal strength.[8] Due to the flaws of the contour overlap method,[9] the FCC changed to a method developed by Arbitron, a private data collection company.[10] Under Arbitron's methodology, major metropolitan areas are assigned markets labeled as "Arbitron Metro Survey Areas," or "Arbitron Metros."[11] Each radio station is also assigned a "home" Metro, which is based on either the community that the station is licensed to serve or if a station licensed elsewhere competes with stations in that same Metro.[12] The Arbitron method still applies the previous contour overlap method under certain circumstances.[13]

* J.D. candidate, The George Washington University Law School, May 2017. Senior Production Editor, Federal Communications Law Journal, 2016-17.

1. ADX Comm. of Pensacola v. FCC, 794 F.3d 74 (D.C. Cir. 2015).
2. *See id.* at 74.
3. Communications Act of 1934, 47 U.S.C. § 307 (2012).
4. *See id.* § 307(a).
5. *See id.*
6. *See id.* § 307(b).
7. *See ADX Comm.*, 794 F.3d at 77.
8. *See id.* at 76 (citing 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, para. 256 (2003) [hereinafter *Ownership Order*]); 794 F.3d at 77 (citing *Ownership Order*, *supra*, at paras. 250-52, 256).
9. *See id.* at 77 (citing *Ownership Order*, *supra* note 8, at para. 257).
10. *See id.*
11. *Id.*
12. *Id.*
13. *See id.*

Interested parties may petition to bar another license applicant from acquiring a license if the interested party can present a prima facie showing that the license acquisition would be against public interest.[14] Additionally, when Arbitron changes a market definition, the FCC applies a two-year waiting period before a radio station owner can take advantage of the new market definition.[15]

In 2012, Cumulus Licensing LLC (Cumulus) applied for radio station licenses in the Pensacola and Mobile Metros.[16] To ensure that it would only need to satisfy the newer Arbitron-based methodology, Cumulus proposed transferring some of its licenses to new owners and shifted the "community of license" for another local station.[17] Cumulus's competitor, ADX, filed petitions to deny the license transfers, claiming that the transfers would violate Cumulus's ownership limits under the contour-overlap methodology.[18] ADX also argued that the two-year waiting period should apply to Cumulus's attempt to transfer licenses.[19] The Media Bureau denied ADX's petition[20] and the FCC affirmed the Media Bureau's decision.[21]

II. ANALYSIS

The FCC and the Media Bureau reasoned that Cumulus's application did not involve acquiring another radio station in one market, but was instead an acquisition in another market and thus did not breach Cumulus's cap on radio stations, even if the markets were adjacent to each other.[22] Additionally, the FCC decided that Cumulus's actions did not trigger the two-year waiting period because its license transfers did not change affect Arbitron's market definitions.[23] Finally, the FCC argued that ADX lacked standing to challenge its decision because ADX could not demonstrate that its injury was likely to be redressed by a favorable decision by the court.[24]

ADX appealed, arguing that the FCC's actions were arbitrary and contrary to the public's interest.[25] It argued that the FCC and the Media Bureau's "robotic"[26] application failed to take into account the situation's nuances, like the fact that some stations were "transmitted from the same tower even though they are classified as being located in different markets."[27]

14. *See id.*
15. *See id.*
16. *See id.* at 78.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* (citing 7 Johnson Road Licenses, Inc., *Memorandum Opinion and Order*, 29 FCC Rcd 6386 (2014) [hereinafter *2014 Denial Order*]).
22. *See id.*
23. *See id.* (citing and quoting Dan J. Alpert, Esq. et al., *Letter*, 28 FCC Rcd. 20 (2013) [hereinafter *2013 Bureau Denial Letter*]).
24. *See id.* at 82.
25. *See id.* at 79.
26. *Id.*
27. *Id.*

The Court was tasked with deciding whether the FCC's actions were arbitrary,[28] and it reminded the parties that it must defer to the FCC's interpretation of its own rule unless the interpretation is plainly erroneous or inconsistent with the regulation.[29]

After finding that ADX had standing,[30] the Court concluded that the FCC's interpretation of the *Ownership Order* was not plainly erroneous or otherwise arbitrary or capricious.[31] The FCC had identified problems with the contour overlap methodology, and it had presented rational reasons to abandon it and to refuse to apply it in this case.[32] Based on this decision, the Court found it reasonable for the FCC to conclude that there was no issue with the adjacent Metros; ADX only showed that the situation would have violated the old contour overlap method.[33] Additionally, ADX's proposal to apply the contour overlap method in this case would require the FCC to apply it in too many other circumstances, which would defeat the purpose of adopting the newer Arbitron method.[34] Further, the FCC's use of the Media Bureau's full public interest analysis demonstrated that it had made a rational connection between the facts found and choices made.[35]

Additionally, the Court found that the FCC was reasonable in determining that Cumulus changing its community of license was not a change in the boundaries of a market by Arbitron and thus did not necessitate a two-year waiting period.[36] The FCC also successfully argued that its decision not to apply the waiting period was not plainly erroneous by distinguishing this case from the limited circumstances to which the waiting period may apply. The FCC also showed that it had taken into account, but ultimately discarded, the possibility of manipulation of market definitions in this case.[37]

III. CONCLUSION

The FCC justified its granting of new licenses relying on its Arbitron-based methodology. *ADX* illustrates the FCC's approach to the granting of licenses when considering market definitions, ownership limits in adjacent markets, and some of the geographic and ownership variables that may affect its decision making.

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28. *See id.* (citing 5 U.S.C. § 706(2)(A) (2012)).
29. *See id.* (quoting *Star Wireless, LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008)).
30. *See id.* at 82.
31. *See id.*
32. *See id.* at 80.
33. *See id.*
34. *See id.*
35. *See id.* at 81.
36. *See id.* at 83.
37. *See id.*

GREAT LAKES COMNET, INC. V. FCC

823 F.3d 998 (D.C. Cir. 2016)

by Stephen Klein *

In May 2016, the United States Court of Appeals for the District of Columbia Circuit decided *Great Lakes Comnet v. FCC*.[1] The D.C. Circuit found: (1) that Great Lakes Comnet, Inc. (Great Lakes) qualified as a competitive local exchange carrier (CLEC); (2) that the carrier's use of transport facilities in urban areas did not exclude it from the rural exemption; and (3) that remand was appropriate because the FCC failed to demonstrate that an alternative finding was sufficient to sustain its conclusion that Great Lakes was excluded from the exemption.[2]

I. BACKGROUND

Great Lakes operates as an intermediate carrier in Michigan between local carriers and AT&T's long-distance service.[3] In 2014, AT&T filed a formal complaint with the FCC alleging that Great Lakes was charging access fees that are greater than the benchmark rates imposed on CLECs.[4] The FCC determined that Great Lakes qualified as a CLEC for rate benchmarks and that it did not qualify under the rural exemption to those benchmarks.[5] This case is a petition for review of that order.[6]

II. ANALYSIS

The Court first determined that Great Lakes qualified as a CLEC for the purpose of benchmark rates under 47 C.F.R. § 61.26.[7] Great Lakes argued that intermediate carriers should fall outside the CLEC definition because they do not directly provide any service to end users and therefore the FCC's conclusion to the contrary was "clearly erroneous" under the standard of review developed in *Auer v. Robbins*.[8] The FCC countered that the regulation only require a CLEC to provide "some of the interstate exchange access services used to send traffic to or from an end user."[9] Additionally, the FCC's

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* J.D. candidate, The George Washington University Law School, May 2017. Production Editor, Federal Communications Law Journal, 2016-17.

1. Great Lakes Comnet, Inc. v. FCC, 823 F.3d 998 (D.C. Cir. 2016).
2. *See id.* at 998.
3. *See id.* at 1001. An intermediate carrier connects local exchange carriers and long-distance carriers. *See id.*
4. *See id.*
5. *See id.* at 1001-02.
6. *See id.* at 1002.
7. *See id.*
8. *See id.* at 1003. See Auer v. Robins, 519 U.S. 452 (1997) (setting out plainly erroneous standard of review).
9. *Id.* at 1002 (quoting AT&T Services Inc. v. Great Lakes Comnet, Inc., *Memorandum Opinion and Order*, 30 FCC Rcd 2586, 2590 (2015)).

2004 Eighth Report and Order had specifically amended the relevant regulations for the precise purpose of subjecting intermediate carriers to the benchmark rate regulation.[10]

Great Lakes argued that the canon of surplusage dictated that CLEC definition should be confined to carriers who serve end users directly, and that the FCC's interpretation conflicted with its 2011 Transformation Order.[11] However, the Court determined that the canon did not apply in this case because the regulatory history and text was clear that the CLEC definition did extend to intermediary carriers.[12]

Additionally, Great Lakes argued that the rate in question conflicts with the 2011 FCC Order, which will transition carriers into a new rate framework by 2018.[13] The Court quickly dismissed the second argument, only finding relevant the carrier rate of the year before AT&T's complaint.[14] Therefore, the Court agreed with the FCC and determined that, because of the clarity of the regulatory text and history, the FCC's classification of Great Lakes as a CLEC was not plainly erroneous under *Auer*, and Great Lakes' arguments were without merit.[15]

Another point of dispute was Great Lakes's contention that it should qualify as a rural CLEC, and as such, is exempt from the FCC's benchmark rules.[16] The FCC based its decision regarding Great Lakes on two grounds: first, that a carrier is not exempt if it had transport facilities in an urban area; and second, whether 8YY long-distance calls originate in an urban area.[17]

The Court found the FCC's first contention plainly erroneous because the exemption did not apply to carriers serving customers in an urban area, and did not relate to the existence of transport facilities in an urban area.[18] The Court did not reach the merits of the FCC's second contention because the FCC had not demonstrated that it believed that the rationale was independently sufficient to preclude the rural classification.[19] Additionally, in oral argument, the FCC advanced an argument that intermediate carriers could not be classified as rural CLECs under any circumstances.[20] However, the Court was unable to rely on this argument because the FCC had not placed it in the original order.[21]

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10. *See id.* (citing Access Charge Reform, *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108 (2004)).
11. *See id.* at 1003; *see also generally* Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663 (2011) [hereinafter *Transformation Order*].
12. *See Great Lakes Comnet*, 823 F.3d at 1003.
13. *See id.* (citing *Transformation Order*, *supra* note 11, at para. 801).
14. *See id.* at 1003.
15. *See id.*
16. *See id.* at 1004.
17. *See id.*
18. *See id.*; 47 C.F.R. § 61.26 (2015).
19. *See id.*
20. *See id.*
21. *See id.*

The Court quickly disposed of Great Lakes arguments that the FCC chose the wrong ILEC for setting its benchmark rates, the 2011 Order constituted an unlawful taking, and the FCC Order was applied retroactively against a reasonable expectation they would not apply.[22]

III. CONCLUSION

The Court denied all parts of the petition except the issue of Great Lakes' classification as a rural CLEC, which it remanded to the FCC for further proceedings.[23]

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22. S*ee id.* at 1004-05
23. *See id.* at 1005.

MONTGOMERY COUNTY V. FCC

811 F.3d 121 (4th Cir. 2015)

by Kenyon Redfoot [*]

In *Montgomery County v. FCC*,[1] the United States Court of Appeals for the Fourth Circuit denied a petition for review of an FCC Order implementing "the [congressional] mandate that localities 'shall approve' facility-modification requests covered by Section 6409(a)" of the Spectrum Act.[2]

I. BACKGROUND

Passed in 2012 as part of the Middle Class Tax Relief and Job Creation Act, the Spectrum Act seeks, in applicable part, to facilitate the timely deployment of wireless infrastructure by providing that "local governments may not deny, and *shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[3] Pursuant to its delegated authority under the statute,[4] the FCC issued an Order on October 17, 2014, to resolve several matters left unaddressed by the foregoing language from Section 6409(a) of the Spectrum Act.[5] The petitioners behind the administrative appeal in *Montgomery County*—a coalition of local governments, including Montgomery County, Maryland—were attempting to overturn two specific aspects of this Order.

II. ANALYSIS

First, the Order established a "deemed granted remedy" to implement Section 6409(a)'s "shall approve" mandate.[6] In essence, the "deemed granted remedy" represents a sixty-day shot clock for local authorities to grant a covered facility-modification request before it is "deemed granted" by operation of federal law.[7] Citing landmark Supreme Court cases including *Printz v. United States* and *New York v. United States*,[8] the petitioners in

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* J.D. candidate, The George Washington University Law School, May 2017. Articles Editor, Federal Communications Law Journal, 2016-17.

1. Montgomery Cty. v. FCC, 811 F.3d 121 (4th Cir. 2015).
2. *Id.* at 124, 126.
3. Spectrum Act, 47 U.S.C. § 1455(a)(1) (2012) (emphasis added).
4. *Id.* § 1403(a).
5. Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd 12865 (2014).
6. *Id.* at para. 226.
7. *See id.* To effectuate this operation of law, a permit applicant is only required to provide written notice to the relevant local authority that the application has been deemed granted. *Id.*
8. *See generally* Printz v. United States, 521 U.S. 898 (1997) (striking down a federal statute requiring states to run background checks on handgun purchases); New York v. United States, 505 U.S. 144 (1992) (striking down a federal statute requiring states to enact laws

Montgomery County argued that the FCC's "deemed granted remedy" violated the Tenth Amendment by conscripting local governments into the administration of a federal regulatory scheme.[9] The Fourth Circuit rejected this challenge, distinguishing the "deemed granted remedy" from federal overreaches in *Printz* and *New York* on the basis that the FCC's procedure does not require local governments to enforce the Spectrum Act.[10] To the contrary, the Fourth Circuit observed that "the 'deemed granted remedy' obviates the need for the states to affirmatively approve applications."[11]

The second component of the Order at issue in *Montgomery County* involved the FCC's interpretation of two undefined terms in Section 6409(a), setting the parameters for what requests trigger the Spectrum Act's "shall approve" mandate – and, in turn, the default protection of the Order's "deemed granted remedy."[12] The first challenged definition from the Order was that given to the term "base station," which the FCC construed broadly "to include 'structures other than towers that support or house an antenna, transceiver, or other associated equipment,' even if the structure was not built primarily for that purpose."[13] The second challenged definition from the Order involved the FCC's objective, multi-part criteria for evaluating when an equipment modification "substantially changes the physical dimensions" of a wireless facility, and thus falls within a locality's limited discretion for denying an application.[14]

While the petitioners raised a series of related challenges to the Order's definitions for these Spectrum Act terms, such challenges were fundamentally grounded in the argument that the FCC's statutory interpretations were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" under the Administrative Procedure Act.[15] Given the nature of this challenge—and the fact that the FCC was the agency charged with administering the Spectrum Act—the Fourth Circuit determined that the Order was entitled to a deferential *Chevron* analysis.[16] Quickly finding that the language of Section 6409(a) was sufficiently ambiguous,[17] the Fourth Circuit concluded that the FCC's Order

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providing for the disposal of radioactive waste within their borders or else take title and possession of the waste themselves).

9. *See* Montgomery Cty. v. FCC, 811 F.3d 121, 127-29 (4th Cir. 2015).

10. *See id.* at 128.

11. *Id.*

12. *See id.* at 127, 129-30.

13. *Id.* at 127.

14. *Id.*

15. *Id.* at 129-30 (quoting 5 U.S.C. § 706(2)(A)).

16. *See id.*; *see generally* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984) (articulating the principle of judicial deference to administrative interpretations of statutory schemes).

17. *Montgomery Cty.*, 811 F.3d at 129 ("There is no question that the terms of the Spectrum Act at issue here are ambiguous.").

represented a reasonable policy position in light of the Spectrum Act's underlying goal of removing barriers to wireless deployment.[18]

III. CONCLUSION

Although the Order's efficacy in achieving this goal will remain the subject of ongoing scrutiny, the Fourth Circuit's decision in *Montgomery County* continues a trend of growing judicial solicitude for the adverse consequences of case-by-case litigation and local inefficiency in regulating wireless infrastructure buildout. In 2012, the United States Court of Appeals for the Fifth Circuit upheld an FCC Declaratory Order imposing 90- and 150-day shot clock *presumptions* for local governments to address collocation and other wireless facilities requests, respectively.[19] However, while these "deadlines" still afforded localities opportunities to rebut the presumption of unreasonable delay based on contextual factors,[20] both the "deemed granted remedy" at sixty days and the objective criteria for a "substantial" facilities modification at issue in *Montgomery County* were absolute.[21] In this sense, the decision in *Montgomery County* not only contributes to the ongoing refinement of an important branch of Tenth Amendment jurisprudence, it further paves the path for FCC regulations—shot clocks or otherwise—that may be used to strike an acceptable balance between interests of federalism and the avoidance of municipal delay in a rapidly evolving wireless industry.

18. *See id.* at 133 ("Petitioners have the burden of showing that the FCC's definition is an unreasonable interpretation of the Spectrum Act. We conclude that Petitioners have failed to carry their burden.").

19. *See* City of Arlington v. FCC, 668 F.3d 229, 255-56 (5th Cir. 2012).

20. *See id.* at 259.

21. *See Montgomery Cty.*, 811 F.3d at 131 ("[T]he FCC has set forth objective standards that divest municipalities of their reviewing discretion.").

MAKO COMMUNICATIONS, LLC V. FCC

No. 15-1264 (D.C. Cir. 2016)

by Kenyon Redfoot *

In *Mako Communications v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit denied two petitions for review of an FCC Order excluding low-power television (LPTV) stations from protection in the "repacking" phase of the ongoing broadcast incentive auction.[2]

I. BACKGROUND

Enacted as Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, the Spectrum Act sets forth—and authorizes the FCC to conduct—a multi-step auction process designed to combat "spectrum crunch" by reallocating television broadcast licenses to satisfy the growing demands of mobile broadband.[3] The auction's first phase, which commenced in March 2016,[4] involved the repurchase of licensed spectrum from television broadcasters through "reverse" bidding.[5] Ultimately, this spectrum will be sold to wireless service providers in a "forward" auction.[6] To connect these matters of supply and demand, however, the Spectrum Act framework will require the FCC to "repack" space for television broadcasters planning to stay on the air.[7] The natural result of the auction—indeed, its fundamental purpose—will necessitate that these remaining broadcasters share a narrower range of spectrum than had been previously allocated for television service.[8]

While this plan is likely to present myriad technical and economic challenges for broadcasters generally,[9] LPTV stations are in a position of unique vulnerability arising from their secondary status to full-power counterparts. Since 1982, LPTV stations have been required to either avoid interference with primary broadcasters or cease operation.[10] However, as the

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* J.D. candidate, The George Washington University Law School, May 2017. Articles Editor, Federal Communications Law Journal, 2016-17.

1. Mako Comm., LLC v. FCC, No. 15-1264 (D.C. Cir. Aug. 30, 2016).
2. *Mako*, slip op. at 12.
3. *See Mako*, slip op. at 3-4.
4. *See* Dan Meyer, *FCC 600 MHz Incentive Auction Begins; Verizon, AT&T, and T-Mobile Wait*, RCR WIRELESS NEWS (Mar. 29, 2016), http://www.rcrwireless.com/20160329/policy/fcc-600-mhz-incentive-auction-begins-verizon-att-t-mobile-wait-2-tag2.
5. *See generally* Dru Sefton, *A Guide to the FCC Spectrum Auction*, CURRENT (Dec. 17, 2015), http://current.org/2015/12/a-guide-to-the-fcc-spectrum-auction/.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See Spectrum*, CORP. FOR PUB. BROAD., http://www.cpb.org/spectrum (last visited Sep. 2, 2016) (providing an embedded *PBS* video explaining the likely costs of repacking for broadcasters).
10. *See* Mako Comm., LLC v. FCC, No. 15-1264, slip op. at 8 (D.C. Cir. Aug. 30, 2016) (citing An Inquiry into the Future Role of Low Power TV Broad. & TV Translators in the Nat'l

band of spectrum available to a large pool of broadcasters shrinks, avoiding interference becomes increasingly difficult.[11] In light of this concern, the Spectrum Act contains two subsections, codified under 47 U.S.C. § 1452(b), purporting to limit the FCC's repacking power.[12] While the first general limitation requires the FCC to "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee,"[13] the statutory definition of "broadcast television licensee" does not extend to the majority of LPTV stations (i.e., those operating without a Class A license).[14] Nonetheless, § 1452(b)(5) provides further that "[n]othing in [§ 1452(b)] shall be construed to alter the spectrum usage rights of [LPTV] stations."[15] To interpret and reconcile these (and other) Spectrum Act provisions, the FCC issued an Order in May 2014 concluding that "[p]rotection of LPTV . . . stations in the repacking process is not mandated by" § 1452(b).[16] Following unsuccessful Petitions for Reconsideration of the FCC's Order,[17] two LPTV station operators, Mako Communications and Beach TV, appealed to the D.C. Circuit for review.

II. ANALYSIS

The principal argument raised by the petitioners in *Mako* was that the FCC's denial of protection to LPTV stations violated § 1452(b)(5) by "alter[ing] [their] spectrum usage rights."[18] Applying the conventional *Chevron* analysis, the Court sustained the FCC's interpretation of the statute.[19] Because "LPTV stations have always been subject to displacement by primary services such as full-power stations" and, more recently, by wireless service providers, the Court determined that the practical risk of LPTV displacement attendant to the repacking process did not alter their already secondary status.[20]

Telecomms. Sys., 47 Fed. Reg. 21,468, 21,489 (1982) (to be codified in 47 C.F.R. pts. 73, 74, 76, 78)).

11. *Cf.* Sefton, *supra* note 5 (referencing a National Association of Broadcasters prediction that 80% of full-power broadcasters would remain in operation if the FCC reclaimed 41% of current television spectrum in the "reverse" auction).

12. *See* 47 U.S.C. § 1452(b)(2), (5) (2012).

13. 47 U.S.C. § 1452(b)(2).

14. 47 U.S.C. § 1401(6) (2012).

15. 47 U.S.C. § 1452(b)(5).

16. *See* Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, *Report and Order,* 29 FCC Rcd 6567, para. 238 (2014) [hereinafter *Order*].

17. *See* Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions, *Second Order on Reconsideration*, 30 FCC Rcd 6746, paras. 64, 67, 68 (2015).

18. *See* Mako Comm., LLC v. FCC, No. 15-1264, slip op. at 7 (D.C. Cir. Aug. 30, 2016).

19. *Id.*; *see generally* Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984) (articulating the principle of judicial deference to administrative interpretations of statutory schemes).

20. *See Mako*, slip op. at 8-10 ("[T]he challenged orders subordinate LPTV stations to wireless licensees in the same way the [FCC] had done before the Spectrum Act.").

A distinct procedural challenge to the Order was also raised by the petitioners and summarily dismissed by the Court.[21] Under Section 312 of the Communications Act, revocation of a spectrum license entitles the affected licensee to certain procedural protections set forth in Section 9(b) of the Administrative Procedure Act.[22] Presumably, if LPTV displacement constituted a license revocation as was argued by the petitioners,[23] that would also fall within the scope of a prohibited alteration under 47 U.S.C. § 1452(b)(5). However, accepting the FCC's explanation that "displacement requires only that LPTV . . . stations vacate the channel on which they are operating," but "does not require termination of operations or relinquishment of spectrum usage rights," the Court concluded that the potential for displacement was not the sort of "intentional sanction" contemplated by the Communications Act definition of license revocation.[24]

III. CONCLUSION

While *Mako* seemingly resolves a legal uncertainty in the Spectrum Act, the decision's practical effect is unlikely to be fully appreciated until the incentive auction unfolds. At this point, LPTV displacement is merely a fear, if a well-founded one. However, industry stakeholders can only speculate about the extent to which it will be realized and the service areas it will affect. Particularly in rural and remote communities, LPTV stations have been praised for offering free content of local interest.[25] Mindful of this important role, the FCC has indicated that greater clarity may be forthcoming and has already provided (in a separate rulemaking) for the use of repacking and optimization software to help LPTV stations transition to the postauction media landscape.[26]

21. *See Mako*, slip op. at 11-12.
22. Communications Act of 1934, 47 U.S.C. § 312 (2012); *see also* 5 U.S.C. § 558(c) (2012).
23. *See Mako*, slip op. at 11-12.
24. *See id.*
25. *See, e.g.*, *Order*, *supra* note 15 (statement of Comm'r Clyburn) ("LPTVs provide diverse and local television programming and . . . are an important free over-the-air television resource in the most remote of locations.).
26. *See* Low Power TV Digital Rules, 81 Fed. Reg. 5,041, 5,044-45 (2016).

SATURN TELECOMMUNICATION SERVICES V. FCC

632 F. App'x 591 (11th Cir. 2016)

by Chasel Lee [*]

In *Saturn Telecommunication Services v. FCC*,[1] the United States Court of Appeals for the Eleventh Circuit rejected a petition by Saturn Telecommunication Services, Inc. to review the FCC's dismissal of Saturn's complaint against AT&T for violating their statutory obligations regarding unbundled access to network elements.[2] The Court found that Saturn's claims had already been settled between Saturn and AT&T in 2006, that their agreement bars raising these claims again, and that the FCC's dismissal was thereby proper.[3]

I. BACKGROUND

In 2006, Saturn, a competitive local exchange carrier (CLEC) providing services in Florida, raised allegations of misconduct against BellSouth, Inc., the incumbent local exchange carrier (ILEC), regarding the construction of a new network for Saturn's customers and their subsequent migration to the new network in the wake of the FCC's elimination of UNE-P provision requirements in 2005.[4] After filing complaints before the FCC and Florida Public Service Commission (FPSC),[5] and after trying to block BellSouth's then-pending merger with AT&T,[6] the two sides eventually agreed to a Settlement Agreement on November 2006.[7]

In addition to resolving the immediate problem of network construction and migration, Saturn agreed to withdraw their complaints and comments before the FCC and the FPSC and to refrain from refiling these claims.[8] Saturn also agreed to "'release[], acquit[], and discharge[] [AT&T] from all Demands, Actions and Claims, whether known or unknown, asserted or which could have been asserted, against [AT&T] related to' the FPSC Complaint or the FCC Comments."[9] "Demands, Actions and Claims" were defined as:

> [A]ll obligations, promises, covenants, agreements, contracts, endorsements, controversies, suits, actions, causes of actions,

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* J.D. candidate, The George Washington University Law School, May 2017. Senior Managing Editor, Federal Communications Law Journal, 2016-17.

1. Saturn Telecomm. Servs., Inc. v. FCC, 632 F. App'x 591 (11th Cir. 2016) (per curiam).
2. *Id.* at 593.
3. *See id.*
4. *See* Saturn Telecomm. Servs. Inc. v. BellSouth Telecomms., Inc., *Memorandum Opinion and Order*, 28 FCC Rcd 4335, paras. 5-10 (2013) [hereinafter Saturn EB Order].
5. *See id.* at para. 10.
6. *See id.*
7. *See id.* at para. 11.
8. *See id.* at paras. 12-13.
9. *Id.* (citing the Settlement Agreement).

> rights of action . . . claims, demands, rights, charges . . . of any kind or sort whatsoever or howsoever or whenever arising . . . that *relate to* the claims set forth by [Saturn] in the FCC [Comments] and the FPSC Complaint.[10]

However, implementation of the Settlement Agreement ran into numerous difficulties, and Saturn filed an informal complaint with the FCC and a three-claim lawsuit in federal district court against AT&T in connection with the ongoing conflict.[11] After the district court dismissed two of the claims,[12] Saturn had the case dismissed and filed a formal complaint in 2009 with the FCC seeking damages.[13]

After reviewing Saturn's petition, the Enforcement Bureau dismissed the entire complaint in 2013.[14] Citing the "related to" language in the "Demands, Actions and Claims" definition, the Enforcement Bureau found that the claims at issue "related to" those already disputed in 2006,[15] and Saturn was therefore disallowed from raising those issues again.[16] Saturn's argument that the Settlement Agreement did not reach post-Agreement conduct was dismissed[17] as the allegations stemmed from either pre-Agreement conduct or conduct discussed explicitly in the Agreement.[18] Also, the "howsoever and whenever arising" and "relate to" language of the "Demands, Actions and Claims" definition included the claims at issue.[19]

Saturn subsequently moved for reconsideration by the full Commission.[20] The FCC issued an Order in October 2014 upholding the Enforcement Bureau's decision in full and dismissing the complaint with prejudice, agreeing with the Enforcement Bureau's findings and conclusions.[21] Saturn then petitioned the Eleventh Circuit, whose jurisdiction includes Florida, for review of the FCC's decision.[22]

II. ANALYSIS

The Court agreed with the Enforcement Bureau and the full FCC, finding the language of the Settlement Agreement to be determinative.[23] It

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10. *Id.* at para. 25; Saturn Telecomm. Servs., Inc. v. FCC, 632 F. App'x 591, 592 (11th Cir. 2016) (per curiam) (emphasis added).
11. Saturn EB Order, *supra* note 4, at paras. 16-17.
12. *See id.* at para. 18.
13. *See id.* at paras. 20-24.
14. *See id.* at para. 23.
15. *See id.* at paras. 26, 28.
16. *See id.*
17. *See id.* at para. 30.
18. *See id.* at paras. 32-33.
19. *Id.* at para. 34.
20. See Saturn Telecomm. Servs., Inc. v. BellSouth Telecomms., Inc., *Order on Reconsideration*, 29 FCC Rcd 12520, para. 13 (2014).
21. *See generally id.* at paras. 14-24.
22. Saturn Telecomm. Servs., Inc. v. FCC, 632 F. App'x 591, 592 (11th Cir. 2016) (per curiam).
23. *See id.* at 593.

stated that the Settlement Agreement's language was "broad[] and unambiguous[],"[24] with little room for escape. Saturn had "fail[ed] to allege a new independent violation,"[25] instead raising "a continuation of the same, released misconduct."[26] Saturn had merely restated its old complaint, which it had agreed to settle.

III. CONCLUSION

The Court reviewed the language in the Settlement Agreement and found that Saturn's claims were barred by the Agreement it signed ten years ago. Accordingly, the Court agreed with the FCC's decision on the case and dismissed the petition to reconsider.

24. *See id.* at 592.
25. *See id.* at 593.
26. *Id.*

LAW V. FCC

627 F. App'x 1 (D.C. Cir. 2015), *cert. denied*, No. 16-311 (Oct. 17, 2016)

by Melissa Morgans *

In *Law v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit dismissed appellants' appeal from the FCC's granting of radio license applications.[2] The D.C. Circuit held, citing *Rainbow/PUSH Coalition v. FCC*, that there is no "automatic audience standing" for individuals who may be a part of a broadcaster's local audience.[3]

I. BACKGROUND

In 2012, following a bankruptcy action,[4] the FCC granted an application to assign two radio licenses for New York City radio stations.[5] After the grant, four New York City residents filed a petition under Section 309(d) of the Communications Act of 1934,[6] indicating the license application would negatively impact local black audiences[7] and contribute to the media's consolidation into the hands of the "corporate elite."[8] The FCC dismissed the petitioners' argument which asserted the license application would be contrary to the public interest under Section 309(d)[9] and denied to hear them on their Fifth Amendment claim.[10]

II. ANALYSIS

The D.C. Circuit held petitioners lacked standing to bring suit as members of a radio station's listening audience, holding that there is no "automatic audience standing."[11] Aside from being members of the listening audience of the radio station, the appellants did not provide affidavits or other

* J.D. candidate, The George Washington University Law School, May 2017. Senior Articles Editor, Federal Communications Law Journal, 2016-17.

1. Law v. FCC, 627 F. App'x 1 (D.C. Cir. 2015).
2. *See id.* at 1.
3. *Id.* at 1 (quoting Rainbow/PUSH Coalition v. FCC, 330 F.3d 539, 542 (D.C. Cir. 2003)).
4. *See In re* Inner City Media Corp., No. 11-13967 (Bankr. S.D.N.Y, Feb 23, 2012) (Westlaw, Bankruptcy Cases).
5. *See* Brief for Appellee at 1, Law v. FCC, 627 F. App'x 1 (D.C. Cir. 2015) (No. 14-1130).
6. *See* Communications Act of 1934 § 309(d), 47 U.S.C. § 309(d) (2012).
7. *See* Urban Radio I, L.L.C., Debtor-in-Possession and YMF Media, New York Licensee LLC for Consent to Assign Licenses, Memorandum Opinion and Order, 29 FCC Rcd 6389, para. 4 (2014) [hereinafter Urban Radio Order].
8. *Id.*
9. *See* Brief for Appellee, supra note 5, at 1.
10. *See* Urban Radio Order, supra note 7, at para. 3.
11. Law v. FCC, 627 F. App'x 1, 1 (D.C. Cir. 2015) (quoting Rainbow/PUSH Coalition v. FCC, 330 F.3d 539, 542 (D.C. Cir. 2003)).

evidence on behalf of the group to assert standing under Article III.[12] Given the lack of standing, the D.C. Circuit dismissed the case.[13]

III. CONCLUSION

As the D.C. Circuit decided *Law* on an issue of standing,[14] it did not address the pressing underlying issue involving the reduction of black-oriented broadcast programing in New York City.[15] Rather, the Court furthered the policy articulated in *Rainbow/PUSH Coalition v. FCC* that being a part of a radio station's listening audience does not affirm legal standing.[16] As a result, parties considering petitioning against FCC license applications should ensure they possess Article III standing, knowing the D.C. Circuit has reliably rejected the argument of audience standing.[17]

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12. *See id.* at 1.
13. *Id.*
14. *Id.*
15. David Hinckley, *Radio Personality Bob Law Warns that Black Radio Is in danger of Disappearing from New York*, N.Y. DAILY NEWS (June 13, 2012), http://www.nydailynews.com/entertainment/tv-movies/radio-personality-bob-law-warns-black-radio-danger-disappearing-new-york-article-1.1094465.
16. *See Rainbow/PUSH Coalition*, 330 F.3d at 542.
17. *Compare* Law v. FCC, 627 F. App'x 1, 1 (D.C. Cir. 2015) *with Rainbow/PUSH Coalition*, 330 F.3d at 542.

KAY V. FCC

621 F. App'x 5 (D.C. Cir. 2016)

by Brittany Pont [*]

In *Kay v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit denied a petition from James A. Kay, Jr. challenging an FCC order to reconfigure the 800 MHz spectrum band in order to reduce interference with public safety communication systems. This case explores whether a petitioner maintains standing to challenge an FCC Order reconfiguring the 800 MHz spectrum when he is the sole member of a limited liability company holding such licenses. The D.C. Circuit found that he cannot assert this challenge.

I. BACKGROUND

An 800 MHz radio system is a combination of conventional two-way radio and computer-controlled transmitters.[2] Police, firefighters, and other public safety officials use portions of the band for communications, which is comprised of spectrum at 806-824 MHz paired with spectrum at 851-869 MHz.[3] In order to combat harmful interferences on these systems, in 2004 the FCC set forth a plan to reconfigure the band.[4] The plan ordered certain licensees to move their operations to a different area of the spectrum.[5]

Kay first petitioned the D.C. Circuit in 2006, when he personally held licenses that were affected by the FCC order.[6] In the present case, however, Kay acknowledges that he personally no longer holds any licenses.[7] Instead, he maintains "control and ultimate beneficial ownership" of Third District Enterprises (Third District), a Nevada limited liability corporation and licensee of 800 MHz licenses.[8] Kay asserts that his ownership of Third District provides him continued standing to bring this case in his personal capacity since he is the company's sole member.[9]

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* J.D. candidate, The George Washington University Law School, May 2017. Notes Editor, Federal Communications Law Journal, 2016-17.

1. Kay v. FCC, 621 F. App'x 5 (D.C. Cir. 2015).
2. *See* UC RIVERSIDE POLICE DEP'T, 800 MHZ FREQUENTLY ASKED QUESTIONS, http://police.ucr.edu/docs/mhz_faq.pdf (last visited Oct. 5, 2016).
3. *See 800 MHz Spectrum*, FCC, https://www.fcc.gov/general/800-mhz-spectrum (last updated Aug. 12, 2016).
4. *See id.*
5. *See Kay*, 621 F. App'x 5.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*

II. ANALYSIS

The D.C. Circuit began by reminding the petitioner that a corporation is a separate and distinct legal entity from its shareholders, even if the corporation is solely owned.[10] Thus, a shareholder is generally unable to bring a personal lawsuit to "vindicate the rights of that separate legal entity."[11] Kay does not assert, nor does the court find, that he falls under any of the exceptions to this rule.[12] Thus, when Kay transferred his personal licenses to Third District, his claim became moot.[13] Additionally, the fact that Third District is a limited liability corporation, as opposed to a traditional corporation, does not alter the analysis; just as a corporation is a legally distinct entity from the corporate shareholders, a limited liability company is also legally distinct from its owners.[14]

III. CONCLUSION

The D.C. Circuit found that because Kay cannot personally assert the legally distinct rights of Third District, his challenge of the FCC Order is denied.[15] This decision may have an impact on other parties who transferred personally-held 800 MHz licenses to corporate ownership and may also affect those others who transfer licenses on other spectrum frequencies. The decision that personal standing is lost upon such a transfer to a corporate entity should serve as a warning that any challenges to a reconfiguration order must occur prior to such a transfer or sale of a license.

10. *See id.* (citing Am. Airways Charters, Inc. v. Regan, 746 F.2d 865, 872-73 (D.C. Cir. 1984)).

11. *See id.* (citing PHILLIP A. BLUMBERG ET AL., 5 BLUMBERG ON CORPORATE GROUPS § 167.03, at 21 (2d ed. 2015); WILLIAM MEAD FLETCHER, 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5910, at 502-04 (2009)); *see also Am. Airways Charters*, 746 F.2d at 873 n.14.

12. *See Kay*, 621 F. App'x at 6.

13. *See id.*

14. *Id.* (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)).

15. *See id.* at 6.

BEHR V. FCC

638 F. App'x 1 (D.C. Cir. 2015)

by Melissa Morgans [*]

In *Behr v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's order denying petitioner's request for an evidentiary hearing after partial approval of a license modification application under 47 C.F.R. § 1.110.[2] The FCC denied the request, arguing that it did not grant any application *in part*, but granted one application[3] and separately denied another.[4] The D.C. Circuit deferred to the FCC's judgment and affirmed the order.

I. BACKGROUND

In 1993, Behr won an FCC lottery for a 220-222 MHz-Band broadcasting license[5] which, due to an administrative error, Behr received in 1996.[6] The license required Behr to construct a base station within twelve months.[7] In June 2003, Behr filed an application to modify his license and attached a request for a waiver of a construction requirement asking for an extension from twelve months to five to ten years.[8] In November 2003, the Wireless Telecommunications Bureau denied the waiver request and granted the license modification application.[9]

Under 47 C.F.R. § 1.110,[10] if the FCC, without a hearing, grants any application *in part*, the application is considered granted unless the applicant sends the FCC a written rejection of the grant within thirty days.[11] If the applicant does send in a written rejection within thirty days, the FCC must vacate the original action and send the application for a hearing.[12] Behr contended that his application was granted *in part* and then should have been sent to a hearing before the FCC under Section 1.110.[13] However, the FCC did not hold a hearing because it did not believe that it granted any application

* J.D. candidate, The George Washington University Law School, May 2017. Senior Articles Editor, Federal Communications Law Journal, 2016-17.

1. *See* Behr v. FCC, 638 F. App'x 1 (D.C. Cir. 2015).
2. *Id.* at 1; *see also* 47 C.F.R. § 1.110 (2015).
3. *See Behr*, 638 F. App'x at 2.
4. *Id.* at 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1-2.
9. *Id.* at 2.
10. *See* 47 C.F.R. § 1.110 (2015).
11. *See* Behr v. FCC, 638 F. App'x 1, 2 (D.C. Cir. 2015).
12. *See* 47 C.F.R. § 1.110; *see also Behr*, 638 F. App'x at 2.
13. *See Behr*, 638 F. App'x at 2.

in part.[14] Rather, the FCC contended Behr's matter involved one granted modification application and one separately denied waiver request.[15]

II. ANALYSIS

The D.C. Circuit affirmed the FCC's order under the applicable standard of review, "arbitrary, capricious, [or] an abuse of discretion," because the FCC's decision making was rational.[16] The FCC reasonably thought the license modification would need to be updated regardless of the status of the waiver request, and thus treated them separately.[17] The D.C. Circuit also found the FCC is entitled to great deference when it interprets its own regulations.[18]

Judicial precedent also supported the decision, specifically *Buckley-Jaeger v. FCC*.[19] In *Buckley-Jaeger*, the D.C. Circuit held that Section 1.110 disputes are reserved for "situations where the applicant receives less than a full authorization."[20] Here, Behr did receive full authorization of his license modification request and therefore does not fall under this category.[21] Finally, the D.C. Circuit asserted there were other remedies open to Behr in addition to this Section 1.110 lawsuit, namely "filing a petition for reconsideration or an application for review"—opportunities he did not pursue.[22]

III. CONCLUSION

Behr is a lesson in uniformity and lost opportunity. First, *Behr* exemplifies the D.C. Circuit's choice to defer to the FCC, especially when the agency interprets its own regulations.[23] Second, *Behr* demonstrates how parties will be held accountable for any squandered opportunities for relief.[24] Going forward, parties should be aware of what judicial remedies are available to them, as the D.C. Circuit is willing to take that into account when determining the party's diligence.

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14. *See id*. at 2.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*. at 2-3; *See also* Buckley-Jaeger v. FCC, 397 F.2d 651 (D.C. Cir. 1968).
20. *Behr*, 638 F. App'x at 3 (quoting *Buckley-Jaeger*, 397 F.2d at 656).
21. *Id.* at 3.
22. *See id*.
23. *Id*. at 2.
24. *Id*. at 3.

BEACH TV PROPERTIES, INC. V. FCC

617 F. App'x 10 (D.C. Cir. 2015)

by Alexander Gorelik [*]

In *Beach TV Properties, Inc. v. FCC,* [1] the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's rejection of the broadcaster's certification for eligibility. The D.C. Circuit affirmed the FCC's action based on the broadcaster's initial deficient certification and its untimely amended submission.[2]

I. BACKGROUND

The Community Broadcasters Protection Act of 1999 authorized the FCC to provide certain licenses to ensure that low-power television stations, which provide "programming tailored to the interests of viewers in small localized areas," could survive the transition to the digital television format.[3] Class A licensees are protected from interference from newer broadcast facilities in the area so long as the licensee continues to meet certain requirements.[4]

To convert from a regular low power television license to a Class A license, the FCC required the submission of a completed certification of eligibility form prior to January, 28, 2000, [5] in accordance with the Community Broadcasters Protection Act of 1999.[6] Beach TV Properties, Inc. is a broadcaster that provides television programming aimed at tourists in various American vacation cities.[7] On December 29, 1999, following the FCC's release of regulations to establish a Class A television license, Beach TV Properties, Inc. submitted its certification of eligibility form for such a license.[8]

After a review of Beach TV's certification of eligibility submission, the FCC deemed the company's submission noncompliant because the applicant did not mark any of the blocks specifying its qualifications for a Class A

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* J.D. candidate, The George Washington University Law School, May 2017. Associate, Federal Communications Law Journal.

1. Beach TV Props., Inc. v. FCC, 617 F. App'x 10 (2015).
2. *See id.* at 10.
3. 145 CONG. REC. 29,977 (1999).
4. *See* Brief for Respondents, *supra* note 2, at 7 (citing Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, § 5008, 113 Stat. 1501, 1501A-594 to -598).
5. *See* Brief for Respondents, *supra* note 2, at 6-7 (citing Mass Media Bureau Implements Community Broadcasters Protection Act of 1999, *Public Notice*, https://www.fcc.gov/document/mass-media-bureau-implements-community-broadcasters-protection-act-1999 (1999)).
6. *See* Community Broadcasters Protection Act of 1999 § 5005.
7. *See* TRIPSMARTER.COM, http://www.tripsmarter.com/ (last visited Oct. 4, 2016).
8. *See* Brief for Respondents at 9, Beach TV Props., Inc. v. FCC, 617 F. App'x 10 (2015) (Nos. 14-1229, 14-1230).

license.[9] Beach TV asked for a reevaluation of the dismissal and submitted an amended form, which was promptly denied because the FCC received the submission after the statutory deadline.[10] In response, the broadcaster asked for review of the denial by the full Commission, which was denied in a 2012 Order.[11] Beach TV filed for a reconsideration of the FCC's decision, but the Media Bureau rejected the submitted challenges.[12] Beach TV filed suit to overturn the denial of a reconsideration.[13]

II. ANALYSIS

In its review, the D.C. Circuit Court of Appeals affirmed the FCC's decisions.[14] The Court found that of the seven challenges brought by Beach TV, three were jurisdictionally barred, two were procedurally barred, and two were meritless.[15]

Beach TV first claimed that the FCC failed to properly publish and promulgate the relevant rules pursuant to the Administrative Procedure Act.[16] The Court pointed out that Beach TV neglected to present those arguments in front of the FCC first and therefore any authority to assess them now was lacking.[17] Beach TV also claimed that it lacked notice for the form's requirements and that it was the victim of disparate treatment.[18] The Court rejected these arguments because they were not asserted prior to the request for reconsideration.[19]

Finally, the Court rejected the broadcaster's claim that the omissions in its original license submission were immaterial because the application failed to identify how the company met any of the requirements for eligibility.[20] The Court also rejected Beach TV's argument that the FCC should have extended its deadline for a timely submission of the form by noting that the FCC's deadline was supported by statute.[21] The Court also reiterated its conclusion in *Virgin Islands Telephone Corp. v. FCC* that untimely submissions must only be accepted in "extremely unusual circumstances."[22]

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9. *See* Brief for Respondents, *supra* note 2, at 11 (citing Dismissal of LPTV Licensee Certificates of Eligibility for Class A Television Status, *Public Notice*, 15 FCC Rcd 9761, 9762 (2000)).
10. *See* Beach TV Props., Inc. v. FCC, 617 F. App'x 10, at 10 (2015).
11. *See* Brief for Respondents, *supra* note 2, at 14 (citing Atlanta Channel, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14541, para. 1 (2012)).
12. *See* Brief for Respondents, *supra* note 2, at 16-19.
13. *See Beach TV Props.*, 617 F. App'x at 10.
14. *See id.*
15. *See id.*
16. *See id.* (citing 5. U.S.C. §§ 552-553 (2012)).
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* at 11.
21. *See* 47 U.S.C. § 336(f)(1)(B) (2012).
22. *See Beach TV Props.*, 617 F. App'x at 11 (citing V.I. Tel. Corp. v. FCC, 989 F.2d 1231, 1237 (D.C. Cir. 1993)).

III. CONCLUSION

The decision underscores the importance of a timely assertion of a challenge and further decreases the likelihood of other successful appeals against denials of the Class A licenses for similar reasons.

JOHNSON V. FCC

No. 14-1250 (D.C. Cir. 2015)

by Arian Attar [*] *and Lynn Chang* [†]

In *Johnson v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit dismissed an appeal of the FCC's dismissal of an objection to a radio licensing assignment.[2] This case was originally handled by the FCC's Media Bureau, Audio Division.[3]

I. BACKGROUND

In December 2010, petitioner William Johnson sought a determination by the FCC that the FM Translator Station W227AV's license had expired according to Section 312(g) of the Communications Act.[4] One motive for seeking an FCC determination on license expiration is to show the license is not being used, so the petitioner can then have the license assigned to them and take advantage of its benefits. In May 2013, the FCC granted an application to reassign W227AV from Reach Communications, Inc. to Suncoast Radio, Inc., and the application went unopposed.[5]

Despite previously having the opportunity to object to the assignment through public comment, Johnson filed an assignment petition, where he objected to the assignment of W227AV from Reach Communications, Inc. to Suncoast Radio, Inc.[6] Johnson argued the assignment should be rescinded because the license had expired and therefore could not be assigned.[7] In August 2013, the FCC denied Johnson's 2010 petition as lacking merit and dismissed the assignment petition because it was not timely filed.[8] In September 2013, Johnson filed a petition for review of the FCC's August 2013 decision, but this petition was again dismissed as untimely in April 2014.[9] Johnson then challenged the April 2014 dismissal by filing another petition for review, but the FCC dismissed the application for review in September 2014 because it was untimely.[10] In November 2014, Johnson

* J.D. candidate, The George Washington University Law School, May 2017. Associate, Federal Communications Law Journal.

† J.D. candidate, The George Washington University Law School, May 2017. Articles Editor, Federal Communications Law Journal, 2016-17.

1. Johnson v. FCC, No. 14-1250 (D.C. Cir. Oct. 6, 2015).
2. *See id.*
3. Brief for Respondent at 7-9, Johnson v. FCC, No. 14-1250 (D.C. Cir. Oct. 6, 2015).
4. *See id.* 47 U.S.C. § 312(g) (2012) states that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of the broadcast station expires at the end of that period."
5. Brief for Respondent, *supra* note 3, at 2-3.
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*

petitioned the D.C. Circuit for review of the FCC's September 2014 decision.[11]

II. ANALYSIS

The main issue in *Johnson* was whether the D.C. Circuit had jurisdiction to rule upon the merits of a petitioner's complaint in a situation where the petitioner did not timely file an appeal.[12] Pursuant to Section 402(c) of the Communications Act, the petitioner had 30 days to file his petition.[13] In this case, the petitioner missed the deadline by nearly one month.[14] The D.C. Circuit agreed with the FCC that the petitioner "failed to file his appeal within [the appropriate time], and it therefore must be dismissed."[15]

III. CONCLUSION

Johnson illustrates the importance of adhering to procedural requirements and exemplifies the risks of late filing. Courts impose a stringent reading of the requirements and are unlikely to allow tardy filings or petitions get to the merits. It is also important to note the number of procedural failures on the part of the petitioner in this case prior to the D.C. Circuit's decision, because it illustrates how noncompliance can strain FCC resources.

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11. *See id.* at 3.
12. *Id.* at 1.
13. Communications Act of 1934 § 402(c), 47 U.S.C. § 402(c) (2012).
14. Brief for Respondent, *supra* note 3, at 1.
15. 47 U.S.C. § 402(c); Johnson v. FCC, No. 14-1250 (D.C. Cir. Oct. 6, 2015).

SCHUM V. FCC

617 F. App'x 5 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1672 (2016)

by Lynn Chang *

In *Schum v. FCC*,[1] the United States Court of Appeals for the District of Columbia Circuit dismissed the plaintiff's petition for review and appeal of an FCC action approving the transfer of a radio license from one of the plaintiff's companies to a separate entity.[2]

I. BACKGROUND

After a Texas state court found a judgment against the plaintiff personally, the plaintiff declared bankruptcy. The FCC approved a transfer of a radio license from The Watch, Ltd. (The Watch) to a different licensee after the bankruptcy court put up the license for auction.[3] The plaintiff is the sole owner of DFW Radio, Inc., a general partner of The Watch.[4] The plaintiff alleged that he was injured by the FCC's approval of the transfer.[5]

The issue in this case was whether the plaintiff could prove injury to establish standing.[6] To proceed to a trial on the merits, the plaintiff must have shown a concrete injury that resulted from the FCC's actions.[7] To this end, the plaintiff attempted to assert three distinct injuries: (1) the FCC's approval terminated fees that the new licensee allegedly owed to The Watch;[8] (2) entry of a personal judgment against him resulted in lost job opportunities;[9] and (3) The Watch's valuation had fallen dramatically as a result of the action.[10]

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* J.D. candidate, The George Washington University Law School, May 2017. Articles Editor, Federal Communications Law Journal, 2016-17.

1. Schum v. FCC, 617 F. App'x 5 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 1672 (2016).
2. *See id.* at 6.
3. *See id.* at 7. The Watch, Ltd. was founded in 1997 with Mr. Schum serving as President since inception. *Executive Profile: Dave Schum*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/person.asp?personId=9406342&privcapId=9394978&previousCapId=9394978&previousTitle=The%20Watch%20Ltd. (last visited Oct. 19, 2016). After filing for bankruptcy, The Watch is now known as Renaissance Radio, Inc. and continues to own an operate radio broadcasting stations in the Dallas area. Company *Overview of the Watch Ltd.*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=9394978 (last visited Oct. 19, 2016).
4. *See id.* at 6.
5. *See id.*
6. *See id.*
7. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Lujan v. Defs. of Wildlife, 504 U.S. 555, 556 (1992) ("[A] plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy.").
8. *See Schum*, 617 F. App'x at 6. As the judgment mentions, "Schum is the sole owner of DFW Radio, Inc., which is the general partner of The Watch, Ltd." *Id.*
9. *See id.*
10. The plaintiff alleges that he personally "sustained over 50% of the loss." *Id.*

II. ANALYSIS

The D.C. Circuit rejected all three of the plaintiff's contentions.[11] The D.C. Circuit found that the plaintiff did not suffer any injury in fact from the lost fees or the decline in value of The Watch because these were "merely derivative of harms suffered by the company," and are not personal injuries on which the plaintiff could obtain any form of recovery.[12] Further while the plaintiff's lost job opportunities may "arguably represent an injury in fact," they too fail to meet the "standing requirements of traceability and redressability."[13] The D.C. Circuit notes that the FCC's order is an ancillary action that "helped to effectuate" the Texas court case and the plaintiff's subsequent bankruptcy proceedings.[14] As a result, the injury cannot be traced to the FCC order.[15] In addition, the D.C. Circuit decided that all three complaints failed to satisfy the final standing requirement: that a favorable decision would offer redress for the injuries.[16]

III. CONCLUSION

Schum is not likely to have a large impact in future cases. It is a straightforward procedural case and has no precedential value as an unpublished opinion. While it is fairly interesting how the court discusses whether fees, business value, or job opportunities may count as injuries in fact, the question is dealt with rather perfunctorily due to the "well-established shareholder standing rule."[17] Litigants must invoke "those narrow exceptions to the [shareholder standing] rule" should they wish to challenge a FCC action in their personal capacity or have the company in question as the party issuing a challenge.

11. *See id.*
12. *Id.*
13. *Id.*
14. *Id.* at 6.
15. *See id.*
16. *See id.*
17. *Id.*