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

James A. Kay Petitioner, v. Federal Communications Commission and United States of America, Respondents.	)))))))))	Case No. 06-1076 (and consolidated cases)

REPLY IN SUPPORT OF FCC'S MOTION TO DISMISS

The Federal Communications Commission respectfully submits this reply in support of its July 14, 2014 motion to dismiss these cases for want of jurisdiction.

As the FCC pointed out in its motion, Petitioners James A. Kay and Charles D. Guskey have failed to demonstrate standing. While each Petitioner challenges a series of FCC Orders that restructure the 800 MHz spectrum band, neither Petitioner holds a license to use 800 MHz spectrum. Thus, they cannot demonstrate the "injury in fact," "fairly traceable" to the Orders that is the "irreducible constitutional minimum" of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In opposing the FCC's motion to dismiss, Kay contends that he has standing by virtue of his financial interest in Third District Enterprises, L.L.C., an FCC licensee holding several 800 MHz licenses. *See* Kay Resp. 1-3. Likewise, Guskey

claims that he has standing by virtue of his financial interest in Preferred Communications Systems, Inc., another 800 MHz licensee that recently withdrew from these consolidated cases. *See* Guskey Resp. 12, 15. As we explain below, Petitioners' claims are unavailing. It is well established that a shareholder lacks standing to enforce the rights belonging to a corporation. *See Franchise Tax Bd. of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). Petitioners' arguments therefore fail to stave off dismissal for want of jurisdiction.

DISCUSSION

I. KAY LACKS STANDING.

When Kay filed his Certificate as to Parties, Rulings, and Related Cases in Case No. 06-1076, he made the following disclosure pursuant to FRAP 26.1:

> James A. Kay Jr. is an *individual petitioner* in Case No. 06-1076. The only other parties related to Mr. Kay with an interest in the outcome of the case are: (a) Third District Enterprises, L.L.C., a limited liability company organized under the laws of the state of Nevada, and (b) Buddy Corp., a corporation organized under the laws of the State of California. Each of these companies is wholly owned and controlled by Mr. Kay.[1]

After Kay brought suit against the FCC, the Commission revoked all of the 800 MHz licenses directly held by Kay. Those revocations were affirmed through all administrative and judicial appeals. *See James A. Kay, Jr. and Marc Sobel,*

[1] *See* Joint Certificate to Parties, Rulings, and Related Cases, D.C. Cir. Nos. 06-1076, 06-1079, 06-1081, 06-1082, at 4 (filed March 31, 2006) (emphasis added). Buddy Corp.'s 800 MHz licenses were revoked in the FCC Orders that revoked the 800 MHz licenses directly held by Kay.

Memorandum Opinion and Order, 25 FCC Rcd 4068 (2010), *recon. dismissed*, Report and Order, 25 FCC Rcd 7639 (2010), *appeal dismissed*, *Kay v. FCC*, 2010 WL 4340464 (D.C. Cir. Oct. 19, 2010), *cert. denied*, 131 S. Ct. 2913 (2011). Because Kay concededly holds no 800 MHz licenses in his individual capacity, *see* Kay Resp. 2, he is not injured by the FCC's efforts to restructure the 800 MHz band. As a consequence, Kay lacks Article III standing to challenge the FCC Orders at issue in these consolidated cases.[2] *See* Mot. 8.

In an attempt to cure his loss of standing, Kay now relies on his ownership interest in Third District Enterprises, L.L.C. ("Third District") – an FCC licensee he identified as a "related party" (and *not* a fellow Petitioner) in his 2006 Corporate Disclosure Statement. *See* Kay Resp. 1-3. Kay's stake in Third District does not provide him standing to invoke the jurisdiction of this Court, however, because the "longstanding equitable restriction" on shareholder standing "generally prohibits shareholders from initiating actions to enforce the rights of the corporation." *Franchise Tax Bd.*, 493 U.S. at 336; *see also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) ("No shareholder – not even a sole shareholder – has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation."); *Labovitz v.*

[2] Even though Kay had standing when he filed his petition for review, "[a] plaintiff must maintain standing throughout the course of litigation," so his subsequent loss of standing now necessitates dismissal. *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003).

Washington Times Corp., 172 F.3d 897, 901 n.6 (D.C. Cir. 1999) ("In the shareholder context, the question is whether the corporation should be entitled to bring an action, at least in the first instance, without the distraction of stockholders' suits.") (internal quotation marks and citation omitted).[3] Kay's response does not address the well-established prohibition on shareholder standing.

The only exception to this rule is for a "shareholder with a direct, personal interest in a cause of action," *Franchise Tax Bd.*, 493 U.S. at 336, who asserts a claim that is "separate and distinct" from that of the corporation. *Gilardi v. U.S. Dept. of Health and Human Svcs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013) (shareholders of closely held corporation had standing to challenge contraceptive mandate of Patient Protection and Affordable Care Act because only they could demonstrate infringement of right to free exercise of religion), *cert. granted, j. vacated on other grounds*, *Gilardi v. U.S. Dept. of Health and Human Svcs.*, 134 S. Ct. 2902 (2014) ; *cf. Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990)

[3] It is well established that the shareholder-standing rule applies equally to members of limited liability companies who – like shareholders of a more-traditional corporation – lack standing to assert claims for wrongs done to such companies. *See, e.g.*, *Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 476 n.33 (D. Md. 2007) ("Shareholders (or in the case of an LLC, its members) do not have standing to sue on the corporation's behalf."); *U.S. v. Omnicare, Inc.*, 2013 WL 3819671, *19 (N.D. Ill. 2013) (holding that "[a]ny cause of action and damages … would belong to [the LLC], rather than any single member of the limited liability company"); *In re Heyl*, 502 B.R. 337, 342 (8th Cir. BAP 2013) (even though principal was a member of creditor, a limited liability company, he could not assert creditor's interests on appeal).

(petitioners lacked standing as shareholders because their losses were derivative of an injury belonging to the corporation). But Kay has not demonstrated entitlement to this exception from the general rule. That is because he has failed to allege – let alone show – any injury that is "separate and distinct" from any injury suffered by Third District. *See Gilardi*, 733 F.3d at 1216; *Williams*, 901 F.2d at 164. Kay's Statement of Issues generally alleges that the FCC Orders under review violate Title III of the Communications of Act of 1934, as amended, 47 U.S.C. § 301 *et seq.*, and fail to comply with the Administrative Procedure Act, 5 U.S.C. § 553 *et seq*. It also expresses intent to present two "specific questions":

> (a) Whether the mandatory relocation of conventional, analog 800 MHz SMR *licensees* in order to alleviate interference to public safety licensees by other non-conventional, digital 800 MHz licensees is supported by the record below, is contrary to applicable law, and is arbitrary and capricious.
>
> (b) Whether the plan to award a substantial block of 1.9 GHz spectrum on an exclusive basis to a single licensee, without affording other *licensees* and potential *licensees* comparable opportunity to obtain such spectrum rights, and without utilizing the competitive bidding mechanism to establish the public value to be paid for such spectrum is supported by the record below, is contrary to applicable law, and is arbitrary and capricious.[4]

These purported injuries, by their terms, apply to 800 MHz *licensees*. As such, any "injury" Kay may suffer in his capacity as an interest holder must be derivative of an injury suffered by Third District, the license holder.

[4] James A. Kay, Jr.'s Docketing Statement and Statement of Issues to Be Raised, D.C. Cir. No. 06-1076, at 1-2 (filed March 30, 2006) (emphasis added).

Kay's response to the FCC's motion further underscores that his interests are derivative of Third District's. According to Kay, he "continues to hold interest in several 800 MHz licenses," which provides him "the requisite standing to seek judicial review of the rulemaking actions and policy decisions affecting those authorizations and operations undertaken pursuant to them." Kay Resp. 1; *see also id.* 2-3 ("As beneficial owner of and the person in 100% control of Third District, the licensee of seventeen 800 MHz authorizations, Petitioner clearly has sufficient standing to seek judicial review of Commission rulemaking actions and policy decisions affecting the 800 MHz band."). Nowhere in his papers does Kay identify an injury unique to *him*; instead, Kay's filings make clear that he is seeking redress *on behalf of* Third District, the holder of 800 MHz licenses.

It is thus apparent that Kay is relying on his interest in Third District to advance claims that he lacks standing to pursue as someone without an 800 MHz license. The shareholder-standing rule prohibits Kay from using Third District as a surrogate. Kay "chose to apply for the [800 MHz] license[s] through the corporate form of" Third District, so Third District is the real party in interest, and the only entity that could have standing to bring suit against the FCC for modification of its 800 MHz licenses. *Williams*, 901 F.2d at 164; *see also Franchise Tax Bd.*, 493 U.S. at 336; *Am. Airways Charters*, 746 F.2d at 873 n.14. Kay therefore lacks

standing to challenge the FCC Orders at issue, notwithstanding his interest in Third District.

II. GUSKEY LACKS STANDING.

Guskey also has not demonstrated standing. Like Kay, Guskey is not a licensee. *See* Mot. 6-7. Like Kay, Guskey argues for standing based on his financial interest in another 800 MHz licensee, Preferred Communications Systems, Inc. ("Preferred"). *See* Guskey Resp. 12. And like Kay, Guskey fails.

Guskey alleges (without providing any supporting documentation) that he has made loans to Preferred, which "are convertible to stock … translat[ing] to an approximately one-third share of [Preferred]." *Id.* Guskey then contends that he "ha[s] been directly harmed by virtue of the diminished value of [his] investment and reduction in any return on [his] investment" resulting from the modification of Preferred's 800 MHz licenses. *Id.*; *see also id.*, 4-11 (alleging various injuries to Preferred). According to Guskey, this demonstrates that he "ha[s] been personally harmed/damaged by the impact of the FCC orders," *id.*, 15, such that his "standing is not as a third-party." *Id.*, 12.

Guskey is wrong. Any decrease in the value of Guskey's investment would be derivative of an injury suffered by Preferred, the corporation, which holds the 800 MHz licenses modified by the FCC. Thus, under the well-established shareholder-standing rule discussed above, he lacks standing to challenge the FCC

Orders at issue. *See, e.g*, *Bixler v. Foster*, 596 F.3d 751, 757 (10th Cir. 2010) ("[p]laintiffs' allegations … merely assert the minority shareholders suffered a diminution in value of their corporate shares," which "is not direct and personal … but is, rather, an injury to the corporation"); *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1024 (8th Cir. 2008) ("A shareholder generally may not sue on his own behalf … to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action."). Given that Preferred has withdrawn its own judicial challenge to the FCC's 800 MHz rebanding decisions, *see* Mot. 3-4, and there is no allegation that Preferred is acting in bad faith, it would be particularly inappropriate to permit Guskey to enforce rights belonging to the corporation. *See Franchise Tax Board*, 493 U.S. at 336. The Court should therefore dismiss Guskey's cases (Nos. 07-1332 and 07-1367) for lack of standing.[5]

[5] Guskey suggests in passing that the Court defer any ruling on his standing to the merits panel assigned to this matter. *See* Guskey Resp. 16. Such deferral is unnecessary and inappropriate. There is simply no question, based on the pleadings, that Guskey and Kay lack standing. But even if those Petitioners had identified a personal interest in the *Orders* that differed from the interests of Preferred and Third District, respectively, neither has actually demonstrated that interest with facts; and it is clear that Petitioners have an obligation to do so at the first instance standing is addressed. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("[A] petitioner whose standing is not self-evident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review

CONCLUSION

The Court should dismiss the Kay case (No. 06-1076) and the Guskey cases (Nos. 07-1332 and 07-1367) for want of jurisdiction because those petitioners have not demonstrated standing.

Respectfully submitted,

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proceeding," which, in cases like this one, "will be in response to a motion to dismiss for want of standing.").

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CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on August 4, 2014, I electronically filed the foregoing Reply In Support Of FCC's Motion To Dismiss with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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