**CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(J) OF THE COURT'S RULES**

BRIEF FOR RESPONDENT

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

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NO. 14-1026

(CONSOLIDATED WITH NO. 14-1027)

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DAVID A. SCHUM,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**1. Parties.**

The petitioner is David A. Schum. The respondent is the Federal Communications Commission.

**2. Rulings under review.**

*In re Applications of DFW Radio License, LLC, Assignor and Bernard Dallas, LLC, Assignee and Bernard Dallas, LLC, Assignor and Principle Broadcasting Network Dallas LLC, Assignee for Assignment of the Authorizations of Stations KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas*, Memorandum Opinion and Order, 29 FCC Rcd 804 (2014).

**3. Related cases.**

The order on review has not previously been before this Court. Counsel is not aware of any related cases that are pending before this Court or any other court. This Court previously denied a petition for a writ of mandamus seeking to have the Federal Communications Commission rule on the application for review that led to the order on review. Order, *In re: David A. Schum*, No. 13-1041 (D.C. Cir. May 31, 2013), *rehearing and rehearing en banc denied* (D.C. Cir. Sept. 13, 2013).

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## GLOSSARY

| | |
|---|---|
| Act or Communications Act | Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*. |
| *Assignment Order* | *Letter from Peter H. Doyle to David A. Schum and Daniel B. Zwirn*, 21 FCC Rcd 14996 (Media Bur. 2006) (JA392) |
| Bernard | Bernard Dallas, LLC (assignee of radio station authorizations of KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas) |
| Bureau | Media Bureau, Audio Division |
| Commission or FCC | Federal Communications Commission |
| DFW Radio | DFW Radio License, LLC (assignor of radio station authorizations of KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas) |
| *Order on Review* | *In re Applications of DFW Radio License, LLC, Assignor and Bernard Dallas, LLC, Assignee and Bernard Dallas, LLC, Assignor and Principle Broadcasting Network Dallas LLC, Assignee for Assignment of the Authorizations of Stations KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas*, Memorandum Opinion and Order, 29 FCC Rcd 804 (2014) (JA531) |
| Principle | Principle Broadcasting Network Dallas LLC |
| *Reconsideration Order* | *Letter from Peter H. Doyle to Dennis J. Kelly, Esq. and Gregory L. Masters, Esq.*, 23 FCC Rcd 2646 (Media Bur. 2008) (JA426) |
| Schum | David A. Schum |
| Zwirn Fund | D.B. Zwirn Special Opportunities Fund, L.P. |

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## INTRODUCTION

David A. Schum is the majority investor and manager of The Watch, Ltd., a company that owns 100% of DFW Radio License, LLC ("DFW Radio"). DFW Radio, in turn, owned two AM radio stations in Texas. When The Watch defaulted on a loan from D.B. Zwirn Special Opportunities Fund, L.P. ("Zwirn Fund") and went into bankruptcy, the bankruptcy court ordered that The Watch's assets, including the two radio stations, be sold at public auction. The Zwirn Fund was the high bidder, and assigned its purchase rights to its affiliated company, Bernard Dallas LLC ("Bernard"). To effectuate the sale, under the supervision and with the approval of the

bankruptcy court, DFW Radio and Bernard jointly applied to the FCC for consent to assign the two radio station authorizations from DFW Radio to Bernard.

Although The Watch—Schum's company—agreed to the auction and joined the FCC application, at some point Schum himself started refusing to comply with the directions of the bankruptcy court and began resisting the transfers. He brought multiple appeals of the bankruptcy court's orders to the federal district court and the Fifth Circuit. All failed.[1]

Schum then sought to block transfer of the radio station authorizations by filing a petition to deny the assignment application with the FCC, arguing among other things that Bernard was foreign owned in violation of the Communications Act. The Commission denied the petition and, finding the transfer to be in the public interest, consented to the assignment of the radio station authorizations from DFW Radio to Bernard.

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[1] *See In re The Watch, Ltd.*, 257 Fed.Appx 748 (5th Cir. 2007) (unpublished) (dismissing as moot Schum's appeal of the district court's dismissal of his challenge to the bankruptcy court's final-sale approval order); *In re The Watch, Ltd.*, 295 Fed.Appx 647, 649-650 (5th Cir. 2008) (unpublished) (noting Schum's "refus[al] to execute documents to effectuate the closing of the sale of the assets," leading the bankruptcy court to "enter[] a series of orders in aid of enforcing the Sale Approval Order"; and dismissing another challenge by Schum as "a repackaged attack" on the bankruptcy court's sale approval order).

Schum seeks review in this Court, but his arguments have no merit. For starters, Schum has not and cannot demonstrate Article III standing. And even if he could, his contention that the Commission erred in approving the assignment application is baseless: The Commission properly held that Schum failed to meet his statutory burden of demonstrating why the assignment would be *prima facie* inconsistent with the public interest.

## JURISDICTION

On January 22, 2014, the Federal Communications Commission released the order—*In re Applications of DFW Radio License, LLC, Assignor and Bernard Dallas, LLC, Assignee and Bernard Dallas, LLC, Assignor and Principle Broadcasting Network Dallas LLC, Assignee*, 29 FCC Rcd 804 (2014) (the "*Order on Review*") (JA531)—that is the subject of this litigation. On February 21, 2014, Schum filed a petition for review under 47 U.S.C. § 402(a), which the Court docketed as No. 14-1026, as well as a notice of appeal under 47 U.S.C. § 402(b), which the Court docketed as No. 14-1027.[1]

Sections 402(a) and (b) provide mutually exclusive grants of jurisdiction to review final FCC orders. *See Freeman Eng'g Assocs., Inc. v.*

[1] The United States has not entered an appearance in this litigation; the United States ordinarily would be a respondent in a petition for review case filed under 47 U.S.C. § 402(a), but is not a party to appeals of FCC orders under 47 U.S.C. § 402(b).

*FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997). Because the *Order on Review* grants an application to assign a construction permit and a station license for AM radio service, the Court's jurisdiction here must rest, if at all, on 47 U.S.C. § 402(b)(6). Accordingly, the Court should dismiss Schum's petition for review in No. 14-1026. *See, e.g.*, *Spectrum Five LLC v. FCC*, 758 F.3d 254, 259-60 n.7 (D.C. Cir. 2014) (dismissing challenge filed under the incorrect jurisdictional provision).

As we discuss further below (at pp. 22-29), the Court should also dismiss the appeal in No. 14-1027, because Schum has failed to demonstrate Article III standing.

## QUESTIONS PRESENTED

1. Whether Schum, who comes before the Court solely as an investor in a company that formerly held Commission authorizations, has failed to demonstrate that he has standing in his individual capacity to challenge the *Order on Review*?

2. If Schum has standing, whether the Court should disturb the Commission's grant of the application to assign the two radio station authorizations from DFW Radio to Bernard?[2]

[2] As he notes in his Brief ("Br."), Schum no longer is challenging the agency's subsequent grant of an application to assign the radio station authorizations from Bernard to Principle Broadcasting Network Dallas LLC

## STATUTES AND REGULATIONS

The pertinent statutory provisions and regulations are set forth in the addendum to this brief.

## COUNTERSTATEMENT

### I. Statutory Background

Section 310 of the Communications Act provides that "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission, and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d). Section 310 also provides that no radio station license "shall … be granted to or held by" "any foreign government," 47 U.S.C. § 310(a), or "alien," 47 U.S.C. § 310(b).

The Communications Act also permits any "party in interest" to file with the Commission "a petition to deny any application," but requires that such petition "contain specific allegations of fact," "supported by affidavit of a person or persons with personal knowledge thereof," "sufficient to show

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("Principle"), a transaction that ultimately was not consummated. *See* Br. at 12, 15, 34.

that . . . a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. § 309(d)(1). "If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience and necessity]," then the Commission "shall make the grant" and "deny the petition." *Id.* § 309(d)(2).

## II. Factual Background

### A. The Application To Assign the Radio Station Authorizations

In 2006, under the direction of the U.S. Bankruptcy Court for the Northern District of Texas, DFW Radio and Bernard jointly filed an application for the Commission's consent to assign from DFW Radio to Bernard two radio station authorizations—a license for station KFCD(AM), Farmersville, Texas, and a construction permit for station KHSE(AM), Wylie, Texas.[3]

As noted above, DFW Radio, the assignor on the application, is wholly owned by The Watch, and Schum apparently was (or is) the majority or sole

[3] *See* Application Exhibit 13—Order (A) Approving Sale Free and Clear of Certain Liens, Claims, Rights, Interests and Encumbrances to Zwirn Special Opportunities Fund, L.P. or its Designee and (B) Granting Related Relief, *In re: The Watch, Ltd.*, No. 05-35874 (Bankr. N.D. Tex. Dec. 27, 2005) (JA018).

shareholder in the three entities that, in turn, own The Watch. *See* Br. at 8-9.[4] In his role as DFW Radio's manager, Schum signed and certified the assignor's portion of the application on behalf of DFW Radio, and expressly "acknowledge[d] that all certifications and attached Exhibits are considered material representations." Application at 4 (JA012). Bernard, the assignee to the application, is wholly owned by Bernard Radio LLC, which, in turn, was (or is) wholly-owned by the Zwirn Fund and R.L. Transition Corp.[5] As its managing member, Daniel B. Zwirn signed and certified the assignee's portion of the application on behalf of Bernard. *Id.* at 6 (JA014). The application form expressly warns the assignor and the assignee that "willful false statements on this form are punishable by fine and/or imprisonment . . ., and/or revocation of any station license or construction permit . . ., and/or forfeiture. . ." *Id.* at 4, 6 (JA012, JA014).

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[4] According to Schum, The Watch is wholly owned by Renaissance Radio, Inc. (59.36% owned by Schum), The Radio Café, LLC (57% owned by Schum), and DFW Radio, Inc. (100% owned by Schum). Br. at 8-9.

[5] On May 27, 2009, the Bureau granted Bernard's unopposed application for a *pro forma* transfer of control of ownership interests in Bernard. *See Order on Review* ¶ 13 (explaining the removal of D.B. Zwirn & Co., L.P., DBZ GP, LLC, and Zwirn Holdings, LLC, from the ownership chain of Bernard and the substitution of R.L. Transition Corp.) (JA536). *See also* Br. at 24 (referencing the transfer of control).

As relevant here, in the assignee's portion, Bernard certified that "it complies with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments." *Ibid.* (JA014).

### B. The Petition To Deny and the Grant of the Assignment Application

1. Schum and eight other investors in The Watch (collectively, "petitioners")[6] filed with the Commission's Media Bureau a petition to deny the DFW Radio-to-Bernard assignment application. Petition To Deny (JA098).

The petitioners argued that the application should be dismissed, denied, or designated for hearing, on four grounds—including, as relevant here, that the "ownership exhibit submitted as a part of the assignee's portion of the . . . application is unedifying in the extreme as to whether assignee complies

[6] Of the nine petitioners before the agency, only Schum has sought relief from this Court. Because this case is appropriately before this Court, if at all, based on Schum's appeal (rather than his petition for review, *see* pp. 3-4, *supra*, we use the term petitioners to refer to the parties who sought relief from the Commission, not to parties before this Court.

with" the "alien ownership" prohibitions under Section 310 of the Communications Act. *Id.* at 15 (JA115).[7]

Bernard opposed the petition to deny. Opposition to Petition To Deny (JA155). In doing so, Bernard submitted a declaration, under penalty of perjury, that "[t]here is no direct or indirect foreign equity or voting ownership in Bernard Dallas LLC . . . includ[ing] equity investment in D.B. Zwirn Special Opportunities Fund, L.P., an insulated member of Bernard Dallas's direct parent." *Id.*, Declaration of Steven F. Campbell (JA370).

In reply, petitioners argued that "should the Commission fail to make inquiry into exactly who owns [the] Zwirn [Fund], and whether or not they are United States citizens, the Commission will have shirked its duty and violated Section 308(b) of the Communications Act," which obligates the Commission to assess "the citizenship, character, and financial, technical, and other qualifications of the applicant." Reply to "Opposition to Petition To Deny" at 8-9 (JA382-83) (emphasis omitted). The petitioners made no

[7] The other three grounds the petitioners offered for denying the assignment application were that: (1) grant of the application would constitute "an illegal reversionary interest" under the Commission's rules; (2) "the Zwirn organization exercised an unauthorized transfer of control" of the construction permit of KHSE(AM) in violation of Section 310(d) of the Communications Act; and (3) "counsel for Zwirn communicated a threat to David Schum, . . . which would constitute an abuse of the Commission's processes." Petition To Deny at Summary (JA099-100).

mention of the Campbell declaration; instead, they relied on an article from "a leading newspaper in the United Kingdom" reporting "that disgraced former Clinton Administration official Samuel 'Sandy' Berger 'is poised to join hedge firm DB Zwirn as a special adviser,'" which, they argued, "could raise questions as to whether Berger might be an attributable principal in the licensee," and if so, "raises substantial and material questions as to whether Zwirn can be trusted to control a Commission licensee." *Id.* at 9-10 (JA383-84).

2. Acting under authority delegated to it by the Commission, *see* 47 C.F.R. § 0.61(a), the Bureau denied the petition and granted the assignment application. *Letter from Peter H. Doyle to David A. Schum and Daniel B. Zwirn*, 21 FCC Rcd 14996 (Media Bur. 2006) ("*Assignment Order*") (JA392). As relevant here, the Bureau rejected petitioners' assertions "that Bernard failed to disclose ownership information about [the Zwirn Fund], its principal equity owner, and there is thus 'no way of objectively knowing (other than taking Zwirn's word for it)' whether Bernard complies with the foreign ownership restrictions of Section 310 of the Act." *Id.* at 15002 (JA398) (footnotes omitted).

The Bureau pointed to (1) the "ownership exhibit to the Assignment Application," which "certified that [the Zwirn Fund], which holds the

majority of the equity, but no voting interest, in Bernard's parent company is 'insulated from involvement . . . pursuant to FCC requirements' and thus exempt from attribution," *id.* at 15002-03 (JA398-99) (footnotes omitted);[8] and (2) the Campbell declaration, which averred that there was "no direct or indirect foreign equity or voting ownership in Bernard." *Id.* at 15003 (JA399). And, because petitioners had presented "no rebuttal evidence," the Bureau "reject[ed] their speculative foreign ownership allegations." *Ibid.* (JA399).[9]

Thus, "based on the evidence presented in the record," the Bureau concluded that the petitioners had "not raised a substantial and material question of fact warranting further inquiry," *id.* at 15003 (JA399), and "further [found] that Bernard Dallas LLC is qualified as an assignee and that grant of the Assignment Application is consistent with the public interest, convenience, and necessity." *Ibid.* (JA399) (footnote omitted). Accordingly,

[8] According to the assignment application, the Zwirn Fund held 0% of the voting and 100% of the equity interests, and (predecessors-in-interest to) R.L. Transition Corp. (*see* n.5 *supra*) held 100% of the voting and 0% of the equity interests in the company that owns Bernard. *See* Application Exhibit 11—Assignee's Ownership (JA058-60).

[9] The Bureau also rejected each of petitioners' remaining grounds for denying the assignment application. *See Assignment Order*, 21 FCC Rcd at 14999-15002 (JA395-98).

the Bureau granted the assignment application and rejected the petition to deny. *Ibid.* (JA399).

3. The petitioners then asked the Bureau to reconsider the *Assignment Order*, repeating many of the same arguments they had made previously. Petition for Reconsideration (JA401). The Bureau denied their request. *Letter from Peter H. Doyle to Dennis J. Kelly, Esq. and Gregory L. Masters, Esq.*, 23 FCC Rcd 2646 (Media Bur. 2008) ("*Reconsideration Order*") (JA426). Petitioners largely based their renewed assertion of Bernard's non-compliance with Section 310 on "a Bloomberg.com article stating: (1) that a [Zwirn Fund]-associated hedge fund had withdrawn its registration with the Securities and Exchange Commission (SEC); (2) that a 'key employee in the Zwirn organization [pled] guilty to federal criminal charges during a prior employment at Citigroup; and (3) that Connecticut's Attorney General told a reporter that hedge funds should be subjected to greater scrutiny because of their 'aura of secrecy.'" *Reconsideration Order*, 23 FCC Rcd at 2647 (JA427) (internal ellipsis and footnotes omitted). The Bureau found that this "new evidence" was "irrelevant." *Ibid.* (JA427) (footnote omitted). The Bureau also "decline[d] to reconsider Petitioners' repetitive arguments and their request for an evidentiary hearing," and explained that the "Commission will not grant reconsideration 'merely for the

purpose of again debating matters on which the tribunal has once deliberated and spoken.'" *Id.* at 2648 (JA428).

### C. The Commission's Review of the Bureau's Action

1. On March 20, 2008, the petitioners asked the Commission to review the Bureau's grant of the DFW Radio-to-Bernard assignment application. Application for Review (JA429). The petitioners claimed that Commission review was warranted because the Bureau had erred: (a) "by determining that Bernard . . . complied with 47 U.S.C. § 310(a-b), the alien ownership statute," and (b) "by failing to find that a prima facie case existed that Bernard had engaged in an unauthorized transfer of control of KHSE(AM), in violation of 47 U.S.C. §310(d)." *Id.* at Summary (JA430).

On May 15, 2008, petitioners attempted to supplement their application for review. Supplement to Application for Review (JA450).[10] Bernard opposed the supplement, and also made a request for administrative sanctions against petitioners, explaining that the petitioners already "have been warned"

[10] The petitioners' supplement included a "letter of offer" relating to D.B Zwirn Mauritius and D.B. Zwirn Special Opportunities Fund, Ltd (which is a different entity than the Zwirn Fund at issue here, *see Order on Review* n.101, noting that "'D.B. Zwirn Special Opportunities Fund *Ltd*' has never been a party to this proceeding" (JA544)); a notice to "its investors" that the Zwirn Fund had "elected to dissolve"; and a *Wall Street Journal* article reporting "that the Securities and Exchange Commission's investigation of the Zwirn organization 'has intensified.'" Supplement to Application for Review at 2-5 (JA451-54).

by the Commission (in the subsequent proceeding to assign the radio station authorizations from Bernard to Principle) that when Commission processes "are used . . . for private financial gain, to settle personal claims, or as an emotional outlet, the public interest is disserved" because, "[b]eyond the costs to licensees and the public, consideration of meritless challenges wastes Commission resources." Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners at 4 (JA493), quoting *Letter from Peter H. Doyle to Richard R. Zaragoza, Esq., Gregory L. Masters, Esq., Dennis J. Kelly, Esq., and Barry Friedman, Esq.*, 24 FCC Rcd 5743, 5748 (Media Bur. 2009) (JA510).[11] In reply, petitioners argued that because Bernard did not "possess an adequate defense to Petitioners 'Supplement,' Bernard turns to bullying tactics, trots out the 'harassment' defense, and screams for sanctions against Petitioners." Reply at 2 (JA500).

[11] Bernard also noted that the bankruptcy court had already "sanctioned Petitioner David Schum for filing a motion to compel information from the [Zwirn] Fund that, in the court's view, 'constitute[d] frivolous litigation, harassment, and a waste of the Court's time and of Zwirn's time.'" Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners at 4-5 (JA493-94) (quoting Order, *In re The Watch, Ltd*, No. 05-35874 (Bankr. N.D. Tex. May 22, 2007) (JA497)).

On September 4, 2008, petitioners attempted to supplement their application for review a second time, referencing a *New York Post* article and the Commission's underlying investigation of whether a different licensee, Tama Broadcasting, Inc., had transferred control of its radio stations to the Zwirn Fund, among others. *See* Second Supplement to Application for Review at 2 (JA512).

2. On January 22, 2014, the Commission denied the application for review, holding that the Bureau had not erred in rejecting petitioners' "foreign ownership and unauthorized transfer of control allegations" as a basis for denying the assignment application or designating it for hearing. *See Order on Review* ¶ 7 (JA533). The Commission determined that the petitioners had failed to satisfy their burden under Section 309(d) of demonstrating that grant of the assignment application would be *prima facie* inconsistent with the public interest. *Id.* ¶ 16 (JA537-38).

The Commission explained that under Section 1.115(b) of its rules, 47 C.F.R. § 1.115(b), an application for review "must establish either that: (i) the delegated actions were in conflict with statute, regulation, case precedent or Commission policy; (ii) the actions involved a question of law or policy that has not previously been resolved by the Commission; (iii) the actions involved the application of precedent or policy that should be overturned or

revised; (iv) there has been an erroneous finding as to an important or material question of fact; or (v) there has been prejudicial procedural error." *Id.* ¶ 15 (JA537). The Commission found that the petitioners "failed to meet these requirements." *Ibid.* (JA537).

Specifically, the Commission found that the Bureau "correctly rejected the . . . allegation that Bernard may have violated the Commission's foreign ownership restrictions," and affirmed the "conclusion that it was not necessary to designate the application[] for hearing." *Id.* ¶ 16 (JA537). The Commission explained that the petitioners had "not submitted any information that calls into question the veracity of the declaration submitted by Bernard attesting that there is no foreign equity or voting ownership in Bernard," and concluded that the petitioners' foreign ownership allegations "are conclusory and rest entirely on information drawn from news articles and unrelated proceedings." *Ibid.* (JA537). The Commission agreed with the Bureau's "determination that these materials do not raise a substantial and material question of fact warranting further consideration." *Ibid.* (JA537).[12]

[12] The Commission noted that the Bureau had "correctly pointed out" that "the Commission has previously held that news articles are the equivalent of hearsay and do not satisfy the personal knowledge and specificity requirements for a petition to deny required by Section 309(d) of the Act." *Order on Review* ¶ 16 (JA537). The Commission also found that the Bureau had "correctly rejected the [petitioners'] argument that the Bureau should

The Commission also rejected the petitioners' argument that the Bureau "should have required Bernard to carry the burden of proof of showing lack of proscribed foreign ownership interests because 'the essential facts are all within [Bernard/Zwirn's] sole power to produce.'" *Ibid.* (JA538) (quoting Application for Review at 7 (JA438)). The Commission explained that "section 309(d) of the Communications Act places the burden on a petitioner seeking denial of an application to demonstrate why grant of the application in question would be inconsistent with the public interest." *Ibid.* (JA538). Because the petitioners "failed to establish a *prima facie* case that grant of the application would be contrary to the public interest," the Commission found that the petitioners had "failed to meet [their] statutory burden." *Ibid.* (JA538).

In so holding, the Commission clarified that in the absence of "the submission of any properly supported facts that raised an issue as to the validity of the certification," the Bureau could "properly rely on an applicant's affirmative certification under penalty of perjury that the applicant

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have considered the [Security and Exchange Commission]'s investigation in disposing of their allegations." *Ibid.* (JA538). Finally, the Commission found that "the materials on which the [petitioners] rely do not specifically allege that [the Zwirn Fund] has foreign investors," and so "their claim is merely an unfounded speculative inference from these materials." *Ibid.* (JA538).

complies with the foreign ownership provisions of Section 310(b) of the Act." *Id.* ¶ 18 (JA539). The Commission noted that although "the Campbell Declaration is probative as to the alien ownership issue," "in light of Bernard's certification in each assignment application that it complied with the foreign ownership restrictions, its consideration was not required by the narrow facts of this case." *Ibid.* (JA539). As the Commission further explained, the Zwirn Fund "was not required by the Commission's attribution rules or the application form to disclose its non-voting, insulated investors." *Ibid.* (JA539).[13] On this record, the Bureau "was not required to 'look behind' Bernard's certification." *Ibid.* (JA539).[14]

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[13] Generally, the FCC does not attribute ownership of a broadcast station to a person or entity that holds less than 5% of the voting stock in the licensee or in a company that controls the licensee. In addition, partnership interests of any level generally are attributable, but the FCC allows a partnership or a limited liability company ("LLC") to "insulate" limited partners and non-managing members from attribution by adopting specified insulation provisions in the partnership's or LLC's formation documents. *See* Application Exhibit 11—Assignee's Ownership ("The LLC agreement of Bernard Radio LLC contains provisions insulating D.B. Zwirn Special Opportunities Fund, L.P., its non-managing member, from involvement in the LLC's media enterprises pursuant to FCC requirements.") (JA058).

[14] The Commission also rejected the petitioners' argument that the Bureau "should have required Bernard to disclose its nonattributable interest-holders," *Order on Review* ¶ 19 (JA539), as well as petitioners' other challenges to the assignment.

In sum, the Commission found that the petitioners "have simply failed to meet their statutory burden here" "of demonstrating why grant of the application in question would be inconsistent with the public interest," and "have failed to demonstrate any substantive or procedural error by the Bureau or a conflict with any statute, regulation, case precedent, or Commission policy." *Id.* ¶ 33 (JA549). The Commission thus dismissed in part and otherwise denied the application for review of the assignment approval, including dismissing "as procedurally defective various untimely supplements and requests." *Id.* ¶ 15 (JA537); *see also id.* ¶ 34 (denying the application for review filed on March 20, 2008) & ¶ 35 (dismissing and, in the alternative, denying supplements filed on May 15, 2008, and September 4, 2008) (JA549).[15]

[15] The Commission noted that "most of the information included in the supplements to the DFW-to-Bernard Application [for Review], was addressed by the staff" in the context of the subsequent Bernard-to-Principle assignment, "which concluded that the additional information lacks probative value." *Order on Review* ¶ 31 (JA547). The Commission dismissed the supplements and requests for official notice that had been filed because the petitioners did not challenge that conclusion and because the filings were untimely and their proponents had not shown that the public interest warranted consideration of the procedurally defective filings. *Ibid.* (JA547). Alternatively, the Commission denied "the requests for leave to file supplements and the requests for official notice because the proffered information lacks any probative value." *Id.* ¶ 32 (JA547).

## SUMMARY OF ARGUMENT

This appeal should be dismissed for lack of jurisdiction. In his brief, Schum fairly describes the requirements he must meet to establish Article III standing, but then fails to demonstrate how he satisfies those requirements. Schum is a shareholder in The Watch, which in turn owned the company (DFW Radio) whose assignment application was granted and the grant upheld by the *Order on Review*. He thus must demonstrate why his appeal should not be dismissed under the shareholder-standing doctrine. Schum does not and cannot articulate a basis for falling within the exception to that doctrine for shareholders who assert a claim that is "separate and distinct" from that of the corporation. *Gilardi v. U.S. Dep't of Health and Human Svcs*., 733 F.3d 1208, 1216 (D.C. Cir. 2013), *cert. granted, j. vacated on other grounds*, 134 S. Ct. 2902 (2014). Nor does Schum show how the FCC's decision caused his alleged injuries or that the Court could redress those alleged injuries by vacating the *Order on Review*.

If the Court reaches the merits, its task, as Schum acknowledges, is to "determine whether the FCC's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record." Br. at 47 (citation omitted). In the *Order on Review*, the Commission acted well within its discretion in affirming the Bureau's grant

of the assignment application. The Commission's determinations—that Schum failed to meet his burden to show there was a substantial and material question of fact warranting further inquiry, and that grant of the application would be *prima facie* inconsistent with the public interest—were amply supported by substantial evidence in the record. Although "Schum disagrees" with the Commission's determinations, Br. at 39, Schum has not shown that the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A). Accordingly, there is no basis for the Court to disturb the *Order on Review*.

## STANDARD OF REVIEW

The question whether Schum has demonstrated Article III standing to bring this appeal, is a threshold issue that the Court must resolve before it may proceed to the merits. *Cherry v. FCC*, 641 F.3d 494, 499 (D.C. Cir. 2011), citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998).

If Schum has standing, then the Court must affirm the *Order on Review* unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). To withstand a challenge to

agency action, the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Commission's interpretation "of its own rules is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Star Wireless, LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (internal quotation marks and citation omitted); *see also Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) ("Reviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms.").

The Court also must uphold the Commission's factual findings that are supported by substantial evidence. *See, e.g., Millar v. FCC*, 707 F.2d 1530, 1540 (D.C. Cir. 1983). In this context, substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "An agency conclusion 'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" *Robinson v. NTSB*, 28 F.3d 210, 215 (D.C. Cir. 1994), quoting *Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989).

## ARGUMENT

### I. Schum has not demonstrated Article III standing to challenge the *Order on Review*.

To properly invoke this Court's jurisdiction, Schum must demonstrate that he has Article III standing to challenge the Commission's assignment decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). As we explain below, he has failed to do so. The Court therefore should dismiss this appeal for lack of jurisdiction. *See Spectrum Five*, 758 F.3d at 256.

Schum fairly describes the standards he must meet to demonstrate standing. Br. at 28-30. He notes that "[t]o establish standing under Article III, a party must demonstrate [a] an injury in fact that is [b] fairly traceable to the challenged agency action, and must show it is [c] 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision' from this [C]ourt." Br. at 28-29 (citation omitted); *C-Span v. FCC*, 545 F.3d 1051, 1054 (D.C. Cir. 2008). Schum also recognizes that he "bears the burden of establishing standing," and that the Court's rules require him to set forth the basis for his claim to standing "in the opening brief." Br. at 28 & 29.

Schum acknowledges that he did not hold the two radio station authorizations at issue in this case, but states that he is a majority shareholder

in the former licensee—and claims Article III standing based on that status.[16] *See* Br. at 29. He correctly observes that a shareholder "generally cannot sue for indirect harm he suffers as a result of an injury to the corporation." *Ibid.* (citing *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd*, 493 U.S. 331, 336 (1990)). 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*, 733 F.3d at 1216.[17] And any such asserted injury must still meet the general constitutional requirements for standing under *Lujan*.

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[16] Before the agency, Schum was afforded standing to participate in the administrative proceeding as a "listener" of radio stations KFCD(AM) and KHSE(AM). *Order on Review* ¶ 4 (JA533). He does not raise that as a basis for standing on appeal, however, *see* Br. at 29, and, as Schum correctly observes, "[a]dministrative standing is not Article III standing" to bring an action in court. Br. at 28. *Accord Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 74 (D.C. Cir. 1999) ("Federal agencies may, and sometimes do, permit persons to intervene in administrative proceedings even though these persons would not have standing to challenge the agency's final action in federal court. . . . The criteria for establishing 'administrative standing' therefore may permissibly be less demanding than the criteria for 'judicial standing.'").

[17] *See, e.g.*, *Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990) (petitioners lacked standing as shareholders because their losses were derivative of injury belonging to the corporation); *Gilardi*, 733 F.3d at 1216 (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).

Schum cannot avail himself of this exception because he has not shown a redressable injury that is "separate and distinct" from The Watch/DFW Radio. Schum asserts three economic injuries he allegedly suffered "[o]nce the FCC made their initial approval of the license grant, without designating the application for hearing as requested by Schum" (Br. at 32) that, he claims, are separate and distinct from DFW Radio's injuries:

(1) Lost Income. While the DFW Radio-to-Bernard assignment application was pending at the FCC, Bernard paid fees to The Watch/DFW Radio under a contract called a Local Marketing Agreement, for access to station facilities and broadcast time to air programming. Schum claims that the FCC's approval of the assignment application caused those fees to cease in February 2007, which in turn meant "Schum lost his sole source of income." Br. at 32;

(2) Lost Employment Opportunities. Schum asserts that he personally guaranteed the loan The Watch defaulted on, and "Bernard was able to obtain, in a Texas State Court, a judgment" against him that "precluded [him] from passing the compliance requirements" of "[t]wo companies [that] intended to hire [him]" (*ibid.*); and,

(3) Diminution in value of the company's assets. Citing two appraisals of The Watch conducted in 2002 and 2003, which valued the company at $22.1 and $17.2 million respectively, Schum alleges that the "Bernard credit bid [of] $9,000,000 at the [Bankruptcy-court-sponsored] auction" reflected a substantial reduction in value of The Watch, and "[o]ver 50% of the loss in value is Schum's" (*id.* at 33).

None of these alleged injuries, however, suffices to create individual standing for Schum.

### A. Schum's allegations of lost income and diminution in the value of his stake in The Watch do not suffice to avoid the shareholder-standing doctrine.

Schum's first and third alleged injuries—lost income and the diminution in value of his ownership stake in the Watch—are paradigmatic examples of claims that fail under the shareholder-standing rule. Both "derive exclusively from injuries allegedly suffered" by The Watch/DFW Radio. *Kay v. FCC*, Order, No. 06-1076 (D.C. Cir. Oct. 21, 2014) (dismissing claim for lack of standing by an individual seeking redress for injuries to a corporation).

For starters, under the Local Marketing Agreement, Bernard paid fees to The Watch, *not* to Schum personally. *See* Br. 31; Local Marketing Agreement for KFCD(AM) at 1 (JA061). That Schum derivatively received the bulk of those fees as his "sole source of income," Br. at 31, does not differentiate Schum from any other major shareholder of a company involved in litigation.

Likewise, any diminution in value of The Watch or DFW Radio was an injury to the corporate entities. It is well established that a diminution in value of corporate shares "is not direct and personal . . . but is, rather, an

injury to the corporation." *Bixler v. Foster*, 596 F.3d 751, 757 (10th Cir. 2010).[18]

In sum, although as a shareholder Schum may have felt the impact of the termination of the Local Marketing Agreement and the diminution in value of The Watch, neither of these injuries is in any way "separate and distinct" from those of the company. *See Gilardi*, 733 F.3d at 1216; *Williams*, 901 F.2d at 164.

### B. Schum's allegations of lost employment opportunities were not caused by the Commission's actions.

Schum's allegations of lost employment opportunities are arguably derivative of corporate claims, too, in that they are based on the corporation's actions that led to its bankruptcy. But this claim does not suffice to demonstrate standing for the more-fundamental reason that Schum has failed

[18] Schum also cannot base his assertion of standing on any diminution in the value of his interest in The Watch for the separate reason that this alleged injury is not "fairly traceable to the challenged action." *C-Span*, 545 at 1054 (citations omitted). It was caused by the bankruptcy proceedings and the court-ordered sale of the companies' assets—not by the *Order on Review*. *See Cherry*, 641 F.3d at 498 ("Where the alleged injuries . . . 'occurred before, existed at the time of, and continued unchanged after the challenged Commission action,' they 'cannot be fairly traced to the transfer approval.'") (quoting *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998)). Indeed, Schum bases this alleged injury on the difference between prior valuations of the company, from 2002 and 2003, and the bid Bernard made at the bankruptcy-sponsored auction in 2005. But had Bernard not entered that winning bid, presumably the radio stations would have been sold at a *lower* price.

to show that this alleged injury was caused in any way by, let alone "fairly traceable to," *C-Span*, 545 F.3d at 1054, the challenged action taken by the Commission.

Schum contends that a 2006 Texas state court judgment against him for approximately $3.5 million, based on his personal guarantee of a loan to The Watch in 2004 (*see* Br. , Schum Affidavit at ¶ [4]), made him "ineligible to return to his profession prior to the radio business." Br. at 32. But Schum acknowledges that the Texas judgment was precipitated by The Watch's May 2005 default on the loan that Schum personally guaranteed. *See ibid.*; *see also id.* at 18-19 (noting that The Watch exited bankruptcy in February 2004 and went back into bankruptcy a second time 15 months later). His explanation for how the FCC's later assignment decision caused that judgment makes no sense.[19]

[19] Indeed, the *Assignment Order* expressly notes that the FCC's "decision to grant the Assignment Application merely finds that the parties are qualified under, and the proposed transactions do not violate, the Communications Act of 1934, as amended, and the Commission's rules and policies" and so "it is permissive only and does not prejudice the outcome of the court proceeding and any relief to which the parties are entitled under the civil suit." 21 FCC Rcd at 15003 n.50 (JA399). *See Cherry*, 641 F.3d at 498 (the "alleged injuries are not attributable to the Commission's approval of the license assignments, but rather to the judicial . . . action").

### C. None of Schum's standing allegations satisfies the requirement of redressability.

All three of Schum's alleged injuries also fail to satisfy the third prong of standing—that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *C-Span*, 545 F.3d at 1054.

In particular, there is no foundation—let alone persuasive proof—for Schum's assertion that vacatur of the *Order on Review* would mean that "Bankruptcy Court Ordered LMA fees to Schum would be due retroactively from February 2007 to the present." Br. at 36. Nor is there any foundation for his assertion (*ibid.*) that vacatur of the *Order on Review* would lead the Texas state court to set aside the judgment against him (based on The Watch's 2005 bankruptcy, which predated the proposed DFW Radio-Bernard transaction), let alone award him damages for fraud. Nor is there any foundation for Schum's claim that vacatur of the FCC's decision would remedy his alleged injury because "[t]he Lost value of the assets, due to Bernard's fraudulent representations to Schum, the Bankruptcy Court and to the FCC, would be restored." *Ibid.* These claims are purely speculative, and fail to satisfy the redressabililty prong of the standing test. Schum has not shown, as he must, "'that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision of the court.'" *Spectrum*

*Five*, 758 F.3d at 260 (quoting *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 738 (D.C. Cir. 2008)).

* * * * *

Accordingly, this Court should dismiss the appeal for lack of standing.

## II. If Schum has standing, the Court should affirm the *Order on Review* because the Commission properly upheld the grant of the assignment application without conducting a hearing.

Although Schum lists four largely overlapping issues in his brief, they essentially merge into one fundamental argument: The Bureau was required to conduct a hearing on the DFW-to-Bernard assignment because, in the absence of such a hearing, a determination could not be made that grant of the application would be consistent with the public interest.[20] This contention has no merit. Although a "party in interest," under Section 309(d)(1) of the Act, may file a petition to deny an application, Schum is simply incorrect that a party in interest is entitled to a hearing simply by requesting one. *See, e.g.*, Br. at 44 ("Schum requested the FCC set the Bernard application for hearing in eight different filings"). Rather, an application may only be

[20] *See* Br. at 27 ("The FCC abused its authority, did not satisfy its procedural responsibilities and refused to set the applications for hearing resulting in decisions that were arbitrary and capricious, lacking [in] substantial evidence in the record or otherwise not in accordance with law."); *see also* Application for Review at 2 ("this is to state the questions of law presented by this Application for Review to hold a hearing to determine whether the above-captioned assignee, Bernard Dallas, LLC . . . is basically qualified to hold a Commission license") (JA433).

designated for hearing *if* "a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest] finding." 47 U.S.C. § 309(e). And the Communications Act places the burden on the party in interest to demonstrate that a grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1).

On appeal, Schum continues to press the thrice-rejected claim that a substantial and material question of fact exists regarding Bernard's qualifications to be a Commission assignee. Schum alleges that Bernard was disqualified because of its "foreign ownership" and its assumption of "premature control" of the radio station authorizations. And "Schum believes the facts and information presented to the FCC was enough to, at the minimum, have raised a 'substantial issue' and a 'substantial and material issue of fact.'" Br. at 39. But, as the Commission thoroughly explained in the *Order on Review*, Schum "simply failed to meet [his] statutory burden" "of demonstrating why grant of the [DFW Radio-to-Bernard assignment application] would be inconsistent with the public interest," *id.* ¶ 33 (JA549), and therefore "it was not necessary to designate the application[] for hearing," *id.* ¶ 16 (JA537).

As to the "foreign ownership" allegations, the record contained Bernard's certification in the assignment application that "it complies with the provisions of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments." Application at 6 (JA014). Buttressing that certification, Bernard submitted a declaration under penalty of perjury stating "[t]here is no direct or indirect foreign equity or voting ownership in Bernard Dallas LLC. … This includes equity investment in D.B. Zwirn Special Opportunities Fund, L.P., an insulated member of Bernard Dallas's direct parent." Campbell Declaration (JA370). As the Commission held in the *Order on Review*, "[a]bsent the submission of any properly supported facts that raise an issue as to the validity of the certification," the agency "may properly rely on an applicant's affirmative certification under penalty of perjury that the applicant complies with the foreign ownership provisions of Section 310(b) of the Act." *Id.* ¶ 18 (JA539).

The petitioners submitted no such "properly supported" facts to question the veracity of Bernard's certification. The Commission found that their assertions of foreign ownership "are conclusory and rest entirely on information drawn from news articles and unrelated proceedings." *Id.* ¶ 16

(JA537).[21] The Commission further explained that "news articles are the equivalent of hearsay and do not satisfy the personal knowledge and specificity requirements for a petition to deny [an assignment application] required by Section 309(d) of the Act." *Ibid*. (JA537).

Thus, on the one hand, the record contained sworn statements from Bernard—unrebutted by petitioners—stating there was no foreign ownership. On the other hand, the petitioners submitted only materials that "do not specifically allege that [the Zwirn Fund] has foreign investors," and thus their claim of foreign investment "is merely an unfounded speculative inference from these materials." *Ibid*. (JA538). On this record, the Commission properly held that the Bureau "was not required to 'look behind' Bernard's certification" but had properly relied on it. *Id*. ¶ 18 (JA539).[22] The Commission therefore reasonably concluded that Schum's allegations of

[21] The petitioners submitted newspaper articles, for example, discussing the Zwirn Fund's withdrawal of its SEC registration; the Connecticut Attorney General's views on the regulation of hedge funds generally; a Zwirn Fund employee's apparent admission of prior fraud; an SEC investigation of the Zwirn Fund; a motion in an unrelated civil case in which a Zwirn Fund affiliate states that its partners are citizens of New York; and an FCC Enforcment Bureau investigation involving other stations acquired by a Zwirn Fund affiliate. *Order on Review* ¶ 16 (JA537).

[22] In addition, the Commission explained that, in determining whether a substantial and material question of fact warranting a hearing has been raised, "the Commission generally does not consider unadjudicated allegations of misconduct that does not involve potential violation of Commission rules or the Communications Act." *Order on Review* ¶ 16 (JA537-38).

foreign ownership "do not raise a substantial and material question of fact warranting further consideration." *Id.* ¶ 16 (JA537).[23]

The Commission similarly found that Schum's "premature control" allegation, Br. at 38, raised "no material and substantial questions of fact warranting further inquiry in a hearing." *Id.* ¶ 21 (JA540). The "premature control" allegation relates only to the construction of station KHSE(AM). *See* Petition To Deny at 11-14 (JA111-14). The Commission found that "DFW Radio retained ultimate control over the station construction under the [Bankruptcy] Court Orders and the [parties'] agreements, which stated explicitly that the 'construction contract, the budget for such construction, and all other terms and documents . . . shall be in all respects satisfactory to the Debtors [DFW Radio and Watch]." *Order on Review* ¶ 23 (JA541). And, while Schum and the other petitioners alleged that the Zwirn Fund did not

[23] Schum also complains that the Commission failed to notify him of its evidentiary requirements for his "foreign ownership" and "premature control" allegations. *See* Br. at 38-41. Like most administrative agencies, the FCC sets out such requirements through its rules and orders; nothing in the Administrative Procedure Act, the Communications Act, or any other body of law requires an agency to do more. Nor is there any basis to Schum's complaint that the FCC set "evidentiary standards that could not be met." *Id.* at 38. The Communications Act places the burden on petitioners seeking to have the Commission deny an application to present "specific allegations of fact" "supported by affidavit of a person or persons with personal knowledge" that grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1). Schum's complaint thus lies with Congress, not the FCC.

abide by those terms, the Commission found that they failed to "present probative evidence in support of their claim." *Id.* ¶ 24 (JA542); *see also id.* ¶ 25 (concluding that Schum and the other investors "have failed to raise a substantial and material question of fact calling for further inquiry into whether or not Zwirn prematurely assumed control of KHSE(AM)") (JA542).

On this record, Schum is wrong to claim that the Commission was legally unable to determine that grant of the DFW Radio-to-Bernard assignment application would be consistent with the public interest without holding a hearing on Bernard's qualifications. As the Commission fully explained in the *Order on Review*, based on its examination of the application and the administrative record, the agency properly *was* able to determine that grant of the DFW-to-Bernard assignment application would be consistent with the public interest. *See Assignment Order*, 21 FCC Rcd at 15003 (JA399);[24] *see also Order on Review* ¶ 16 (affirming the Bureau's "conclusion that it was not necessary to designate the application[] for hearing") (JA537).

[24] The Bureau also noted that "[i]t is well-established that the Commission will accommodate court decrees unless a public interest determination under the Act compels a different result," and expressly found that there was "no reason not to honor the [Bankruptcy] Court's Order and grant the [DFW Radio-to-Bernard] Assignment Application" because such accommodation "contravenes neither the Act nor the [Commission's] Rules." *Assignment Order*, 21 FCC Rcd at 15000 (JA396).

The Commission simply had no reason to dismiss, deny, or designate for hearing, the DFW Radio-to-Bernard assignment application. Accordingly, the *Order on Review* should not be disturbed.

## CONCLUSION

The Court should dismiss the petition for review filed under Section 402(a), because that subsection is not the proper jurisdictional provision. And because Schum has not demonstrated Article III standing, the Court should dismiss Schum's appeal, filed under Section 402(b), for lack of jurisdiction. If the Court reaches the merits, it should deny Schum's appeal and affirm the *Order on Review*.

Respectfully submitted,

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December 16, 2014

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

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|---|---|
| DAVID A. SCHUM,<br><br>PETITIONER,<br><br>v.<br><br>FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,<br><br>RESPONDENTS. | NO. 14-1026<br>(CONSOLIDATED WITH<br>NO. 14-1027) |

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondent in the captioned case contains 8,183 words.

/s/ Pamela L. Smith
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December 16, 2014

# STATUTORY ADDENDUM

Communications Act Provisions:
47 U.S.C. § 309(d) & (e)
47 U.S.C. § 310(a), (b) & (d)

FCC Rules:
47 C.F.R. § 1.115(b)

# 47 U.S.C.

## § 309. Application for license

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

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

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

**(e) Hearings; intervention; evidence; burden of proof**

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof

shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

## § 310. License ownership restrictions

**(a) Grant to or holding by foreign government or representative**
The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

**(b) Grant to or holding by alien or representative, foreign corporation, etc.**
No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

**(d) Assignment and transfer of construction permit or station license**
No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

# 47 C.F.R.

## § 1.115(b) Application for review of action taken pursuant to delegated authority.

(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.
(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.
(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

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

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|---|---|---|
| DAVID A. SCHUM, | ) | |
| Petitioner, | ) | |
| | ) | Nos. 14-1026 & |
| v. | ) | 14-1027 |
| | ) | |
| FEDERAL COMMUNICATIONS COMMISSION | ) | |
| & UNITED STATES OF AMERICA, | ) | |
| Respondents. | ) | |

**CERTIFICATE OF SERVICE**

I, Pamela L. Smith, hereby certify that on December 16, 2014, I electronically filed the foregoing FINAL Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

David A. Schum
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Dallas, TX 75225
*Counsel for: David A. Schum*

*/s/ Pamela L. Smith*