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

NALINI KAPUR, RISHI KAPUR, AND RAVI KAPUR,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Orders of
the Federal Communications Commission

BRIEF FOR APPELLEE

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TABLE OF AUTHORITIES*

Cases **Page(s)**

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* *Authorities upon which we chiefly rely are marked with asterisks.*

Statutes and Regulations

Administrative Decisions

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Other Authorities

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** All parties, intervenors, and amici appearing in this Court are listed in the Appellants' Principal Brief.

(B) **Rulings under Review.** The appeals challenge the following orders of the Federal Communications Commission:

- *KAXT, LLC (Assignor) and OTA Broadcasting (SFO) LLC (Assignee)*, 35 FCC Rcd 667 (2020), *reprinted at* JA ___–___.
- *OTA Broadcasting (SFO), LLC (Assignor) and TV-49, Inc (Assignee)*, 35 FCC Rcd 638 (2020), *reprinted at* JA ___–___.
- *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee)*, 32 FCC Rcd 9638 (2017), *reprinted at* JA ___–___.

(C) **Related Cases.** The orders on appeal have not previously been before this Court or any other court. Appellee is aware of no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

FCC	Federal Communications Commission
KQDSI	KQDS, Inc.
OTA	OTA Broadcasting (SFO), LLC
OTA Parent	OTA Broadcasting, LLC

Case Nos. 20-1047 and 20-1048

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BRIEF FOR APPELLEE

INTRODUCTION

These appeals follow eight separate administrative appeals that Appellants Nalini Kapur and her sons, Rishi and Ravi, filed before the Federal Communications Commission, seeking to preserve their derivative interest in a San Francisco Bay Area broadcast television station. The Kapurs are investors who held a minority share in the station's former licensee, and who opposed the majority owners' sale of the station in 2013. California courts rejected the Kapurs' attempts to

block that sale, and they have spent the past seven years unsuccessfully seeking to persuade the FCC that the station's buyer—which has since sold the station to another company—lacks the good character required to hold an FCC license. As owners with only a derivative interest in the station, and only a minority share in its original licensee, the Kapurs lack standing to challenge the transfer and re-transfer of the station license. In any event, the FCC reasonably determined that none of the Kapurs' contentions warranted a hearing.

JURISDICTIONAL STATEMENT

The Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, vests this Court with exclusive jurisdiction over appeals from FCC orders that grant applications to renew or assign the licenses of broadcast television stations. *See id.* § 402(b)(2), (3), (6). The Commission released the final orders on appeal here on January 22, 2020. The Kapurs timely filed these appeals within 30 days. *See id.* § 402(c). This Court nonetheless lacks jurisdiction over these appeals because, as explained below, *see infra* Part I, the Kapurs lack standing to challenge the license transfers.

STATEMENT OF THE ISSUES

1. Whether the Kapurs lack standing to challenge the FCC orders approving the transfer, and subsequent re-transfer, of the station license

when they held only a minority ownership interest in the station's original licensee.

2. Whether, if the Kapurs have standing, the Commission reasonably declined to conduct an evidentiary hearing on their claims that the station's original buyer lacked the requisite good character to become the station's licensee.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory Background

Under the Communications Act, no person may operate a radio or television station in the United States except in accordance with a license granted by the FCC. 47 U.S.C. § 301. The Commission grants license applications when it "find[s] that public interest, convenience, and necessity would be served" by doing so. *Id.* § 309(a); *see also id.* § 309(k)(1)(A) (renewal applications). If a party contends that the award

of a license would not serve those purposes, it may petition the agency to deny the application. *See id.* § 309(d)(1).[1]

The Commission applies "a two-pronged test for determining if allegations made" in a petition to deny "require further FCC inquiry." *Gencom, Inc. v. FCC*, 832 F.2d 171, 180 (D.C. Cir. 1987). First, it asks whether the party "seeking a hearing has set forth 'specific allegations of fact sufficient to show that … a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity].'" *Id.* (alterations in original; quoting *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)); *see* 47 U.S.C. § 309(d)(1). Second, if "a prima facie case has been made," the agency asks "whether on the basis of the application, the pleadings filed, or other matters which [it] may officially notice, a substantial and material question of fact is presented" that warrants a hearing. *Gencom*, 832 F.2d at 181 (internal quotation marks omitted).

[1] The Kapurs cite the current version of Section 309 and other provisions of the Act, and of the FCC's rules, that have been amended during the time period relevant here. For consistency, we do so as well. The amendments in question have no bearing on the issues before the Court.

B. Factual Background

Full-power broadcast television stations were required to transition from analog to digital transmission on or before June 12, 2009. *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 403 (D.C. Cir. 2013). As that deadline approached, the station—then owned by Warren and Linda Trumbly, through Broadland Properties, Inc.—needed additional capital to buy digital equipment. Attach. A to 4/27/15 Kapur Pet. for Further Recon. 3 (JA ___) (Yew Opinion). The Kapurs provided Broadland $300,000 for that purpose. Yew Opinion 3–4 (JA ___–___).

Along with relatives of the Trumblys and several longtime associates of the station, the Kapurs and Trumblys subsequently formed KAXT, LLC. *See* Yew Opinion 3–5 (JA ___–___). In an application that identified the Kapurs, collectively, as owning 42 percent of KAXT, LLC, the new entity requested and received the FCC's consent to become the station's licensee. *See* 8/20/09 Broadland Properties, Inc./KAXT, LLC, Application for Consent to Assignment, https://publicfiles.fcc.gov/api/service/tv/application/1328338.html (last visited Aug. 2, 2020).

In January 2013, the majority owners of KAXT, LLC, voted to approve the sale of the station to OTA for $10.1 million. *See* Attach. to

9/25/13 KAXT, LLC, Supp. to Opp. to Pet. to Deny 5 (JA ___) (Ownership Decision). When the Kapurs refused to recognize the vote as valid, the majority owners commenced an arbitration proceeding to resolve the ownership dispute. *See* Yew Opinion 7 (JA ___); Ownership Decision 1 (JA ___).

On September 17, 2013, the arbitrator determined that the Kapurs collectively held only a noncontrolling 42 percent interest in KAXT, LLC; the remaining owners held a controlling 58 percent. *See* Ownership Decision 5–15 (JA __–__). The arbitrator's final award decision, issued January 22, 2014, incorporated that ownership decision. *See* Exh. A. to 4/24/14 OTA Supp. to Opp. to Pet. to Deny 1 (JA ___) (Final Arbitration Award). California courts ratified the arbitrator's decisions. *See Kapur v. Trumbly*, 2015 WL 2329294, at *1 (Cal. Ct. App. May 14, 2015).

C. Agency Proceedings

Beginning in 2013, the FCC conducted two sets of proceedings concerning the station that culminated in the *Orders* on appeal. In the first set of proceedings (OTA license proceedings), the agency allowed OTA Broadcasting (SFO), LLC (OTA) to replace KAXT, LLC, as the station's licensee, and later to renew that license. *See KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee)*, 32 FCC Rcd

9638 (JA ___) (2017) (*2017 Order*), *review denied*, 35 FCC Rcd 667, 667–68, 671 ¶¶ 1, 10 (JA ___–___, ___) (2020) (*OTA License Order*). In the second set of proceedings (TV-49 license proceedings), the Commission allowed OTA to assign the station license to TV-49, Inc. *See OTA Broadcasting (SFO), LLC (Assignor) and TV-49, Inc. (Assignee)*, 35 FCC Rcd 638, 638 ¶ 1 (JA ___) (2020) (*TV-49 Order*).

1. OTA License Proceedings

a. Initial Submissions to the Agency

On February 11, 2013, KAXT, LLC, and OTA applied to the FCC for permission to assign the station license to OTA. *See* 2/11/13 KAXT, LLC/OTA App. for Consent to Assignment 1–7 (JA ___–___) (OTA App.). The Kapurs petitioned to deny the application on March 18, 2013. *See* 3/18/13 Kapur Pet. to Deny 8 (JA ___) (Pet. to Deny). They argued in their petition that the application was premature because Warren Trumbly had not yet "established, in the arbitration he initiated, his authority to" sell the station to OTA. *Id.* at 5 (JA ___) (emphasis omitted); *see id.* at 5–8 (JA ___–___). They accordingly asked the Commission "to dismiss, deny, or, in the alternative, hold [the application] in abeyance" until "final resolution" of the arbitration. *Id.* at 1, 7 (JA ___, ___).

Approximately one year later—after the arbitrator determined "that the Asset Purchase Agreement between [OTA] and KAXT, LLC was duly authorized and validly executed." 9/25/13 KAXT, LLC, Supp. to Opp. 2 (JA ___); *see* Final Arbitration Award 1 (JA ___); Ownership Decision 7, 13–16 (JA ___, ___–___)—the Kapurs "supplemented" their petition to deny, arguing that the Commission should not grant the OTA assignment application without an evidentiary hearing on OTA's "character qualifications" to become the station's licensee. 2/24/14 Kapur Supp. to Pet. to Deny 2–3 (JA ___—___) (2014 Supp.).

The sole basis for this claim was a February 17, 2014, letter that OTA had sent the Kapurs through the parties' respective counsel. *See* Attach. A to 2014 Supp. at 1–4 (JA ___–___) (February 2014 Letter). OTA stated in this letter that, in light of the arbitrator's final arbitration award, the company was "prepared to pursue any and all available legal and equitable remedies against the Kapurs" if "the Kapurs refuse[d] to withdraw their baseless FCC Petition and the FCC nevertheless approve[d] the [OTA] Assignment Application." February 2014 Letter 2 (JA ___). Characterizing the letter as threatening in "content and tone," the Kapurs argued that OTA lacked the "character qualifications to purchase the Station." 2014 Supp. 4 (JA ___).

b. *2014 Bureau Order*

On July 11, 2014, staff in the FCC's Media Bureau granted the OTA assignment application and denied the Kapurs' objections to that application. *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee)*, 29 FCC Rcd 8266, 8266 ¶ 1 (JA ___) (Media Bur. 2014) (*2014 Bureau Order*). On that same date, KAXT, LLC, assigned the station license to OTA. *See* 7/17/14 KAXT, LLC/OTA Consummation Notice 1 (JA ___) (Section I, Item 7).

c. Renewal Application

On July 30, 2014, OTA filed an application with the Commission to renew its newly acquired license.[2] *See* 7/30/14 OTA Renewal App. 2 (JA ___) (Renewal App.). In the renewal application, OTA certified that "neither the licensee nor any party to the [renewal application] [had] or [had] had any interest in, or connection with[,] … any pending broadcast application in which character issues [had] been raised." Renewal App. 2 (JA ___) (Section II, Item 2(b)).

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[2] Under the eight-year renewal cycle for the station license, *see* 47 U.S.C. § 307(c)(1), the license was set to expire on December 1, 2014—just months after the assignment to OTA. Licensees are permitted to continue operating while their renewal applications are pending. *See id.* § 307(c)(3).

d. *March 2015 Bureau Order*

On August 11, 2014, the Kapurs petitioned for reconsideration of the *2014 Bureau Order*. *See* 8/11/14 Kapur Recon. Pet. 8 (JA ___) (2014 Recon. Pet.). On November 3, 2014, they separately petitioned the agency to hold OTA's renewal application in abeyance "until … final action … on" their "challenge to OTA's acquisition of the Station pursuant to the [OTA] Assignment Application." 11/3/14 Kapur Renewal Abeyance Pet. 8 (JA ___) (Renewal Pet.).

In addition to reprising their argument concerning OTA's allegedly threatening February 2014 letter, *see* Renewal Pet. 2–3 (JA ___–___); 2014 Recon. Pet. 4–5 (JA ___–___), the Kapurs also argued that a character hearing was warranted based on OTA's certification in response to Question 2(b) of Section II of the renewal application. Renewal Pet. 4 (JA ___); 2014 Recon. Pet. 7–8 (JA ___–___). That "certification was false," they contended, because "OTA was well aware" of the character allegations in the Kapurs' 2014 supplement, and the OTA assignment application was "still pending" within the meaning of the FCC's rules. Renewal Pet. 3–4 & n.7 (JA ___–___) (citing 47 C.F.R. § 1.65).

The FCC's Media Bureau rejected this new claim. *See KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee)*, 30 FCC Rcd 2691, 2695, 2697 ¶¶ 11–12, 17 (JA ___, ___) (Media Bur. 2015) (*March 2015 Bureau Order*). Finding that renewal of the station license served the public interest, the Bureau granted OTA's renewal application. *See id.* ¶¶ 18, 21 (JA ___–___).

e. *December 2015 Bureau Order*

The Kapurs filed a petition for further reconsideration of the staff's decision to approve the assignment of the station license to OTA, and they separately petitioned for reconsideration of the Bureau's approval of OTA's license renewal. *See* 4/27/15 Kapur Pet. for Further Recon. 4 (JA ___) (2015 Recon. Pet.); 4/27/15 Pet. for Recon. of Renewal Decision 1 (JA ___) (2015 Renewal Recon. Pet.). Central to those petitions was a decision in a state court civil suit that Diya TV, Inc.—a programmer owned by Ravi Kapur—brought against KAXT, LLC, and Warren Trumbly. *See* Yew Opinion 1 (JA ___). The Kapurs argued that this decision (which they have designated the "Yew Opinion") proved that OTA participated in strategy discussions with the Trumblys during their arbitration with the Kapurs. *See* 2015 Recon. Pet. 5 (JA ___). Accordingly, they argued, the decision contravenes OTA's representation that the

company was merely "caught in the cross-fire of [an] intramural squabble" between the Kapurs and the Trumblys. *Id.* at 6 (JA ___) (quoting 3/17/14 OTA Comments 2 (JA ___)); *see id.* at 6–7 (JA ___–___); 2015 Renewal Recon. Pet. 3 (JA ___).

In addition, the Kapurs raised allegations concerning Todd Lawyer, a unitholder of OTA's parent company, OTA Broadcasting, LLC (OTA Parent). 2015 Recon. Pet. 8 (JA ___); 2015 Renewal Recon. Pet. 2 (JA ___); *see* Attach. D to 2015 Recon. Pet. 1 (JA ___) (Insulation Letter). On February 8, 2013—shortly before pleading guilty to a federal felony—Lawyer entered into a letter agreement with OTA Parent that he would no longer have any involvement in the company's management or operation. *See id.* The Kapurs argued that OTA's failure to "provide a particularized explanation," in the OTA assignment application, "concerning OTA [Parent's] efforts to insulate Lawyer" further justified a hearing on OTA's character qualifications. 2015 Recon. Pet. 10 (JA ___); *see* 2015 Renewal Recon. Pet. 2 (JA ___).

In a decision issued December 11, 2015, the Media Bureau again denied reconsideration. *KAXT, LLC (Assignor) and OTA Broadcasting (SFO), LLC (Assignee)*, 30 FCC Rcd 14102–03 ¶ 1 (JA ___–___) (Media Bur. 2015) (*December 2015 Bureau Order*).

f. *Orders* on Appeal from the OTA License Proceedings

i. 2017 Order

Renewing their various arguments, the Kapurs sought Commission-level review of the staff's *Orders*. *See* 1/1/16 Kapur App. for Review 3–14 (JA ___–___) (2016 App. for Review). On every issue, the Commission unanimously affirmed the staff's conclusion that no hearing was warranted. *See 2017 Order* ¶ 14 (JA ___).

February 2014 Letter. The Commission first concluded that there was no substantial or material question as to whether OTA's February 2014 letter urging the Kapurs to withdraw their petition to deny had "impermissibly infring[ed]" on the Kapurs' right to participate in the application proceeding. *2017 Order* ¶ 15 (JA ___) (internal quotation marks omitted). In the Commission's judgment, the letter was not an improper threat but a good-faith notice that OTA intended to "enforce [its] contractual rights by pursuing all available legal relief." *Id.* (internal quotation marks omitted).

Question 2(b). The Commission then concluded that there was no need for a character hearing based on OTA's failure, in its renewal application, to disclose the character allegations raised in the Kapurs'

filings opposing the OTA assignment application, because those allegations had never been "designated for hearing." *2017 Order* ¶ 16 (JA ___) (internal quotation marks omitted). "In any event, as a separate and independent basis for rejecting" the Kapurs' claim, the Commission agreed with the Media Bureau that the record gave no indication that OTA had acted with "intent to deceive." *Id.* (JA ___–___).

"Innocent Bystander" Assertion. The Commission also rejected the Kapurs' contention that the alleged discrepancy between the Yew Opinion and OTA's representation that it was "caught in the cross-fire" between the Kapurs and Trumblys, 3/17/14 OTA Comments 2 (JA ___), demanded a character hearing, *see 2017 Order* ¶ 20 (JA ___–___). The Commission concluded that "any cooperation between OTA and KAXT-LLC" was "immaterial" to OTA's character qualifications. *Id.* (JA ___).

Todd Lawyer. The Commission concluded that the Media Bureau had correctly rejected the Kapurs' arguments concerning Todd Lawyer as untimely under Section 1.106(c) of the Commission's rules. 47 C.F.R. § 1.106(c); *see 2017 Order* ¶¶ 17–19 (JA ___–___). The Kapurs "failed to demonstrate"—either to the Bureau, when first raising the Lawyer issue in April 2015, or in their subsequent pleadings before the Commission—that they had not discovered "the facts surrounding Todd Lawyer's felony

conviction and insulation from OTA" at an earlier time. *Id.* ¶ 18 (JA ___). And regardless, the Commission reasoned, "ordinary diligence would have revealed [the relevant facts]" before the Kapurs filed their petition to deny in March 2013. *See id.* ¶ 19 (JA ___).

In the alternative, the Commission rejected the Kapurs' arguments concerning Todd Lawyer on the merits. *2017 Order* ¶ 19 (JA ___). Considering that OTA had filed the insulation letter in other FCC proceedings, the Commission explained, there was no "attempt by OTA to conceal the facts" surrounding Lawyer's felony and insulation from OTA Parent. *Id.*

ii. OTA License Order

The Kapurs sought reconsideration of the *2017 Order*. *See* 12/4/17 Kapur Recon. Pet. 15 (JA ___) (2017 Recon. Pet.). In addition to reasserting their previous claims, they raised yet another argument—that a hearing on OTA's character qualifications was required because of "public file" violations at the station during the November 2016 election season, when the station aired multiple political advertisements without documenting them in the manner required under the Communications Act and the Commission's rules. *See id.* at 7–10 (JA ___–___). After the Media Bureau denied reconsideration, *see KAXT, LLC (Assignor) and*

OTA Broadcasting (SFO), LLC (Assignee), 33 FCC Rcd 8760, 8760 ¶ 1 (JA ___) (Media Bur. 2018), the Kapurs again sought Commission-level review. *See* 10/18/18 Kapur App. for Review of DA 18-957 10 (JA ___).

In the resulting order—the last in the OTA license proceedings—the Commission declined to revisit the previously raised issues, explaining that the agency had already "thoroughly considered" them. *OTA License Order* ¶ 6 (JA ___). Instead, the Commission addressed the Kapurs' newly raised arguments concerning OTA's public file violations and determined that those violations also did not warrant a character hearing. *See id.* ¶ 8 (JA ___–___). The Commission explained that OTA's conduct "as a licensee" had no bearing on its initial character qualifications to *become* a licensee. *See OTA License Order* ¶ 8 n.30 (JA ___). In addition, the Commission declined to designate a hearing when there was no evidence that OTA's violations had been "intentional" or that OTA had sought to conceal them. *Id.* ¶ 8 & nn.29, 31 (JA ___–___).

2. *TV-49 Order*

In October 2017, OTA and TV-49 applied to the Commission to approve the assignment of the station license from OTA to TV-49. *See* 10/27/17 OTA/TV-49 App. for Consent to Assignment 4 (JA ___). The

Kapurs filed a petition to deny the TV-49 application in November 2017. *See* 11/30/17 Kapur Pet. to Deny 7 (JA ___) (Second Pet. to Deny).

According to the Kapurs, because OTA "lack[ed] the basic qualifications to have held the Station's license in the first place," it also lacked the qualifications to "assign [the license] to TV-49." Second Pet. to Deny 1 (JA ___). In support of this claim, the second petition relied primarily on the same arguments raised in the OTA license proceedings. *See id.* at 1–6 (JA ___–___). The Kapurs did not contest TV-49's fitness as a prospective licensee independent of OTA's alleged failings. *See id.*

The Media Bureau denied the Kapurs' objections and granted the TV-49 application. *See OTA Broadcasting (SFO), LLC (Assignor) and TV-49, Inc. (Assignee)*, 33 FCC Rcd 8765, 8765 ¶ 1 (JA ___) (Media Bur. 2018) (*2018 TV-49 Bureau Order*). The Kapurs filed an application for review by the full Commission. *See* 10/18/18 Kapur App. for Review of DA 18–959 10 (JA ___) (2018 TV-49 App. for Review).

The Commission dismissed that application for review for lack of standing. *TV-49 Order* ¶ 1, 10 (JA ___, ___). Under the Communications Act and the FCC's rules, the Commission explained, only "person[s] aggrieved" by an order may bring an application to review it. *Id.* ¶ 5 (JA ___) (quoting 47 U.S.C. § 155(c)(4) and citing 47 C.F.R. § 1.115(a)).

The agency has interpreted that procedural limitation to incorporate the injury, causation, and redressability requirements of Article III standing. *Id.* In the context of the TV-49 license proceedings, the Commission found, the Kapurs did not satisfy any one of those requirements. *See id.* ¶¶ 6–8 (JA ___–___).

The Kapurs' lone theory of standing was that the TV-49 and OTA license proceedings were "inextricably linked" and jointly caused the Kapurs to "los[e]" their ownership stake in the station. *See TV-49 Order* ¶ 6 & n.19 (JA ___). But because the Kapurs were only minority owners of KAXT, LLC, the Commission reasoned, their claimed injury arose not from any order of the Commission, but from the decision of the majority owners of KAXT, LLC, to sell the station and its assets to OTA. *See TV-49 Order* ¶ 6 & n.21 (JA ___). And "[r]egardless," the Commission explained, the agency's decision to allow OTA, years later, to assign the station license to TV-49 in no way affected the ownership interest that the Kapurs had already lost. *Id.* ¶ 6 (JA ___–___); *see id.* ¶ 7 (JA ___). Denying consent for OTA to assign the station to TV-49, the Commission emphasized, "would not restore [the station license] to the original licensee, KAXT, LLC." *Id.* ¶ 8 (JA ___).

STANDARD OF REVIEW

The Court reviews questions of standing de novo. *E.g.*, *Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019). By contrast, the Court's "role in reviewing the Commission's determination" not to designate a hearing in the OTA license proceedings "is a limited one." *Gencom*, 832 F.2d at 181. Because "[t]he decision of whether or not hearings are necessary or desirable is a matter in which the Commission's discretion and expertise [are] paramount," the Court upholds the agency's determinations in this arena so long as they are not "arbitrary, capricious or unreasonable." *Id.*

SUMMARY OF THE ARGUMENT

The appeals should be dismissed for lack of standing; in the alternative, the Commission's *Orders* should be affirmed on the merits.

1. The Kapurs assert standing primarily on the theory that the *Orders* deprived them of their ownership stake in the station. But the Kapurs never held the station license; they held a minority ownership interest in the limited liability company that was the licenseholder. The Kapurs thus are barred under the shareholder standing rule from bringing suit in their individual capacities to contest the decision of KAXT, LLC, to sell the station. In any event, the Kapurs fail to show that the loss of their derivative ownership interest is fairly traceable to the

Commission's *Orders*, or that reversing the *Orders* could redress that claimed injury.

In this Court, the Kapurs assert for the first time that they have standing as members of the station's audience. But this Court has made clear that mere generalized and conclusory assertions that parties reside in a station's service area, or view its programming, are insufficient to establish the concrete injury that Article III requires. And generalized, conclusory allegations of injury as members of the viewing public are all that the Kapurs offer here.

2. In the alternative, the Court should affirm the Commission's *Orders* on the merits. The FCC has broad discretion in determining whether to conduct a hearing to resolve allegations that an entity lacks the good character to hold a Commission license. The Commission reasonably concluded that none of the Kapurs' character allegations against OTA required a hearing.

Only three sets of the Kapurs' allegations concern conduct that occurred before OTA became the station's licensee: the allegations concerning OTA's February 2014 letter, its innocent bystander representation, and the attempted insulation of Todd Lawyer. The letter was not an improper threat, but a lawful warning that OTA intended to

pursue all legal remedies to enforce its contractual rights. OTA's involvement in the outside ownership dispute concerning KAXT, LLC, was immaterial to OTA's fitness as a licensee, and, in any event, OTA never attempted to conceal it from the Commission. The Kapurs' allegations concerning Todd Lawyer were untimely and failed on that procedural ground. In addition, as the Commission found, it would be unreasonable to infer that OTA attempted to deceive the agency about Lawyer when the insulation letter was on file in multiple FCC proceedings.

The Kapurs' remaining two sets of character allegations—that OTA made a false certification in the station's renewal application, and that the station committed multiple violations of the FCC's public file rules during the November 2016 election season—concern conduct that occurred after OTA became the station's licensee. That later conduct has no bearing on whether, in 2014, the Commission should have conducted a hearing on OTA's fitness to become the station's licensee.

In any event, the Commission reasonably concluded that OTA's response to Question 2(b) in the renewal application was not inaccurate or, even if it was, did not reflect an intent to deceive the agency. And similarly, because there was no evidence that OTA's public file violations

were intentional—many of them resulted from the actions of independent programmers, in violation of the programmers' time-brokerage agreements with the station—those violations did not warrant a hearing either.

ARGUMENT

I. THE KAPURS LACK STANDING.

To pursue a cause of action in federal court, a party must have standing, which involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see Cherry v. FCC*, 641 F.3d 494, 497 (D.C. Cir. 2011).

"[T]he irreducible constitutional minimum of standing contains three elements: (1) the [party in question] must have suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must exist a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of Animals v. Jewell*, 828 F.3d 989, 991–92 (D.C. Cir. 2016) (internal quotation marks omitted).

The doctrine of prudential standing encompasses additional, court-imposed "limits on the class of persons who may invoke the courts' decisional and remedial powers." *Warth*, 422 U.S. at 499. Among these limits is the principle that parties "cannot rest [a] claim to relief on the legal rights or interests of third parties." *LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011) (quoting *Warth*, 422 U.S. at 499). They must instead assert their "own legal rights and interests." *Franchise Tax Bd. v. Alcan Aluminium*, 493 U.S. 331, 336 (1990).

The burden to demonstrate standing is on the party invoking a court's jurisdiction. *E.g.*, *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 246 (D.C. Cir. 2013).

A. The Kapurs Fail to Establish Standing as Former Owners of the Station.

The Kapurs principally seek to establish standing as "collective owners of a base level of 42 percent of [KAXT, LLC's] equity interests." Second Add. A-II-9–A-II-10; *accord id.* at A-II-3 & n.8. In that capacity, they formerly held a "collective ownership interest in … the … Station," *id.* at A-II-4, the loss of which, they contend, "traces directly" to the *Orders* in the OTA license proceedings, *id.* at A-II-7; *see id.* at A-II-10–A-II-11. The *TV-49 Order* exacerbated this harm, the Kapurs argue, by

bringing "the equitable interests of a new third party … into the mix," rendering the Kapurs' "chances of recovering their investment" in the station "more remote." *Id.* at A-II-11.[3]

1. The Shareholder Standing Rule Forecloses This Theory.

The well-settled shareholder standing rule "generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax*, 493 U.S. at 336. "[N]ot 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." *Cherry*, 641 F.3d at 497 (alteration in original; quoting *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984)). The rule derives from the prudential consideration that a party "generally must assert his own legal rights

[3] The Kapurs make no attempt to explain the basis for their purported standing within the confines of their brief. *See* Br. 27, 49–50. Instead—to avoid "the word limit applicable to that brief," Second Add. A-II-8—they present all arguments (and evidence) concerning standing in a separate addendum. Although this Court's rules permit the submission of "evidence" relating to standing in an addendum to the brief, the Court requires that the brief contain all supporting "arguments." D.C. Cir. R. 28(a)(7).

and interests[] and cannot rest his claim to relief on the legal rights or interests of third parties." *Franchise Tax*, 493 U.S. at 336.[4]

Here, the injury on which the Kapurs base their claim of standing—loss of the station to OTA—is not an injury they suffered as individuals. They were never personally owners or licensees of the station; it was KAXT, LLC, that owned the station and held the station license before its assignment to OTA. Accordingly, any cause of action arising from the *Orders* in the OTA license proceedings belongs to KAXT, LLC, not the Kapurs. The Kapurs even more clearly lack standing to challenge the *TV-49 Order*, which the Commission issued when the Kapurs no longer held even a derivative interest in the station.

There is an exception to the shareholder standing rule for "shareholder[s] with a direct, personal interest in a cause of action," *Franchise Tax*, 493 U.S. at 336, where that interest is "separate and distinct" from that of the corporation, *Gilardi v. U.S. Dep't of Health and Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013), *vacated on other*

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[4] The rule applies to members of limited liability companies. *See United States v. Omnicare, Inc.*, No. 07 C 05777, 2013 WL 3819671, at *19 (N.D. Ill. 2013); *Orgain v. City of Salisbury*, 521 F. Supp. 2d 465, 476 n.33 (D. Md. 2007); *see also Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1056 n.13 (9th Cir. 2009) (collecting additional cases).

grounds, 573 U.S. 956 (2014). But the Kapurs do not and cannot explain how their alleged "ownership interest" in a station owned by KAXT, LLC—let alone by OTA—could be separate or distinct from the company's ownership interest. *E.g.*, Second Add. A-II-4.

2. The Kapurs Fail to Prove That Either Set of *Orders* Caused Their Claimed Injury.

Prudential considerations concerning shareholder standing aside, the Kapurs have failed to show that the loss of their interest in the station is "fairly traceable" to either set of the *Orders* on appeal. *E.g.*, *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015).

As the Kapurs concede, it was KAXT, LLC's "sale of the … Station" to OTA that "is the source of the injury in this case": the "loss of their [derivative] ownership interest in … the … Station." Second Add. A-II-4, A-II-7. But that sale did not result from the Commission's *Orders*; it was instead a product of decisions by the controlling owners of KAXT, LLC. The Commission plainly is not responsible when, against the wishes of minority shareholders, a licensee's controlling owners elect to sell the company. *See TV-49 Order* ¶ 6 n.21 (JA ___—___); *see also Iacopi v. FCC*, 451 F.2d 1142, 1146 (9th Cir. 1971) ("That Iacopi's 19% interest is 'locked-

in' with whoever holds the 81% interest does not seem to us to be an injury flowing from the Commission's order." (dictum)).[5]

Here, although the Kapurs owned 42 percent of KAXT, LLC, and did not wish to sell the station, their interest was "locked-in" with that of the majority shareholders, *Iacopi*, 451 F.2d at 1146, who chose to sell, *see* Yew Opinion 6 (JA ___). Thus, "[e]ven without FCC approval" of the assignment of the station license to OTA—or of the subsequent assignment to TV-49—"control of" KAXT, LLC, "would [have] remain[ed] with" the majority owners. *Cherry*, 641 F.3d at 498.

3. The Kapurs' Claimed Injury Is Not Redressable.

The Kapurs assert that "reversing and vacating" the *Orders* on appeal will "likely" restore their "unique investment in the … Station." Second Add. A-II-7; *accord id.* at A-II-15. But reversing the Commission's consent for OTA to assign the station license to TV-49 would clearly "not restore [the station] to the original licensee—KAXT, LLC." *TV-49 Order* ¶ 8 (JA ___).

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[5] Likewise, any additional "complexity" added to the Kapurs' efforts to recover their investment resulting from the sale to TV-49, Second Add. A-II-11, is not attributable to the Commission, but instead to OTA's decision to sell the station to a third party.

Moreover—although the Kapurs notably fail to disclose this—public records maintained by the California secretary of state reveal that KAXT, LLC, has been dissolved.[6] As of January 8, 2020, the company no longer exists under California law, and it can exercise no "powers, rights," or legal "privileges."[7] In view of this development, the Kapurs fail to show how reversing or vacating either set of the *Orders* on appeal could ultimately return the station license to KAXT, LLC, or otherwise redress the Kapurs' lost interest in the station.

B. The Kapurs Fail to Establish Audience Standing.

In their submissions to the FCC, the Kapurs framed their interest in the agency's license proceedings solely in terms of their desire to maintain their derivative ownership stake in the station. *See, e.g.*, 2018 TV-49 App. for Review 4 (JA ___) ("It is difficult to perceive of parties with a greater or more direct 'interest' in a license assignment application than those who have been working for years to restore the subject station

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[6] *See* 1/8/20 KAXT, LLC, Certificate of Dissolution, *available at* https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=200913510106-27631797.

[7] 1/8/20 KAXT, LLC, Certificate of Cancellation, *available at* https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=200913510106-27631798.

license to the entity in which they hold ownership interests."). Before this Court, for the first time, they also claim standing under "traditional broadcast standards."[8] Second Add. A-II-5. All three Kapurs, they state, are "residents of the … Station's service area" (or "signal coverage area"). *Id.* at A-II-5; *see id.* at A-II-6 & n.15; R. Kapur Decl. ¶ 3. They further assert that "Ravi Kapur has been a regular viewer of the … Station from February 1, 2013 to the present." Second Add. at A-II-6; R. Kapur Decl. ¶ 4.

This Court has made clear, however, that conclusory or conjectural allegations of injury that rely on generalized claims of audience standing do not suffice to show the concrete, actual (or imminent) injury that Article III requires. For example, in two cases involving the Rainbow/PUSH Coalition, the Court expressly rejected the concept of

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[8] The Kapurs repeatedly contend that the administrative record "contains evidence" that they meet the requirements for audience standing. *E.g.*, Second Add. A-II-14. But they nowhere assert, let alone demonstrate, that they raised this theory of standing in any of their agency pleadings. Accordingly, even if the Court concludes that the Kapurs have established audience standing in their submissions here (they have not), the Court should dismiss their challenge to the *TV-49 Order* for lack of jurisdiction under Section 405 of the Communications Act. *See* 47 U.S.C. § 405(a)(2) (precluding judicial review of "questions of fact or law upon which the Commission … has been afforded no opportunity to pass").

"automatic audience standing": the notion that "a person has standing to protect the 'public interest' by challenging any decision of the Commission regulating a broadcaster in whose" area of service "the person lives." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) (*Rainbow/PUSH I*); *accord Rainbow/PUSH Coal. v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005) (*Rainbow/PUSH II*).

Rainbow/PUSH I involved claims that certain of the appellant's members "live[d] and watch[ed] television in the markets that [were] at issue in [the] appeal," and hoped to promote "access to diverse broadcasting sources." 330 F.3d at 543. Those claims, the Court held, failed to demonstrate a sufficiently concrete Article III injury. *See id.* at 544–46.

Similarly, in *Rainbow/PUSH II*, the Court held that audience standing "requires a showing that the challenged FCC action resulted in some actual effect upon the programming of the licensed station. 396 F.3d at 1243 (internal quotation marks omitted). "[O]therwise," the Court explained, "fears of decreased diversity remain purely speculative." *Id.* (internal quotation marks omitted).

The Kapurs thus cannot establish audience standing through bare-bones assertions that they reside within reach of the station's broadcasts

and that Ravi Kapur is a "regular viewer of the … Station." *E.g.*, Second Add. A-II-6. An appellant "must demonstrate, not merely allege, that there is a substantial probability it will suffer injury if the court does not grant relief." *Rainbow/PUSH II*, 396 F.3d at 1239 (internal quotation marks omitted). Here, the Kapurs nowhere explain how either set of the *Orders* on appeal harmed them (or stand imminently to harm them) in their capacity as members of the viewing public. *See* Second Add. A-II-5–A-II-7, A-II-13–A-II-15.

The Kapurs state in passing that "Station carriage of Diya TV was important to Ravi Kapur." Second Add. A-II-7; *accord id.* at A-II-15. But even taking that unsworn assertion into account—and Ravi Kapur conspicuously did not attest to it in his declaration—it does not demonstrate an injury-in-fact to any of the Kapurs as viewers. Both the statutory addendum and the Yew Opinion (on which the Kapurs heavily rely) make clear that Ravi Kapur asserts an interest in the station's carriage of Diya TV as Diya TV's founder and owner, not as a consumer of its programming. *See, e.g.*, Second Add. A-II-14–A-II-15 ("Ravi Kapur has been much more than just a passive station viewer. Rather, he helped the … Station expand its programming lineup from one channel to a diverse set of multiple channels …. One of those channels … was Diya

TV, owned by Ravi Kapur." (footnote omitted)); Yew Opinion at 5 (JA ___) ("The Kapurs decided to invest in KAXT because Ravi would have his own channel that he could use without additional payment to KAXT."). Because the Kapurs have not asserted or shown that they have suffered any concrete injury from the *Orders* on appeal as viewers of the station, they fail to establish audience standing.

II. THE COMMISSION REASONABLY DECLINED TO CONDUCT A CHARACTER HEARING IN THE OTA LICENSE PROCEEDINGS.

Even if the Court concludes that the Kapurs have standing, it should uphold the *Orders* on appeal. Contrary to the Kapurs' various claims that the agency was required to conduct an evidentiary hearing on OTA's character qualifications to serve as the station's licensee, the Commission reasonably determined that no hearing was warranted.[9]

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[9] The Commission did not address the merits of these claims in the *TV-49 Order*. If the Court determines that it has jurisdiction based on the Kapurs' newly raised theory of audience standing, the Court should nonetheless uphold the *TV-49 Order* on the merits of the Commission's procedural determination, applying Section 1.115(a) of the FCC's rules, 47 C.F.R. § 1.115(a), that the Kapurs were not parties "aggrieved" by OTA's assignment of the station license to TV-49, *see TV-49 Order* ¶ 5–9 (JA ___–___). The Kapurs did not claim audience standing before the agency, *id.* ¶ 6 n.18 (JA ___), and they failed to demonstrate the elements of Article III standing as owners of the station's former licensee, *see TV-49 Order* ¶¶ 6–8 (JA ___–___). The Commission thus correctly concluded that the Kapurs were foreclosed, under Section 1.115(a), from obtaining

Section 309 of the Communications Act establishes a two-part analysis for the Commission to apply in determining whether to conduct an evidentiary hearing to explore objections to a license application. 47 U.S.C. § 309(d); *see Gencom*, 832 F.2d at 180. First, the Commission determines whether the requesting party's "specific allegations of fact," if credited, support denying the application in question as contrary to the public interest. *Id.* (quoting *Citizens for Jazz*, 775 F.2d at 394). "The Commission's inquiry at this level is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the [objector's] affidavit[] were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established." *Id.* at 181.

If "a prima facie case has been made," the Commission next asks "whether 'on the basis of the application, the pleadings filed, or other matters which [it] may officially notice,' 'a substantial and material question of fact is presented'" that warrants a hearing. *Gencom*, 832 F.2d

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full-Commission review of the *2018 TV-49 Bureau Order*. *See id.* ¶ 5 (JA ___). And as this Court has held, the FCC does not abuse its discretion by adhering to its own procedural rules. *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003).

at 181 (quoting *Citizens for Jazz*, 775 F.2d at 394). At this stage, the Commission exercises considerable "discretion," *id.*, and "judgment," *Citizens for Jazz*, 775 F.2d at 396. Unless that judgment is "so irrational as to be arbitrary or capricious," *id.*, this Court will uphold it.

A. OTA's February 2014 Letter Did Not Warrant a Hearing.

The Kapurs argue (Br. 29) that the Commission "[a]rbitrarily" refused to conduct a hearing on OTA's character qualifications based on the February 2014 letter that OTA sent them, through counsel, after the arbitrator determined that Warren Trumbly and the other majority owners of KAXT, LLC, could sell the station to OTA. *See* Final Arbitration Award 1 (JA ___); Ownership Decision 7 (JA ___). In that letter, OTA observed that, although the arbitrator had rejected "the Kapurs' … position that KAXT lacked the authority to sell [the station]," the Kapurs had yet to withdraw their petition. February 2014 Letter 2 (JA ___). OTA accordingly "urge[d] the Kapurs to immediately halt any and all conduct … that could frustrate or further delay OTA's contractual right to acquire [the station]," and indicated that "OTA [was] prepared to pursue any and all available legal and equitable remedies … based on

[the Kapurs'] efforts to delay and disrupt the transfer of [the station's] license and assets to OTA." *Id.*

The Commission has recognized that licensees should exercise "caution" not to engage in "harassment tactics" calculated to "hinder public participation" in FCC licensing proceedings. *Fort Collins Broad. Co.*, 38 F.C.C.2d 707, 711–12 (1972). But "in doing so, it has consistently recognized that "licensees … have the right to pursue any legal remedies they may have at their disposal." *Id.* at 711; *see Patrick Henry*, 69 F.C.C.2d 1305, 1314 (1978) ("[W]e stress that we in no way wish to cast a chilling effect on those … who seek to exercise their rights to obtain legal redress for … damages incurred.").

In keeping with this precedent, the Commission reasonably concluded that the Kapurs' allegations concerning OTA's letter were insufficient to show that granting the OTA assignment application would be "prima facie inconsistent" with the public interest. *Gencom*, 832 F.2d at 180 (internal quotation marks omitted); *see OTA License Order* ¶ 6 (JA ___–___); *2017 Order* ¶ 15 (JA ___). The Commission considered the letter and the Kapurs' allegations in context: Initially, the Kapurs' only objection to the OTA assignment application was that the Warren Trumbly-aligned owners lacked "legal authority to sell the Station." *Id.*

After the arbitrator determined that the sale was valid (first in the ownership decision, and then in the January 2014 final arbitration award), OTA sent the February 2014 letter. *See id.*; February 2014 Letter 1 (JA ___). The Commission reasonably concluded that the Kapurs' assertions that OTA had harassed them by sending the letter had no basis. *See 2017 Order* ¶ 15 (JA ___). By advising the Kapurs that OTA intended to "enforce [its] contractual rights by pursuing all available legal relief[,]" the letter did not "impermissibly infring[e] upon [the Kapurs'] rights." *Id.* (quoting *2014 Bureau Order* ¶ 12 (JA ___)).

The Kapurs argue (Br. 30) that the Court should nonetheless overturn the Commission's decision because the Media Bureau incorrectly asserted, in the *2014 Bureau Order*, that the supplement in which the Kapurs first objected to OTA's letter was "untimely." *2014 Bureau Order* ¶ 11 (JA ___). That aspect of the *2014 Bureau Order* is irrelevant, because the full Commission did not rely on it. *See OTA License Order* ¶ 6 (JA ___–___); *2017 Order* ¶ 15 (JA ___).

The Kapurs appear to concede that "an applicant's advising a petitioner that [the applicant] might file" suit to enforce its legal rights "does not reflect adversely on [the applicant's] character qualifications." Br. 31 (emphasis and internal quotation marks omitted). They

nonetheless contend that "[t]he gulf is too wide between the hypothetical [advisory] letter [that] the Commission posited … and the actual letter [that the Kapurs] received." *Id.*

The Kapurs offer no explanation as to why they believe that is so. They claim that the letter "plainly threatened" them, Br. 30, and that "[d]iscouraging" their "participation" in the OTA license proceedings was the letter's "patent purpose." Br. 31; *see id.* at 29 ("The import of the … Letter was unmistakable. It was a plain language threat ...."). On the contrary, as the Commission found, the letter did nothing more than advise the Kapurs that OTA intended to exercise its available legal rights. *See 2017 Order* ¶ 15 (JA ___).

Finally, the Kapurs state in passing that "[t]he Commission never addressed [their] principal reliance on *Patrick Henry*." Br. 31 n.90. *Patrick Henry* is a 1978 order in which the Commission designated a character hearing based on allegations that the licensee of a radio station, who sought to renew the station license, had improperly sought to intimidate a party that opposed the renewal application by "actually filing suit" against it and "threaten[ing] [its president] and his family with violence." 69 F.C.C.2d at 1312–13.

In all their numerous pleadings to the full Commission, the Kapurs referenced *Patrick Henry* in a single footnote of their 2016 application for review. *See* 2016 App. for Review 4 n.9 (JA ___). As this Court has repeatedly recognized, "the Commission 'need not sift pleadings and documents to identify arguments that are not stated with clarity.'" *NTCH, Inc. v. FCC*, 950 F.3d 871, 885 (D.C. Cir. 2020) (quoting *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997)). Particularly given the obvious distinctions between the allegations in *Patrick Henry* and those here—where the Kapurs have never alleged that OTA in fact sued them or threatened them with violence—there was no cause for the Commission to address the Kapurs' passing reference to that order.

B. OTA's Innocent Bystander Representation Was Irrelevant.

The Kapurs next contend (Br. 32) that the Commission was required to conduct a character hearing because, in a March 2014 pleading before the agency, OTA represented that it was "caught in the cross-fire of [an] intramural squabble" between the Kapurs and the majority owners of KAXT, LLC. 3/17/14 OTA Comments 2 (JA ___). That was a misrepresentation, the Kapurs contend, because in a state court case that Diya TV brought against Warren Trumbly and KAXT, LLC, the

court "made findings" that OTA had "worked closely" and "actively strategized with" the Trumbly-aligned owners during their arbitration against the Kapurs. Br. 32; *see* Yew Opinion 9–10 (JA ___–___).

As the Commission explained, however, "cooperation between OTA and [KAXT, LLC] in" outside litigation was "immaterial" to whether to grant the application (and the subsequent renewal application). *See OTA License Order* ¶ 6 (JA ___–___); *2017 Order* ¶ 20 (JA ___–___).

Section 1.17 of the FCC's rules prohibits "applicant[s] for any Commission authorization" from "intentionally provid[ing] material factual information that is incorrect" in "adjudicatory matter[s]" such as the OTA license proceedings. 47 C.F.R. § 1.17(a)(1); *see 2017 Order* ¶ 20 n.80 (JA ___) (citing this rule). "[R]epresentations or omissions that are insignificant or extraneous to the issues" before the Commission are not "misrepresentations" within the meaning of that rule. *Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016, 4020 ¶ 7 (2003) (*Amendment of Section 1.17*).

Consistent with that principle, the Commission underscored that the degree of OTA's involvement in the ownership dispute between the Kapurs and the majority owners of KAXT, LLC, was not material to

OTA's qualifications to become the station's licensee. Indeed, neither of the initial staff decisions allowing the assignment of the station license to OTA relied on the premise that OTA was a neutral party. *See 2017 Order* ¶ 20 & n.80 (JA ___); *December 2015 Bureau Order* ¶ 17 (JA ___). Moreover, as the Commission explained, "OTA's active participation before the Commission" in opposing the Kapurs' petition to deny made "clear" that OTA and the majority owners had a "common interest in closing the sale of the Station." *2017 Order* ¶ 20 (JA ___–___). "[T]he Kapurs' contention that" there was something "clandestine" about OTA's representation concerning its role in the outside ownership dispute was, under these circumstances, "baseless." *Id.* (JA ___).

The Kapurs also contend that "there is no such thing as an immaterial misrepresentation made to the Commission." Br. 34. But OTA's statement that it was caught in the cross-fire of a dispute between the Kapurs and the Trumblys was not false, and, in any event, not every false or inaccurate statement to the Commission amounts to a "misrepresentation." Only "material factual information that is incorrect" (or intentional, material omissions) meets the FCC's definition of that term. *2017 Order* ¶ 20 n.80 (JA ___) (quoting 47 C.F.R.

§ 1.17(a)(1)). There was thus nothing improper about considering whether OTA's innocent bystander assertion was material.

In addition, the Kapurs misread the "[l]ongstanding judicial and Commission precedent" on which they rely for their claim that misrepresentations to the agency are never immaterial. Br. 32; *see id.* at 34 n.99. None of those decisions establishes that the Commission must conduct a hearing concerning any trivial misstatement.

For example, the Supreme Court in *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), held only that, when a license renewal applicant had repeatedly provided false information that the FCC required it to furnish, denying renewal of the applicant's license was not "unlawful, arbitrary or capricious." *Id.* at 227; *see id.* at 225–27. While the Commission "is *authorized* to treat even the most insignificant misrepresentation as disqualifying," it is not required to do so. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1210 ¶ 60 (1986) (*1986 Character Policy Statement*) (emphasis added), *subsequent history omitted*.

In assessing "matters involving misrepresentation or lack of candor," the FCC's policy is to consider the totality of circumstances. *1986 Character Policy Statement*, 102 F.C.C.2d at 1211 ¶ 61. And in multiple

orders, the Commission has recognized that "immaterial" misstatements are not always disqualifying, *id.*, or subject to sanction, *Amendment of Section 1.17*, 18 FCC Rcd at 4019–20 ¶ 7. The Commission's decision here was fully consistent with these precedents.

C. The Kapurs' Untimely Arguments Concerning Todd Lawyer Did Not Require a Hearing.

Of the remaining three claims that the Kapurs proffer to support the need for a hearing on OTA's character qualifications, only one concerns conduct that occurred before OTA became the station's licensee: their claim concerning Todd Lawyer. *See* Br. 38–42.

Lawyer held a beneficial interest in OTA Parent, as one of its unitholders, and was involved in a conspiracy to commit wire fraud. Attach. B to 2015 Recon. Pet. 1 (JA ___) (Press Release). He pled guilty to that federal felony on February 19, 2013. *See id.* In a letter agreement with OTA Parent dated February 8, 2013, Lawyer acknowledged that, notwithstanding his beneficial interest in the company, he would no longer have any involvement in its management, direction, or operation. *See* Insulation Letter 1 (JA ___). By obtaining this agreement, OTA Parent sought to ensure that Lawyer would be lawfully "insulated" from the company and its subsidiaries, meaning that his interest would not be

attributable to the companies under the FCC's rules, and the companies would thus not need to disclose it. *See id.*; 47 C.F.R. § 73.3555 note 2.

With the insulation letter in place, OTA certified in the OTA assignment application, filed on February 11, 2013, and in the subsequent renewal application, that no "party to the application"—including any individual with an attributable ownership interest in OTA—had been subject to "an adverse final action … by any court" in "any felony" matter. Renewal App. 2 (JA ___) (Section II, Item 3); App. 6 (JA ___) (Section III, Item 8).

The Kapurs contend that the insulation letter was "ineffective to insulate Todd Lawyer from ownership attribution" because governing FCC rules require that licensees implement such arrangements through their "organizational" documents. Br. 40 (citing 47 C.F.R. § 73.3555 note 2 and FCC Form 314, Worksheet #3). The Commission reasonably declined to conduct a character hearing based on this claim—first on procedural grounds, and in the alternative on the merits. *See 2017 Order* ¶ 19 (JA ___).

1. The Todd Lawyer Claim Was Untimely.

The Kapurs first raised their claim concerning Todd Lawyer's felony conviction in their April 2015 "petition for further reconsideration"

of the *2014 Bureau Order*, which the Media Bureau had already upheld in the *March 2015 Bureau Order*. *See 2017 Order* ¶ 19 (JA ___); 2015 Recon. Pet. 8–9 (JA ___–___). Under Section 1.106(c) of the FCC's rules, "a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only" if "[t]he Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest," 47 C.F.R. § 1.106(c)(2), or "[t]he facts or arguments fall within one or more of the categories set forth in [Section] 1.106(b)(2)" of the FCC's rules, *id.* § 1.106(c)(1).

As relevant here, Section 1.106(b)(2) provides that the agency may consider late-raised "facts or arguments" if they were "unknown to [the] petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity." 47 C.F.R. § 1.106(b)(2). The Kapurs contend that their claim concerning Lawyer's felony conviction falls within that category of

previously "unknown" facts that "ordinary diligence" could not have discovered. *See* Br. 39–40; 2015 Recon. Pet. 8 (JA ___).[10]

The Commission disagreed, in part because the Kapurs "failed to indicate how and when they first learned of [Lawyer's] conviction." *2017 Order* ¶ 18 (JA ___). The Lawyer insulation letter had been "publicly available throughout the [OTA License] proceeding[s]." *Id.* The Commission therefore concluded that the Kapurs' conclusory assertion that Lawyer's conviction was "unknown to [them] at the last opportunity to present argument to the Commission," 2015 Recon Pet. 8 (JA ___), was insufficient to show that they could not have alerted the agency to their claim sooner.

As the Commission observed, the agency has previously "relied on the lack of [any] specific date of petitioner discovery as a basis for rejecting similar newly-raised arguments on reconsideration." *2017*

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[10] In a footnote, the Kapurs also assert in passing that the agency "will entertain reconsideration petitions *without regard to timeliness* where 'consideration of the facts or argument relied on is required in the public interest.'" Br. 39 n.106 (quoting 47 C.F.R. § 1.106(c)(2)). This Court routinely declines to reach "cursory arguments made only in a footnote." *E.g.*, *C.I.R. v. Simmons*, 646 F.3d 6, 12 (D.C. Cir. 2011). But regardless, the Kapurs have not established that the public interest warranted consideration of their late-filed argument here.

Order ¶ 18 (JA ___); *see Wireless Properties of Virginia, Inc. Assignor and Nextel Spectrum Acquisition Corp. Assignee*, 23 FCC Rcd 7466, 7471–72 ¶ 10 (Wireless Telecomms. Bur. 2008) (dismissing argument raised in reconsideration petition when petitioner did not make clear "on what specific date" he discovered new facts); *Dennis J. Kelly, Esq.*, 23 FCC Rcd 4786, 4787–89 (Media Bur. 2008) (reconsideration petition raised no "new facts unavailable at … time of [petitioner's] initial waiver request" when she "present[ed] no information identifying when she learned of" event in question). The Kapurs do not contend that they were unable to disclose when and how they discovered the Lawyer conviction. *See* Br. 39 & n.107. The Commission thus reasonably determined that the Kapurs failed to establish that they learned of Lawyer's conviction only "after [their] last opportunity to present [this issue] to the Commission." 47 C.F.R. § 1.106(b)(ii).

In addition, "[r]egardless of when and how the Kapurs actually first knew about Todd Lawyer's conviction," the Commission reasonably concluded that they did not satisfy Section 1.106(c) because the "exercise of ordinary diligence would have revealed" the relevant facts before the Kapurs filed their petition to deny. *2017 Order* ¶ 19 (JA ___). When the Kapurs filed that petition on March 18, 2013, "the Commission's public

files for several OTA stations [already] contained copies of the Insulation Letter" that the Kapurs later appended to their April 2015 reconsideration petition. *Id.* The Commission reasoned that "ordinary diligence" would have involved "routine review of the Commission's files" concerning OTA-affiliated stations. *Id.* The Kapurs thus could have brought their claim concerning Lawyer to the Commission "long before they filed" their April 2015 reconsideration petition. *Id.*

The Kapurs argue that the insulation letter "was merely" an "attempt … to insulate … Lawyer from FCC ownership attribution," and "said nothing about … Lawyer's felony." Br. 39–40 (emphasis omitted). But they fail to reconcile that assertion with their representation, before the agency, that "a review of FCC files" would "make clear" OTA's alleged character deficiency. 2015 Recon. Pet. 10 (JA ___). A reasonable party conducting ordinary diligence in the Kapurs' situation would have sought to determine why OTA was seeking to insulate Lawyer, and a cursory internet search for his name would have uncovered the press release concerning his 2013 plea. *See* Press Release 1–2 (JA ___–___), *available at* https://www.justice.gov/usao-edva/pr/brokerage-executive-pleads-guilty-illegal-hotel-flipping-scheme.

When an agency dismisses a claim for procedural reasons, applying its own rules, this Court will not interfere unless the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *BDPCS*, 351 F.3d at 1183 (quoting 5 U.S.C. § 706(a)(2)). And "the Commission does not abuse its discretion when it declines to entertain a late-filed [claim] in the absence of extenuating circumstances prohibiting a timely filing." *Id.* at 1184 (internal quotation marks and alteration omitted). The Court should therefore uphold the Commission's procedural dismissal of the Kapurs' claim concerning Todd Lawyer.

2. The Kapurs' Allegations Concerning Todd Lawyer Did Not Warrant a Hearing.

On the merits, the Kapurs' arguments concerning Todd Lawyer are likewise unavailing. *See 2017 Order* ¶ 19 (JA ___). Beyond posing abstract "questions" concerning, for example, whether a felon should ever be "trusted on anything," Br. 40, the Kapurs do not seek to show that Lawyer's insulation from OTA Parent was substantively deficient. And indeed, the insulation letter expressly precluded Lawyer from having any involvement in OTA Parent's management or operation; acting as an

employee, contractor, or agent of the company; or otherwise seeking to influence the company's direction. *See* Insulation Letter 1 (JA ___).

Instead, the crux of the Kapurs' claim is that Lawyer's insulation was not properly documented in OTA Parent's articles of organization (as opposed to in a side letter). *See* Br. 40–41. Irrespective of whether OTA should have disclosed Lawyer's beneficial interest in OTA Parent on that basis—a question the Commission did not ultimately reach, *see OTA License Order* ¶ 6 n.24 (JA ___)—the Kapurs made no showing that a character hearing was warranted. "[G]iven [the] multiple filings of the Insulation Letter" in other FCC proceedings, there was no basis on which to find that OTA sought "to conceal the facts" about Lawyer here. *2017 Order* ¶ 19 (JA ___). "[T]he *sine qua non* of misrepresentation … is intent to deceive." *Id.* ¶ 19 n.78 (JA ___) (quoting *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983)). The Kapurs' allegations thus do not make a prima facie case of misrepresentation warranting a character hearing. *See id.* ¶ 19 (JA ___).

D. OTA's Response to Question 2(b) of the Renewal Application Did Not Warrant a Hearing.

The Kapurs also contend that the Commission should have conducted a hearing on OTA's character qualifications based on OTA's

certification, "in response to Question 2.b[] of the … Renewal Application[,] that 'neither the licensee nor any party to the application has or has had any interest in or connection with … any pending broadcast application in which character issues have been raised.'" Br. 35 (fourth alteration in original; quoting Renewal App. 2 (JA ___) (Section II, Item 2(b)).

As a threshold matter, OTA's conduct in its renewal application, after it had become the station's licensee, has no bearing on its character qualifications at the time of the OTA assignment application. Thus, in *Gencom*, where the pertinent question was an applicant's intent to use a specified transmitter location "at the time [the permit] application was filed," this Court held that it would have been "perverse indeed" for the Commission to infer misrepresentation from the applicant's activities after that time. 832 F.2d at 182 (emphasis omitted). The same logic applies here—consistent with the hornbook principle of administrative law that the reasonableness of an agency's action turns on "the record before the agency at the time it made its decision." *E.g.*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009).

Even if OTA's renewal application response were relevant, moreover, the FCC reasonably declined to conduct a character hearing

on two "separate and independent" alternative grounds. *2017 Order* ¶ 16 (JA ___–___). First, the Commission determined that OTA's response to Question 2(b) in the renewal application was accurate. *See id.* Second, the Commission found that, in any event, there was no "substantial and material question of fact regarding OTA's character qualifications" because there was no evidence that OTA's response to Question 2(b) was calculated to "deceive" the agency. *See id.*

1. There Was No Reason to Infer That OTA Sought to Deceive the Commission.

We address the second of the Commission's determinations first, because the Kapurs' brief includes no challenge to this aspect of the agency's decision at all. *See* Br. 35–38. That alone is enough for the Court to sustain the Commission's *Orders* with respect to this issue.

In addition, the Commission has long recognized that "the mere existence of an inaccuracy in an application, without any indication that the applicant meant to deceive the Commission, does not elevate such a mistake to the level of an intentional falsehood or otherwise raise a question of fact that must be resolved in an evidentiary hearing." *Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464, 15472–73 ¶ 22 (1996) (internal quotation marks omitted). And when "all of the information"

that an applicant "purportedly failed to reveal" is already "on file" and "readily available" in another FCC proceeding, the Commission has declined to infer that the applicant would "intentionally withhold" the information in question. *Id.* at 15472 ¶ 22.

Consistent with this precedent, the Commission concluded in the *2017 Order* that there was "no logical basis to infer" that OTA sought to "deceive" the agency in its renewal application by concealing the Kapurs' character allegations. *2017 Order* ¶ 16 n.69 (JA ___). Especially considering that the Media Bureau had addressed those allegations only weeks before OTA filed the renewal application, the Commission's conclusion was reasonable.

2. OTA's Question 2(b) Certification Was Accurate.

The Commission's alternative ground of decision—that OTA's response to Question 2(b) was accurate—also was reasonable. *See 2017 Order* ¶ 16 (JA ___).

The FCC form for license renewal applications asks, in Section II, whether the applicant can certify that "neither the licensee nor any party to the application has or has had any interest in, or connection with … any pending broadcast application in which character issues have been

raised." Renewal App. 2 (JA ___) (Section II, Item 2(b)). OTA responded "yes" to Question 2(b) in its renewal application. *See id.*

At the time of that certification, on July 30, 2014, the Media Bureau had already issued the *2014 Bureau Order* in which it first approved the assignment of the station license to OTA. The Kapurs took the position before the Commission (as they implicitly do here) that the OTA assignment application was nonetheless still "pending" under Section 1.65(a) of the FCC's rules. *See* 47 C.F.R. § 1.65(a). The Kapurs accordingly contend that OTA was required to respond "no" to Question 2(b), and to furnish the Commission with an explanatory exhibit concerning the Kapurs' character allegations. *See* Br. 33–38.

The Commission disagreed, in large part based on *Greater Muskegon*. *2017 Order* ¶ 16 (JA ___). As relevant here, that order concerned a certification by KQDS, Inc. (KQDSI) in its application for consent to acquire control of stock in the licensee of two Minnesota radio stations. *See Greater Muskegon*, 11 FCC Rcd at 15464, 15472 ¶¶ 1, 22. The application for transfer of control included a question "whether any party to [the] application … had any interest in … an application in any Commission proceeding which left unresolved character issues against the applicant." *See id.* at 15472 ¶ 20 n.12 (quoting Section II, Item 10(d),

of the then-governing FCC Form 315). In responding, KQDSI did not disclose character allegations against it in a separate, pending proceeding concerning the acquisition of a television station by the sole owner of KQDSI. *See id.* at 15471–72 ¶¶ 19, 22. But the Commission concluded that "KQDSI [had] not fail[ed] to report any 'unresolved character issues,'" because the objector in the television proceeding "had only made allegations of possible misconduct." *Id.* at 15742 ¶ 22. Because "[n]o issues had been designated" for a hearing or "determined to have merit," the Commission concluded that there were "no 'unresolved' issue[s]" for KQDSI to have disclosed. *Id.*

Because the FCC in the OTA license proceedings had "rejected as meritless each [character] allegation made by the Kapurs," it never designated those allegations for a hearing. *2017 Order* ¶ 16 (JA ___). Accordingly, just as there were no "issues that were left unresolved" in *Greater Muskegon*, *id.* (internal quotation marks and alteration omitted), there were no "issues" that OTA was required to disclose in its renewal application here, *id.* As the Commission explained, the term "issues" in Question 2(b), as in the question addressed in *Greater Muskegon*, "refer[s] to the issues in a hearing designation order." *Id.*

The Kapurs' principal challenge to this determination is that the question analyzed in *Greater Muskegon* is analogous to Question 2(a) in the renewal application form—not Question 2(b). *See* Br. 37 n.103. They contend that the language of Question 2(a) differs in meaningful respects from the language of Question 2(b). *See* Br. 36–38.

Question 2(a), the Kapurs argue, "requires an applicant to certify that 'neither the licensee nor any party to the application has or has had any interest in or connection with[] any broadcast application *in any proceeding* where character issues were *left unresolved* or were *resolved adversely* against the applicant or any party to the application." Br. 36 (emphasis added) (quoting Renewal App. 2 (JA ___) (Section II, Item 2(a)). "By contrast," they contend, Question 2(b) concerns character issues "that have been 'raised.'" *Id.* (quoting Renewal App. 2 (JA ___) (Section II, Item 2(b)).

The Commission's contrary conclusion that the term "issues" in both subparts of Question 2 has the same meaning—i.e., "issues in a hearing designation order," *2017 Order* ¶ 16 (JA ___)—was consistent with the "normal presumption" that a single term used "in multiple places within a single statute," or other legal document, "bears a consistent meaning throughout." *Azar v. Allina Health Servs.*, 139 S. Ct.

1804, 1812 (2019); *see* Antonin Scalia & Bryan A. Garner, *Reading Law* 170 (2012) (discussing application of canon to legal documents generally).

The Kapurs' contrary reading of the required certification, moreover, would risk inviting "misuse of Commission procedures." *Coosa Valley News, Inc.*, 23 FCC Rcd 9146, 9149 (Media Bur. 2008); *see 2017 Order* ¶ 16 n.67 (JA ___). If licensees seeking renewals were required to disclose mere allegations against them in other proceedings, individuals with "personal grievances" against the licensees, or competing businesses, would have an incentive to make frivolous character allegations for the purpose of delaying the renewal proceedings. *Coosa Valley*, 23 FCC Rcd at 9149.

As for the Kapurs' assertion (Br. 37) that the Commission's interpretation of Question 2(b) "implausibly rewrites" the "longstanding interpretation" of the Video Division of the FCC's Media Bureau, they nowhere identify what staff order(s) they have in mind. In any event, it is well settled "that an agency is not bound by the actions of its staff if the agency has not endorsed those actions." *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 660 (D.C. Cir. 2004); *accord 2017 Order* ¶ 16 n.66 (JA ___) (citing *Comcast Corp. v. FCC*, 526 F.3d 763, 769–70 (D.C. Cir. 2008)).

Indeed, as the Commission itself observed, the interpretation of Question 2(b) in the *2017 Order* was fully consistent with prior Commission-level orders. *See 2017 Order* ¶16 & nn.66, 68 (JA ___–___). In addition to *Greater Muskegon*, 11 FCC Rcd at 15742 ¶ 22, the 1986 *Character Policy Statement* provides that "no restrictions will be placed on the renewals of any stations not designated" for hearing, 102 F.C.C.2d at 1224 ¶ 93.

E. OTA's Public File Violations Did Not Warrant a Hearing.

Finally, the Kapurs argue that the Commission was required to conduct a hearing to determine whether the station's public file violations in the November 2016 election season disqualified OTA as a licensee. Br. 42–47. Some of those violations were identified in a Media Bureau investigation that resulted in a consent decree with OTA in January 2017. *See Investigation into the Political File Practices of OTA Broadcasting (SFO), LLC*, 32 FCC Rcd 795, 799 ¶ 5 (Media Bur. 2017). Others of the violations took place during the period covered by the consent decree, *see id.*, in October and November 2016, but the Media Bureau did not discover or address them in its investigation, *see OTA License Order* ¶ 8 n.28 (JA ___); Exh. A to 12/4/2017 Kapur Pet. for Recon.

6–7, 10–11 (JA ___–___, ___–___); Exh. 1 to 12/28/17 Kapur Reply to Opp. 2 (JA ___) (OTA discovered additional violations only "[i]n response to" Kapurs' July 12, 2017, filing in FCC's "incentive auction" proceeding). These additional violations include multiple instances in which political advertisements for a county affordable housing ballot measure, and for a local mayoral candidate, aired on multicast channels of the station that were programmed by other legal entities, not the station itself, under "time brokerage agreements." Exh. 1 to 12/28/17 Kapur Reply in Supp. of 2017 Recon. Pet. 2 (JA ___).

On two alternative, independent grounds, the Commission reasonably declined to designate OTA for a character hearing based on these public file violations. *OTA License Order* ¶ 8 & n.30 (JA ___–___).

1. OTA's Public File Violations in 2016 Had No Bearing on Its Qualifications to Become the Station's Licensee Years Earlier.

As a threshold matter, as the Commission explained, OTA's conduct as a licensee, although it might be relevant to a claim that OTA should "no longer *remain* a licensee," was not relevant to the Kapurs' claim in the OTA license proceedings, which was that "OTA lacked the character and fitness to be a licensee at the time the Commission approved the sale of [the station] to OTA" in the *2014 Bureau Order*. *OTA License Order*

¶ 8 n.30 (JA ___). That common-sense proposition—as we have already explained with respect to the Kapurs' claim concerning OTA's renewal application, *see supra* p. 50—is fully consistent with this Court's decision in *Gencom*, and with the cases recognizing that "the reasonableness of an agency's decision" is judged based on "the record before the agency at the time," *e.g.*, *Rural Cellular*, 588 F.3d at 1107.

To be sure, as the Kapurs argue, Section 405 of the Communications Act, 47 U.S.C. § 405, allows the Commission, in appropriate circumstances, to reconsider its actions "based on new evidence," Br. 45. But any new evidence must pertain to the decision under reconsideration. Here, the agency's decision to grant the OTA assignment application concerned OTA's fitness to become the station's licensee in 2014. On reconsideration of that decision in the *OTA License Order*, the Commission took account of the Kapurs' new evidence concerning OTA's 2016 public file violations, but it determined that OTA's conduct years after becoming the station's licensee was not relevant to the agency's initial decision to grant the OTA assignment application. *See OTA License Order* ¶ 8 n.30 (JA ___).

The Kapurs challenge the Commission's determination on this point (Br. 45) based on Section 1.65 of the FCC's rules, 47 C.F.R. § 1.65.

Section 1.65(a) provides that "[e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application." *Id.* § 1.65(a). And it defines a "pending" application—"[f]or purposes of this section"—as one whose "grant or denial …. is no longer subject to reconsideration by the Commission or to review by any court." *Id.*

OTA thus did have a continuing obligation, throughout the OTA license proceedings, to ensure the accuracy and completeness of the OTA assignment application. But the Kapurs' argument is that OTA's public file violations, which occurred long after it became a licensee, required the agency to conduct a character hearing before granting the application. *See, e.g.*, 2017 Recon. Pet. 10 (JA ___) ("pattern of OTA [public file] violations … leaves … no realistic choice but … [a] hearing"). And those violations have no bearing on OTA's qualifications to hold a license at the time of the application.

2. The Commission Reasonably Adhered to Its Established Policy of Not Designating Public File Violations for a Hearing without Evidence of Intentional Misconduct.

Although the Commission could have rested exclusively on its threshold determination that the timing of OTA's public file violations

rendered them irrelevant, the *OTA License Order* also includes an alternative, independent ground of decision. *See OTA License Order* ¶ 8 (JA ___–___). The FCC has a longstanding policy "not to designate a potentially disqualifying public file issue for hearing when there is no evidence of intentional misconduct." *Id.* at ¶ 8 n.31 (JA ___) (quoting *R & L Broadcasters*, 7 FCC Rcd 5551, 5554 ¶ 16 (1992)); *see Northern Television, Inc.*, 91 F.C.C.2d 305, 308 (1982) ("Absent a showing of intentional misconduct or of any resulting prejudice to the parties or to the public, no substantial and material question of fact is raised [by public file violations]."); *see also Michael Lazarus, Esq.*, 26 FCC Rcd 5966, 5970 & n.29 (Media Bur. 2011) (applying policy and collecting additional authorities). The Commission reasonably applied this policy here.

The additional public file violations that the Kapurs identified involved advertisements that "were aired on two [of the station's] multicast channels," which the station did not program directly. *OTA License Order* ¶ 8 n.29 (JA ___). The programmers of those channels "did not disclose [to the station] the airing of [those] advertisements"—"in express violation of the terms of the [governing] time brokerage agreements." *Id.* (internal quotation marks omitted). Although the Commission made clear that these facts do not "excuse[]" OTA's "ultimate

responsibility for [the] rule violation[s]," they do defeat any inference that the station "was aware of these violations at the time of the 2017 *Consent Decree* and chose to conceal them." *Id.* On this record, the Commission's conclusion that OTA's public file violations raise "no substantial [or] material questions of fact as to OTA's basic qualifications," *id.* ¶ 8 (JA ___), was well within the sphere of the agency's "wide[]" discretion to decline to conduct evidentiary hearings, *Gencom*, 832 F.2d at 181.[11]

[11] The Commission's decision not to conduct a hearing on OTA's character qualifications is the only matter properly before this Court. The Kapurs' suggestion (Br. 47) that "these cases extend beyond OTA to OTA Parent" and the results of the FCC's incentive auction is unfounded. As the Kapurs themselves recognize, OTA Parent did not receive any incentive auction payments based on its ownership of the station (KAXT-CD) here. *See* Br. 15 & n.41 (citing *Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2786, Appendix A (Media and Wireless Telecomms. Burs. 2017)). Payments that OTA Parent received for other stations that it owned are immaterial to these appeals.

CONCLUSION

These appeals should be dismissed for lack of standing, or in the alternative denied.

Dated: August 3, 2020

Respectfully submitted,

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/s/ Sarah E. Citrin
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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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47 U.S.C. § 155 provides, in pertinent part:

§ 155. Commission

*****

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

(2) As used in this subsection the term "order, decision, report, or action" does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b) of this title.

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

(9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

*****

47 U.S.C. § 309 provides, in pertinent part:

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

*****

(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) (or subsection (k) 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) (or subsection (k) 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) (or

subsection (k) in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e).

*****

(k) Broadcast station renewal procedures

(1) Standards for renewal

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e), that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited

In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

*****

47 U.S.C. § 405 provides:

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review

of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.17 provides:

> **§ 1.17 Truthful and accurate statements to the Commission.**
>
> (a) In any investigatory or adjudicatory matter within the Commission's jurisdiction (including, but not limited to, any informal adjudication or informal investigation but excluding any declaratory ruling proceeding) and in any proceeding to amend the FM or Television Table of Allotments (with respect to expressions of interest) or any tariff proceeding, no person subject to this rule shall;
>
> (1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and
>
> (2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.
>
> (b) For purpose of paragraph (a) of this section, "persons subject to this rule" shall mean the following:
>
> (1) Any applicant for any Commission authorization;
>
> (2) Any holder of any Commission authorization, whether by application or by blanket authorization or other rule;
>
> (3) Any person performing without Commission authorization an activity that requires Commission authorization;
>
> (4) Any person that has received a citation or a letter of inquiry from the Commission or its staff, or is otherwise the subject of a Commission or staff investigation, including an informal investigation;

(5) In a proceeding to amend the FM or Television Table of Allotments, any person filing an expression of interest; and

(6) To the extent not already covered in this paragraph (b), any cable operator or common carrier.

47 C.F.R. § 1.65 provides:

§ 1.65 Substantial and significant changes in information furnished by applicants to the Commission.

(a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Except as otherwise required by rules applicable to particular types of applications, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of the application so as to furnish such additional or corrected information as may be appropriate. Except as otherwise required by rules applicable to particular types of applications, whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with § 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

(b) Applications in broadcast services subject to competitive bidding will be subject to the provisions of §§ 1.2105(b), 73.5002 and 73.3522 of this chapter regarding the modification of their applications.

(c) All broadcast permittees and licensees must report annually to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form. If a report is required by this paragraph(s), it shall be filed on the anniversary of the date that the licensee's renewal application is required to be filed, except that licensees owning multiple stations with different anniversary dates need file only one report per year on the anniversary of their choice, provided that their reports are not more than one year apart. Permittees and licensees bear the obligation to make diligent, good faith efforts to become knowledgeable of any such reportable adjudicated misconduct.

Note: The terms adverse finding and adverse final action as used in paragraph (c) of this section include adjudications made by an ultimate trier of fact, whether a government agency or court, but do not include factual determinations which are subject to review de novo unless the time for taking such review has expired under the relevant procedural rules. The pendency of an appeal of an adverse finding or adverse final action does not relieve a permittee or licensee from its obligation to report the finding or action.

47 C.F.R. § 1.106 provides, in pertinent part:

§ 1.106 Petitions for reconsideration in non-rulemaking proceedings.

(a)(1) Except as provided in paragraphs (b)(3) and (p) of this section, petitions requesting reconsideration of a final Commission action in non-rulemaking proceedings will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A

petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rulemaking proceedings, see § 1.429. This § 1.106 does not govern reconsideration of such actions.)

(2) Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held. If the presiding officer finds that there is substantial doubt, on established policy and undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a statement to that effect. No appeal may be filed from an order denying such a request. See also, §§ 1.229 and 1.251.

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

(i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or

(ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) In the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts or arguments fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.

*****

47 C.F.R. § 1.115 provides, in pertinent part:

§ 1.115 Application for review of action taken pursuant to delegated authority.

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

*****

47 C.F.R. § 73.3555 provides, in pertinent part:

§ 73.3555 Multiple Ownership

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(b) Local television multiple ownership rule. An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if:

(1) The digital noise limited service contours of the stations (computed in accordance with § 73.622(e)) do not overlap; or

(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those TV stations the digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination. In areas where there is no DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations digital noise limited service contours of which overlap with the digital noise limited service contour of at least one of the stations in the proposed combination.

(2) [Reserved]

(c) Radio-television cross-ownership rule.

(1) The rule in this paragraph (c) is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in

accordance with § 73.625) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.186), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the principal community contour(s) of the TV broadcast station(s) (computed in accordance with § 73.625) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and one commercial radio station situated as described in paragraph (c)(1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations. Independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have digital noise limited service contours (computed in accordance with § 73.622(e)) that overlap with the digital noise limited service contour(s) of the TV station(s) at issue;

(ii) Radio stations.

(A)(1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement in paragraphs (c)(2)(i) and (ii) of this section must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers. Newspapers that are published at least four days a week within the TV station's DMA in the dominant language of the market and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system. If cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) Newspaper/broadcast cross-ownership rule.

(1) No party (including all parties under common control) may directly or indirectly own, operate, or control a daily newspaper and a full-power commercial broadcast station (AM, FM, or TV) if:

(i) The predicted or measured 2 mV/m groundwave contour of the AM station (computed in accordance with § 73.183 or § 73.186) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the AM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market;

(ii) The predicted or measured 1 mV/m contour of the FM station (computed in accordance with § 73.313) encompasses the entire community in which the newspaper is published and, in areas designated as Nielsen Audio Metro markets, the FM station and the community of publication of the newspaper are located in the same Nielsen Audio Metro market; or

(iii) The principal community contour of the TV station (computed in accordance with § 73.625) encompasses the entire community in which the newspaper is published; and the community of license of the TV station and the community of publication of the newspaper are located in the same DMA.

(2) The prohibition in paragraph (d)(1) of this section shall not apply upon a showing that either the newspaper or television station is failed or failing.

(e) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) of this section through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K of part 73.

Note 1 to § 73.3555: The words "cognizable interest" as used herein include any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station.

Note 2 to § 73.3555: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

a. Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

b. Investment companies, as defined in 15 U.S.C. 80a–3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

c. Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph i. of this note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds 50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee," then X's interest in

"Licensee" would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable. For purposes of paragraph i. of this note, X's interest in "Licensee" would be 15% (0.6 x 0.25) and A's interest in "Licensee" would be 1.5% (0.1 x 0.6 x 0.25). Neither interest would be attributed under paragraph i. of this note.]

d. Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

e. Subject to paragraph i. of this note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph i. of this note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

f. 1. A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

2. For a licensee or system that is a limited partnership to make the certification set forth in paragraph f. 1. of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph f. 1. of this note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 85–252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83–46, FCC 86–410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

3. In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

g. Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to

its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

h. Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

1. The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

2. The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

3. The sum of the interests computed under paragraph h. 1. of this note plus the sum of the interests computed under paragraph h. 2. of this note is equal to or exceeds 20 percent.

i.1. Notwithstanding paragraphs e. and f. of this Note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

A. The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

B.(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph i.; or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

2. Notwithstanding paragraph i.1. of this Note, the interest holder may exceed the 33 percent threshold therein without triggering attribution where holding such interest would enable an eligible entity to acquire a broadcast station, provided that:

i. The combined equity and debt of the interest holder in the eligible entity is less than 50 percent, or

ii. The total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option, or promise to acquire an equity interest in the eligible entity or any related entity. For purposes of this paragraph i.2, an "eligible entity" shall include any entity that qualifies as a small business under the Small Business Administration's size standards for its industry grouping, as set forth in 13 CFR 121.201, at the time the transaction is approved by the FCC, and holds:

A. 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or

B. 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or

partnership that will own the media outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or

C. More than 50 percent of the voting power of the corporation that will own the media outlet if such corporation is a publicly traded company.

j. "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

2. Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

3. Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains

ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b), (c), and (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) of this section if the brokering station is a radio station.

k. "Joint Sales Agreement" is an agreement with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station."

1. Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section.

2. Where two television stations are both located in the same market, as defined for purposes of the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d), and (e) of this section.

3. Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraphs (b), (c), and (d) of this section if the brokering station is

a television station or with paragraphs (a), (c), and (d) of this section if the brokering station is a radio station.

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