

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)) Bernard Dallas, LLC, Assignor, and ACM Dallas) V LLC, Assignee)) Applications for Assignment of Licenses for) Stations KFCD(AM), Farmersville, Texas, and) KHSE(AM), Wylie, Texas)) and)) ACM Dallas V LLC, Assignor, and Hammond) Broadcasting , LLC, Assignee,)) Application for Assignment of License for Station) KHSE(AM), Wylie, Texas)	File Nos. BAL-20150408AAC BAL-20150408AAD Facility ID Nos. 43757, 133464 File No. BAL-20150506ACF Facility ID No. 133464
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MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2016

Released: September 28, 2016

By the Commission:

1. By this Memorandum Opinion and Order, we dismiss two Applications for Review filed by David A. Schum (Schum) on May 9 and 13, 2016.¹ In the Bernard-to-ACM AFR, Schum seeks review of a Media Bureau (Bureau) decision² dismissing in part and otherwise denying his petition for reconsideration of an earlier Bureau decision.³ In that earlier decision, the Bureau denied his petition to deny applications to assign the licenses of KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas (collectively, Stations), from Bernard Dallas LLC (Bernard) to ACM Dallas V LLC (ACM) (Bernard-to-ACM Applications) and granted those applications.⁴ In the ACM-to-Hammond AFR, Schum

¹ We will refer to the two Applications for Review, collectively, as the AFRs, and, individually, as the Bernard-to-ACM AFR (May 9, 2016, filing) and the ACM-to-Hammond AFR (May 13, 2016, filing). No party opposed the Bernard-to-ACM AFR. Hammond and ACM, however, separately opposed the ACM-to-Hammond AFR on May 23, and May 25, 2016, respectively. Schum replied to the oppositions on June 1, 2016 (reply to Hammond opposition) and June 2, 2016 (reply to ACM opposition).

² *Bernard Dallas LLC and ACM Dallas V LLC*, Letter Order, (MB dated April 7, 2016) (*Bernard-to-ACM Reconsideration Order*).

³ *Bernard Dallas LLC and ACM Dallas V LLC*, Letter Order, (MB dated Sept. 16, 2015) (*Bernard-to-ACM Letter Order*).

⁴ Bernard and ACM consummated these assignments on October 30, 2015. ACM filed an application to assign the license for KFCD(AM) to Vikram Shah Broadcasting, Inc. File No. BAL-20150902AEG. The Bureau granted this unopposed application on November 18, 2015. *Broadcast Actions*, Public Notice, Report No. 48617 (MB Nov. 23, 2015). Neither Schum nor any other filer appealed that grant, nor did the Commission disturb it. Accordingly, the grant is now final. By notification dated December 14, 2015, ACM reported that the parties had consummated the assignment on December 3, 2015.

seeks review of a Bureau decision⁵ dismissing as repetitious his petition for reconsideration of an earlier Bureau decision.⁶ In that earlier decision, the Bureau denied his petition to deny an application to assign the license of KHSE(AM), Wylie, Texas, from ACM to Hammond Broadcasting, LLC (ACM-to-Hammond Application), and granted that application.

2. In both AFRs, Schum argues that the Bureau erred in 2006⁷ in granting the applications (DFW-to-Bernard Applications)⁸ by which Bernard acquired the Stations' authorizations from DFW Radio, LLC (DFW), in whose parent, The Watch Ltd., Schum holds a majority interest.⁹ In the *Bernard-to-ACM Letter Order*, the Bureau dismissed this argument as an impermissible collateral attack on the Bureau's grant of the DFW-to-Bernard Applications.¹⁰ We affirm the Bureau's action and its reasoning, which applies equally in the context of Schum's opposition to the ACM-to-Hammond Application.¹¹ We note that the Bureau's grant nearly ten years ago of the DFW-to-Bernard Applications is final and no longer appealable. As a result, the doctrine of collateral estoppel bars Schum from relitigating any issues resolved during consideration of those applications.¹² Specifically, Schum cannot relitigate the merits of

⁵ *ACM Dallas V LLC and Hammond Broadcasting, LLC*, Letter Order (MB dated April 13, 2016).

⁶ *ACM Dallas V LLC and Hammond Broadcasting, LLC*, Letter Order (MB dated Oct. 8, 2015) (*ACM-to-Hammond Letter Order*).

⁷ *KFCD(AM), Farmersville, TX*, Letter, 21 FCC Rcd 14996 (MB 2006), *recons. denied*, 23 FCC Rcd 2646 (MB 2008).

⁸ See File Nos. BAL-20060117ACU and BAP-20060117ACV.

⁹ Bernard-to-ACM AFR at 3 (arguing Bureau erred "when they granted a license assignment to Bernard," Bernard obtained the Stations' authorizations through "fraud, lack of candor and deceit" and Bureau erred in rejecting Schum's challenge to DFW-to-Bernard Applications as impermissible collateral attack), 4 (asserting that grant of DFW-to-Bernard Applications violated provisions of the Communications Act of 1934, as amended (Act)), 10 (arguing Bureau should not have rejected challenge to DFW-to-Bernard Applications as impermissible collateral attack and asserting grant of DFW-to-Bernard Applications "should be set aside or set for hearing"), 18 (requesting that grant of DFW-to-Bernard applications be designated for hearing); ACM-to-Hammond AFR at 3 (arguing Bernard obtained the Stations' authorizations through "fraud, lack of candor and deceit"), 4 (asserting that grant of DFW-to-Bernard Applications violated provisions of the Act), 6 (arguing DW-to-Bernard Applications "should not have been granted"), 10-11 (arguing Bureau should not have rejected challenge to DFW-to-Bernard Applications as impermissible collateral attack and asserting grant of DFW-to-Bernard Applications "should be set aside or set for hearing"), and 13 (requesting designation of DFW-to-Bernard Applications for hearing). The Commission affirmed the Bureau's grant of the DFW-to-Bernard Applications. *DFW Radio License, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 804 (2014) (*DFW Order*). Schum appealed our decision. His appeal was dismissed. *Schum v. FCC*, Nos. 14-1026 & 14-1027, 2015 U.S. App. LEXIS 16693 (D.C. Cir. Sept. 18, 2015). Schum sought rehearing and rehearing *en banc*. The U.S. Court of Appeals for the District of Columbia denied both of his requests. *Schum v. FCC*, Nos. 14-1026 & 14-1027, 2015 U.S. App. LEXIS 19542 (D.C. Cir., Nov. 9, 2015); *Schum v. FCC*, Nos. 14-1026 & 14-1027, 2015 U.S. App. LEXIS 19540 (D.C. Cir., Nov. 9, 2015), as did the U.S. Supreme Court. *cert denied*, *Schum v. FCC*, No. 15-1844, 136 S.Ct. 1672 (April 16, 2016), *reh'g denied*, 2016 WL 3221759 (Mem), 84 USLW 3674 (June 13, 2016).

¹⁰ *Bernard-to-ACM Letter Order* at 3, 4.

¹¹ In the context of the ACM-to-Hammond Application, Schum makes this argument for the first time in his ACM-to-Hammond AFR. His failure to present the argument to the Bureau constitutes a separate and independent ground for dismissing it in that context. See *infra* para. 4.

¹² *Westel Samoa, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 6342, 6346 para. 13 (1998) (discussing principle of collateral estoppel and explaining it applies when "(1) the identical issue was previously litigated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action"); *RKO General, Inc.*, Memorandum Opinion and Order, 94 FCC 2d 890, 894-95 para. 7 and n.15 (1983) (stating "[i]nvocation of the doctrine of collateral estoppel bars relitigation of the same issues in subsequent proceedings involving the same parties or their

(continued....)

his allegations regarding Bernard's purported failure to fully disclose its ownership in the DFW-to-Bernard Applications,¹³ Bernard's alleged foreign ownership and/or foreign funding,¹⁴ Bernard's claimed premature assumption of control of the Stations,¹⁵ or the purported unauthorized transfer of control of the Station's authorizations in 2009, all of which were rejected by the Bureau and the Commission.¹⁶ Moreover, to the extent Schum raises new objections to the Commission's decision affirming the Bureau's grant of the DFW-to-Bernard Applications, the Commission has long encouraged finality of administrative proceedings, and at least one court has recognized a licensee's strong and legitimate interest in administrative finality.¹⁷ The Commission will not reopen a proceeding absent a showing of fraud on the agency or where the result is unconscionable.¹⁸ Although Schum repeats his longstanding and consistently rejected allegations that the qualifications of a lender before the bankruptcy court were misrepresented and the lender's status as a foreign company improperly was not disclosed to the Commission, he does not invoke this principle of law or provide any evidence to establish the presence of fraud.¹⁹ Accordingly, for these reasons too, we dismiss Schum's arguments related to the DFW-to-Bernard Applications.

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privies"). As set forth in note 9, *supra*, Schum's appeal of the Commission decision on these matters was dismissed, and the Supreme Court declined to hear the case.

¹³ Bernard-to-ACM AFR at 11; ACM-to-Hammond AFR at 11.

¹⁴ Bernard-to-ACM AFR at 8-9; ACM-to-Hammond AFR at 9-10. Schum alleges the Bureau erred in relying upon the declaration that Bernard submitted regarding its compliance with the foreign ownership provisions of the Act. He also asserts that the Bureau erred in allocating the burden of proof under Section 309(d).

¹⁵ Bernard-to-ACM AFR at 13.

¹⁶ Bernard-to-ACM AFR at 14. We take this opportunity to correct an inadvertent oversight by the Bureau in the *Bernard-to-ACM Letter Order*. In 2009, there were not one but two changes in the ownership structure of Bernard. The first change—and the only one discussed by the Bureau—involved a *pro forma* transfer of control of Bernard's sole member. The second change—which was not addressed by the Bureau but appears to be the one at the heart of Schum's allegations—involved the alleged removal of Daniel B. Zwirn from the ownership structure of D.B. Zwirn Special Opportunities Fund, L.P. (Zwirn). Schum's allegations regarding the second change were previously considered and rejected by the Commission in the context of the DFW-to-Bernard Applications. *DFW Order*, 29 FCC Rcd at 821, para. 32 (“[I]t is clear from the record here and from the 2009 *pro forma* transfer application that [Daniel B.] Zwirn's ownership interest in, and his control of, Bernard were not affected by his announcement to investors that he would be winding down the Special Opportunities Funds or by his removal from the Special Opportunities Funds. [Daniel B.] Zwirn is, was, and always has been in control of Bernard, and his beneficial ownership and control of Bernard were not affected by any removal from the Special Opportunities Funds.”). Schum may not relitigate the issue here.

¹⁷ See *California Metro Mobile Communication v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004); *Petition of Radio Para La Raza for Revocation of License of Station KSLV, Monte Vista, Colo.*, Memorandum Opinion and Order, 40 F.C.C.2d 1102, 1104 para. 6 (1973).

¹⁸ See, e.g., *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5018 n.17 (2001), *appeal dismissed sub nom. New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002); *Application of E-String Wireless, Ltd., Assignor, & Martin Broad., Inc., Assignee*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 133, 136 para. 9 (MB 2016).

¹⁹ For example, although Schum alleges that Zwirn lied to the court about the citizenship of a lender, Bernard-to-ACM AFR at 7; ACM-to-Hammond AFR at 7, Schum does not provide transcripts or other evidence of any specific statements that he believes were untrue. Likewise, for reasons stated by the Bureau below, the record does not present a substantial and material question of fact regarding Schum's allegation that Zwirn improperly failed to disclose that an alleged sex offender was an investor in Zwirn. *Bernard-to-ACM Letter Order* at 3 and n.14; *Bernard-to-ACM Reconsideration Order* at 5. While we do not doubt that Schum's loss of his stations in bankruptcy is a serious financial hardship, we do not believe the prior grant of the DFW-to-Bernard application led to an unconscionable result.

3. We likewise dismiss Schum's arguments regarding the claimed failure of both Bernard and ACM to fully disclose their ownership in the Bernard-to-ACM and ACM-to-Hammond Applications and the character issues resulting from such failures.²⁰ Section 5(c)(4) of the Communications Act of 1934, as amended, and Section 1.115(a) of the Commission's rules (Rules) require that, in order to file an application for review, a party must be "aggrieved" by the action of which review is sought.²¹ To make such a showing, a party seeking review must demonstrate a direct causal link between the challenged action and its alleged injury, and show that the injury would be prevented or redressed by the relief requested.²² We find that, with respect to his arguments related to Bernard's and ACM's ownership disclosures in the Bernard-to-ACM and ACM-to-Hammond Applications and their implications on Bernard's and ACM's character qualifications, Schum is not a "person aggrieved" by the Bureau's grant of these applications.²³ Although Schum asserts that he has been a listener of the Stations in the past and therefore asserts that he has standing to file the AFRs,²⁴ he claims that he is aggrieved because, if DFW "fails to recover the licenses for the stations, I would lose the entire net worth of my investment and lost revenue"²⁵ For the reasons set forth above, the grant of the DFW-to-Bernard Applications is final and non-appealable, and Schum has not established a basis for re-opening the proceeding. Thus, even if Schum were to prevail in his effort to invalidate the assignment of the Stations' authorizations to ACM, the licenses would not revert to DFW; they would revert to Bernard. Similarly, if Schum's challenge to the grant of the ACM-to-Hammond Application were successful, the license for KHSE(AM) would go to ACM. In any event, the license for KFCD(AM) will stay with Vikram Shah Broadcasting, Inc., which holds that authorization through an assignment authorized by a final order.²⁶ In sum, Schum's alleged injury therefore would not be redressed by favorable Commission action here. Accordingly, his arguments regarding Bernard and ACM are fatally defective, and we dismiss them.

4. We also dismiss a number of arguments made by Schum for the first time in each AFR. In both, Schum asserts for the first time that the Bureau violated the Fifth Amendment's takings clause when it failed to designate "the applications" for hearing;²⁷ the Bureau erred in certain factual findings;²⁸ and that a foreign entity at one time held not just the right to acquire the Stations' authorizations but

²⁰ Bernard-to-ACM AFR at 11-13, 16-17; ACM-to-Hammond AFR at 3, 11-12. To the extent that Schum makes new allegations about Bernard in the ACM-to-Hammond AFR, his failure to present these allegations to the Bureau constitutes a separate and independent ground for dismissing them in that context. *See infra* para. 4.

²¹ 47 U.S.C. § 155(c)(4); 47 C.F.R. § 1.115(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 application for review which fails to make an adequate showing in this respect will be dismissed.").

²² *K Licensee, Ind.*, Memorandum Opinion and Order, 31 FCC Rcd 841, 842 para. 3 (2016); *Susquehanna Radio Corp. and Whitley Media LLC*, Memorandum Opinion and Order, 29 FCC Rcd 13276, 13277 para. 3 (2014), *recon. denied*, 30 FCC Rcd 13978 (2015).

²³ We further affirm the Bureau's finding that neither Bernard nor Zwirn were parties to the ACM-to-Hammond Application. *ACM-to-Hammond Letter Order* at 3. This constitutes a separate and independent basis for the dismissal of Schum's allegations regarding Bernard and Zwirn in the context of the ACM-to-Hammond Application.

²⁴ Bernard-to-ACM Petition to Deny at 2-3 and Exh. 1; ACM-to-Hammond Petition to Deny at 2 and Exh. 1.

²⁵ *Id.*

²⁶ *See supra* note 4.

²⁷ Bernard-to-ACM AFR at 4, 16; ACM-to-Hammond AFR at 3-4, 13-14.

²⁸ Bernard-to-ACM AFR at 5-6, 14-15; ACM-to-Hammond AFR at 5-6. Schum disputes the Bureau's description of the process by which Bernard acquired the Stations' authorizations from DFW. None of the specific statements that Schum disputes—all of which were made in the background section of the underlying decisions—were material to the Bureau's analysis of the Applications. Accordingly, even if we were to reach the substance of Schum's argument and to find that the Bureau had indeed erred, this would not justify review. 47 CFR § 1.115(b)(2)(iv).

actually held those authorizations.²⁹ In addition, in the ACM-to-Hammond AFR, Schum newly argues that the Bureau erred in granting the Bernard-to-ACM Applications.³⁰ These new arguments are procedurally defective and we accordingly dismiss them.³¹

5. We also reject Schum's attempt to incorporate by reference allegations made in his petitions to deny and petitions for reconsideration.³² The Rules do not allow such incorporation by reference. An application for review must set forth fully the applicant's arguments and all underlying relevant facts.³³

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 5(c)(4) and (5) of the Communications Act of 1934, as amended,³⁴ and Sections 1.115(a), (c) and (g) of the Commission's rules,³⁵ the Applications for Review filed by David A. Schum on May 9, and 13, 2016, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ Bernard-to-ACM AFR at 3 (alleging that Bernard "received an unauthorized assignment from a non-qualified foreign entity"), 7-8 (arguing that the Bureau did not state the process by which the Stations' authorizations were assigned from DFW to a foreign entity, from that entity to a party holding an indirect interest in Bernard, and from that party to Bernard); ACM-to-Hammond AFR at 7-8 (arguing that Bureau did not state the process by which the Stations' authorizations were assigned from DFW to a foreign entity, from that entity to a party holding an indirect interest in Bernard, and from that party to Bernard).

³⁰ ACM-to-Hammond AFR at 6 (arguing that "[n]one of the transfers involving Bernard[] should have been granted"), 11 (arguing grant of the Bernard-to-ACM Applications "should be set aside or set for hearing"), 14 (urging Commission to vacate or otherwise reverse grant of Bernard-to-ACM Applications).

³¹ 47 CFR § 1.115(c). We note that Schum failed to explain the basis for his bare assertion that the Bureau violated the Fifth Amendment's takings clause and that this forms an alternative and independent basis for dismissing that claim. *Red Hot Radio*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004) (*Red Hot Radio*) ("[T]he burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the AFR."). Schum made this unsupported contention again despite the fact that the Commission previously dismissed the same claim for this same reason in the context of the DFW-to-Bernard Applications. *DFW Order*, 29 FCC Rcd at 813 para. 20. We also note that it is unclear but appears likely that the applications to which Schum refers are the DFW-to-Bernard Applications. See Bernard-to-ACM AFR at 16. To the extent that is the case, the findings in paragraph 2 apply.

³² Bernard-to-ACM AFR at 6, 11, 13; ACM-to-Hammond AFR at 6, 11, 13.

³³ *Red Hot Radio*, 19 FCC Rcd at 6745 n.63 ("Such incorporation by reference is not allowed under our rules. Our rules do not allow for a 'kitchen sink' approach to an AFR, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the AFR.").

³⁴ 47 U.S.C. § 155(c)(4), (5).

³⁵ 47 CFR § 1.115(a), (c), (g).