

No. _____

In the Supreme Court of the United States

PRESS COMMUNICATIONS, LLC,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Communications Act strictly limits broadcast licenses to eight year terms unless they have filed a license renewal application. These term limits permit periodic review of the performance of licensees and the disenfranchisement of licensees who fail to serve the public interest. The FCC has adopted a policy of extending license terms indefinitely by continuing to vest licensees with all of the rights of licensees until such time as the FCC affirmatively “cancels” the expired licenses. Can a Federal administrative agency circumvent a statutory licensing framework established by Congress by recognizing pseudo-licenses?

PARTIES TO THE PROCEEDING

The parties before the United States Court of Appeals for the District of Columbia Circuit were (i) the Petitioner, Press Communications, LLC, (ii) the Respondent, the Federal Communications Commission (FCC), and (iii) Intervenor below, Atlantic City Board of Education.

RULE 29.6 DISCLOSURE STATEMENT

Press Communications, LLC is a Delaware limited liability company. The company is not publicly traded, has no parent companies, and no publicly traded company holds 10% or more of its membership shares.

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PETITION FOR WRIT OF CERTIORARI**OPINIONS BELOW**

The order of the FCC's Media Bureau was released on October 9, 2015 and is reported at *Atlantic City Board of Education*, 30 FCC Rcd 10583 (MB 2015). App.37 The FCC's decision on review of that order was released on August 9, 2016 and is reported at *Atlantic City Board of Education*, 31 FCC Rcd 9380 (2016). App. 20 The opinion of the D.C. Circuit was entered on November 21, 2017 and is reported at *Press Communications, LLC. v. Federal Communications Commission*, No. 16-1290, Nov. 21, 2017. ("*Press v. FCC*") App. 1

JURISDICTION

The D.C. Circuit's judgment was entered on November 21, 2017. This case is therefore timely filed under Rule 13 of this Court's rules. The Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The Appendix reproduces 47 U.S.C. §§ 301, 307(c) and 309(h) and (k).

STATEMENT OF THE CASE

This cases starkly poses the question of whether an administrative agency can deliberately subvert a federal statutory licensing scheme based on fixed license terms by treating expired licenses as indefinitely retaining license-like rights until the licenses are affirmatively cancelled by the agency. The

Communications Act¹ (the “Act”) unequivocally and repeatedly stresses that broadcast licenses are limited to eight years and that no rights whatsoever are retained after the expiration of such licenses. Yet the Federal Communications Commission (FCC) has adopted a policy of treating expired licenses as retaining virtually all rights associated with licenseeship until years after the licenses have expired. This policy in this case prevented petitioner Press Communications, LLC (“Press”) from changing its transmitter site so as to improve its own service with no adverse effect on any other licensed operator. Of more fundamental and far reaching importance, the FCC’s policy represents a serious usurpation of the fundamental power of Congress to establish the ground rules that the agencies it has created must adhere to in carrying out their administrative functions. The substitution of the FCC’s own conflicting policy for the command of Congress upsets the fixed Constitutional and legislative framework under which limited powers are delegated to agencies to administer laws in accordance with legislative mandates. Review by the Court is necessary to re-establish the absolute primacy of Congress over federal agencies in the regulatory hierarchy.

This case arises from a relatively routine procedure whereby broadcast licensees can request rearrangement of their channels and the channels assigned to neighboring stations in order to accommodate improvements in service. The details of how that process works are not critical to the issue

¹ Communications Act of 1934, as Amended, 47 U.S.C. §§ 151 et seq.

presented here, but we must pause briefly to provide the context for the issue in dispute. Station WBHX is an FM radio station which is licensed to the small community of Tuckerton on Long Beach Island off the coast of New Jersey. WBHX is licensed to Press Communications, LLC (Press), the petitioner here. In 2010, Press was advised by its tower site lessor that its site was being put up for sale and the transmitter site lease might no longer be available. Press explored other sites, but no other feasible sites were available on the island. Press accordingly filed an application to modify its license so as to permit it to operate from a mainland-based site. This site would not only be less susceptible to hurricane damage and flooding but would also double the service area and potential listening audience of the station.

Because radio stations on the East Coast are relatively closely packed and must protect nearby stations from interference, Press could only accomplish this move by initiating the channel rearrangement process: WBHX's channel would be swapped with the channel of a station in Pleasantville, NJ (WZBZ). Of particular significance here is the fact that the channel that WZBZ would be assigned under the proposed modification would have been impermissibly close (or "short-spaced," in the terminology used by the FCC) to the previously authorized facilities of a station (WAJM) whose license had expired four years earlier without any renewal application being filed. Under the terms of the Act, that license no longer existed. Press therefore did not consider that license in the universe of stations whose contours require protection under the channel reassignment process. The importance of that core and central issue will be discussed below. Press filed an

application proposing this rearrangement of channels in August of 2010.

While this simultaneous swapping of licenses might appear complicated, it is a process well established in the Commission's rules and procedures. The proponent of such a plan must pay for the technical and other costs incurred in connection with the modification of the channel of the other party. At the end of the day, the other licensee must have as good or better facilities than it had before, at no cost to itself, and the proponent ends up, as would have happened in this case, with more secure service to a significantly larger audience. The FCC has, understandably, deemed such channel changes to be in the public interest.

About a month after Press filed its application, the former licensee of WAJM submitted a renewal application – over four years after the deadline for filing such an application. It cited only “administrative oversight” for this failure to seek the renewal of its license within the time prescribed by the Commission's rules. It did not even bother to seek a waiver of the rule that requires renewal applications to be filed four months before the subject license expires. It turned out that the station had continued to operate unlawfully since its license had expired. Moreover, the station had been guilty not only of operating without a license for all those years, but also of violating a number of other FCC regulations in the course of those operations. The station admitted that since 2001 it had committed serious and repeated violations of the FCC's rules, that it had failed to correct those violations upon their discovery even when admonished by the FCC to do so, and that it “demonstrated a reckless disregard of its

responsibilities as a Commission licensee.” *Atlantic City Board of Education*, Order and Consent Decree, 30 FCC Rcd. 10583, 10591 (MB 2015) (“*Media Bureau Order*”). App. 55 Though the FCC’s Media Bureau found this undisputed constellation of ongoing violations to be “significant,” the Bureau administered only a ceremonial tap on the former licensee’s wrist by imposing a \$6,250 fine while at the same time granting a “renewal” of the license which had ceased to exist nine years earlier. *Ibid.* at 56-57.

Press had objected to the processing of this grossly late-filed renewal application on several grounds. First, once the WAJM license had expired without a timely renewal application being filed, there was no cognizable interest left to protect from competing applications. Second, even if there were a protectable interest to be considered, FCC’s “cut-off” rules precluded the acceptance of the WAJM renewal application which was inconsistent with the application that Press had filed a month before WAJM’s application. (In the FM service, the filing of a minor modification application “cuts off” the filing of a later application which is mutually exclusive with the earlier filed one. 47 C.F.R. § 73.3573(f). The Bureau nevertheless ruled that, irrespective of the Act’s strict license term limits, under longstanding Commission policy the former WAJM license was entitled to protection from inconsistent filings despite its non-licensed status. *Media Bureau Order* at 10585. App. 43-44 It also indicated briefly that some sort of waiver of the short-spacing rules had to be requested with respect to the channel change of WZBZ because that change would be impermissibly close to another station. App. 45 But WZBC was *already* short-spaced

to that other station. Press's proposed new arrangement would simply maintain precisely the same degree of short-spacing as the FCC had previously approved, leaving WZBZ no worse off after the change. Under the FCC's established procedures, maintaining the same amount of short-spacing adequately deals with such a situation and no waiver must be specifically requested.² However, the Bureau suggested (without citing any authority for the proposition) that in situations where a short-spacing proposal requires the *involuntary* relocation of another station, as was the case here, a waiver request was expressly required. App. 45-46 This distinction between voluntary and involuntary relocations had never been articulated by the Commission before and there is no apparent reason for the distinction. The Bureau nevertheless dismissed Press's application both for not protecting the nonexistent license that had belonged to WAJM and for not expressly requesting a waiver. *Ibid.* at 10585-6.

Upon timely appeal to the full Commission, the Commission reviewed and affirmed the Bureau's articulation of the longstanding policy of vesting licensees with the protected status of licensees even long after their licenses have expired. *Atlantic City Board of Education*, 31 FCC Rcd 9380 (2016) ("*FCC MO&O*"). App. 20 The FCC explained that its policy provides expired stations with protection from

² *Fremont and Holton, Michigan*, Report and Order, 14 FCC Rcd 17108 (1999); *Joliet and Lemont, Illinois*, Report and Order, 22 FCC Rcd 12915 (Audio Division 2007); *Fishers, Lawrence, Indianapolis and Clinton, Indiana*, Rulemaking, 20 FCC Rcd 4303 (Audio Division 2005).

competing applications, “thus avoiding disruption in service to the public.” *Id.* at 9384. App. 26-33 The Commission also summarily upheld the Bureau’s treatment of the waiver issue. *Id.* at 9385. App. 33 The FCC’s policy here is inexplicably inconsistent with the policy upheld by the D.C. Circuit in *Eagle Broadcasting Group, Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009). There the FCC and the court ruled that a broadcast licensee’s license was subject to automatic cancellation for failure to transmit signals for a twelve month period, as required by Section 312(g) of the Act. The licensee had actually continued to broadcast but from an unauthorized location. The court held that “[un]licensed radio transmissions are not recognized under the Act.” *Id.* at 552. The paradoxical result is that a licensed station which operates from a location other than its authorized site has its license cancelled, while a station with no license at all operates for years and is not only not cancelled but is fully protected from competing applications.

On appeal to the D.C. Circuit Court of Appeals, the court focused almost exclusively on the issue of whether a waiver request with respect to the short-spaced station was required but had not been requested. It found that such a waiver request was indeed required and therefore it did not address the thornier issue of whether the Commission’s treatment of expired licenses is contrary to the statute. *Press Communications, LLC. v. Federal Communications Commission*, No. 16-1290, pp. 14-15, Nov. 21. 2017. App. 16 The circuit court’s sidestepping of any review of the FCC’s policy of indefinitely extending licenses, however, was erroneous. It left unresolved the key issue presented which determines the ultimate

outcome of this case. The waiver matter on which it solely rested its decision can be resolved easily by Press simply refiling the application and explicitly requesting a waiver of the short-spacing rule. No one, including the Commission, has at any time suggested that such a waiver would not have been granted if requested.³ But by leaving intact the Commission's unlawful grant of a renewal of an expired license, the court left WAJM as a permanent barrier to Press's ability to relocate its station from the island home from which it has now been expelled. The FCC's action therefore permanently disenfranchises Press, an innocent decades-old broadcaster, from being able to relocate its station to a viable site, while rewarding and entrenching a station that repeatedly and seriously violated the law and forfeited by "oversight" any right it should have had to maintain its licenseeship.

Press does not propose to address here whether or not a waiver request was required. While that issue was wrongly decided by the court of appeals, it is a matter that can be rectified by refiling below. Of broader significance is the Commission's flatly articulated policy that broadcast licenses effectively do not expire by their terms at the end of eight years, as explicitly ordained by Congress, but instead survive indefinitely for years and years after the expiration date unless and until the FCC affirmatively declares the licenses cancelled. The court's failure to address the extended license issue permanently bars Press from

³ The Bureau itself in the course of its review of the Press application never suggested until its Order that a waiver request was required, despite identifying early on other easily correctible deficiencies in the application, as is its policy.

being able to relocate its station. Access to broadcast licenses is a unique and valuable privilege which Congress was at pains to restrict very narrowly to terms of precisely limited duration. The FCC's policy of extending license terms impedes Press from having an opportunity to save and improve its own station. It also prevents other licensees from improving their service contours because they have to protect phantom stations which survive only in the FCC's regard without any color of statutory right. Because the FCC's approach directly, routinely and flagrantly violates the terms of the Communications Act and does so as a matter of consistent FCC policy, action by this Court is necessary to restore compliance with the statutory scheme.

REASONS FOR GRANTING CERTIORARI

A. The Communications Act Expressly Bars the Treatment Accorded to WAJM Below.

In exceptionally clear language, Congress has unambiguously limited the length of a broadcast license to a maximum of eight years:

Each license granted for the operation of a broadcasting station ***shall be*** for a term of ***not to exceed 8 years***.

47 U.S.C. § 307(c)(1) (emphasis added). App 69 While the Act permits the FCC to grant licenses for *less* than eight years, eight years is the absolute limit. For most of the life of the 1934 Act, the outer term of a broadcast radio license was set at three years. Congress lengthened that term limit to seven years, and then eight in 1996. But whether three years or eight, the Act has consistently reflected the considered judgment of Congress that broadcast licenses are to be of a fixed

duration that would permit (i) periodic evaluation of the performance of licensees in serving the public interest and (ii) concomitant opportunities for new licensees to take the reins if the incumbent failed to meet the prescribed standards.⁴ Non-broadcast radio license terms are not subject to these strict term limits, again underscoring the Congressional concern that broadcast license terms be strictly circumscribed.

Reinforcing this limitation, Section 301 of the Act, 47 U.S.C. § 301, mandates that no FCC-issued license “shall be construed to create any right, beyond the terms, conditions, and periods of the license.” App. 67 That is to say, a licensee does not even have any license-*like* rights after the expiration of its license. When a license expires, the licensee has no rights at all stemming from the now non-existent license. To emphasize this point yet another time, Congress enacted Section 309(h) of the Act, 47 U.S.C. § 309(h), which requires that each license issued by the FCC shall contain a statement confirming that

the license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

App. 70 This language is contained in every license issued by the FCC. Congress obviously went to considerable statutory effort to convey not only its clear will that broadcast licenses should not exceed eight years in length but also its command that a license

⁴ *Broadcast License Terms*, 12 FCC Rcd 1720 (1997).

should not be construed to vest *any rights at all* in a licensee once that term limit has expired.

The Act specifies only one circumstance in which a license (and any rights associated therewith) may extend for more than eight years: Section 307(c)(3) provides that, where a licensee has filed an application for renewal of its license, the license remains in effect until final action on that application. 47 U.S.C. § 307(c)(3). App. 70 Thus, if a license expires and no renewal application has been filed, Section 307(c) (together with Sections 301 and 309(k)) dictates that the former licensee can have no further rights flowing from its expired license.

In its action below, the Commission violated this clear statutory direction.

It is undisputed that the WAJM license expired on June 1, 2006, and that the licensee of WAJM had, as of that date (and for more than four years thereafter), failed to file an application for license renewal. That being the case, in August, 2010, the Commission was statutorily barred from according it any rights of any sort emanating from the expired license. The Commission nevertheless dismissed the Press application – filed a month *before* the eventual WAJM renewal application – because the Press application failed to protect the “existing license[]” of WAJM. *FCC MO&O* at 9383. App 29.

But when the Press application was filed, WAJM could not have had any “existing license” or any related rights because Congress had expressly barred not only any extension of its license beyond its expiration date (which, in the case of WAJM, was June 1, 2006) but

also the recognition of any pseudo-rights, penumbras, vestiges or simulacra of rights that might be construed to linger on indefinitely after expiration. Yet this is *precisely* what the Commission did here. Under any *Chevron I*⁵ analysis of the Commission's action, the action is patently unsustainable. When Congress has spoken directly to the precise question in issue and its intent is clear, "that is the end of the matter." *Id.* The failure by the FCC to extinguish any and all rights held by the former licensee of WAJM is therefore as clear a violation of the Act as is imaginable.

B. The FCC Policy of Extending License-Like Rights to Former Licensees Fundamentally Subverts the Statutory Licensing Scheme.

It is apparent that the FCC's action was erroneous on its face, yet the D.C. Circuit Court avoided reversing an established FCC policy in part because the FCC had indicated that it plans to start sending reminders to licensees at renewal time to cut down on the number of instances where revival of expired licenses is necessitated.⁶ But the FCC proposed no change in the current policy that it followed here. Instead the Commission unabashedly declared that it is its policy to extend quasi-license rights to former licensees. It routinely extends broadcast license rights beyond the eight-year statutory limit pursuant to a "consistent practice" that "treats a broadcast license as having been cancelled only after [the Bureau] has issued a

⁵ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984)

⁶ *Press v. FCC*, at 14.

letter, public notice, or both, affirmatively stating that the license has been cancelled.” *FCC MO&O* at 9384-5. (App. 28). A license which has expired therefore continues to have some sort of quasi-vitality until it is “cancelled.” In the Commission’s view, an expired license lives on indefinitely, zombie-like, unless and until the FCC drives a stake into its heart by declaring it “cancelled” (after which the zombie licensee still has 30 days in which to seek reconsideration of the cancellation). During this post-expiration/pre-“cancellation” period, the station is technically not authorized to operate, but it typically does continue to operate and is otherwise, in the FCC’s view, entitled to all of the protections of a licensed station.

These quasi-license extensions are not trivial. The FCC proudly recited instances of licenses that had been reanimated as much as four, five or even seven years after their statutory expiration dates. *Id.* at footnote 21. In one case cited by Press, a station’s license was renewed more than *twenty* years after it had expired.⁷ There is apparently no limit to how long these quasi-license rights can endure, but, as here, a former licensee needs only to recite “administrative oversight” as an excuse for failing to file its license renewal on time and all rights are quickly restored, even to the detriment of innocent third parties who have properly and timely filed applications in the meantime.

The Commission’s fanciful conception that it can keep a license in suspended animation simply by not “canceling” it is contrary to the Act. Nothing in the Act gives the FCC any discretion to “cancel” or not “cancel”

⁷ *Barracuda Broadcasting, Inc.*, Letter, September 28, 2010.

an expired license. A license expires automatically by its own terms. The language of the Act is unequivocal: a broadcast license may not extend beyond eight years (absent a pending renewal application). Since, according to the Act, a licensee holds only those rights set out in the license and only for the term specified in the license, once the license expires so too do any and all ancillary rights that might be associated with the license – including, in particular, any right to be protected from mutually exclusive applications.

The FCC's unapologetic arrogation to itself of the right to effectively extend broadcast licenses indefinitely is more than an agency caprice. It goes to the very heart of the licensing scheme adopted by Congress. That scheme depends on strictly fixed license terms and the associated opportunity to remove miscreant licensees like WAJM and replace them with licensees who will better serve the public interest. Here the FCC's policy shielded WAJM for 4½ years from any examination of its repeated failures to obey the FCC's rules, prevented other parties who might have challenged the licensee's qualifications to remain a licensee from having the opportunity to timely present such a challenge, and blocked third parties from being able to improve their signal coverage and service to a large segment of the public. This Court has made it clear that administrative agencies are bound to heed clearly expressed Congressional mandates and have no discretion to do otherwise. See, e.g., *National Home Builders Association v. Defenders of Wildlife*, 551 U.S. 644 (2007). And Congress itself has reminded the FCC that it cannot substitute its own will for that expressed by Congress:

“[A]s a creature of Congress, the Commission must obey the directives of its creator, and it is not for the FCC to presume legislative intent when Congress clearly mandated that an action be taken, or to refuse to take an action because it felt that Congress had not passed the precise lottery statute it wanted.”

Conference Report on Communications Act Amendments of 1982, H. Rep. No. 97-765, 97th Cong., 2d Sess. 23-24 (1982). That same principle must apply here.

In another context, this Court has suggested that judicial review may be warranted when an administrative agency has “consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” *Heckler v. Chaney*, 470 U.S. 821, 833, n.4 (1985), citing *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Here the FCC makes no bones about having established and implemented for many years a policy of granting what are effectively indefinitely long license terms. The FCC has simply elevated its own judgment about the importance of preserving “continuity of service” over the scheme which Congress adopted and which the FCC is charged with enforcing. By adopting and implementing a policy that directly contravenes the Congressional enactment, the FCC has so far overstepped the boundaries of its authority as to amount to an abdication of its statutory responsibilities. The broadcast medium remains the single most powerful voice for mass communications in this country, and a deliberate and continuing

subversion of the licensing policy established by Congress should not be left unreviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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