DAVID ALAN SCHUM v. FCC

Petition for a Writ of Certiorari

INDEX OF APPENDICES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2016**

FCC-16-126

Filed On: July 7, 2017

David Alan Schum,

Appellant

v.

Federal Communications Commission,

Appellee

ON APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Tatel, Brown, and Wilkins, Circuit Judges

JUDGMENT

This appeal of an order of the Federal Communications Commission was considered on the briefs filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). Upon consideration of the foregoing and appellant's motion to supplement the record on appeal, the corrected response thereto, and the reply, it is

ORDERED that the motion to supplement the record be granted with respect to the materials cited by the appellant to support his standing claim. See Sierra Club v. EPA, 292 F.3d 895, 899 (D.C. Cir. 2010); D.C. Cir. Rule 28(a)(7). The motion is otherwise denied. It is

FURTHER ORDERED AND ADJUDGED that the appeal be dismissed for lack of standing. The appellant has not alleged facts demonstrating that the appellee has caused him an injury in fact that is redressable by the court, which are the "irreducible constitutional minimum" requirements for standing. Ranger Cellular v. FCC, 348 F.3d 1044, 1048-49 (D.C. Cir. 2003) (quoting Bennett v. Spear, 520 U.S. 154, 167 (1997)). This court previously held that the appellant lacked standing to challenge a prior assignment of the two radio station licenses at issue, Schum v. FCC, 617 F. App'x 5 (D.C. Cir. 2015) (per curiam), and he likewise lacks standing to challenge the subsequent assignments at issue here.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2016**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2016**

FCC-16-126

Filed On: January 9, 2017 [1654643]

David Alan Schum,

Appellant

v.

Federal Communications Commission,

Appellee

ORDER

It appearing that this case might be suitable for disposition without oral argument, see Fed. R. App. P. 34(a)(2) and D.C. Cir. Rule 34(j), it is

ORDERED, on the court's own motion, that the following briefing schedule will apply in this case:

Appellant's Brief	March 9, 2017
Appendix	March 9, 2017
Appellee's Brief	April 10, 2017
Appellant's Reply Brief	April 25, 2017

This order does not preclude the court, after examining the briefs, from setting this case for oral argument. If the court resolves to decide the case without oral argument, an order will be issued disclosing the panel prior to issuance of a decision on the merits. All parties should include the following phrase on any subsequent pleading or brief filed in this case: "CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE COURT'S RULES."

All issues and arguments must be raised by appellant in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

A request for appointment of counsel does not relieve appellant of the obligation to file responses to any motion filed by appellee or to comply with any order issued by the court, including a briefing schedule. Failure by appellant to respond to a dispositive

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2016**

motion or comply with any order of the court, including this order, will result in dismissal of the case for lack of prosecution. See D.C. Cir. Rule 38.

The court reminds the parties that

> In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

To enhance the clarity of their briefs, the parties are cautioned to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Procedures 41 (2016); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail could delay the processing of the brief. Additionally, parties are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a).

The Clerk is directed to send a copy of this order to appellant by certified mail, return receipt requested, and by first class mail.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2016**

FCC-16-126

Filed On: June 23, 2017

David Alan Schum,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Tatel, Brown, and Wilkins, Circuit Judges

ORDER

The court concludes, on its own motion, that oral argument will not assist the court in this case. Accordingly, the court will dispose of the appeal without oral argument on the basis of the record and the presentations in the briefs. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j).

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1376 **September Term, 2017**

FCC-16-126

Filed On: September 28, 2017

David Alan Schum,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Tatel and Wilkins, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

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	)	File Nos. BAL-20150408AAC BAL-20150408AAD Facility ID Nos. 43757, 133464
	)	
and	)	
	)	
ACM Dallas V LLC, Assignor, and Hammond Broadcasting , LLC, Assignee,	)	File No. BAL-20150506ACF Facility ID No. 133464
	)	
Application for Assignment of License for Station KHSE(AM), Wylie, Texas	)	

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) decision[2] 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 decision[5] 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 2006[7] 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

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[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.

(Continued from previous page)
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

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[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).

Federal Communications Commission
Washington, D.C. 20554

December 28, 2006

DA 06- 2607
In Reply Refer To:
1800B3-ALV
Released: December 28, 2006

David A. Schum
DFW Radio License, LLC
P.O. Box 12345
Dallas, TX 75225-0345

Daniel B. Zwirn
Bernard Dallas LLC
745 Fifth Avenue
18th Floor
New York, NY 10151

Re: KFCD(AM), Farmersville, TX
Facility ID No. 43757
File No. BAL-20060117ACU

KHSE(AM), Wylie, TX
Facility ID No. 133464
File No. BAP-20060117ACV

Application for Assignment of Licenses

Dear Applicants:

We have before us the above-captioned application (the "Assignment Application") proposing to assign the license of Station KFCD(AM), Farmersville, Texas, and the construction permit of Station KHSE(AM), Wylie, Texas, from DFW Radio License, LLC ("DFW Radio") to Bernard Dallas LLC ("Bernard"). We also have before us a Petition to Deny ("Petition"), filed February 23, 2006, by nine investors in Stations KFCD(AM) and KHSE(AM) (the "Petitioners").[1] For the reasons stated below, we deny the Petition and grant the Assignment Application.

Background

On February 5, 2004, The Watch, Ltd. ("Watch"), the former licensee of KFCD(AM) and permittee of KHSD(AM), and D.B. Zwirn Special Opportunities Fund, L.P. ("DBZ") entered into a Financing Agreement (the "Agreement") whereby DBZ provided a loan to Watch to facilitate Watch's

[1] Petitioners are David A. Schum, J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders, and Richard J. Drendel. Bernard filed an Opposition to the Petition on March 8, 2006, to which the Petitioners filed a Reply on March 16, 2006.

emergence from Chapter 11 bankruptcy,[2] operation of KFCD(AM), and construction of KHSE(AM). The Agreement also provided for the assignment of the KFCD(AM) license and KHSE(AM) permit to DFW Radio, a wholly-owned subsidiary of Watch.[3]

In the spring of 2005, DBZ notified Watch and DFW Radio (Watch and DFW Radio, collectively, the "Debtors") that they were in default under the Agreement and demanded full payment of all obligations.[4] Subsequently, on May 25, 2005, DBZ filed for the appointment of a receiver in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court").[5] The Debtors simultaneously filed for relief and reorganization under Chapter 11 of the Bankruptcy Code.[6] On May 27, 2005, DBZ filed a motion to appoint a Chapter 11 trustee for the bankrupt companies or, in the alternative, to convert the case to a Chapter 7 liquidation ("Chapter 11 Motion").

The Debtors and DBZ subsequently agreed to resolve the Chapter 11 Motion on the following terms and conditions, memorialized by a June 23, 2005, Order of the Court:[7] (1) the Debtors were authorized to obtain additional financing from DBZ to construct KHSE(AM);[8] (2) the loan proceeds were to be "advanced to or as directed by W. Lawrence Patrick ["Patrick"], the Debtors' proposed Media Broker";[9] (3) Patrick was authorized to supervise construction, employ a superintendent of construction, and market KFCD(AM) and KHSE(AM) for sale;[10] and (4) prior to September 20, 2005, David A. Schum ("Schum"), the sole manager of DFW Radio and one of the Petitioners, was allowed to seek third-party refinancing and thus halt the sales process.[11]

Schum was unable to obtain third-party refinancing, and the Court mandated that the Debtors' assets be sold at a public auction. At the October 13, 2005, public auction, the Debtors received bids

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[2] *See In re Renaissance Radio, Inc.*, Case No. 03-33479-BJH-11. Renaissance Radio, Inc. ("Renaissance") is the former owner of KFCD(AM) and KHSE(AM). Pursuant to Renaissance's Chapter 11 plan of reorganization, the stations were assigned from Renaissance to Watch, a newly-formed and commonly-controlled partnership. *See* BAL-20031126ATD, ATE (consummated February 5, 2004).

[3] On May 17, 2004, the Commission granted an application to assign the station authorizations from Watch to DFW Radio. *See* BAL-20040305ACG, ACH (consummated June 1, 2004).

[4] *See* Petition at 5; Opposition at 3.

[5] *See* "Plaintiff's Original Petition and Application for Appointment of a Receiver," attached as Exhibit B to Opposition.

[6] *See In re The Watch, Ltd, et al.,* Case Nos. 05-35892-BJH-11 and 05-35874-BJH-11. On January 5, 2006, the Commission granted an application to assign the license for KFCD(AM) and the construction permit for KHSE(AM) from DFW Radio to DFW Radio License, LLC, Debtor-in-Possession. *See* BAL/BAP-20050713ABE, ABF. DFW Radio has not yet notified the Commission that the assignment has been consummated.

[7] *See* "Agreed Order Regarding Emergency Motion to Appoint Chapter 11 Trustee or, in the Alternative, to Convert Case to Chapter 7," dated June 23, 2005, Case No. 05-35874-BJH (the "June 23, 2005, Order"), attached as Exhibit A to Opposition.

[8] *Id.* at ¶ 1.

[9] *Id.*

[10] *Id.* at ¶¶ 1-2.

[11] *Id.* at ¶ 4. *See also* Court's July 20, 2005 "Rights Order Pursuant to Stalking Horse Designation Procedure and Other Bid Procedures," attached as Exhibit E to Opposition.

from six separate bidders. Attorneys for the Debtors designated DBZ as the successful bidder with its highest credit bid, and on December 5, 2005, the Court reviewed the marketing and sales procedures and approved the sale of the Debtors' assets to DBZ.[12] DBZ subsequently assigned its purchase rights to Bernard, its newly-formed affiliate, and on January 17, 2006, the parties filed the subject application seeking Commission consent to assign the license for KFCD(AM) and the permit for KHSE(AM) from DFW Radio to Bernard.

The Petitioners object to the grant of the Assignment Application on four grounds. First, the Petitioners allege that the auction sale to DBZ amounts to "the attempted sanctioning of a reversionary interest"[13] in violation of Section 73.1150 of the Commission's Rules (the "Rules").[14] Second, the Petitioners contend that DBZ prematurely assumed control of the construction of KHSE(AM) in violation of Section 310(d) of the Communications Act of 1934, as amended (the "Act").[15] Third, the Petitioners assert that DBZ threatened Schum with legal action when Schum attempted to exercise control over the KHSE(AM) construction, and thus abused the Commission's processes. Finally, the Petitioners state that Bernard failed to disclose fully the ownership information of DBZ, its principal equity owner, and that DBZ may not comply with the Commission's foreign ownership limitations.[16]

Discussion

Standing. Petitioners are nine equity owners of Watch, the parent company of DFW Radio. Petitioners claim standing to file the Petition based upon their assertions that: (1) the majority of the Petitioners live in the primary service areas of Stations KFCD(AM) and KHSE(AM) and have been, or will be, listeners of the stations; and (2) all of the Petitioners will lose their investments in the stations and suffer "severe economic harm" if the Commission grants the Assignment Application.[17] Bernard counters that the Petitioners lack standing, and the Petition should be denied, because: (1) the Petitioners make no claim regarding programming on KFCD(AM) and "cannot possibly be listeners of KHSE – a just-constructed station that ... is still awaiting a grant of program test authority";[18] and (2) Petitioners have not shown how denying the Assignment Application would prevent the alleged economic harm from occurring.[19]

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[12] On December 27, 2005, the Court entered its written order approving the sale of the assets to DBZ. *See* December 27, 2005, Court "Order (A) Approving Sale Free and Clear of Certain Liens, Claims, Rights, Interests and Encumbrances to Zwirn Special Opportunities Fund, L.P. or Its Designee and (B) Granting Requested Relief," attached at Exhibit 10 to Assignment Application (the "December 27, 2005, Order").

[13] Petition at 6.

[14] 47 C.F.R. § 73.1150.

[15] 47 U.S.C. § 310(d).

[16] *See* 47 U.S.C. § 310(a-b).

[17] Petition at 2-3.

[18] Opposition at 5.

[19] *Id.* at 6. According to Bernard, "were the application denied, the Petitioners would not recoup their 'investments'; rather, the companies' assets would remain part of the bankruptcy estate and be used to satisfy the debts owing to creditors." *Id.*

stating that actions with respect to construction should be taken through the debtors' court-appointed professionals.[41]

Initially with regard to this allegation, it is unclear how the communication in any way involves, let alone abuses, Commission processes. Moreover, even were we to consider the September 9, 2005, e-mail to be tangentially related to Commission processes, we find that there is nothing objectionable about it. The Commission has stated that abuse of process is a "broad concept that includes use of Commission process to achieve a result that the process was not intended to achieve, or use of that process to subvert the purpose the process was intended to achieve."[42] In its Order on character qualifications, the Commission further defined "abuse of process" as "serious willful misconduct that directly threatens the integrity of the Commission's licensing processes."[43]

We find no merit to the allegation that DBZ was committing an abuse of the Commission's processes. The e-mail sent by DBZ's counsel was not an improper threat, but rather a good faith effort to protect DBZ's financial interest and ensure construction of the station.[44] DBZ was acting in accordance with the Court Order, and its actions neither evidence an improper motive nor subvert Commission processes. Accordingly, we reject the argument that DBZ's "threat" amounted to an actionable abuse of Commission processes.

Foreign Ownership. Finally, the Petitioners assert that Bernard failed to disclose ownership information about DBZ, its principal equity owner, and there is thus "no way of objectively knowing (other than taking Zwirn's word for it)"[45] whether Bernard complies with the foreign ownership restrictions of Section 310 of the Act.[46] In its ownership exhibit to the Assignment Application, Bernard certified that DBZ, which holds the majority of the equity, but no voting interest, in Bernard's parent company is "insulated from involvement in the LLC's media enterprises pursuant to FCC requirements"[47]

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[41] *See* Exhibit J to Opposition. The September 9, 2005, e-mail, from counsel for DBZ to counsel for Watch, reads as follows:

> Although having Schum's input on certain matters is helpful, I don't believe it is appropriate for him to contact the FAA, the FCC, or any other agency directly. The Debtors need to take actions through their court-appointed representatives. If Schum feels that communication is necessary, he needs to come through you . . . This type of direct communication is not appropriate and is in direct violation of the Court's Order. Please let Dave know that this type of conduct is improper, and that future violations will be addressed with the Court.

[42] *See In The Matter of Saga Communications of New England, Inc.*, Notice of Apparent Liability, 19 FCC Rcd 2741 (EB 2004); *Ronald Brasher*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, 15 FCC Rcd 16326, 16331 (2000) (citing *Broadcast Renewal Applicants*, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd 5179, 5199 n.2 (1988)).

[43] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1211 (1986).

[44] *See Fort Collins Broadcasting Co., Inc.*, Memorandum Opinion and Order, 38 FCC 2d 707, 711-12 (1972) (Commission found that the licensee was not committing an abuse of process, but was simply "acting like any other potential litigant [who] believed in good faith that it could advise [petitioner] that it might file suit").

[45] Reply at ii.

[46] 47 U.S.C. § 310(a-b).

[47] *See* Assignment Application at Attachment 11. According to Bernard, the LLC agreement of its parent company, Bernard Radio LLC, contains provisions insulating DBZ from involvement in media-related activities.

and thus exempt from attribution.[48] Moreover, Bernard certified in the Assignment Application that it complies with the alien ownership restrictions and subsequently submitted a declaration, under penalty of perjury, from Steven F. Campbell, a Vice President of DBZ, attesting that "[t]here is no direct or indirect foreign equity or voting ownership in Bernard Dallas LLC. This includes equity investments in D.B. Zwirn Special Opportunities Fund, L.P., an insulated member of Bernard Dallas's direct parent."[49] The Petitioners present no rebuttal evidence, and we thus reject their speculative foreign ownership allegations.

Conclusion

Based on the evidence presented in the record, we find that the Petitioners have not raised a substantial and material question of fact warranting further inquiry. We further find that Bernard Dallas LLC is qualified as an assignee and that grant of the Assignment Application is consistent with the public interest, convenience, and necessity.[50] Accordingly, IT IS ORDERED, That the application to assign the license of Station KFCD(AM), Farmersville, Texas (File No. BAL-20060117ACU) and the construction permit of Station KHSE(AM), Wylie, Texas (File No. BAP-20060117ACV) from DFW Radio License, LLC to Bernard Dallas LLC, IS GRANTED, subject to the condition that the KFCD(AM) transaction may not be consummated prior to the grant of the pending license renewal application for KFCD(AM). IT IS FURTHER ORDERED, That the February 23, 2006, Petition to Deny filed by David A. Schum et al. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Dennis J. Kelly, Esq.
Gregory L. Masters, Esq.

[48] *See* 47 C.F.R. § 73.3555, Note 2(f)(1) ("An interest in a LLC 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"). Bernard supplied the requisite certification regarding the insulation of DBZ.

[49] *See* Exhibit K to Opposition.

[50] Petitioners have advised that Schum has appealed the result of the auction in a Texas state court. Accordingly, we emphasize that our decision to grant the Assignment Application merely finds that the parties are qualified under, and the proposed transactions do not violate, the Communications Act of 1934, as amended, and the Commission's rules and policies. As such, it is permissive only and does not prejudice the outcome of the court proceeding and any relief to which the parties are entitled under the civil suit.

Federal Communications Commission

Washington, D.C. 20554

February 19, 2008

DA 08-408
In Reply Refer To:
1800B3-MJW
Released: February 19, 2008

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Re: KFCD(AM) Farmersville, TX
Facility ID No. 43757
File No. BAL-20070216ABA

KHSE(AM), Wylie, TX
Facility ID No. 133464
File No. BAL-20070216ABB

Applications for Assignment of License

Petition to Deny
Informal Objection

Dear Counsel:

We have before us the captioned applications (the "Applications") for consent to assign the license of Station KFCD(AM), Farmerville, TX ("KFCD"), and the construction permit of Station KHSE(AM), Wylie, TX ("KHSE") (collectively, the "Station Authorizations") from Bernard Dallas, LLC ("Bernard") to Principle Broadcasting Network – Dallas, LLC. Also before us are a Petition to Deny ("Petition") the Applications filed by David A. Schum *et al.* ("Petitioners")[1] and an Informal Objection

[1] In addition to Mr. Schum, Petitioners include J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders and Richard J. Drendel. The

("Objection") to the Applications filed by Joy Crain Johns ("Johns").[2] We also have before us an Opposition to Petition to Deny ("Opposition") filed by Bernard,[3] a Response to Informal Objection ("Response") filed by Bernard,[4] and a Consolidated Reply ("Reply") filed by Petitioners.[5] For the reasons stated below, we deny the Petition and Objection and grant the assignment applications.

Background. Simultaneously with the release of this letter decision we are releasing a related decision that denies reconsideration of our December 28, 2006, action denying Petitioners' Petition to Deny and granting applications to assign the Station Authorizations from DFW Radio License, LLC ("DFW"), to Bernard, the proposed assignor here.[6] We found that the reconsideration petition was without merit to the extent it raised new matters and otherwise procedurally defective because it merely repeated Petitioners' already-rejected allegations of prohibited foreign ownership and unauthorized transfer of control.[7]

The instant Petition and Objection reiterate the same allegations that were rejected in the *Letter Decision Denying Petition to Deny the DFW-to-Bernard Assignment.* Petitioners and Ms. Johns also submit articles from Bloomberg.com and the New York Post concerning: (1) the discharge of a former employee of D.B. Zwirn & Co., one of Bernard's principal investors; (2) hearsay statements of accounting irregularities at D.B. Zwirn & Co.; (3) the withdrawal of a Securities and Exchange Commission ("SEC") registration by D.B. Zwirn & Co.;[8] and (4) the Connecticut Attorney General's

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Petition was filed March 29, 2007. Petitioners are equity owners of The Watch, the parent company of DFW Radio, a former licensee of KFCD(AM) and former permittee of KHSE(AM). *See Letter to David A. Schum et al.* re KFCD(AM) and KHSE(AM), 21 FCC Rcd 14996 (MB 2006) (*"Letter Decision Denying Petition to Deny the DFW-to-Bernard Assignment"*).

[2] Ms. Johns filed "individually and as Executrix of the Estate of Albert L, Crain, deceased." Objection at 1. She filed the Objection on May 1, 2007, and supplemented it on May 25, 2007 (the "Supplement").

[3] The Opposition was filed on April 11, 2007.

[4] The Response was filed on June 21, 2007. Bernard represents that counsel for Principle Broadcasting Network LLC - Dallas, the proposed assignee, joins in the Response. *Id.* at 5 n.9.

[5] The Reply was filed on April 23, 2007.

[6] *Letter to David A. Schum, et al.* re KFCD(AM) and KHSE(AM), DA-08-XXXX, (MB, rel. Feb XX, 2008). (*"Letter Decision Denying the DFW-to-Bernard Petition for Reconsideration"*) (released simultaneously herewith).

[7] The Commission will not revisit issues "on which the tribunal has once deliberated and spoken." *Chapman S. Root Revocable Trust*, Memorandum Opinion and Order, 8 FCC Rcd 4223, 4224 (1993), *quoting WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, *rehearing denied*, 384 U.S. 947, *petition to reopen denied*, 4 FCC 2d 608 (1966). (*"WWIZ"*) *See also, Pacific Broadcasting of Missouri*, Memorandum Opinion and Order, 19 FCC Rcd 10950, 10952 (2004). The allegations respecting violations of Section 310 of the Communications Act of 1934, as amended, 47 U.S.C. § 310, ("Section 310"), unauthorized transfer of control and other matters were fully considered and rejected in the DFW-Bernard Reconsideration Order. Bernard characterizes the Objection and Supplement as "woefully belated." Opposition at 3. We agree. Pursuant to 47 C.F.R. § 73.3584 ("Section 73.3584") such "untimely Petitions to Deny, as well as other pleadings in the nature of a Petition to Deny and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration." Section 73.3584, however, is discretionary. Thus, given our disposition of this matter, and to forestall repetitious requests for reconsideration, we have addressed Ms. Johns' allegations herein.

[8] Petitioners request we take official notice of the withdrawal of the SEC registration by D.B. Zwirn & Co. Petition at 11. Bernard has not disputed that the registration was withdrawn. *See* Fed. R. Evid., Rule 201. Nonetheless, Petitioners' request for official notice is moot because the withdrawal of the registration, taken as true, does not support Petitioners' claim of undisclosed foreign ownership of Bernard. *See* text accompanying n.14 *infra.*

statements on disclosures made by hedge funds, generally.[9] Ms. Johns also supplies a copy of a motion filed in an unrelated case in which D.B Zwirn investors have been characterized as "citizen[s] of New York."[10] The "evidence" respecting unauthorized transfer of control is a statement by Bernard's Texas counsel, in a bankruptcy hearing, that "the debtors [the Petitioners here] no longer own these stations."[11] For the reasons set forth below, we find that neither the Petition nor Objection has raised a substantial and material fact warranting further consideration.[12]

Discussion. Petitioners imply that D.B. Zwirn and Co. withdrew its SEC registration because the company was concerned that the registration would disclose foreign ownership of DBZ. We reject this speculative inference because, as disclosed in the submitted news articles, over a hundred other companies also withdrew their registrations when a court invalidated an SEC regulation that had imposed a registration requirement. Moreover, we find: (1) that the Connecticut Attorney General's remarks about hedge fund disclosure do not relate to foreign ownership interests by those funds; (2) the hearsay accounts of accounting irregularities at D.B Zwirn and Co. are unconnected to foreign investment interests; (3) Petitioners have not established that D.B. Zwirn's former employee's criminal conviction is relevant to a Section 310 violation and; (4) there is no nexus between Petitioners' claim of foreign ownership interests by Bernard and a motion filed in the unrelated U.S. District Court proceeding where D.B. Zwirn & Co. characterized its investors as "citizens of New York."[13]

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[9] *See* Petition at 3, Objection at 2-3.

[10] *See* Supplement at 3. Ms. Johns states that a Notice of Removal filed by D.B. Zwirn & Co. in an unrelated case, *Wright Capital Corp. v. D.B. Zwirn & Co. and Brin Investment Corp.*, Case No. 1-07CV-105-C (N.D. Tex.), characterized D.B. Zwirn & Co.'s investors as being "domiciled" in New York, and "citizen[s] of New York" but made no reference to the investors being U.S. citizens Objection at 3. This, Ms. Johns asserts, raises an issue of whether the "individual investors of D.B. Zwirn are citizens of the United States as opposed to aliens." *Id.*

[11] The Bankruptcy Court hearing concerned Petitioners' refusal to execute applications for assignment of the KFCD license and the KHSE construction permit from DFW to Bernard. The Bankruptcy Judge directed Bernard's counsel to draft an order allowing counsel to sign the applications on DFW's behalf. *See* Objection, Exhibit A at 32.

[12] We note Bernard's claim that Petitioners and Ms. Johns filings "border on abusive," and are "wasteful of Commission resources." Response at 1, 5. Although our denial of the Petition makes it unnecessary to address that claim at this juncture, we remain mindful that petitions to deny "are specifically intended to enable interested parties to provide factual information to the Commission as to whether grant of an application would serve the public interest. To the extent that they are used for other than their intended purpose, *e.g.*, for private financial gain, to settle personal claims, or as an emotional outlet, the public interest is disserved. Beyond the costs to licensees and the public, consideration of meritless challenges wastes Commission resources." *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* Report and Order, 5 FCC Rcd 3911, 3912 (1990), *recon. denied,* 6 FCC Rcd 3380 (1991).

[13] *See supra* n.9. The statement that D.B. Zwirn & Co. investors are "citizens of New York" was made to support diversity jurisdiction pursuant to 28 U.S.C. § 1332 which provides, *inter alia,* that U.S. District Courts have original jurisdiction over civil actions brought by "citizens of different states." Hence, the reference does not imply that the investors are not also citizens of the United States.

In sum, as in the *Letter Decision Denying the DFW-to-Bernard Petition for Reconsideration,* (released simultaneously herewith) we find nothing here that rebuts the sworn statement by a DBZ principal that "[t]here is no direct or indirect foreign equity ownership in Bernard Dallas LLC."[14] Moreover, as to Petitioners' assertions of unauthorized transfer of control, we agree with Bernard[15] that the statement to the bankruptcy judge that Petitioners "no longer own the stations" reflected only that the bankruptcy court had approved Bernard's purchase of the stations, not that Bernard prematurely had assumed control.[16]

We also decline to consider Petitioners' and Ms. Johns' other allegations concerning unauthorized transfer of control and abuse of process.[17] With the exception of the material discussed *supra,* their allegations here merely replicate those we rejected in connection with the DFW-to-Bernard assignment.[18] We thus agree with Bernard that Petitioners' and Ms. Johns' attempts to reprise arguments already made and rejected is improper.[19] The Commission will not grant reconsideration "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken."[20]

Decision. Accordingly, IT IS ORDERED that the Petition to Deny filed March 29, 2007 by David A. Schum, J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders and Richard J. Drendel, and the Informal Opposition filed May 1, 2007, as supplemented May 25, 2007, by Joy Crain Johns ARE DENIED. IT IS FURTHER ORDERED, that the Applications for Assignment of License, File No. BAL-20070216ABA and File No. BAL-20070216ABB, ARE GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[14] *See DFW-to-Bernard Letter*, 21 FCC Rcd at 15003.

[15] *See* Opposition at 2-3, *citing WWIZ*, 37 FCC at 686; *WAIT Radio,* 46 RR 2d 1556 (1980).

[16] *See Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395, 397 (D.C. Cir. 1985). (A hearing is required only if "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Id.* at 395, *citing Columbus Broadcasting Coalition*, 505 F.2d 320, 330, (D.C. Cir. 1974).

[17] *See* Petition at 12-16.

[18] *See DFW-to-Bernard* Letter at 5-6.

[19] *See* Opposition to Petition for Reconsideration filed by Bernard, Feb. 12, 2007, at 2-3. (The cited Opposition to Petition for Reconsideration was filed in response to Petitioners' Petition for Reconsideration of the *DFW-to-Bernard Letter.* *See supra* n.1.).

[20] *WWIZ,* 37 FCC at 686.

license of Station KFCD(AM), Farmerville, TX ("KFCD"), and the construction permit of Station KHSE(AM), Wylie, TX ("KHSE") (collectively, the "Station Authorizations"), from Bernard Dallas, LLC ("Bernard") to Principle Broadcasting Network – Dallas, LLC ("Principle").[2] For the reasons set forth below, we dismiss the Supplement, deny the Second Supplement, admonish the Petitioners for filing frivolous and obstructive pleadings and deny the Petition.

Background. This is the latest chapter in the saga of Stations KFCD and KHSE. At one time, both stations were licensed to DFW Radio License LLC ("DFW") of which The Watch, Ltd. ("The Watch") was the parent company. The Watch and DFW defaulted on loans with B.B. Zwirn Special Opportunities Fund, L.P. ("Zwirn") and a bankruptcy court ordered that the DFW assets be sold at auction.[3] Zwirn prevailed at the auction and its designee, Bernard, became the licensee of Stations KFCD and KHSE.[4] The Petitioners unsuccessfully sought to deny that transaction[5] and, currently, the Media Bureau ("Bureau") decision denying reconsideration of that decision[6] is the subject of an Application for Review filed by Petitioners. Subsequently, the instant Applications were filed seeking consent to the assignment of the Station Authorizations from Bernard to Principle. The Petitioners unsuccessfully sought to deny this transaction too and now seek reconsideration of the *Bernard-to-Principle Decision*.

In support of their reconsideration request, Petitioners initially allege that the Bureau incorrectly determined that Bernard complies with the alien ownership provisions of the Communications Act of 1934, as amended (the "Act")[7] and assert that Bernard has never disclosed all of its ownership to the Commission.[8] Additionally, Petitioners contend that Bernard engaged in an unauthorized transfer of control of KHSE(AM), in violation of Section 310(d) of the Act.[9] Petitioners claim that the foregoing demonstrate that Bernard lacks the basic character qualifications to be a Commission licensee and that, accordingly, the staff could not have lawfully granted the Applications. Petitioners attempt to incorporate

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[2] Also before us are: an Opposition to Petition for Reconsideration ("Opposition") filed by Bernard on April 2, 2008; a Reply to "Opposition to Petition for Reconsideration" ("Reply") filed by Petitioners on April 9, 2008; a Motion for Leave to File "Supplement to Petition for Reconsideration" ("Motion") together with a Supplement to Petition for Reconsideration ("Supplement") filed by Petitioners on May 15, 2008; an Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners ("Response") filed by Bernard on June 4, 2008; a Reply ("Reply to Response") filed by Petitioners on June 16, 2008; and a Motion for Leave to File "Second Supplement to Petition for Reconsideration" ("Second Motion") and a Second Supplement to Petition for Reconsideration ("Second Supplement") filed by Petitioners on September 4, 2008.

[3] *See Letter to David A. Schum et al.*, 21 FCC Rcd 14996, 14997-98 (MB 2006)("*DFW-to-Bernard Decision*").

[4] *See DFW-to-Bernard Decision,* 21 FCC Rcd at 14998.

[5] *Id.*

[6] *See Letter to David A. Schum et al. re KFCD(AM) and KHSE(AM)*, Letter, 23 FCC Rcd 2646 (MB, 2008)("*DFW-to-Bernard Reconsideration Decision*").

[7] *See* 47 U.S.C. §§ 310(a) and (b).

[8] Petitioners state that Bernard disclosed only one principal, David Bernard Zwirn, who is represented to own a 1% equity interest in Bernard. It states that "Bernard has intentionally withheld disclosing the other 99% of its ownership." Petition at 3.

[9] *See* 47 U.S.C. § 310(d). Petitioners allege that Zwirn usurped control over the construction of KHSE(AM) and froze DFW out of decision making. Further, they state that Zwirn's agent hired an antenna design engineer, attempted to cancel tower studies that had been made at DFW's request, and otherwise mad e changes to the station without the consent of DFW.

by reference the "facts and arguments" set forth below and in their Application for Review filed with regard to the assignment of these station licenses from DFW to Bernard.[10]

These claims were previously made by Petitioners and have been addressed in the *DFW-to-Bernard Petition Decision*, the *DFW-to-Bernard Reconsideration Decision,* and the *Bernard-to-Principle Decision.* As Bernard argues in its Opposition, and as Petitioners have previously been informed,[11] the Commission will not grant reconsideration "merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken."[12] Because we have already addressed these issues multiple times, we will not address these matters further herein.

Petitioners also claim that newly discovered facts warrant reconsideration. In this regard, they point to articles reporting that the D. B. Zwirn Special Opportunities Fund was liquidating its two largest hedge funds as a consequence of accounting issues.[13] Additionally, they claim that Zwirn has been under investigation by the Securities and Exchange Commission ("SEC") since 2006 and that the audit has now been completed. They contend that the Commission must review the results of this investigation before making any decision on Zwirn's basic qualifications to be a Commission licensee.

In their additional filings, Petitioners expand on these allegations. They now claim that the SEC investigation is for fraud.[14] Additionally, they contend that an August 3, 2006, "Letter of Offer" looking toward the acquisition of shares of Dhandapani Finance Limited demonstrates Zwirn misrepresented its ownership to the Commission.[15] Petitioners also include a March 7, 2008, memorandum in which Zwirn

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[10] We have previously informed Petitioners that using incorporation by reference to reprise arguments already made and rejected is improper. *DFW-to-Bernard Reconsideration Decision,* 23 FCC Rcd at 2648. As we noted, the "kitchen sink" approach to filings, as apparently preferred by Petitioners, is disfavored by the Commission and is not permitted. *DFW-to-Bernard Reconsideration Decision,* 23 FCC Rcd at 2648 n.19 citing *Red Hot Radio,* Memorandum Opinion and Order, 9 FCC Rcd 6737, 6745 n.63 (2004). Accordingly, we reject this further attempt by Petitioners to incorporate herein its numerous prior pleadings in this matter and in the DFW to Bernard assignment matter.

[11] *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2648 n.20.

[12] *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC,* 351 F.2d 824 (D.C. Cir. 1965), *cert. denied,* 387 U.S. 967 (1966).

[13] *See* "Troubled Firm to Close 2 Funds Worth $4 Billion," NYTIMES.com (Feb. 23, 2008); *see also* "D.B. Zwirn to liquidate $4 billion in assets," moneycentral.msn.com (Feb. 22, 2008).

[14] *See* Reply at 2.

[15] *See* Supplement at 2 - 5 and Exhibit B. This "Letter of Offer" is a letter pursuant to the requirements of the Securities and Exchange Board of India, by which D.B. Zwirn Mauritius and D.B. Zwirn Special Opportunities Fund, L.P. notify Dhandapani Finance Limited that they were making, at a price-certain-per-share, an offer to purchase shares of Dhandapani. Petitioners state that the Letter of Offer contains the statement that "D.B. Zwirn & Co. is owned by Zwirn Holdings, LLC, DBZ GP, LLC, Dubin & Sweica Asset Management, LLC, and certain individuals." Petitioners claim that Zwirn/Bernard did not previously inform the Commission of the existence and interests of Dubin & Sweica Asset Management, LLC, and the "certain individuals" mentioned in the "Letter of Offer," and therefore misrepresented its ownership to the Commission in disclosing only 1% equity principal Daniel Bernard Zwirn in the Applications. In its Response, Bernard states that it has consistently reported to the Commission that D.B. Zwirn & Co. has limited partners that are insulated from involvement in the partnership's media enterprises pursuant to Commission requirements. Dubin & Sweica, it states, is owned by U.S. citizens and is an insulated limited partner. Accordingly, it states, there is nothing inconsistent between the 2006 Letter of Offer and Bernard's ownership disclosure in this proceeding. Finally, Bernard alleges that Petitioners are conflating four separate funds managed by D.B. Zwirn & Co., L.P. whereas only one of these funds (*i.e.,* D.B. Zwirn Special Opportunities Fund, L.P.) holds an indirect ownership interest in Bernard.

advises investors that it intends to dissolve the D. B. Zwirn Special Opportunities Fund, L.P.,[16] and a May 9, 2008, article from the *Wall Street Journal* concerning Zwirn's difficulties and the SEC's investigation of them.[17] Petitioners also attempt to rebut Bernard's claim that the newspaper articles Petitioners have filed are hearsay by asserting that courts have ruled that judicial notice may be taken of newspaper articles to determine whether a fact is within public knowledge.[18] Finally, Petitioners submit a newspaper article from the *New York Post* claiming that, on August 20, 2008, the Commission's Enforcement Bureau issued a letter commencing an investigation into whether Straight Way Radio, Bernard Radio LLC, D. B. Zwirn Special Opportunities Fund, L.P. and/or D.B. Zwirn & Co. LP engaged in an unauthorized transfer of control regarding stations in Florida and Georgia.[19] They claim that Zwirn had an obligation under Section 1.65 of the Commission's Rules (the "Rules")[20] to report this investigation to the Commission.[21]

Discussion. *Procedural Matters.* As an initial matter, we will deny Petitioners' Motion and dismiss their first Supplement. Section 1.106(f) of the Rules[22] provides that supplements to petitions for reconsideration be filed "within 30 days from the date of public notice of the final Commission action" unless leave to file is granted pursuant to a separate request. Petitioners' Motion is a separate request for leave to file their first Supplement. They have not, however, provided grounds for us to grant such leave. As Bernard points out, the "Letter of Offer" Petitioners proffer is dated August 3, 2006, and, accordingly, was available at the time the Petition was filed. Therefore, the material they present in their first Supplement could have been provided earlier and does not warrant consideration pursuant to Section 1.106(c) of the Rules as set forth above. Additionally, even were we to consider the first Supplement, that material does not contain facts indicating that aliens own or control Bernard in excess of the limits set forth in Section 310(a) and (b) of the Act or that Zwirn misrepresented its ownership. Finally, the fact that Zwirn is dissolving the D. B. Zwirn Special Opportunities Fund is irrelevant to our consideration of the Applications.

We will, however, grant the Petitioners' Second Motion and consider their Second Supplement which pertains to an Enforcement Bureau investigation involving D.B. Zwirn & Co., L.P., the ultimate parent of Bernard. That investigation commenced on August 20, 2008,[23] and, therefore, could not have been known to the Petitioners until subsequent to the expiration of the filing period for supplements to petitions for reconsideration as set forth in Section 1.106(f) of the Rules.

Substantive Matters. Section 1.106(c) of the Rules and established case law provide that, "reconsideration is appropriate only when the petitioner either shows a material error or omission in the

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[16] *See* Supplement at 4-5 and Exhibit C.

[17] *Id.* at 5 and Exhibit D.

[18] Reply at 2-3 citing *United States v. Microsoft, Inc.*, 253 F.3d 34, 108-09 (D.C. Cir. 2001); *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991).

[19] *See* Second Supplement at 2-3 and Exhibit B.

[20] 47 C.F.R. § 1.65.

[21] *See* Second Supplement at 3.

[22] 47 C.F.R. § 1.106(f).

[23] *Tama Broadcasting, Inc.*, Order, 24 FCC Rcd 1612 (EB 2009); *Tama Broadcasting, Inc.*, Consent Decree, 24 FCC Rcd 1615, 1616 (EB 2009).

original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."[24] Petitioners have not met this burden.

In the one new argument raised in the Petition, Petitioners, citing articles from the webpages of *The New York Times*[25] and MSN's Moneycentral,[26] contend that Zwirn has been under investigation for fraud by SEC since 2006. The Commission, they contend, should review the results of that investigation when available. The *New York Times* article mentioning the investigation was not published until subsequent to the issuance of the *Bernard-to-Principle Decision*. Accordingly, we will assume that the SEC investigation was unknown to Petitioners prior to our grant of the Applications. Nevertheless, we will not grant reconsideration on the basis of that allegation. First, the allegation is supported only by newspaper articles. Hearsay, such as that contained in newspaper articles, is not reliable evidence of the truth of the matters related in the article.[27] Second, even if we were to consider the articles, they wholly fail to raise a substantial and material question of fact that requires further inquiry as to whether any of the parties lacks the character necessary to be a Commission licensee. Generally, only if the investigation had resulted in an adjudication, and that adjudication was that Zwirn committed a fraud before the SEC or another governmental agency, would such non-FCC conduct be actionable under our *Character Policy.*[28] Neither of these factors is present here.

Additionally, the Enforcement Bureau investigation noted by Petitioners in their Second Supplement does not pertain to the stations involved herein. We have previously determined that there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations.[29] Moreover, the Commission has terminated that investigation.[30] The parties thereto have entered into a Consent Decree that bars the Commission from considering the facts developed in that investigation in the instant case.[31] We also find that Petitioners have failed to show that

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[24] 47 C.F.R. §1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC at 686 (1964); *see also National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

[25] "Troubled Firm to Close 2 Funds Worth $4 Billion," NYTIMES.com (Feb. 23, 2008).

[26] "D.B. Zwirn to liquidate $4 billion in assets," moneycentral.msn.com (Feb. 22, 2008).

[27] *Pikes Peak Broadcasting Co.*, Memorandum Opinion and Order, 12 FCC Rcd 4626, 4630 (1997) citing *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 927 (1982) and *Rothschild Broadcasting, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 7226, 7227 (1995).

[28] *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1204 (1985), *recon. granted in part, denied in part,* 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990)(*"Character Policy").* The Commission did create an exception to the general rule that non-Commission related misconduct must result in an adjudication before the Commission will consider it. In adopting the *Character Policy* the Commission acknowledged "that there may be circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." In such cases, it indicated, the misconduct might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee and might be a matter of Commission concern even prior to adjudication by another body. *Character Policy*, 102 FCC 2d at n.60. We do not believe that the alleged unadjudicated misconduct herein, even if true, "shocks the conscience." Accordingly, it would not fit within this exception to the adjudication requirement.

[29] *Character Policy*, 102 FCC 2d at 1223-24.

[30] *Tama Broadcasting, Inc.*, 24 FCC Rcd at 1613.

[31] The Consent Decree provides that, "[t]he Bureau further agrees that, in the absence of new material evidence, it will not use the facts developed in this Investigation through the Effective Date, or the existence of this Consent Decree, to institute any proceeding, formal or informal, or take any action against Tama Broadcasting, Inc., D.B.

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

In re Applications of	)	
	)	
DFW RADIO LICENSE, LLC, Assignor	)	
	)	
and	)	File Nos. BAL-20060117ACU/
	)	BAP-20060117ACV
BERNARD DALLAS, LLC, Assignee	)	
	)	
and	)	
	)	
BERNARD DALLAS, LLC, Assignor	)	
	)	
and	)	File Nos. BAL-20070216ABA/
	)	BAL-20070216ABB
PRINCIPLE BROADCASTING NETWORK	)	
DALLAS LLC, Assignee	)	
	)	
for Assignment of the Authorizations of Stations	)	
KFCD(AM), Farmersville, Texas, and	)	Facility ID No. 43757
KHSE(AM), Wylie, Texas	)	Facility ID No. 133464

MEMORANDUM OPINION AND ORDER

Adopted: January 17, 2014 **Released: January 22, 2014**

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order we dismiss to the extent indicated below and otherwise deny Applications for Review filed on March 20, 2008, and June 19, 2009, by David A. Schum ("Schum"), *et al.*[1] (collectively, the "Opposing Parties"). The Opposing Parties seek review of: (1) the February 19, 2008, letter decision[2] denying the Opposing Parties' Petition for Reconsideration of the December 28, 2006, Media Bureau ("Bureau") decision[3] denying the Opposing Parties' Petition to Deny the captioned applications for Commission consent to the assignment of the authorizations of Stations KFCD(AM), Farmersville, Texas, and KHSE(AM), Wylie, Texas (the "Stations"), from DFW Radio

[1] The parties to the Applications for Review are David A. Schum, J. Michael Lloyd, Frank D. Timmons, Carol D. Kratville, Brian M. Brown, Robert E. Howard, Edwin E. Wodka, John W. Saunders and Richard J. Drendel. Additionally, Joy Crain Johns, individually and as Executrix of the estate of Albert Crain, joined in the latter pleading. We will refer to these pleadings herein as the "DFW-to-Bernard Application for Review" and the "Bernard-to-Principle Application for Review," respectively.

[2] *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas*, Letter, 23 FCC Rcd 2646 (MB 2008) (the "*DFW- to-Bernard Reconsideration Decision*").

[3] *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas*, Letter, 21 FCC Rcd 14996 (MB 2006) (the "*DFW-to-Bernard Decision*").

License, LLC to Bernard Dallas, LLC;[4] and (2) the May 20, 2009, letter decision[5] denying the Opposing Parties' Petition for Reconsideration of the Bureau's December 28, 2006, decision[6] denying the Opposing Parties' Petition to Deny the captioned applications for Commission consent to the assignment of the authorizations of the Stations from Bernard Dallas to Principle Broadcasting Network – Dallas, LLC.[7]

II. BACKGROUND

2. The Opposing Parties were investors in "The Watch, Ltd." ("The Watch"), former licensee of KFCD(AM) and former permittee of KHSE(AM) (collectively, the "Stations").[8] The authorizations were subsequently assigned to DFW Radio License, LLC ("DFW Radio"), a wholly-owned subsidiary of The Watch. The Watch and DFW Radio defaulted on loans and agreements with D.B. Zwirn Special Opportunities Fund, L.P. ("DBZ"), and a bankruptcy court ordered that DFW Radio's assets be sold at auction.[9] DBZ was the successful bidder and subsequently assigned its purchase rights to Bernard Dallas, LLC ("Bernard"), a newly-formed affiliate of DBZ. DFW Radio and Bernard filed applications for assignment of the authorizations from DFW Radio to Bernard.[10] Subsequently, on February 16, 2007, Bernard and Principle filed applications for Commission consent to assignment of the Stations' licenses from Bernard to Principle.[11]

3. *The DFW-to-Bernard Application.* The Opposing Parties filed a Petition to Deny the DFW -to-Bernard assignment applications, alleging that: (1) the assignment would result in a prohibited reversionary interest, (2) DBZ prematurely assumed control of the construction of KHSE(AM), and (3) Bernard failed to disclose the owners of DBZ, which held a 99 percent insulated equity interest in

[4] DFW-to-Bernard Application for Review at 1, 2. Bernard filed an Opposition to Application for Review on April 4, 2008 (the "Opposition") and the Opposing Parties filed a Reply to Opposition to Application for Review on April 9, 2008 (the "Reply"). The Opposing Parties filed a Motion for Leave to File Supplement to Application for Review, and an accompanying Supplement to Application for Review on May 15, 2008. Bernard filed an Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners on June 4, 2008. The Opposing Parties filed a Reply on June 16, 2008. The Opposing Parties filed a Motion for Leave to File Second Supplement to Application for Review and a Second Supplement to Application for Review on September 4, 2008.

[5] *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas,* Letter, 24 FCC Rcd 5743 (MB 2009) (the "*Bernard-to-Principle Reconsideration Decision*").

[6] *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas,* Letter, 23 FCC Rcd 2642 (MB 2008) (the "*Bernard-to-Principle Decision*").

[7] Bernard-to-Principle Application for Review at 1, 2. Bernard filed an Opposition to this Application for Review on July 6, 2009. Additionally, Schum individually filed a Petition for Leave to File Supplement and Supplement to Application for Review on October 12, 2011 (the "2011 Supplement") (which he subsequently withdrew, corrected, and refiled on November 22, 2011); Bernard filed an Opposition to the 2011 Supplement on October 27, 2011, and a Supplement to its Opposition on January 6, 2012.

Schum also filed a second individual Petition for Leave to File Supplement and Supplement to Application for Review on February 27, 2012, to which Bernard Dallas filed an Opposition on March 8, 2012, and Schum a Reply on March 29, 2012.

[8] *See DFW-to-Bernard Decision,* 21 FCC Rcd at 14996-14997.

[9] *See id.* at 14997-14998.

[10] *See* BAL-20060117ACU; BAP-20060117ACV (the "DFW-to-Bernard Dallas Application"). David Schum refused to sign the assignment applications on behalf of DFW Radio. Thereafter, pursuant to an order from the bankruptcy court, DBZ's attorney signed the assignor's portion of the applications on DFW Radio's behalf. *See* Petition at 10 n.2.

[11] *See* BAL-20070216ABA; BAL-20070206ABB (the "Bernard-to-Principle Application.")

Bernard, and thus that Bernard may not comply with the Commission's foreign ownership limits based on the level of foreign ownership in DBZ.[12]

4. The *DFW-to-Bernard Decision* afforded the Opposing Parties "listener standing"[13] and found that: (1) DBZ did not retain a reversionary interest in the Stations because it was not a former licensee of either station;[14] (2) Opposing Parties failed to present any probative evidence that DBZ had exercised control over construction of KHSE(AM);[15] (3) DBZ's actions were consistent with orders of the bankruptcy court and represented only a good-faith effort to protect DBZ's financial interests; and (4) Bernard had certified in its assignment application that it complied with the foreign ownership restrictions and had provided a declaration representing that there "is no direct or indirect foreign equity or voting interest in Bernard Dallas LLC" and Opposing Parties provided no rebuttal evidence.[16] The Decision concluded that Opposing Parties had not raised a substantial and material question of fact warranting further inquiry and granted the applications.[17]

5. The Opposing Parties, based on allegedly new information, filed a petition for reconsideration ("Petition for Reconsideration") of the *DFW-to-Bernard Decision* again challenging Bernard's compliance with the Commission's foreign ownership limitations.[18] Based on a news article, they claimed that a DBZ-associated hedge fund (D.B. Zwirn & Co.) had withdrawn its registration with the Securities and Exchange Commission ("SEC") to conceal foreign ownership interests in DBZ. The news article also referred to a statement by the Connecticut Attorney General that in his opinion, hedge funds should be subjected to greater scrutiny because of their "aura of secrecy" and stated that a "key employee" of D.B. Zwirn & Co. pled guilty to federal criminal charges relating to his prior employment at Citigroup.[19] The *Reconsideration Decision* rejected the argument as wholly speculative and meritless.

6. The Petition for Reconsideration also attempted to incorporate by reference the Opposing Parties' prior arguments regarding the purported unauthorized transfer of control of KHSE(AM), abuse of Commission processes by Bernard's local counsel, and the alleged retention of an impermissible reversionary interest in the authorizations. The *Reconsideration Decision* found that the Opposing Parties' attempt at incorporation by reference was impermissible because it reprised arguments already made and rejected.[20]

7. The DFW-to-Bernard Application for Review alleges that the staff erred in rejecting the Opposing Parties' foreign ownership and unauthorized transfer of control allegations. Specifically, they argue that (1) it was error for the staff to accept a declaration submitted by Bernard because it allegedly reached legal conclusions; (2) by doing so, the staff improperly delegated to a private party the Commission's responsibility to find facts and determine law; and (3) absent full ownership disclosure, it

[12] 47 U.S.C. § 310(b)(3),(4). *See DFW-to-Bernard Decision* at 14998.

[13] *See id.* at 14999. *See also, e.g., CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13042 (1999) ("we will accord party-in-interest status to a petitioner who demonstrates either residence in the station's service area or that the petitioner listens to or views the station regularly, and that such listening or viewing is not the result of transient contacts with the station"); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[14] *See DFW-to-Bernard Decision* at 14999.

[15] *Id.*

[16] *Id.* at 15003.

[17] *Id.*

[18] DFW-to-Bernard Petition for Reconsideration at 3 and Appendix A.

[19] See DFW-to-Bernard Reconsideration Decision, 23 FCC Rcd at 2647.

[20] *Id.* at 2648.

was "legally impossible" for the Commission to find that grant of the application is in the public interest. In addition, the Opposing Parties assert that "newly discovered facts" indicate that Daniel Bernard Zwirn[21] "may have committed serious fraud thereby raising material questions as to his character qualifications to be a Commission licensee, necessitating vacating the above-captioned applications and their designation for hearing."[22]

8. *The Bernard-to-Principle Application.* The Opposing Parties filed a Petition to Deny the Bernard-to-Principle Application, and Ms. Joy Crain Johns filed an Informal Objection to that Application. The Petition and Objection reiterate the failure to disclose/foreign ownership and unauthorized transfer of control allegations that the Bureau had rejected in the *DFW-to-Bernard Decision.* They also reargue the following: (1) a DBZ-associated hedge fund (D.B Zwirn & Co.) had withdrawn its registration with the SEC, allegedly to conceal foreign ownership interests in DBZ; and (2) a "key employee" of D.B. Zwirn & Co. pled guilty to federal criminal charges relating to his prior employment at Citigroup. Petitioners and Ms. Johns also submitted articles from Bloomberg.com and the *New York Post* containing: (3) hearsay statements of alleged accounting irregularities at D.B. Zwirn & Co.; and (4) the Connecticut Attorney General's statements on disclosures made by hedge funds, generally. Ms. Johns also supplied a copy of a motion filed in an unrelated case in which D.B Zwirn & Co. investors were characterized as "citizen[s] of New York."[23]

9. *In the Bernard-to Principle Decision,*[24] the Bureau again rejected the alien ownership and unauthorized transfer of control allegations. It also rejected as speculative the inference that D.B Zwirn and Co. withdrew its SEC registration because the company was concerned that the registration would disclose foreign ownership interests in DBZ, noting that the articles reported that over one hundred other companies also withdrew their registrations when a court invalidated an SEC registration requirement. The Bureau also found that: (1) the Connecticut Attorney General's remarks about hedge fund disclosure did not relate to foreign ownership interests by those funds; (2) the hearsay accounts of accounting irregularities at D.B Zwirn and Co. were unconnected to alleged foreign investment interests; (3) Petitioners had not established that D.B. Zwirn & Co's former employee's criminal conviction is relevant to a Section 310(b) violation; and (4) there was no nexus between Petitioners' claim of foreign ownership interests by Bernard and a motion filed in the unrelated U.S. District Court proceeding where D.B. Zwirn & Co. characterized its investors as "citizens of New York."[25]

10. The Opposing Parties sought reconsideration of the *Bernard-to-Principle Decision,* reiterating the thrice-rejected alien ownership and unauthorized transfer of control arguments. Petitioners also claimed that newly discovered facts warranted reconsideration: that newspaper articles reported that DBZ was liquidating its two largest hedge funds as a consequence of accounting issues, that "the Zwirn organization" has been under investigation for fraud by the SEC since 2006 and that the SEC audit had been completed. They contended that the Commission must review the results of this investigation before making any decision on DBZ's basic qualifications to be a Commission licensee. In a supplemental filing, Opposing Parties proffered an August 3, 2006, "Letter of Offer" looking toward the acquisition of

[21] Daniel Bernard Zwirn exercises ultimate control over Bernard. *See* BAL-20060117ACU, Attachment 11.

[22] DFW-to-Bernard Application for Review at 3.

[23] Ms. Johns stated that a Notice of Removal filed by D.B. Zwirn & Co. in an unrelated case, *Wright Capital Corp. v. D.B. Zwirn & Co. and Brin Investment Corp.,* Case No. 1-07CV-105-C (N.D. Tex.), characterized D.B. Zwirn & Co.'s investors as being "domiciled" in New York, and "citizen[s] of New York" but made no reference to the investors being U.S. citizens. Objection at 3. This, Ms. Johns asserts, raises an issue of whether the "individual investors of D.B. Zwirn are citizens of the United States as opposed to aliens." Johns Supplement to Informal Objection at 3.

[24] *The Bernard-to-Principle Decision* was released simultaneously with the *DFW-to-Bernard Reconsideration Decision* on February 19, 2008.

[25] *See Bernard-to-Principle Decision,* 23 FCC Rcd at 2644.

declaration does not "attest to a legal conclusion," as argued by Opposing Parties; it does not, for example, conclude that Bernard's ownership complies with Section 310(b) of the Act. Rather, it consists of two simple representations of fact by the declarant, which, as noted below, the Opposing Parties have not rebutted.

18. Although the Campbell Declaration is probative as to the alien ownership issue, in light of Bernard's certification in each assignment application that it complied with the foreign ownership restrictions, its consideration was not required by the narrow facts of this case. We recognize that both insulated and non-insulated foreign equity interests in broadcast licensees are considered in determining compliance with Section 310(b).[59] Nevertheless, DBZ was not required by the Commission's attribution rules or the application form to disclose its non-voting, insulated investors. Absent the submission of any properly supported facts that raise an issue as to the validity of the certification, the Commission may properly rely on an applicant's affirmative certification under penalty of perjury that the applicant complies with the foreign ownership provisions of Section 310(b) of the Act.[60] Thus, the staff did not "improperly delegate" to Campbell, Bernard or DBZ the responsibility for determining compliance with Section 310(b). As observed above, Opposing Parties' arguments that Bernard may not be in compliance with Section 310(b) are speculative, inferential and, in any event, based on hearsay and unrelated proceedings that do not shed any light on the matters at issue here. On these narrow facts, the staff was not required to "look behind" Bernard's certification.[61] We find that the Opposing Parties have failed to raise a substantial and material question of fact calling for further inquiry on this issue, and the Bureau committed no procedural or substantive error in rejecting Opposing Parties' unfounded assertions here.

19. We also reject Opposing Parties' argument that staff should have required Bernard to disclose its nonattributable interest-holders because the subsequent *2009 Diversity Order* released over two years after the application was filed required broadcast licensees with complex ownership structures, including nonattributable interests, to disclose that ownership on a new FCC Form 323 Ownership Report due on or before November 1, 2009. By its 2009 Order, the Commission required certain parties to

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[59] *See, e.g., Wilner & Scheiner*, Memorandum Opinion and Order, 103 FCC 2d 511, 519 (1985) n.37, *recon. granted in part*, 1 FCC Rcd 12 (1986) ("By its express terms, the statute provides limitations on the amount of capital stock which can be owned or voted by aliens. Because the statutory limitations are cast in the disjunctive, the non-voting stock owned by aliens is considered in evaluating compliance with the benchmarks established by Section 310(b)."); *Primemedia Broadcasting, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 4293, 4295 (1988) ("once we determine that the alien ownership interest in a broadcast licensee exceeds the statutory benchmark in Section 310(b)(3), our inquiry is at an end and 'we have no authority to independently assess whether or not the grant of a license to a company in which an alien holds an ownership interest above 20% would result in undue influence or control.' *Wilner and Scheiner*, [103 FCC 2d 511,] 517 at note 33. . .").

[60] *See, e.g., Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Report and Order, 97 FCC 2d 997, 1028 n. 75 (1984), *recon. in part*, 58 R.R.2d 604 (1985), *further recon. granted in part*, 1 FCC Rcd 802 (1986) ("We emphasize that our action herein with respect to ownership reporting requirements in no way affects the continued obligation of licensees to reasonably determine and certify compliance with the alien ownership restrictions of [Section 310(b) of the Act]. Such certification is now and will continue to be required in connection with the application process.") *See also BBC License Subsidiary, LP*, Order, 10 FCC Rcd 2458 (MMB 1994) (rejecting argument that application should not be accepted for filing because, *inter alia*, it did not enable the Commission to determine whether the licensee complies with the alien ownership provisions of Section 310(b) of the Act; Bureau "retain[ed] the right ... to request further information" from the applicant or any other persons or entities it deemed to be parties to the application).

[61] The Campbell Declaration was appropriately considered by the staff. *See, e.g., Univision Holdings, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6679 (1992) (in rejecting petitioners' allegation that Univision's non-citizen minority owners would exercise *de facto* control over its operations, the Commission observed that petitioners had provided no affidavits from persons with first-hand knowledge, while Univision made specific factual allegations and properly supported them with an affidavit).

disclose in their reports certain nonattributable interests "in order to obtain an accurate, reliable, and comprehensive assessment of minority and female broadcast ownership in the United States."[62] Accordingly, the Commission stated that it would collect information "from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher Equity/Debt Plus ('EDP') threshold" adopted in a 2008 Commission Order.[63] However, this requirement was subsequently deleted[64] and, in any event, Bernard maintains that its nonattributable investors do not fall into either of those categories.[65] This argument requires no further consideration.

20. Finally, we reject the Opposing Parties belated argument that staff's reliance on Bernard's certification and the Campbell Declaration regarding foreign ownership violates the takings clause of the Fifth Amendment.[66] The Opposing Parties did not present this argument to staff and fail to explain the basis for this bare assertion. Accordingly, it is procedurally defective, and we dismiss it on that basis.[67]

B. Transfer of Control Allegation

21. A bankruptcy court order, and subsequent agreements between DFW Radio and DBZ, provided that DBZ would advance the funds for construction of KHSE(AM) and that construction would be overseen by a media broker, W. Lawrence Patrick ("Patrick"), who could in turn hire a construction superintendent.[68] The contracts expressly provided that DFW Radio would retain ultimate control over the station construction.[69] The Opposing Parties, however, alleged that Schum – as manager of DFW Radio – had no control over the build-out of KHSE(AM). We find that there are no material and substantial questions of fact warranting further inquiry in a hearing.[70]

22. In challenging the DFW-to-Bernard Application, Opposing Parties alleged that, notwithstanding a contrary directive of the Bankruptcy Court, DBZ usurped control over the construction of KHSE(AM) and "froze[] DFW Radio out of any decision making, or even consent, to actions being taken relative to KHSE."[71] They claim that: (1) without DFW's knowledge and consent, Patrick hired and

[62] *2009 Diversity Order*, 24 FCC Rcd at 5898.

[63] *Id.* at 5906, citing *Promotion of Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008). There, the Commission adopted a mechanism to allow an interest holder to exceed the 33 percent EDP attribution threshold. In the *2009 Diversity Order*, the Commission stated that, for reporting purposes, it would apply the EDP threshold of 33 percent for all entities.

[64] *See 2009 Diversity Reconsideration Order*, 24 FCC Rcd at 13046-47.

[65] *See* Opposition to Bernard-to-Principle Application for Review at 7.

[66] Bernard-to-Principle Application for Review at 16.

[67] 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."); *Red Hot Radio*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004) ("[T]he burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

[68] *See DFW-to-Bernard Decision*, 21 FCC Rcd at 15000.

[69] *Id.* at 15000-15001.

[70] Staff concluded that the Opposing Parties failed to establish a *prima facie* case that either Patrick or DBZ had assumed control over KHSE(AM), *DFW- to-Bernard Decision*, 21 FCC Rcd at 15001, but our decision rests on a consideration of the record as a whole, and thus the question of whether Opposing Parties established a *prima facie* case is moot. *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), *cert. denied*, 519 U.S. 823 (1996).

[71] DFW-to-Bernard Petition to Deny at unnumbered page 12.

FCC misconduct as a basis for delaying resolution of the applications at issue here, and we therefore reject the Opposing Parties' request that we do so.[95]

E. Opposing Parties' Supplements and Requests for Official Notice

28. The Opposing Parties have filed seven untimely supplements to their Applications for Review, including two requests for official notice.[96] They urge that the supplements should be accepted because they relate to "new information [which] has come to the attention of Petitioners which they did not have in their possession at the time of their 'Application for Review.'"[97] The "new information" proffered for the DFW-to-Bernard Application for Review consists of a "Letter of Offer" wherein DBZ may acquire shares in a company in India, two newspaper articles (an article concerning the EB investigation of Tama Broadcasting, Inc. ("Tama") and an article about the SEC's investigation of D.B. Zwirn & Co.), a March 7, 2008 memorandum from the D.B. Zwirn Special Opportunities Fund, L.P. to its partners concerning plans to wind down the Fund, and a copy of a letter that the Commission's EB sent to Tama concerning a possible unauthorized transfer of control of Tama's stations to DBZ. In addition, the Opposing Parties state that "relevant information concerning the Zwirn Organization's ownership has been disclosed in connection with a civil lawsuit" involving another broadcaster, and they state that the Commission should ask the parties to place that information in the record of this proceeding.[98] Opposing Parties state that the additional information is relevant to its arguments concerning ownership of the "Zwirn organization." They also state that a key part of the EB investigation is a demand that the respondent "identify" Bernard, DBZ, and other Zwirn entities and that: (1) Zwirn had a duty under Section 1.65 of the Rules to disclose the pending investigation; and (2) the Commission must require the parties to serve their responses in the investigation on the Opposing Parties and the Bureau.[99] Similarly, they claim Bernard had a duty under Section 1.65 of the Rules to disclose the SEC investigation.[100]

29. The "new information" proffered for the Bernard-to-Principle Application for Review involved: (1) excerpts from a May 5, 2009, "proxy letter" indicating that Daniel Zwirn had been removed as investment manager of the D.B. Zwirn Special Opportunities Fund, L.P. and the D.B. Zwirn Special Opportunities Fund Ltd. "by vote of the 'insulated' and undisclosed . . . partners and shareholders";[101] (2) a November 18, 2011, Order by the United States Court of Appeals for the First Circuit dismissing a lawsuit brought by DBZ against one of its former fund managers;[102] (3) a news release reporting the third

[95] *See General Motors Corp.*, *supra*, 19 FCC Rcd at 488 (reliance on possible non-FCC misconduct as a basis for delaying resolution of proceeding would be inappropriate).

[96] *See* note 99, *infra*; *see also* Request for Official Notice [Bernard-to-Principle] (May 30, 2012); Request for Official Notice [Bernard-to-Principle] (Jan 24, 2013).

[97] Motion for Leave to File Supplement to [DFW-to-Bernard] Application for Review (May 15, 2008) at 1; *see also* Motion for Leave to File Second Supplement to [DFW-to-Bernard] Application for Review (Sept. 4, 2008) at 1; Petition for Leave to File Supplement to [Bernard-to-Principle] Application for Review (Nov. 22, 2011) at 2; Petition for Leave to File Supplement to [Bernard-to-Principle] Application for Review (Feb. 27, 2012) at 3; Petition for Leave to File Supplement to [Bernard-to-Principle] Application for Review (Apr. 2, 2012) at 3.

[98] Motion for Leave to File Second Supplement (Sept. 4, 2008) at 4.

[99] Motion for Leave to File Second Supplement (Sept. 4, 2008) at 3-4.

[100] Motion for Leave to File Supplement (May 15, 2008) at 5-6.

[101] Petition for Leave to File Supplement (Nov. 22, 2011) at 4, 7-8 & Ex. A. We note that the "D.B. Zwirn Special Opportunities Fund *Ltd.*" has never been a party to this proceeding. This pleading also includes a newspaper article concerning a convicted sex offender who Opposing Parties claim is "reportedly one of the early and large shareholders in the Zwirn Offshore Fund." *Id.* at 13 & Ex. C.

[102] Petition for Leave to File Supplement (Feb. 27, 2012) at 4-6, citing *D.B. Zwirn Special Opportunities Fund, L.P., n/k/a Fortress Value Recovery Fund I LLC v. Vikas Mehrotra*, Order, Case No. 11-1172 (1st Cir. Nov. 18, 2011) (the "*First Circuit Order*") (attached as Ex. A).

quarter 2011 financial results of the Fortress Investment Group LLC ("Fortress");[103] (4) a news article about the SEC's investigation of DBZ and Perry Gruss, DBZ's chief financial officer;[104] (5) a federal court order denying Gruss's motion to dismiss the SEC's complaint;[105] (6) a federal District Court order describing "Bernard National Loan Investors, Ltd." as "a specialized investment group based in the Cayman Islands"; (7) the signature pages from a financing agreement dated February 5, 2004, purportedly entered into in connection with a bankruptcy proceeding that predated the bankruptcy proceeding leading to The Watch's acquisition of the Stations ;[106] and (8) and several pages of excerpts from the "consolidated financial statement of D.B. Zwirn Special Opportunities Fund, L.P." for 2004.[107]

30. Schum contends that the proxy statement is relevant to control of Bernard both because the "insulated and undisclosed" parties exercised control in removing Zwirn and because "the only equity owner ever listed on FCC ownership reports, D.B. Zwirn Special Opportunities Fund, L.P., no longer exists and Daniel Bernard Zwirn was removed on June 1, 2009."[108] Schum claims that the First Circuit order is relevant because "the case clearly shows that D.B. Zwirn Special Opportunities Fund, L.P., the 100% equity holding limited partnership in the proposed licensee as reported to the FCC on the ownership reports no longer exists and has been replaced by Fortress Value Recovery Fund 1, LLC" and because DBZ allegedly refused to comply with the Court's order to disclose its owners' state or country of citizenship to support federal diversity jurisdiction and instead agreed to dismiss its appeal with prejudice.[109] Schum claims that the Fortress news release evidences "a decreasing value over the last two years indicating the liquidation of the Zwirn funds" and that "the foreign and domestic fund owners are now all in the same fund," but does not explain the relevance of these allegations.[110] Schum claims that

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[103] *Id.* at 7 & Ex. D.

[104] Petition for Leave to File Supplement, Ex. A (Apr. 2, 2012).

[105] May 30, 2012 Request for Official Notice, Ex. A; January 24, 2013 Request for Official Notice, Ex. C (consolidated financial statement of DBZ, Exhibit J in that court proceeding).

[106] *See* Application No. BAL-20031126ATD (*pro forma* assignment of the Stations' licenses from Renaissance Radio, Inc., Debtor-in-Possession, to The Watch), granted December 19, 2003.

[107] January 24, 2013 Request for Official Notice at Ex. A, p.2 (selected pages of an *Opinion and Order* in *Bernard National Loan Investors, Ltd. v. Traditions Management, LLC, AEY, LLC, Michael Aiken, Mark Enderle, and Mark Yarborough*, Case No. 08 Civ. 3573 (S.D. N.Y. Mar. 1, 2010) (denying plaintiff's claim for breach of contract, breach of covenant of good faith and fair dealing, and indemnification); *id.* at Ex. B & C. Schum claims the financial statement excerpts constitute "seven relevant pages from Exhibit J from case # 1:11-cv-02420-RWS," in *SEC v. Perry Gruss*, U.S. District Court for the Southern District of New York. *Id.* at 2 & Ex. C.

[108] Supplement to [Bernard-to-Principle] Application for Review (Nov. 22, 2011) at 11.

[109] Petition for Leave to File Supplement (Feb. 27, 2012) at 6. The suit was brought originally in Massachusetts state court and alleged that Mr. Mehrotra assisted an associate in defrauding DBZ of approximately $7.5 million. Mr. Mehrotra removed the action to the United States District Court for the District of Massachusetts, contending that the District Court had jurisdiction because the parties were citizens of different states and the amount in controversy exceeded $75,000. *See* 28 U.S.C. §§ 1332, 1441. On January 31, 2011, the District Court granted Mr. Mehrotra's motion to dismiss, holding that DBZ's complaint was filed after the applicable statute of limitations had expired. Zwirn appealed to the Court of Appeals for the First Circuit. *First Circuit Order* at 2. The Court ultimately dismissed the appeal with prejudice pursuant to the parties' joint motion. *D.B. Zwirn Special Opportunities Fund, L.P., n/k/a Fortress Value Recovery Fund 1 LLC v. Vikas Mehrotra*, Judgment, Case No. 11-1172 (1st Cir. Dec. 9, 2011) (attached as Ex. C to Petition for Leave to File Supplement (Feb. 27, 2012)).

[110] Petition for Leave to File Supplement (Feb. 27, 2012) at 7. Neither the relevance of the "decreasing value" of the funds managed by Fortress or the connection to the liquidation of the Zwirn funds is apparent from the material supplied. Moreover, the complete footnote for the Value Recovery Funds reads as follows: "Fortress will receive management fees from thee funds equal to 1% of cash receipts and up to 1% *per annum* on certain managed assets, subject to collectability, and may receive limited incentive income if aggregate realizations exceed an agreed

(continued....)

the news article about Daniel B. Zwirn and Perry Gruss is relevant because (1) the article allegedly "confirms" that Zwirn was removed as a manager of DBZ in June 2009, which, he alleges, means that Zwirn was not in control of Bernard when the licenses at issue were transferred in 2009, via a pro forma application, to RL Transition Corp., and that the pro forma transfer therefore was fraudulent; and (2) the article allegedly "reinforces [the Opposing Parties'] contention that Zwirn's overseas (offshore) and domestic (onshore) funds were being operated as one fund. . . ."[111] Schum claims that the federal court order denying Gruss's motion to dismiss the SEC complaint "clearly spells out the foreign funding of Bernard Radio, LLC as well as the lack of financial control by Daniel B. Zwirn."[112] Schum also claims that other federal court proceedings which are "appropriate for official notice" also "clearly show that the original lender was a Cayman Islands company."[113]

1. The Supplements and Requests for Official Notice Are Procedurally Defective

31. We dismiss the supplements and requests for official notice because they are procedurally defective. All of the supplements and requests for official notice violate section 1.115(d) of the Commission's rules because they were filed more than thirty days after the issuance of the decisions on review.[114] Likewise, to the extent the Opposing Parties challenge the grant of the pro forma transfer application, their challenge is untimely.[115] Further, the information in the Bernard-to-Principle

(Continued from previous page)
threshold." There is no mention of "onshore" or "offshore" accounts or their ownership. These claims require no further discussion.

[111] Petition for Leave to File Supplement (Apr. 2, 2012) at 4-6. The Opposing Parties claim that because Zwirn apparently did not mention RL Transition Corp. as one of his remaining businesses in a quote that appeared in the article, he "admits he has nothing to do with RL Transition Corp after the 'pro forma' transfer." *Id.* at 6.

[112] May 30, 2012, Request for Official Notice at 4; January 24, 2013 Request for Official Notice at 5-6.

[113] January 24, 2013 Request for Official Notice at 6 and Exhibits A and B (selected pages from executed version of February 5, 2004 Financing Agreement between The Watch, Ltd. (Borrower), The Financial Institutions from Time to Time Party Hereto (Lender), and Highbridge/Zwirn Special Opportunities Fund, L.P. (agent), which Schum claims was filed with the Bankruptcy Court in Dallas as part of the bankruptcy proceeding through which the Watch, Ltd. acquired the Stations. On the signature page, Perry Gruss signed as Director of lender Bernard National Loan Investors, Ltd.

[114] Section 1.115(d) of the Rules provides that an "application for review and any supplemental thereto shall be filed within 30 days of public notice of the [staff] action." Here, Applications for Review were due by March 20, 2008, for the DFW-to-Bernard Application and by June 19, 2009, for the Bernard-to-Principle Application. The Opposing Parties' supplements to the DFW-to-Bernard Application for Review were filed on May 15, 2008, and September 4, 2008; Schum's supplements to the Bernard-to-Principle Application were filed on Nov. 22, 2011 and on February 21, April 2, and May 30, 2012. The November 22, 2011 supplement included a request to withdraw supplements filed on October 12 and 27, 2011 due to an incorrect file number and an incorrect format.

[115] *See* Petition for Leave to File Supplement [Bernard-to-Principle] (Apr. 2, 2012) at 6 ("The 'pro forma' transfer is fraudulent."). The pro forma transfer application was granted on May 27, 2009, and petitions for reconsideration were due 30 days thereafter. 47 C.F.R. § 1.106(f). The Opposing Parties mention staff's grant of the pro forma application in their Bernard-to-Principle Application for Review, filed June 19, 2009 (at note 1) but do not seek review of it. The allegations raised in the January 24, 2013 Request for Official Notice are both untimely and outside the scope of the proceeding, as they relate to the permissibility of a loan entered into nearly 10 years ago in a transaction that is not now before the Commission and that the aggrieved parties are raising for the first time in January of 2013. Rather, they appear to relate to a *pro forma* assignment of the authorizations from The Watch, Ltd. to DFW Radio License, LLC (*see* File No. BAL-20040305ACG, Attachment 5, granted March 17, 2004), and ultimately led to the assignment of the authorizations to DFW Radio License, Debtor-in-Possession (File No. BAL-20050713ABE, granted Jan. 5, 2006.) In addition, the court opinion at issue was decided three years prior to Schum's request for Official Notice. Schum fails to explain why he is only now bringing this matter to our attention. He states only that "until [he] became aware of the U.S. District Court Case," he did not know that Bernard National Loan Investors, Ltd. was a foreign company. January 24, 2013 Request for Official Notice at 5.

supplements was not previously presented to staff. Thus, these supplements also violate section 5(c) of the Communications Act and section 1.115(c) of the Commission's rules.[116] As the basis for filing the belated supplements, the Opposing Parties rely erroneously on section 1.106(b)(2) of the Commission's rules, which concerns petitions for reconsideration of orders denying an application for review.[117] Section 1.106(b)(2) does not authorize late-filed supplements to applications for review or the submission of new facts in an application for review. The Opposing Parties have not refuted Bernard's claim that the filings violate section 1.115,[118] nor have they shown that the public interest warrants our consideration of the procedurally defective filings. In addition, most of the information included in the supplements to the DFW-to-Bernard Application was addressed by staff in the *Bernard-to-Principle Reconsideration Decision*, which concluded that the additional information lacks probative value.[119] The parties have not challenged these conclusions in their Bernard-to-Principle Application for Review.[120] Accordingly, we dismiss the supplements and requests for official notice.

2. The Supplements and Requests for Official Notice Lack Probative Value

32. In addition, and as an independent basis for rejecting the supplements and requests for official notice, we deny the requests for leave to file supplements and the requests for official notice because the proffered information lacks any probative value. As staff previously determined, the Letter of Offer does not indicate that aliens own or control Bernard in excess of the limits of section 310(a) and

[116] 47 U.S.C. § 155(c)(5) ("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."); 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."); *see BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003); *Application of Robert J. Maccini, Receiver Assignor & Aritaur Communications, Inc. Assignee*, 10 FCC Rcd 9376, 9376 & n.1 (1995). New questions of fact or law should be presented to the designated authority issuing the initial determination, subject to the requirements of 47 C.F.R. §1.106(b)(2). *See e.g., Charles W. Crawford*, Memorandum Opinion and Order, 17 FCC Rcd 19328, 19329 (2002); *Application of Kevin Johnson*, 9 FCC Rcd 2471, 2473 (1993) (citing *Philadelphia MDS Co.*, 8 FCC Rcd 3147 (1993) and *Sherry Rullman*, 8 FCC Rcd 4012 (1993)).

[117] 47 C.F.R. § 1.106(b)(2); *see, e.g.*, Petition for Leave to File Supplement (Apr. 2, 2012) at 2-3; Petition for Leave to File Supplement (Feb. 27, 2012) at 2-3.

[118] *See, e.g.*, Opposition to Petition for Leave to File Supplement and Supplement to Application for Review (March 8, 2012) at 1-2; Supplement to Opposition to Petition for Leave to File Supplement and Supplement to Application for Review (Jan. 6, 2012) at 2. *See also* Response to Opposition to Petition for Leave to File Supplement and Supplement to Application for Review (March 19, 2012) at 2 (claiming, without discussing the applicability of section 1.115(d), that Schum filed the supplement "as soon as possible after being made aware of the court order" submitted for consideration); Petition for Leave to File Supplement (Apr. 2, 2012) (relying solely on section 1.106(b)(2) without addressing Bernard's earlier claims that section 1.115(d) governs the timing of supplements to applications for review); Petition for Leave to File Supplement (Nov. 22, 2011) at 5-6.

[119] *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5746-47 (discussing Letter of Offer, EB investigation, and SEC investigation). In addition, contrary to the Opposing Parties' allegation that staff's rulings on foreign ownership and EB's investigation represent differential treatment of similarly situated licensees, DFW-to-Bernard Second Supplement (Sept. 4, 2008) at 3, EB's investigation did not involve compliance with the foreign ownership restrictions. *See Tama Broadcasting, Inc.*, Order, 24 FCC Rcd 1612, 1612-13 (EB 2009) (stating that investigation concerned allegations of unauthorized transfer of control resulting from conduct that exceeded the scope of a local marketing agreement).

[120] Although the Opposing Parties do not challenge staff's conclusion that the SEC investigation is not relevant under the Commission's character qualifications policy, they argue that the Commission should condition the outcome of this proceeding on the result of the SEC's investigation. Bernard-to-Principle Application for Review at 13. We have addressed that argument above. *See* para. 27, *supra.*

that Jeffrey Epstein ("Epstein") allegedly holds in Zwirn.[14] Before considering the substance of these allegations, we must determine whether they are relevant to our consideration of the Applications. Put another way, we must decide if Zwirn and/or Epstein are parties to the Applications.

Zwirn is a member of Rocklynn Radio, LLC, the sole member of Bernard. However, Bernard has indicated that Zwirn is an insulated member.[15] The instructions to FCC Form 314 (Application for Consent to Assignment of Broadcast Station Construction Permit or License) state that "[g]enerally, insulated limited partners or members of a limited liability corporation ... are not considered parties to the application."[16] Schum has not disputed Bernard's statement that Zwirn is an insulated member of Bernard's parent nor has he submitted any evidence that contradicts Bernard's statement. Accordingly, we find that Zwirn is not a party to the Applications. We also conclude that Epstein – who Schum asserts indirectly holds an interest in Zwirn – is not a party to the Applications. Given our finding that Zwirn and Epstein are not parties to the Applications, we reject Schum's argument that Bernard should have disclosed the ownership of Zwirn –and Epstein's alleged indirect interest in Zwirn – in the Applications.

Finally, Schum reprises his argument regarding the failure of Bernard to disclose ownership information regarding Zwirn in earlier applications. Indeed, Schum goes so far as to request that we dismiss or deny the DFW-to-Bernard assignment applications or designate them for hearing.[17] The deadline for filing petitions for reconsideration of the Commission's denial of the application for review related to the DFW-to-Bernard assignment applications expired well before Schum filed the Petition. Because the time period for filing petitions for reconsideration is prescribed by statute,[18] the Commission may not, with one extremely narrow exception not applicable here, waive or extend the filing period.[19] We find – as the Commission has – that indirect challenges to Commission decisions adopted in proceedings in which the right to review has expired are impermissible collateral attacks and are properly denied.[20] Accordingly, we will not consider Schum's argument regarding the DFW-to-Bernard assignment applications.

Ownership Reports. Schum asserts that Bernard failed to disclose Epstein and another individual in its ownership reports.[21] These individuals allegedly hold equity in Zwirn. As previously discussed, Zwirn is an insulated member of Bernard's parent. Zwirn's indirect interest in Bernard is not attributable and neither are the interests of any individuals holding equity in Zwirn. Bernard is only required to file an

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[14] Petition at 13-16, 21 (basing claims that "Bernard has never fully disclosed the ownership as required" on allegations related to Epstein and Zwirn), 17-19 (alleging that Zwirn "never disclosed [its] foreign funding").

[15] *See* File No. BTC-20090520ACD, Exh. 2 at n.1; File No. BAL-20060117ACU, Attach. 14 at n.1.

[16] FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, Instructions, Section III – Assignee, Item 4: Parties to the Application.

[17] Petition at 31.

[18] 47 U.S.C. § 405(a) ("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.").

[19] *See Reuters Ltd. v. FCC*, 781 F.2d 946, 95, (D.C. Cir. 1986) ("[W]e conclude that the Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration."). *See also Metromedia Inc.*, Memorandum Opinion and Order, 56 FCC 2d 909, 909-10 ¶ 2 (1975) (Commission may not waive 30-day filing period to accept a petition for reconsideration filed one day late); *Fortuna Systems Corp.*, Order on Reconsideration, 3 FCC Rcd 5122, 5123 ¶ 9 (CCB 1988). Specifically, the courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances. *See, e.g., Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993).

[20] *See, e.g., MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 228 n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).

[21] Petition at 16.

ownership report for entities or individuals that hold attributable interests in it.[22] Thus, we find that Bernard was not required to include either Zwirn or the individuals on its ownership reports.

Foreign Funding. Schum again asserts that Bernard failed to disclose information about Zwirn's funding.[23] Schum acknowledges that this issue was raised in the petitions to deny lodged against the DFW-to-Bernard and Bernard-to-Principle assignment applications.[24] However, he claims to have discovered new information about Zwirn that demonstrates that Zwirn had "foreign funding."[25] Schum argues that this foreign funding rendered both Zwirn and Bernard ineligible to hold Commission licenses.[26] He asserts that "the Commission should have denied the license transfer from DFW ... to Bernard ... or set the applications for hearing years ago."[27] Schum himself acknowledges that his foreign funding argument relates to the applications to assign the Stations' authorizations to Bernard not the applications before us now. We will not consider his indirect challenge to our grant of these earlier assignment applications here.[28]

Unauthorized Transfer of Control. Schum also reprises his arguments regarding unauthorized transfers of control.[29] He asserts that the Commission never approved a change in "ownership and control" of Bernard that occurred in 2009.[30] Schum is incorrect. Bernard filed *pro forma* transfer of control applications regarding these changes, which involved the removal of D.B. Zwirn & Co., L.P., DBZ GP, LLC, and Zwirn Holdings, LLC – entities ultimately controlled by Daniel B. Zwirn – from the ownership chain of Bernard.[31] These entities were replaced with RL Transition Corp. The Bureau granted these applications on May 27, 2009.[32] As the Commission noted,[33] petitions for reconsideration of these grants were due 30 days thereafter. To the extent that Schum seeks to challenge the Bureau's

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[22] *See* 47 C.F.R. § 73.3615(a) (requiring that biennial ownership reports be filed by each licensee of a commercial AM station and "each entity that holds an interest in the licensee that is attributable for purposes of determining compliance with the Commission's multiple ownership rules"), and (c) (requiring that ownership reports be filed within 30 days of consummating authorized assignments of permits and licenses and providing for submission of the same information as required for biennial ownership reports). *See also* FCC Form 323 (Ownership Report for Commercial Broadcast Stations), General Instructions, Item 2: Filing Requirements: Non-Biennial Ownership Reports ("Licensees or Permitees ... must file Form 323 to report all attributable interests in the Licensee or Permittee ...."), General Instructions, Item 4: Filing Requirements: Biennial Reports ("Licensee must include all attributable interests on FCC Form 323.").

[23] Petition at 12-16.

[24] Petition at 12 ("Petitioner raised the Zwirn undisclosed ownership issue with the FCC in a Petition to Deny filed February 23, 2006 and again in a Petition to Deny filed March 29, 2007."), 13 ("Petitioner and others objected to Bernard becoming an FCC licensee in the previous filings and Petitioner reaffirms that position with this filing ....").

[25] Petition at 18-19, 24-26.

[26] Petition at 17.

[27] Petition at 13.

[28] While we need not consider the substance of Schum's foreign funding arguments herein, we note that the Commission previously considered and rejected them, finding that "Section 310(b) does not proscribe debt interests held by foreign entities, and Schum has not made prima facie showing that the transactions at issue in this proceeding involve foreign debt that should be treated as equity." *DFW Order*, 29 FCC Rcd at 822 n. 129, *citing Fox Television Stations, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719-21 ¶¶ 13-18 (1995).

[29] Petition at 14, 22-23.

[30] Petition at 14.

[31] *See* File Nos. BTC-20090520ACD and BTC-20090520ACE.

[32] *See Broadcast Actions,* Public Notice, Report No. 46996 (MB June 1, 2009).

[33] *DFW Order*, 29 FCC Rcd at 820 n. 115.

Discussion. *Parties to the Application.* A number of Schum's allegations relate to Bernard and/or Zwirn.[11] Before considering the substance of these allegations, we must determine whether they are relevant to our consideration of the Applications. Put another way, we must decide if Zwirn and/or Bernard are parties to the Application. Schum has not alleged that Bernard or Zwirn hold any attributable – or non-attributable – interests in either ACM or Hammond. Accordingly, we find that they are not parties to the Application and do not consider Schum's allegations regarding them.

Ownership Disclosures. Schum asserts that ACM did not fully disclose its ownership in the Bernard-to-ACM application and in the Application.[12] However, Schum fails to offer any support for this allegation. Accordingly, we do not consider it. In any event, to the extent that Schum seeks to challenge our grant of the Bernard-to-ACM application, it may do so by timely seeking reconsideration of that grant.

Character Qualifications. Schum claims that ACM lacked candor, failing to fully disclose its ownership.[13] However, as noted, Schum has not offered any support for his claim that ACM failed to fully disclose its ownership. Thus, we reject Schum's lack of candor allegation, which is grounded on this allegation.

Acceptability of Application. Schum asserts that it is not possible for ACM to assign a license that it does not hold because it has not "gone through the required FCC approval process."[14] Our recent approval of the Bernard-to-ACM application renders this argument moot. In any event, as is our practice with multi-step transactions,[15] we are conditioning our grant of the Application on ACM's prior or concurrent consummation of its purchase of the Station from Bernard.

Conclusion/Actions. Based on the evidence presented in the record, we find that Schum has not raised a substantial and material question of fact warranting further inquiry. Accordingly, IT IS ORDERED, that the Petition to Deny filed on June 10, 2015, by David A. Schum IS DENIED.

We further find that Hammond Broadcasting, LLC is qualified as an assignee and that grant of the Application is consistent with the public interest, convenience and necessity. Thus, IT IS ORDERED that the application (File No. BAL-20150506ACF) to assign the license for KHSE(AM), Wylie, Texas, from ACM Dallas V LLC to Hammond Broadcasting, LLC IS GRANTED subject to the condition that the assignment of the license for KHSE(AM) from ACM Dallas V LLC to Hammond Broadcasting, LLC shall take place subsequent to and/or simultaneously with the consummation of the assignment of the license for KHSE(AM) from Bernard Dallas, LLC to ACM Dallas V LLC.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[11] Petition at 5-7, 9.

[12] *Id.* at 10-12.

[13] *Id.*

[14] Petition at 8, 13.

[15] *See, e.g., Clear Channel Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 1421, 1437 ¶ 40 (2008); *Cumulus Media, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 12956, 12967 ¶ 20 (MB 2011)

the arguments made by Schum and the Commission affirmed this decision.[4] Subsequently, in 2007, Bernard and Principle Broadcasting Network Dallas LLC (Principle) filed applications seeking consent to the assignment of the Station's authorization from Bernard to Principle. Schum and other equity owners of The Watch challenged these applications too. The Bureau – and later the Commission – rejected the challenges and approved the proposed assignment.[5] The assignment, however, was not consummated.

Instead, in 2015, Bernard sought our consent to assign the Station's authorization to ACM. Schum opposed this application too. He reprised many of the arguments made in opposition to the DFW-to-Bernard and Bernard-to-Principle assignment applications. He also argued that Bernard lacked candor in its dealings with the Commission and made false certifications. In addition to urging us to deny the Bernard-to-ACM assignment application, Schum also requested that we overturn our grant of the application by which the Station's authorization was assigned from DFW to Bernard. We rejected Schum's arguments and granted the application.[6]

Prior to our action on the Bernard-to-ACM assignment application, ACM sought our consent to assign the Station's authorization to Hammond. ACM characterized the Application as the second step in a two stage transaction. Schum objected, repeating his allegations that Bernard failed to fully disclose its and Zwirn's ownership and that Bernard is ineligible to hold a Commission authorization. He also asserted that ACM lacked candor in the Bernard-to-ACM application and the Application because, according to Schum, it did not fully disclose its ownership. Finally, Schum questioned whether it is possible for ACM to seek approval to assign a license that it does not hold.

In the *Letter Decision*, we denied Schum's Petition to Deny and granted the Application. We found that many of Schum's allegations related to either Bernard or Zwirn, entities that were not parties to the Application. We also determined that Schum had offered no evidence in support of his claim that ACM failed to fully disclose its ownership. Based on this finding, we also rejected the related argument that ACM had lacked candor by failing to fully disclose all persons with attributable ownership interests. We also noted that Schum had alleged that it was not in the public interest for the Commission to allow hedge funds to hold Commission authorizations but found that allegation was not transaction-specific and thus was outside of our review of the Application. Finally, we found Schum's argument that the Application was premature to be mooted by our grant of the Bernard-to-ACM assignment application. Schum seeks reconsideration of the *Letter Decision*.

Discussion. Section 1.106(c) of the Commission's rules and established case law provide that "reconsideration is appropriate only when the petitioner either shows a material error or omissions in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters."[7] A petition for reconsideration that reiterates arguments that were

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[4] *KFCD(AM), Farmersville, TX*, Letter, 21 FCC Rcd 14996 (MB 2006) (*DFW-to-Bernard Decision*), *recons. denied*, 23 FCC Rcd 2646 (MB 2008), *review denied*, *DFW Radio License, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 804 (2014) (*DFW Order*), *appeal dismissed Schum v. FCC*, Nos. 14-1026 & 14-1027, 2015 U.S. App. LEXIS 16693 (D.C. Cir. Sept. 18, 2015), *reh'g denied* 2015 U.S. App. LEXIS 19542 (D.C. Cir., Nov. 9, 2015), *reh'g, en banc, denied* 2015 U.S. App. LEXIS 19540 (D.C. Cir., Nov. 9, 2015), *pet. for cert. filed* Feb. 8, 2016.

[5] *KFCD(AM), Farmersville, TX*, Letter, 23 FCC Rcd 2642 (MB 2008) (*Bernard-to-Principle Decision*), *recons. denied* 24 FCC Rcd 5743 (MB 2009), *review denied DFW Order*, 29 FCC Rcd 804, *appeal dismissed Schum v. FCC*, Case Nos. 14-1026 & 14-1027, 2015 U.S. App. LEXIS 16693 (D.C. Cir. Sept. 18, 2015), *reh'g denied* 2015 U.S. App. LEXIS 19542 (D.C. Cir., Nov. 9, 2015), *reh'g, en banc, denied* 2015 U.S. App. LEXIS 19540 (D.C. Cir., Nov. 9, 2015), *pet. for cert. filed* Feb. 8, 2016.

[6] We recently denied in part and otherwise dismissed Schum's Petition for Reconsideration of this decision. *Bernard Dallas LLC*, Letter Order (MB April 7, 2016).

[7] 47 CFR § 1.106(c); *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 US 967 (1966).

previously considered and rejected will be denied.[8] Here, Schum merely repeats arguments that he set forth in his Petition to Deny the Application. Specifically, Schum reprises his allegations regarding ACM's qualifications to hold the Station's authorization, ACM's failure to fully disclose its ownership, and a lack of candor on ACM's part.[9] He also repeats his allegations regarding Bernard and Zwirn.[10] We considered all of Schum's arguments in the *Letter Decision* and either rejected them, or found them unrelated to the transaction or to the parties to the Application.[11] As Schum does not raise any new information reflecting changed circumstances, does not present additional facts not known at the time of his Petition to Deny, and does not attempt to show anything more than a disagreement with our findings on these points, we dismiss the Petition as repetitious.

Conclusion/Actions. For the reasons set forth above, IT IS ORDERED, that the Petition for Reconsideration filed on November 9, 2015, by David A. Schum IS DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

[8] *Saga Communications of Illinois, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 5954, 5956-57 para. 9 (MB 2011), *citing WWIZ, Inc.*, 37 FCC at 686, and *William L. Carroll*, Order, 8 FCC Rcd 6279, 6279 para. 2 (1993).

[9] Petition at 10-11, 12-14.

[10] *Id.* at 4-10, 11-12.

[11] *Letter Decision* at 3 and n. 10.