NO. 17-_____

In the
Supreme Court of the United States

EDWARD R. STOLZ, II, d/b/a
ROYCE INTERNATIONAL BROADCASTING COMPANY,
Petitioner,

–v–

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the FCC violated Petitioner's Fifth Amendment right to due process when it enforced section 405(a) of the Telecommunications Act, which both requires the filing of a petition for reconsideration prior to judicial review of FCC decisions and mandates the enforcement of FCC rulings immediately pending reconsideration, where the Commission did not issue its final ruling on Petitioner's mandatory administrative remedies for over thirteen years.

2. Can a court of appeals can dismiss an argument as moot when the basis for doing so involves a question of fact, presented for the first time at oral argument.

3. Whether the D.C. Circuit erred in its finding that an interlocutory judgment does not constitute a reversionary interest under its previous ruling in *Kidd Communications v. FCC*, 427 F.3d 1 (2005).

PARTIES TO THE PETITON

PETITIONER

- Edward R. Stolz, II
  d/b/a Royce International Broadcasting Company

RESPONDENT

- Federal Communications Commission

INTERVENORS

- Entercom Communications Corp.
- Entercom License, LLC

CORPORATE DISCLOSURE STATEMENT

Royce International Broadcasting Company is a private company, has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Edward R. Stolz, II, d/b/a Royce International Broadcasting Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 882 F.3d 234 and reproduced at App.1a. The court of appeals' order denying the petition for rehearing en banc is unreported but reprinted at App.110a. The FCC's Order on petitioner's 2016 Application for Review is reported at 31 FCC Rcd. 7439 and reproduced at App. 30a. The FCC's Order on petitioner's 2015 Petition for Reconsideration is reported at 31 FCC Rcd. 214 and reproduced at App.37a. The FCC's Order on petitioner's 2005 Application for Review is reported at 30 FCC Rcd. 10556 and reproduced at App.45a. The FCC's Letter on petitioner's 2003 Petition for Reconsideration is reported at 20 FCC 13720 and reproduced at App. 54a. The FCC's Letter on petitioner's 2002 Petition to Deny Assignment of License is unreported but reprinted at App.76a

JURISDICTION

The D.C. Circuit entered judgment on February 16, 2018 (App.1a), and denied rehearing en banc on March 20, 2018. (App.110a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves various provisions of the Communications Act of 1934 as amended by the Telecommunications Act of 1996, along with provisions of the Administrative Procedures Act ("APA"). The primary statutes involved are 47 U.S.C. § 405(a), which reads:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to

appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no

> evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

And 5 U.S.C. § 704, which reads:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Other relevant provisions include, but are not limited to 47 U.S.C. § 308(b), which sets forth the Commission conditions an applicant must meet in order to qualify for a broadcasting station license; 47 U.S.C. § 309(a), which sets forth the Commission's considerations in granting an application for a station license, and 47 U.S.C. § 310(d), which governs assignments and transfers of station licenses. The full text of these provisions, along with other associated statutes and regulations involved in this case, are reproduced at App.112a.

INTRODUCTION

This case begins with the involuntary assignment of a broadcast license from petitioner Edward R. Stolz, II, d/b/a Royce International Broadcasting Company ("Royce" or "Petitioner"), to Entercom Communications Corporation ("Entercom"). It has a long and winding history, now spanning over twenty years. Relevant to this review, Royce filed a petition, asking that the Federal Communications Commission ("Commission" or "FCC") deny Entercom's application to assign Royce's Sacramento-area FM radio broadcast license to Entercom. Following the FCC's improper denial of Royce's petition, Royce then had to wait more than a decade for the Commission to make a ruling on its administrative reviews; in all, the FCC did not issue its final ruling until more than 13 years after Royce filed its petition. For reference, the FCC's own enabling statutes require that administrative reviews be completed in 90 days.

The Court's intervention is needed. This Court has oft stated that justice delayed is justice denied. The FCC has ignored its own procedures for ensuring timely rulings on applications by waiting 13 years to deny Royce's application for review. If the FCC is not required to comply with its own time limitations on reviewing applications, it could pigeonhole cases for years, denying applicants their right to due process while their issues slowly become moot by the passage of time. Here, the more than decade-long delay in action from the FCC deprived Petitioner from seeking relief in the courts until long after the parties' respective positions had changed irrevocably. Now, more than ever, broadcast media and the integrity of our airwaves has been thrust to the forefront of political debate. As such, it is imperative that the FCC is held to its statutorily-imposed deadlines, in order to ensure that the Commission refrains from tactical delay.

The Court's assistance is also needed in resolving a circuit split regarding when an administrative decision is "final." Here, upon the FCC's initial decision to deny Royce's Petition to Deny Assignment of License ("Petition to Deny"), the FCC immediately assigned Royce's license to Entercom, despite the fact that Royce's time to apply for internal review had not yet run. Therefore, Royce immediately lost the benefit of its broadcasting license, but had to wait around 13 years to appeal the FCC's decision to the D.C. Circuit. The Court's clarification is needed to determine whether the FCC regulation requiring that a petitioner go through its administrative process, combined with its regulation that FCC action not be stayed pending administrative review violated Petitioner's due process rights.

Further, the Court is needed to address the question of whether subsequent factual developments, raised for the first time on appeal, can be used by an appellate court to determine that various arguments must be dismissed as moot. Specifically, on the eve of oral argument at the D.C. Circuit, and well over a decade after the FCC initially made its ruling on the Petition to Deny, the FCC introduced evidence that Entercom relinquished one of its broadcasting licenses in the Sacramento market, therefore purportedly making the transfer of the Royce license to Entercom proper, albeit well over a decade after the initial assignment application was made, and well after the FCC's ruling became "final" under any understanding of that term. The Court's assistance is needed to determine whether the evidence of Entercom's voluntary cessation, making it belatedly eligible for the license Royce contends was improperly assigned to it, rendered the D.C. Circuit's responsibility to analyze the propriety of the FCC's ruling moot.

Finally, the Court's clarification is needed to determine if an interlocutory judgment constitutes a reversionary interest for purposes of applying the D.C. Circuit's ruling in *Kidd v. FCC*.

Due to the substantial effect these questions could have on not only this determination and FCC determinations more generally, but also administrative decisions across a wide variety of executive-branch agencies, Petitioner respectfully requests that the Court grant certiorari to weigh in on these issues.

STATEMENT OF THE CASE

1. FCC Authority Over Broadcasting Licenses

Congress granted the FCC exclusive authority to grant, deny, and approve the transfer or assignment of broadcast licenses to operate radio stations. 47 U.S.C. §§ 301, 303, 307-310. (App.112a-134a). Any time a broadcast station owner wants to transfer its ownership to a third party, the FCC must approve the assignment. 47 U.S.C. § 310(d). In order to approve an assignment, the FCC must find that the public interest, convenience, and necessity will be served. *Id.* The public interest in an assignment includes "promoting diversity of program and service viewpoints" and "preventing undue concentration of economic power." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

In order to prevent the undue concentration of economic power and promote diverse programming, the FCC limits the number of stations an entity may own in the same local market. 47 C.F.R § 73.3555(a) (App. 146a). In a local market with 45 or more radio stations, a single entity can own only 5 commercial stations in the same service (AM or FM), whereas in a market with 37 to 44 stations, a single entity can own only 4 commercial stations in the same service. *Id.* The FCC's media ownership rules regulate the way a local market is defined.

2. Initial Court Proceedings

From 1975 until 2003, Royce was the owner and operator of an FM Broadcast Station known as KWOD (now KUDL), 106.5 MHz, Channel 293B, Sacramento, California. Royce was the initial owner of the station, obtaining its FCC license in 1975.

On February 8, 1996, Royce and Entercom signed a three page "Letter of Intent" regarding a potential sale of KWOD, its assets, and its FCC license. The sale was subject to the parties reaching a definitive asset purchase agreement. However, the parties could not come to an agreement regarding the sale.

Subsequently, Entercom sued Royce in California Superior Court, County of Sacramento. On April 30, 2002, the state court issued an Interlocutory Judgment requiring specific performance of the letter of intent. (App.96a). The Interlocutory Judgment required Royce to, *inter alia*, (i) sign all documents necessary to effectuate the FCC's approval of the assignment of KWOD's license from Royce to Entercom; (ii) enter into a time brokerage agreement with Entercom allowing Entercom to operate and control all radio station operations during the "interim period" prior to the FCC's approval of the assignment application; and (iii) compile a list of all other radio station assets and transfer those assets to Entercom upon FCC approval of the assignment application. The Interlocutory Judgment provided that, if Royce did not willingly sign and deliver the required documents, the court could sign and complete them on its behalf.

Following the state court's decision, Royce appealed the Interlocutory Judgment and made numerous attempts, through the state court itself and the court

of appeals, to stay the Interlocutory Judgment while its appeal was pending. In October 2002, after the court of appeals instructed the trial court to establish criteria under which Royce could stay the enforcement of the Interlocutory Judgment pending its appeal, the state court issued an order allowing Royce to stay the enforcement so long as it posted a $10 million bond. (App.88a). Royce was unable to post such a bond, and Entercom proceeded with the filing of an FCC Form 314 assignment of license application. Meanwhile, maintaining that it had a right to stay the judgment under California Code of Civil Procedure § 917.3, Royce filed another writ of supersedeas with the Appellate Court, attempting again to stay the enforcement of the Interlocutory Judgment pending its appeal.

Due to its belief that it had a statutory right to a stay, Royce refused to participate in Entercom's unilateral filing of the assignment of license application. Undeterred by Royce's refusal to cooperate, and in contrast to the state court's order that the state court itself would sign the assignment documents for Royce if Royce refused to sign, Entercom simply entered Stolz's name into the electronic Form 314 application and filed it through the FCC's electronic filing system.

3. 2002 Petition to Deny Assignment of License

On December 30, 2002, Royce timely filed a Petition to Deny the assignment of license, in which it made a number of arguments, in particular noting that Entercom's proposed ownership of KWOD violated 47 C.F.R § 73.3555(a).

Section 73.3555(a) limits the number of radio stations an entity can own in a designated market.

Entercom's acquisition of KWOD would constitute its fifth FM broadcast station in the Sacramento radio market. Royce argued that, according to 47 C.F.R § 73.3555(a), Entercom could only own five FM stations in the Sacramento market if it could show that there were at least 45 AM and FM primary broadcast stations operating in that market. It further argued that the FCC should determine there were only 37 AM and FM primary broadcast stations operating in the Sacramento market at the time. In addition, Royce informed the FCC about its pending appeal of the state court's order and asked that they defer ruling on the assignment of license application until a final decision had been reached.

Entercom filed a timely opposition to Royce's Petition to Deny on January 10, 2003, and Royce filed a timely reply on January 23, 2003. On May 12, 2003, the FCC Media Bureau, Audio Division issued a letter denying Royce's Petition to Deny and granting Entercom's assignment of license application. (App.76a).

4. 2002 Biennial Review Order

On June 2, 2003, during the thirty-day window for Royce to petition the Commission for reconsideration, the FCC issued an order altering the requirements for multiple station ownership. *See In the Matter of 2002 Biennial Regulatory Review, Report and Order*, 18 FCC Rcd. 13620 (2003) ("2002 Order") (App.76a).

The order was the culmination of a comprehensive review of the FCC's rules regarding station ownership, and changed, among other things, the way a local market is defined. This change had a direct effect on

the Sacramento local market; where the local market of Sacramento was determined to have 45 or more stations prior to the 2002 Order, after the 2002 Order it was determined to have between 37 and 44 stations.

As a result of the change in the way the Sacramento local market was calculated, some station owners that had previously complied with the local market rules would own too many stations under the new rules. In order to address situations where a station owner fell out of compliance due to the 2002 Order, the 2002 Order contained a grandfathering provision, to prevent existing license holders from having to divest their interest in one or more stations in order to comply with the new ownership rules. 18 FCC Rcd. at 13808 ¶ 498. The grandfathering provision also established processing guidelines that would govern "pending and new commercial broadcast applications for the assignment or transfer" of radio licenses as of the 2002 Order's adoption date. *Id.* at 13813 ¶ 498. Under the 2002 Order, any pending license applications were subject to the new compliance regulations. Under the new compliance regulations set forth in the 2002 Order, the Sacramento market would have been found to have fewer than 45 AM and FM broadcast stations, and Entercom would not have qualified for assignment of Royce's broadcast license.

Still within its thirty-day window, Royce filed a Petition for Reconsideration, asking that the 2002 Order be applied to Entercom's assignment of license application. Entercom filed a timely opposition on June 24, 2003, and Royce filed a timely reply on July 7, 2003.

Over two years later, on August 22, 2005, the Media Bureau entered a ruling denying Royce's Petition for Reconsideration, stating that Entercom's license assignment application was not "pending" at the time the 2002 Order was enacted, despite the fact that at the time of its enactment, Royce still maintained a right to petition for reconsideration.

5. 2005 Application for Review

Following the denial of its Petition for Reconsideration, and pursuant to 47 C.F.R § 1.115 (App.137a), Royce filed an Application for Review. The Application for Review is a condition precedent to exhausting administrative remedies and appealing the FCC's decision to the D.C. Circuit. Royce's Application for Review was filed on September 20, 2005. Entercom filed its timely opposition on October 5, 2005, and Royce filed its timely reply on October 19, 2005.

As the D.C. Circuit aptly stated, it then "inexplicably took the FCC ten years to issue its barely four-page decision" on Royce's Application for Review. 882 F.3d 234, 239 (emphasis in original). On September 17, 2015, the FCC released its Memorandum Opinion and Order denying Royce's Application for Review (App. 45a).

6. 2015 Petition for Reconsideration

Following the Commission's Memorandum Opinion and Order, on October 19, 2015 Royce filed a Petition for Reconsideration. Its petition was based in part on a decision made by the D.C. Circuit while Royce's Application for Review was pending (*Kidd Communications v. FCC*, 427 F.3d 1 (2005)), and also based on

the Commission's nearly decade long delay in making their ruling on the Application for Review. Entercom filed a timely opposition to Royce's Petition on November 3, 2015, and Royce filed a timely reply on November 16, 2015.

The Chief of the Mass Media Bureau, purporting to act pursuant to 47 CFR § 1.106(p)(1), dismissed the Petition for Reconsideration on January 19, 2016, a mere two months after the conclusion of the pleading cycle.

In order to exhaust its administrative remedies, Royce was obligated to file yet another Application for Review, which it did file on February 18, 2016. Entercom filed its timely opposition on March 4, 2016, and Royce filed its timely reply on March 17, 2016.

On June 20, 2016 the Commission provided its Memorandum Opinion and Order denying Royce's Application for Review (App.30a).

7. Appeal to D.C. Circuit

Following its exhaustion of administrative remedies, Royce filed an appeal with the D.C. Circuit on July 19, 2016, setting forth seven issues for review.

Royce's central argument on appeal was that the Commission should have applied the 2002 Order's new local-market definition to Entercom's assignment of license application because the case was still pending within the Commission's administrative process at the time the 2002 Order took effect. The D.C. Circuit declined to consider Royce's argument, instead dismissing it as moot. After Royce filed its appeal with the D.C. Circuit, and shortly before oral argument,

Entercom relinquished its broadcast license for one of its preexisting FM radio stations in the Sacramento market. The court held that since, at the time of their 2017 decision, Entercom only had four FM radio stations in the Sacramento market, it was eligible under the 2002 Order to acquire KUDL fifteen years prior. The court therefore did not consider Royce's argument that the assignment of license application was granted in error in 2003.

Royce additionally argued to the D.C. Circuit that the Commission's approval of Entercom's assignment of license would be invalid after the court's decision in *Kidd v. FCC*, *supra*. Royce argued that the court's decision in *Kidd* broadly bars involuntary transfers of licenses that stem from state court litigation. The D.C. Circuit found that the Commission improperly barred Royce from utilizing its *Kidd* argument in its Petition for Reconsideration. However the court read *Kidd* narrowly, and held that it only applies where a transfer would enforce a reversionary interest. The court further found that unlike in *Kidd*, where the Commission rested its own decision on a state court decision ordering transfer, here the state court did not order the Commission to assign the license, but instead ordered Royce to sign the assignment of license application.

REASONS FOR GRANTING CERTIORARI

I. THE TELECOMMUNICATIONS ACT REQUIREMENTS (1) THAT PETITIONER FILE A PETITION FOR RECONSIDERATION AS A CONDITION PRECEDENT TO JUDICIAL REVIEW AND (2) MANDATING IMMEDIATE ENFORCEMENT OF FEDERAL COMMUNICATIONS COMMISSION ORDERS, COUPLED WITH THE COMMISSION'S MORE THAN DECADE LONG DELIBERATION ON PETITIONER'S ADMINISTRATIVE REVIEW, RESULTED IN AN EGREGIOUS VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS

The Telecommunications Act section governing the FCC's administrative review process lays out two rules that are relevant to the case at hand. First, the Act provides that the FCC's administrative review process is a condition precedent to judicial review where a party relies on questions of fact or law upon which the Commission has not been given the opportunity to pass. 47 U.S.C. § 405. Second, the Act mandates that, absent special order from the FCC, an order given by the FCC shall not be stayed pending its administrative review process. *Id.* These requirements are contrary to the administrative finality and exhaustion doctrines laid out in the Administrative Procedures Act and this Court's ruling in *Darby v. Cisneros*, 509 U.S. 137, 147 (1993), and when combined with the thirteen-year delay in this case, constitute an egregious violation of Petitioner's due process rights.

In May 2003, the FCC sent Royce a letter denying Royce's Petition to Deny the assignment of its broadcast

license to Entercom. A few days later, the FCC transferred Royce's license to Entercom, despite the fact that Royce had 30 days to petition for reconsideration. Within two weeks of the transfer of Royce's license, and before Royce's petition for reconsideration was due, the FCC's 2002 Order was enacted, changing the way that local markets were calculated. The changes made, had they been applied to the assignment of Royce's license, would have made Entercom ineligible for the assignment, and Royce's license could not and would not have been transferred to Entercom.

At the D.C. Circuit, Royce brought an argument that the FCC's May 2003 decision regarding the Entercom's assignment of license application was "pending" and not "final" at the time the FCC transferred Royce's license to Entercom because Royce still had time to petition for reconsideration under the FCC's regulations. Royce further argued that since the decision was not final when the 2002 Order was enacted, the assignment should have been subject to the 2002 Order's new regulations regarding the calculation of market sizes, and the FCC should not have grandfathered Entercom in under the previous regulatory scheme. The D.C. Circuit dismissed the issue as moot; however, due process concerns make it necessary for this Court to revisit the argument. Essentially, the FCC considered its 2003 letter ruling a final order for purposes of depriving Royce of its license and grandfathering in Entercom's licenses under the pre-2002 Order regulatory scheme. At the same time, it required Royce to go through the FCC's administrative review process for thirteen years as a condition precedent to judicial review, without putting a stay on its decision.

This Court has previously set forth the basic two-part test used to determine whether an administrative decision is "final." *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett*, this Court stated that the first condition in determining administrative finality is that the action marks the "consummation" of the agency's decision-making process. *Id.* at 177–178. The second condition is that the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Id.* at 178.

There is no question here that the second condition of the *Bennett* test was met. Immediately after the Audio Division's May 2003 letter, the FCC assigned Royce's license to Entercom, who has been utilizing and benefiting from the use of the license for the past fifteen years. The problem arises from the first condition of the *Bennett* test: whether the May 2003 letter marks the consummation of the agency's decision-making process. It is here that tension begins to surface between the APA and this Court's precedent on the one hand, and section 405 of the Telecommunications Act on the other.

The FCC's regulations regarding petitions for reconsideration are governed by 47 U.S.C. § 405 (App. 134a). The relevant portions of that statute state that (1) "no application for reconsideration shall stay or postpone the enforcement of an order or action of the Commission"; and (2) "the filing of a petition for reconsideration shall not be a condition precedent to judicial review except where the party seeking review relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass . . . " (emphasis added). Under this section, Royce

was required to file a Petition for Reconsideration as a condition precedent to seeking judicial review, since its argument was based on the FCC's 2002 Order, which was not enacted at the time the FCC assigned Royce's license to Entercom and not considered in Royce's initial Petition to Deny the assignment of license. Further, pursuant to section 405, the assignment of license approved in the FCC's 2003 Letter was not stayed pending Royce's petition for reconsideration.

The FCC's regulations regarding filing a petition for reconsideration as a condition precedent to judicial review despite a lack of stay not only defy logic, but also run contrary to other statutory and judicial authority. The APA's regulations regarding the availability of judicial review are located at 5 U.S.C. § 704 (App.112a). The statute provides, in relevant part, that "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application [. . .] for an appeal to superior agency authority . . . unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative." On its face, this provision should allow Royce to seek judicial review of the Audio Division's May 2003 letter, since the FCC's decision was not "inoperative" pending Royce's "appeal to superior agency authority." However, since the APA gives leeway where "otherwise expressly required by statute," Royce was not relieved of its obligation to follow the requirements of section 405 of the Telecommunications Act. While the APA seems to recognize that where there is no provision dictating that a decision is inoperative until review has been completed, a party should be able to seek immediate judicial review,

the Telecommunications Act makes no such acknowledgement.

This Court, in *Darby v. Cisneros*, 509 U.S. 137, 147 (1993) stated that § 10(c) of the APA (5 U.S.C. § 704) "explicitly requires exhaustion of all intra-agency appeals mandated either by statute or by agency rule" prior to judicial review. However, the Court went on to say that the purpose of 10(c) was to allow agencies to require an appeal to "superior agency authority" before an examiner's initial decision became final. *Id.* at 152. Ultimately, the Court held "[a]gencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and second, by providing that the initial decision would be 'inoperative' pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review." *Id.* Since the FCC stood behind the finality of its May 2003 decision, and did not make it inoperative pending administrative review, according to *Darby*, Royce should have been able to immediately seek judicial review.

With this Court's ruling in mind, it is clear that under circumstances such as the ones at hand, 47 U.S.C. § 405 violates a party's right to judicial appeal. Section 405 requires a party to go through the FCC's internal administrative review process, however it does not provide that the FCC's initial decision becomes "inoperative" while that process is pending. Here, the initial decision, granting the license assignment, was immediately implemented. There was no mechanism for the decision to become "inoperative" while Royce went through the FCC's administrative review process. This, compounded with the fact that it took the FCC thirteen

years to complete that review process, is a clear denial of Royce's due process rights. Royce was immediately deprived if its interest in its broadcast license, and then had to wait thirteen years to seek judicial review of the FCC's action.

Throughout the voluminous history of this case, the FCC has used its own policies and procedures as a mechanism to flout petitioner's due process rights. The FCC should not be able to say that their 2003 decision was final for the purposes of immediately depriving Royce of its license, but then still require Royce to go through an internal administrative review lasting thirteen years before its remedies are considered exhausted. This is a clear violation of Royce's due process rights, and the Court's assistance is needed in remedying this egregious action.

II. THE D.C. CIRCUIT ERRED IN DETERMINING THAT ENTERCOM'S VOLUNTARY RELINQUISHMENT OF ONE OF ITS RADIO BROADCAST LICENSES MOOTED ROYCE'S CHALLENGE TO THE FCC'S RULINGS ON ITS APPLICATION

In ruling on Royce's appeal, the D.C. Circuit recognized the extraordinary amount of time the FCC took when considering Royce's petition to deny and subsequent administrative appeals challenging the assignment of its broadcast license to Entercom. However, despite recognizing the extraordinary amount of time during which Royce's application remained under review by the FCC, the D.C. Circuit ultimately dismissed as moot Royce's challenge to the FCC's ruling in part because Entercom relinquished one of its radio broadcast licenses in the Sacramento market shortly

before oral argument (App.1a). The D.C. Circuit provided no legal basis for its ruling on the issue of mootness, noting only that after relinquishing one of its stations, Entercom now qualified to receive the radio broadcast license in question, albeit thirteen years after Royce's petition to deny the assignment was filed, and well after the FCC issued its final ruling denying the petition.

Royce concedes that, had Entercom relinquished one of its Sacramento market FM radio broadcast licenses prior to the FCC ruling on the assignment of KWOD, such relinquishment would have defeated Royce's petition to deny because Entercom would have been indisputably at or below the radio station ownership limits for the Sacramento market. However, that should not have been the end of the D.C. Circuit's inquiry. While Entercom's relinquishment in 2017 would have allowed it to receive the license for KWOD had it occurred around the time the petition was submitted, in 2002, that has no bearing on whether the D.C. Circuit can rule on the propriety of the FCC's rulings fifteen years later.

Mootness has most often been dealt with, including by this Court, in the context of adversarial proceedings wherein a defendant remediates the behavior for which a plaintiff is seeking legal or equitable redress, prior to the issuance of judgment. It has long been settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, defendant-respondent

Laidlaw was sued under the citizen suit provision of the Clean Water Act ("CWA") for excessive discharge into a waterway, in violation of the CWA and Laidlaw's permit thereunder. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). During the course of litigation, Laidlaw came into substantial compliance with the requirements of its permit under the CWA, even going so far as to permanently close the facility at issue. *Id.* at 168. The District Court assessed money damages against Laidlaw but declined to issue injunctive relief due to Laidlaw's post-suit compliance with its permit. *Id.* The Fourth Circuit vacated the District Court's order regarding damages on Article III standing grounds and ordered the case dismissed; the District Court's denial of injunctive relief was not appealed. *Id.* at 173. This Court directly analyzed and addressed the mootness issue on appeal and found that Laidlaw did not meet its heavy burden in showing mootness. The *Laidlaw* ruling reaffirmed that a defendant claiming that its voluntary compliance moots a case faces a formidable burden. *See, Laidlaw, supra*, at 190; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594, fn. 5 (1999); *see also, U.S. v. Concentrated Phosphate Exporters Ass'n*, 393 U.S. 199, 201 (1968). This Court has made it clear that the standard for determining whether a case has been mooted by voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw, supra*, at 189 quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968) (emphasis added).

When Royce's appeal was dismissed in part as moot, the D.C. Circuit's ruling was devoid of the analysis required by *Laidlaw* and its predecessors. Had analysis of mootness been performed, the D.C. Circuit would surely have concluded that, in fact, Entercom's claims of mootness were particularly unfounded. Unlike in this Court's prior rulings on the issue of mootness, Entercom did not take voluntary remedial steps through relinquishing one of its radio broadcast licenses until well after the FCC issued its ruling on both Royce's petition and subsequent administrative reviews; in fact, Entercom waited to relinquish until shortly before oral argument on Royce's appeal. Assuming, *arguendo*, the FCC initially ruled in Royce's favor and granted its petition to deny Entercom's assignment application, Entercom could not expect to relinquish one of its Sacramento-area broadcast licenses more than a decade later and consummate the assignment. Similarly, the doctrine of mootness cannot be used to legitimize an FCC assignment ruling that was made incorrectly, more than a decade after that ruling was initially made.

Further making this case unique and worthy of this Court's attention, it appears that there is a dearth of caselaw on the issue of mootness in the context of administrative decisions such as the one now before the Court where appellant/petitioner has appealed an administrative ruling. Given that Royce appealed the propriety of the FCC's rulings with respect to its own petition to deny assignment and was not adversarial to Entercom, per se, Entercom's belated actions are simply immaterial to the question of whether the FCC ruled properly when it denied Royce's petition. This issue is of great import and requires the Court's

attention because it appears that the Court has not previously addressed mootness, caused by a third-party action such as Entercom's, in the context of the appeal of an administrative ruling.

III. The D.C. Circuit Erred in Its Determination That an Interlocutory Judgment Does Not Constitute a Reversionary Interest Under *Kidd v. FCC*

Petitioner Royce and, undoubtedly, the radio broadcast industry at large, seek the clarity and final resolution provided by this Court weighing in on the interpretation of the FCC's regulations against so-called "reversionary interests" in broadcast licenses, most recently examined by an appellate court in *Kidd Communications v. FCC*.

In the past, the FCC has taken the position that no security interest could attach to an FCC broadcast license in any manner. *See, In re TerreStar Networks, Inc.*, 2011 WL 3654543 (Bankr. S.D.N.Y. 2011). For example, the FCC has commented on the nature of a radio broadcaster's interest in its broadcast license as follows: "a broadcast license, as distinguished from the station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right." *In re Merkley*, 94 F.C.C.2d 829 (1983). The FCC has found that "such hypothecation endangers the independence of the licensee who is and who should be at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust." *Id.* at 830–31.

While a security interest, including a reversionary interest, in an FCC license is impermissible, a security interest or other right to receive proceeds from an approved transfer of a license is a private right and has been permitted, subject to oversight. *See, In re Tracy Broadcasting*, 438 B.R. at 328; *MLQ Investors*, 146 F.3d at 748. In *In re Ridgely*, for example, the court distinguished between a licensee's private right to receive economic value generated by an FCC license and the FCC's public right to "preserv[e] its regulatory authority over licensees and over the transfer of broadcast licenses." *In re Ridgely*, 139 B.R. at 378–79. The court in *Ridgely* concluded that a security interest over the right to proceeds from an FCC broadcasting license did not disrupt the FCC's regulatory power whereas a security interest in the license itself did. *Id.* at 379.

In *Kidd Communications v. FCC*, the D.C. Circuit noted that, when the FCC deviates from its rules and policies regarding the issue of reversionary interests or any other type of security interest in a broadcast license, it must explain adequately how it reconciles state commercial and contract interests with the FCC's own policy considerations. *Kidd, supra* at 150. Put simply, the FCC may not simply rubber stamp state court orders transferring licenses even where, at least nominally, the state court still allows the FCC to conduct its own public interest determinations. *Id.* While it may be the prerogative of state court judges to attempt to order the transfer of FCC broadcast licenses as a bundle with the other assets of a radio station, the FCC must make public interest determinations in deciding whether to authorize the assignment of a license, even where the remaining station

assets may be worthless without a broadcast license. *Id.*

Here, much like in *Kidd*, the FCC approved the assignment of the Royce FCC license to Entercom, effectively rubber stamping the state court's directive in its interlocutory judgment. In upholding the FCC's approval of the assignment to Entercom, the D.C. Circuit read the law narrowly, relying primarily on the ban on transfers of FCC licenses through which the transferor retains a reversionary interest, as described in 47 C.F.R. 73.1150(a). Such a narrow reading on the prohibition of non-voluntary license transfers is clearly not what the decisions described herein contemplate. As such, Royce and the radio industry at large require the ultimate clarity that only this Court can provide with respect to the matters the FCC must either consider or not consider before approving the assignment of a broadcast license.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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