

**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.*<sup>1</sup> (collectively, the “Opposing Parties”). The Opposing Parties seek review of: (1) the February 19, 2008, letter decision<sup>2</sup> denying the Opposing Parties’ Petition for Reconsideration of the December 28, 2006, Media Bureau (“Bureau”) decision<sup>3</sup> 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

<sup>1</sup> 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.

<sup>2</sup> *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas*, Letter, 23 FCC Rcd 2646 (MB 2008) (the “*DFW-to-Bernard Reconsideration Decision*”).

<sup>3</sup> *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;<sup>4</sup> and (2) the May 20, 2009, letter decision<sup>5</sup> denying the Opposing Parties' Petition for Reconsideration of the Bureau's December 28, 2006, decision<sup>6</sup> 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.<sup>7</sup>

## 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”).<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> Subsequently, on February 16, 2007, Bernard and Principle filed applications for Commission consent to assignment of the Stations' licenses from Bernard to Principle.<sup>11</sup>

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

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<sup>4</sup> 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.

<sup>5</sup> *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas*, Letter, 24 FCC Rcd 5743 (MB 2009) (the “*Bernard-to-Principle Reconsideration Decision*”).

<sup>6</sup> *KFCD(AM), Farmersville, Texas, KHSE(AM), Wylie, Texas*, Letter, 23 FCC Rcd 2642 (MB 2008) (the “*Bernard-to-Principle Decision*”).

<sup>7</sup> 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.

<sup>8</sup> See *DFW-to-Bernard Decision*, 21 FCC Rcd at 14996-14997.

<sup>9</sup> See *id.* at 14997-14998.

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup>

4. The *DFW-to-Bernard Decision* afforded the Opposing Parties "listener standing"<sup>13</sup> and found that: (1) DBZ did not retain a reversionary interest in the Stations because it was not a former licensee of either station;<sup>14</sup> (2) Opposing Parties failed to present any probative evidence that DBZ had exercised control over construction of KHSE(AM);<sup>15</sup> (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.<sup>16</sup> The Decision concluded that Opposing Parties had not raised a substantial and material question of fact warranting further inquiry and granted the applications.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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

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<sup>12</sup> 47 U.S.C. § 310(b)(3),(4). See *DFW-to-Bernard Decision* at 14998.

<sup>13</sup> 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).

<sup>14</sup> See *DFW-to-Bernard Decision* at 14999.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 15003.

<sup>17</sup> *Id.*

<sup>18</sup> *DFW-to-Bernard Petition for Reconsideration* at 3 and Appendix A.

<sup>19</sup> See *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2647.

<sup>20</sup> *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<sup>21</sup> “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.”<sup>22</sup>

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.”<sup>23</sup>

9. *In the Bernard-to Principle Decision*,<sup>24</sup> 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.”<sup>25</sup>

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

<sup>21</sup> Daniel Bernard Zwirn exercises ultimate control over Bernard. See BAL-20060117ACU, Attachment 11.

<sup>22</sup> DFW-to-Bernard Application for Review at 3.

<sup>23</sup> 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.

<sup>24</sup> *The Bernard-to-Principle Decision* was released simultaneously with the *DFW-to-Bernard Reconsideration Decision* on February 19, 2008.

<sup>25</sup> See *Bernard-to-Principle Decision*, 23 FCC Rcd at 2644.

shares of Dhandapani Finance Limited, an Indian firm, which allegedly showed that Bernard had misrepresented its foreign ownership; a March 7, 2008, memorandum in which D.B. Zwirn & Co. advises investors that it intended to dissolve DBZ; and a May 9, 2008, article from the *Wall Street Journal* concerning the SEC's investigation.<sup>26</sup> Finally, in a second supplemental filing, Opposing Parties submitted a news article reporting that, on August 20, 2008, the Commission's Enforcement Bureau ("EB") issued a letter commencing an investigation into whether Straight Way Radio, Bernard Radio LLC, DBZ, and/or D.B. Zwirn & Co. LP engaged in an unauthorized transfer of control of stations in Florida and Georgia. They claimed that Zwirn had an obligation under Section 1.65 of the Commission's Rules (the "Rules")<sup>27</sup> to report this investigation to the Commission.<sup>28</sup>

11. In the *Bernard-to-Principle Reconsideration Decision*, the Bureau accepted the Opposing Parties' supplemental material concerning the EB investigation, dismissed the first supplemental filing as untimely under Section 1.106(f) of the Commission's Rules,<sup>29</sup> and rejected each of their substantive arguments.<sup>30</sup> With respect to the new arguments raised by Opposing Parties, the Bureau held that: (1) the claim that D.B. Zwirn & Co. had been under investigation for fraud by the SEC was supported only by newspaper articles which, even if considered, did not raise a substantial and material question of fact calling for further inquiry, as there was no evidence that the investigation had resulted in an adjudication as generally required by the Commission's *Character Policy*;<sup>31</sup> and (2) with respect to the EB investigation, there is no presumption that misconduct at one station is predictive of the operation of a licensee's other stations, petitioners failed to show that the investigation concerned matters that would be of decisional significance and Bernard therefore had no duty under Section 1.65 of the Commission's rules to amend the application to report the EB investigation. The Bureau also noted that the EB investigation had resulted in a Consent Decree that barred the Commission from considering facts developed in that investigation in this case.<sup>32</sup>

12. In the Bernard-to-Principle Application for Review, Opposing Parties mostly reiterate (stating that they "incorporate by reference") the arguments raised in the DFW-to-Bernard Application for Review. They also charge that the Commission's May 5, 2009, Order requiring the disclosure of certain nonattributable ownership interests in biennial ownership reports rendered arbitrary and capricious the Bureau's failure to demand like disclosure from Bernard.<sup>33</sup> Opposing Parties also argue for the first time that the staff's "failure to conduct a full and fair investigation" of Bernard's ownership not only violated

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<sup>26</sup> See May 15, 2008, *Supplement to Bernard-to-Principle Petition for Reconsideration* at 4-5 and Exhibits B-D.

<sup>27</sup> 47 C.F.R. § 1.65.

<sup>28</sup> Second Supplement to Bernard-to-Principle Petition for Reconsideration (Sep. 4, 2008) at 2-3 and Exhibit B.

<sup>29</sup> 47 C.F.R. § 1.106(f).

<sup>30</sup> *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5746-47. The Bureau found that the Letter of Offer was available at the time Opposing Parties filed the petition for reconsideration of the *Bernard-to-Principle* application grant. Therefore that material could have been presented earlier and did not warrant consideration under 47 C.F.R. § 1.106(c). *See id.* at 5746.

<sup>31</sup> *Id.* at 5747, citing *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1204 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990) ("*Character Policy Statement*").

<sup>32</sup> *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5747, citing *Tama Broadcasting, Inc.*, Consent Decree, 24 FCC Rcd 1612, 1618-19 (EB 2009).

<sup>33</sup> Bernard-to-Principle Application for Review at 3, 7, citing *Promoting Diversification of Ownership In the Broadcasting Services*, Report and Order and Fourth Further Notice of Proposed Rule Making, 23 FCC Rcd 5896 (2009) ("*2009 Diversity Order*"), *recon. granted in part*, Memorandum Opinion and Order and Fifth Further Notice of Proposed Rulemaking, 24 FCC Rcd 13040 ("*2009 Diversity Reconsideration Order*").

the Communications Act but also their rights under the “takings clause” in Amendment 5 to the United States Constitution.<sup>34</sup>

13. *May 2009 Pro Forma Transfer of Control.* Finally, on May 20, 2009, Bernard filed an application for a *pro forma* transfer of control. In this application, DB Zwirn & Co., L.P., DBZ GP, LLC, and Zwirn Holdings, LLC, entities ultimately controlled by Daniel B. Zwirn, were removed from the ownership chain of Bernard and replaced with RL Transition Corp. The sole shareholder and holder of a 100 percent voting interest in RL Transition Corp. also is Daniel B. Zwirn.<sup>35</sup> The staff granted this unopposed application on May 27, 2009.

### III. DISCUSSION

14. Under section 309(d) of the Communications Act,<sup>36</sup> any interested person may petition the Commission to deny or to set for hearing any application for a broadcast license. The petition must contain “specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]. Such allegations of fact shall ... be supported by affidavit of a person ... with personal knowledge thereof.”<sup>37</sup> In determining whether a petition is sufficient to make out a prima facie case, “[t]he Commission's inquiry ... is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.”<sup>38</sup> Allegations that consist “of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits ... are not sufficient” to establish a prima facie case.<sup>39</sup> If the Commission determines that the petition to deny satisfies the threshold standard, the inquiry proceeds to a second phase in which the Commission determines whether, “on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] ... a substantial and material question of fact is presented.”<sup>40</sup> The Commission “may determine how much weight to accord disputed facts based on the record before it.”<sup>41</sup> If the Commission finds that the allegations, taken together with any opposing evidence, raise a substantial and material question of fact as to whether grant of the application would serve the public interest, it must conduct a hearing.<sup>42</sup> A substantial and material question is raised when “the totality of the evidence arouses a sufficient doubt on the [question whether grant of the application would serve the public interest] that further inquiry is called for.”<sup>43</sup> A determination that there are no material and substantial questions of fact renders the prima facie determination moot.<sup>44</sup>

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<sup>34</sup> Bernard-to-Principle Application for Review at 16.

<sup>35</sup> See Application No. BTC-20090520ACD, Exhibit 2, pages 3-4.

<sup>36</sup> 47 U.S.C. § 309(d).

<sup>37</sup> *Id.*

<sup>38</sup> *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C.Cir.1987).

<sup>39</sup> *North Idaho Broadcasting Co.*, 8 FCC Rcd 1637, 1638 (1993) (quoting *Gencom Inc.*, 832 F.2d at 180 n.11).

<sup>40</sup> *Astroline Commc'ns Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (quoting 47 U.S.C. § 309(d)(1)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C.Cir.1985); see also *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998).

<sup>44</sup> *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir.), cert. denied, 519 U.S. 823 (1996).

15. Additionally, under Section 1.115(b)(2) of the Commission's rules, an Application for Review, to warrant Commission consideration, must establish either that: (i) the delegated actions were in conflict with statute, regulation, case precedent or Commission policy; (ii) the actions involved a question of law or policy that has not previously been resolved by the Commission; (iii) the actions involved the application of precedent or policy that should be overturned or revised; (iv) there has been an erroneous finding as to an important or material question of fact; or (v) there has been prejudicial procedural error.<sup>45</sup> Further, no application for review will be granted if it relies on questions of fact or law on which the designated entity has been afforded no opportunity to pass.<sup>46</sup> For the reasons discussed below, Opposing Parties have failed to meet these requirements, and we deny the Applications for Review except with respect to the Opposing Parties' untimely allegation that the Bureau's orders effected an unlawful taking and their attempt to incorporate certain arguments by reference, which we dismiss as procedurally defective. We also dismiss as procedurally defective various untimely supplements and requests.

#### A. Foreign Ownership Allegations

16. We find that the staff correctly rejected the Opposing Parties' allegation that Bernard may have violated the Commission's foreign ownership restrictions, and we affirm the Division's conclusion that it was not necessary to designate the applications for hearing.<sup>47</sup> Opposing Parties have not submitted any information that calls into question the veracity of the declaration submitted by Bernard attesting that there is no foreign equity or voting ownership in Bernard. Opposing Parties' allegations are conclusory and rest entirely on information drawn from news articles and unrelated proceedings.<sup>48</sup> Specifically, the Opposing Parties rely on news articles discussing DBZ's withdrawal of its SEC registration, the Connecticut Attorney General's views on the regulation of hedge funds, a DBZ employee's apparent admission of prior fraud, an SEC investigation of DBZ, a motion in an unrelated civil case in which a DBZ affiliate states that its partners are citizens of New York, and an EB investigation involving other stations acquired by a DBZ affiliate.<sup>49</sup> We agree with staff's determination that these materials do not raise a substantial and material question of fact warranting further consideration, as well as its rationale for that conclusion.<sup>50</sup> As staff correctly pointed out, the Commission has previously held that news articles are the equivalent of hearsay and do not satisfy the personal knowledge and specificity requirements for a petition to deny required by Section 309(d) of the Act.<sup>51</sup> In addition, as the Bureau stated, the Commission generally does not consider unadjudicated

<sup>45</sup> 47 C.F.R. § 1.115(b)(2). See also 47 U.S.C. § 155(c)(4-7).

<sup>46</sup> See 47 C.F.R. § 1.115(c).

<sup>47</sup> *DFW-to-Bernard Decision*, 21 FCC Rcd at 15003.

<sup>48</sup> See *North Idaho Broadcasting Co.*, *supra*, 8 FCC Rcd at 1638.

<sup>49</sup> Bernard-to-Principle Petition to Deny at Ex. N (Bloomberg.com and *New York Post* articles); Bernard-to-Principle Supplement to Informal Objection at Ex. A-C (Bloomberg.com article, nypost.com article, and motion styled "D.B. Zwirn & Co., L.P.'s Notice of Removal"); Bernard-to-Principle Petition for Reconsideration at Ex. A-B (moneycentral.msn.com./Reuters article, *New York Times* article, money.cnn.com/Fortune article, *Wall Street Journal* article, castlehall.typepad.com article); Second Supplement to Bernard-to-Principle Petition for Reconsideration (Sept. 4, 2008) at 2 and Ex. A, B. As noted in paragraphs 10-11 above, the Opposing Parties also submitted supplemental information that staff dismissed as untimely, specifically an August 3, 2006 Letter of Offer concerning acquisition of shares in an Indian firm; a March 7, 2008 memorandum from Daniel B. Zwirn to investors concerning plans to wind down DBZ; and a May 9, 2008 news article about the SEC investigation. Supplement to Bernard-to-Principle Petition for Reconsideration (May 15, 2008). The Opposing Parties do not challenge staff's dismissal of this information as untimely.

<sup>50</sup> *Bernard-to-Principle Decision*, 23 FCC Rcd at 2644; *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5747.

<sup>51</sup> See *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5747; see also *American Mobile Radio Corporation*, 16 FCC Rcd 21431, 21436 (2001); *id.*, 13 FCC Rcd 8829, ¶26 (IB 1997), *aff'd on other grounds*, 16

allegations of misconduct that does not involve potential violation of Commission rules or the Communications Act.<sup>52</sup> The Bureau correctly rejected the Opposing Parties' argument that the Bureau should have considered the SEC's investigation in disposing of their allegations.<sup>53</sup> Moreover, the materials on which the Opposing Parties rely do not specifically allege that DBZ has foreign investors. Rather their claim is merely an unfounded speculative inference from these materials.<sup>54</sup> Thus, the Opposing Parties have failed to establish a *prima facie* case that grant of the applications would be contrary to the public interest. They characterize their objection to staff's determination as a burden of proof issue, claiming that under Commission precedent, staff should have required Bernard to carry the burden of proof of showing lack of proscribed foreign ownership interests because "the essential facts are all within [Bernard/Zwirn's] sole power to produce."<sup>55</sup> The cases cited by Opposing Parties<sup>56</sup> are distinguishable, because each involved the allotment of the burden of proof in a hearing proceeding pursuant to Section 1.254 of the rules.<sup>57</sup> As noted above, section 309(d) of the Communications Act places the burden on a petitioner seeking denial of an application to demonstrate why grant of the application in question would be inconsistent with the public interest. Notwithstanding their untimely pleadings based on speculation and surmise, the Opposing Parties have failed to meet that statutory burden.

17. With regard to the merits, we reject Opposing Parties' assertions that (1) the declaration submitted by Bernard attested to legal conclusions; (2) in relying on that declaration, the staff improperly delegated to a private party the Commission's authority to find facts and determine law; and (3) absent full ownership disclosure, it was "legally impossible" for the Commission to find that grant of the application is in the public interest. The March 8, 2006, Declaration of Steven F. Campbell, Vice President of DBZ U.S. Advisors, states that "[t]here is *no* direct or indirect foreign equity or voting ownership in Bernard Dallas, LLC ('Bernard Dallas'). This includes equity investment in D.B. Zwirn Special Opportunities Fund, L.P., an insulated member of Bernard Dallas' direct parent."<sup>58</sup> This

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FCC Rcd 21431 (2001) (rejecting foreign ownership challenge based on magazine article where applicant provided an affidavit attesting to a specific level of foreign ownership). The Opposing Parties' reliance on *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (cited in *United States v. Microsoft, Inc.*, 253 F.3d 34, 108-09 (D.C. Cir. 2001)) is misplaced. See *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 6746 & n. 18. In that case, the court took judicial notice of a newspaper article to demonstrate that a witness's cooperation with the authorities was widely known by the public, indicating that no purpose would be served by sealing his plea agreement, which required him to cooperate with authorities. *Id.* at 291-92. Here, in contrast, the Opposing Parties offer the newspaper articles for the truth of the matters asserted therein, matters which are not within their personal knowledge and thus do not meet the evidentiary standard set forth in section 309(d) of the Communications Act. See *Pikes Peak Bcstg Co.*, 12 FCC Rcd 4626, 4630 (1997).

<sup>52</sup> *Character Policy Statement, supra*, 102 FCC 2d 1179, 1204; see *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5747.

<sup>53</sup> Bernard-to-Principle Application for Review at 13-14 (referencing SEC investigation cited in DFW-to-Bernard Application for Review at 13-14).

<sup>54</sup> See *DFW-to-Bernard Reconsideration Decision*, 23 FCC Rcd at 2647.

<sup>55</sup> DFW-to-Bernard Application for Review at 7; Bernard-to-Principle Application for Review at 8 (quoting *United Telephone Co. of Ohio*, 26 FCC Rcd 417 ¶ 11 (1970)).

<sup>56</sup> See *Nancy Naleszkiewicz*, Hearing Designation Order, 5 FCC Rcd 7131 (CCB 1990); *The Seven Hills Television Co.*, Decision, 2 FCC Rcd 6867 (Rev. Bd. 1987); *United Telephone Company of Ohio*, Memorandum Opinion and Order, 26 FCC 2d 417 (1970); and *Midwest Radio Television, Inc.*, Memorandum Opinion and Order, 18 FCC 2d 987 (Rev. Bd. 1969).

<sup>57</sup> 47 C.F.R. §1.254.

<sup>58</sup> See March 8, 2006, Bernard Opposition to Petition to Deny, Exhibit K, Declaration of Steven F. Campbell (emphasis added) ("Campbell Declaration").

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).<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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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<sup>59</sup> 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. . .”).

<sup>60</sup> 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).

<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup> However, this requirement was subsequently deleted<sup>64</sup> and, in any event, Bernard maintains that its nonattributable investors do not fall into either of those categories.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

### **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.<sup>68</sup> The contracts expressly provided that DFW Radio would retain ultimate control over the station construction.<sup>69</sup> 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.<sup>70</sup>

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.”<sup>71</sup> They claim that: (1) without DFW’s knowledge and consent, Patrick hired and

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<sup>62</sup> 2009 Diversity Order, 24 FCC Rcd at 5898.

<sup>63</sup> *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.

<sup>64</sup> See 2009 Diversity Reconsideration Order, 24 FCC Rcd at 13046-47.

<sup>65</sup> See Opposition to Bernard-to-Principle Application for Review at 7.

<sup>66</sup> Bernard-to-Principle Application for Review at 16.

<sup>67</sup> 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.”).

<sup>68</sup> See *DFW-to-Bernard Decision*, 21 FCC Rcd at 15000.

<sup>69</sup> *Id.* at 15000-15001.

<sup>70</sup> 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).

<sup>71</sup> DFW-to-Bernard Petition to Deny at unnumbered page 12.

used the construction superintendent, Jack Sellmeyer; (2) KHSE(AM) as constructed included changes made without the knowledge or permission of DFW; and (3) DBZ ordered Patrick not to communicate with or involve DFW in any aspects of construction.<sup>72</sup> Opposing Parties provide no extrinsic evidence to support these charges. In their Petition to Deny the Bernard-to-Principle Application, Opposing Parties reiterate those arguments *verbatim*.<sup>73</sup> Crains, however, cites a statement by Bernard's Texas counsel, in a bankruptcy hearing, that "the debtors [the Opposing Parties here] no longer own these stations."<sup>74</sup>

23. Initially, we note that the common carrier public notice cited by Opposing Parties in support of their transfer of control allegation is inapposite,<sup>75</sup> because that document simply recites factors that the Common Carrier Bureau's staff would consider in determining whether tentative selectees for cellular telephone licenses in smaller markets had improperly given up control of their facilities. The Opposing Parties fail to cite any case in which the Commission has applied the cellular application processing guidelines contained in this public notice to the construction of broadcast stations. Moreover, as noted by the Bureau, the Court Orders regarding the construction of KHSE(AM), as well as the subsequent agreements between DFW Radio and DBZ provided that DBZ would advance the funds for construction and that Patrick, the media broker hired by DFW Radio with the Court's approval, would oversee the station's construction.<sup>76</sup> However, as discussed above, DFW Radio retained ultimate control over station construction under the Court Orders and agreements, which stated explicitly that the "construction contract, the budget for such construction, and all other terms and documents thereto shall be in all respects satisfactory to the Debtors [DFW Radio and Watch]"<sup>77</sup> and that "Zwirn [DBZ] shall not be deemed to be in control of the Debtors, the operation of the Debtors, or to be acting as a responsible person with respect to the operation or management of the Debtors and their assets for any purpose."<sup>78</sup>

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<sup>72</sup> Specifically, Opposing Parties argue that the "out of control team" of DBZ, Patrick, and Sellmeyer refused to order the custom phasing system for KHSE(AM)'s six-tower antenna system designed by DFW's engineer, William J. Sitzman, but rather redesigned and ordered another phasing system, and effused to respond to Mr. Schum's requests for information. *Id.* at unnumbered Pages 8-9.

<sup>73</sup> In their Applications for Review, the Opposing Parties also allege, for the first time, that Schum never received a construction budget for KHSE(AM) or had a key to the facility. DFW-to-Bernard Application for Review at 11-12 & n.2; Bernard-to-Principle Application for Review at 12-13 & n.2. The Opposing Parties do not support these new allegations with any evidence.

<sup>74</sup> See *Informal Objection*, Exhibit A at 23. The Bankruptcy Court hearing concerned DFW's 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 *id.* at 32.

<sup>75</sup> See DFW-to-Bernard Application for Review at 11 (citing *Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120*, Public Notice, 1 FCC Rcd 3 (Comm. Car. Bur. 1986)).

<sup>76</sup> See *Debtors' Application for Authority to Employ Media Broker*, Case No. 05-35874-BJH (Bankr. N.D. Texas, Dallas Division, submitted as Exhibit G to Bernard's Opposition to Petition to Deny the DFW-to-Bernard Application (request of The WATCH and DFW to employ media broker Lawrence Patrick); July 6, 2005, *Order Authorizing Debtor to Employ Media Broker*, 05-35874-BJH (Bankr. N.D. Texas, Dallas Division, submitted as Exhibit H to Bernard's Opposition to Petition to Deny the DFW-to-Bernard Application (Bankruptcy Court Order authorizing The Watch and DFW to employ Patrick for a commission equal to five percent of the first three million dollars of any sale of KFCD and KHSE and two percent of any amount above that figure).

<sup>77</sup> June 23, 2005, Order at 1; see also DFW-to-Bernard Asset Purchase Agreement ("APA") at 1, attached as Exhibit 10 to Assignment Application ("The construction of Station 700 AM shall be managed by Larry Patrick ... acting on behalf of the Seller and by such authority having Seller's ultimate control and supervision prior to the Final Closing").

<sup>78</sup> See July 20, 2005, "Final Order Authorizing Postpetition, Secured, Superpriority Financing" at 8; see also Section 5.2 of APA ("Prior to the Final Closing Date, Buyer shall not, directly or indirectly, control, supervise, direct, or

(continued....)

24. Although the Opposing Parties aver that DBZ did not abide by these terms, they do not present probative evidence in support of their claim that Petitioner Schum, the manager of DFW Radio, was “blocked from any input in the build out of KHSE. . . .”<sup>79</sup> or that DBZ usurped control over construction. Indeed, it appears that that Schum, through counsel in the bankruptcy proceeding, was regularly apprised of the status of construction of KHSE(AM), receiving construction timeline calendars, frequent e-mail updates, and progress reports.<sup>80</sup> Further, although Opposing Parties allege that Sellmeyer and DBZ attempted to unilaterally modify the KHSE(AM) construction permit, Opposing Parties acknowledge, and the record shows, that DFW Radio, in fact, exerted its control to successfully block that effort, and a FCC Form 301 modification application was never filed.<sup>81</sup> DBZ’s funding of KHSE(AM)’s construction pursuant to the Court Orders and court-approved agreements and the fact that it received updates from Patrick on the progress of construction do not establish that DBZ exercised unauthorized control.<sup>82</sup>

25. Additionally, with respect to the statement from DBZ’s counsel to the Bankruptcy Court judge that Petitioners “no longer own the stations,” we believe that, taken in context, *i.e.*, whether the judge should order someone other than Schum to sign an application to cover the construction permit to avoid cancellation of the permit for failure to meet the applicable deadline, that statement reflects only that the bankruptcy court had approved Bernard’s purchase of the stations and was not any recognition that it had had prematurely assumed control.<sup>83</sup> Finally on this issue, we decline to credit Opposing Parties’ speculative and unsupported contention that the KHSE(AM) time brokerage agreement was “forced upon DFW Radio Licensee by Bernard Dallas LLC.”<sup>84</sup> In light of these findings, we conclude that Opposing Parties have failed to raise a substantial and material question of fact calling for further inquiry into whether or not Zwirn prematurely assumed control of KHSE(AM).

### C. The Opposing Parties’ “Other Matters”

26. The Opposing Parties further contend in both the DFW-to-Bernard and Bernard-to-Principle Applications for Review that the fact pattern here is “on all fours with the fact pattern in *Kidd Communications v. FCC*”<sup>85</sup> and attempt to incorporate by reference facts and legal arguments asserted in previously filed pleadings.<sup>86</sup> The Rules do not allow such incorporation by reference. An application for

(Continued from previous page) \_\_\_\_\_

attempt to control, supervise, or direct the operation of the Stations and all such operation, including complete control and supervision of all of the Station’s programs, employees, and policies shall be the sole responsibility of Seller until the Final Closing Date . . .”).

<sup>79</sup> Reply to Opposition to Petition to Deny the DFW-to-Bernard Application at 6.

<sup>80</sup> See Exhibit I to Opposition to Petition to Deny the DFW-to-Bernard Application.

<sup>81</sup> DFW-to-Bernard Application for Review at 10 n.2; Informal Objection to the Bernard-to-Principle Application, Ex. A (“Transcript of Proceedings”) at 13.

<sup>82</sup> The Commission has permitted prospective purchasers to furnish funds and act in varying management capacities in order to assure continuance of service. See *Daniel Forrestall, Receiver*, Memorandum Opinion and Order, 8 FCC Rcd 884, 888 (MMB 1993) (citing *Phoenix Broad. Co.*, 44 FCC2d 838 (1973)).

<sup>83</sup> See *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d at 395, 397 (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).

<sup>84</sup> DFW-to-Bernard Application for Review at 12; Bernard-to-Principle Application for Review at 13.

<sup>85</sup> 427 F.3d 1 (D.C. Cir 2005) (“*Kidd*”).

<sup>86</sup> Specifically, the Opposing Parties “incorporate our facts and legal arguments by reference as to the threats made by Bernard Dallas, LLC, its agents and representatives, against Mr. Schum when Mr. Schum, the sole manager of DFW Radio License, LLC, attempted to exercise control over the affairs of the construction permit of KHSE . . . .” DFW-to-Bernard Application for Review at 13; Bernard-to-Principle Application for Review at 14.

review must set forth fully the applicant's arguments and all underlying relevant facts.<sup>87</sup> Therefore, we dismiss this portion of each Application for Review as procedurally defective. As a separate and independent basis for rejecting these allegations, we find that *Kidd* is clearly distinguishable as a case in which a prior licensee of a station received a security interest in the station's license.<sup>88</sup> Here, DBZ was neither a prior licensee, nor a permittee, of either KHSE(AM) or KHSD(AM), and the financing documents created no security interest in the Stations' licenses.<sup>89</sup> In addition, as staff correctly concluded, Bernard's counsel's communication to DFW's counsel concerned compliance with a bankruptcy court order and therefore did not abuse Commission processes.<sup>90</sup> Thus, in the alternative, we deny these portions of the Applications for Review.

#### D. Alleged "New Facts"

27. The Opposing Parties claim that the "financial press" has reported the "apparent closing of the Zwirn Special Opportunity Fund," and that "[g]iven that this firm has been beset by a Securities and Exchange Commission investigation and accounting irregularities, including Mr. Zwirn's use of a Gulfstream private jet for his travels, the Commission cannot finally approve the action in the above-captioned application until the SEC and accounting reviews have been completed and any civil litigation that results therefrom has been resolved."<sup>91</sup> They request that "the Commission withhold action in this matter until the Audio Division has ruled" on its petition for reconsideration of the *Bernard-to-Principle Decision*.<sup>92</sup> The Bureau has denied that petition. Because we are consolidating the appeal of the *Bernard-to-Principle Reconsideration Decision* in this Order, we need not address that request.<sup>93</sup> Moreover, as noted above, it is well established that press accounts and unadjudicated allegations of misconduct not involving the Communications Act or Commission rules or policies do not constitute the basis of a *prima facie* showing that an applicant lacks the character qualifications to be a Commission licensee.<sup>94</sup> For this reason, it would be inappropriate to rely on pending matters involving possible non-

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<sup>87</sup> *Red Hot Radio*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004) ("Such incorporation by reference is not allowed under our rules. Our rules do not allow for a 'kitchen sink' approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

<sup>88</sup> See *Kidd*, 427 F.3d at 2 (case concerned rule prohibiting a seller from retaining a reversionary interest in a station license and policy prohibiting a licensee from granting a security interest in a broadcast license).

<sup>89</sup> See *DFW-to-Bernard Decision*, 21 FCC Rcd at 14999 & n.25.

<sup>90</sup> *DFW-to-Bernard Decision*, 21 FCC Rcd at 15002.

<sup>91</sup> DFW-to-Bernard Application for Review at 14; see also Bernard-to-Principle Application for Review at 13 (seeking "to preserve the arguments [in the DFW-to-Bernard Application for Review] that the outcome of this case must be conditioned on the result of the Securities and Exchange Commission inquiry into the affairs of Daniel Bernard Zwirn).

<sup>92</sup> DFW-to-Bernard Application for Review at 14.

<sup>93</sup> Were we to address the request for stay, we would find it both procedurally and substantively deficient. A stay request may not be made in an Application for Review. 47 C.F.R. § 1.44(e) provides that a stay request must be filed as a separate pleading and that "any such request that is not filed as a separate pleading will not be considered by the Commission." Moreover, Opposing Parties have not addressed the prerequisites for a stay. See, e.g., *Liberty Productions*, Order, 16 FCC Rcd 18966 (2001) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)) (establishing four-part standard for issuance of stay).

<sup>94</sup> See para. 16 & n.54, *supra*.; *Character Policy Statement*, 102 FCC 2d at 1191 (Commission will consider unadjudicated non-broadcast misconduct only if it is "so egregious as to shock the conscience and evoke almost universal disapprobation"); *General Motors Corp. & Hughes Electronics Corp., Transferors, and the News Corp., Ltd., Transferee*, 19 FCC Rcd 473, 488 (2004) (Commission does not consider pending matters not involving FCC-related misconduct in reaching character determinations).

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.<sup>95</sup>

#### **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.<sup>96</sup> 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.'"<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> Similarly, they claim Bernard had a duty under Section 1.65 of the Rules to disclose the SEC investigation.<sup>100</sup>

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";<sup>101</sup> (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;<sup>102</sup> (3) a news release reporting the third

<sup>95</sup> 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).

<sup>96</sup> 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).

<sup>97</sup> 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.

<sup>98</sup> Motion for Leave to File Second Supplement (Sept. 4, 2008) at 4.

<sup>99</sup> Motion for Leave to File Second Supplement (Sept. 4, 2008) at 3-4.

<sup>100</sup> Motion for Leave to File Supplement (May 15, 2008) at 5-6.

<sup>101</sup> 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.

<sup>102</sup> 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 1 LLC v. Vikas Mehrotra*, Order, Case No. 11-1172 (1<sup>st</sup> Cir. Nov. 18, 2011) (the "First Circuit Order") (attached as Ex. A).

quarter 2011 financial results of the Fortress Investment Group LLC (“Fortress”);<sup>103</sup> (4) a news article about the SEC’s investigation of DBZ and Perry Gruss, DBZ’s chief financial officer;<sup>104</sup> (5) a federal court order denying Gruss’s motion to dismiss the SEC’s complaint;<sup>105</sup> (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;<sup>106</sup> and (8) and several pages of excerpts from the “consolidated financial statement of D.B. Zwirn Special Opportunities Fund, L.P.” for 2004.<sup>107</sup>

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.”<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> Schum claims that

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<sup>103</sup> *Id.* at 7 & Ex. D.

<sup>104</sup> Petition for Leave to File Supplement, Ex. A (Apr. 2, 2012).

<sup>105</sup> 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).

<sup>106</sup> 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.

<sup>107</sup> 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.

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

<sup>109</sup> 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 (1<sup>st</sup> Cir. Dec. 9, 2011) (attached as Ex. C to Petition for Leave to File Supplement (Feb. 27, 2012)).

<sup>110</sup> 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 these 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. . . .”<sup>111</sup> 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.”<sup>112</sup> 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.”<sup>113</sup>

### 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.<sup>114</sup> Likewise, to the extent the Opposing Parties challenge the grant of the pro forma transfer application, their challenge is untimely.<sup>115</sup> Further, the information in the Bernard-to-Principle

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threshold.” There is no mention of “onshore” or “offshore” accounts or their ownership. These claims require no further discussion.

<sup>111</sup> 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.

<sup>112</sup> May 30, 2012, Request for Official Notice at 4; January 24, 2013 Request for Official Notice at 5-6.

<sup>113</sup> 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.

<sup>114</sup> 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.

<sup>115</sup> *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.<sup>116</sup> 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.<sup>117</sup> 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,<sup>118</sup> 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.<sup>119</sup> The parties have not challenged these conclusions in their Bernard-to-Principle Application for Review.<sup>120</sup> 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

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<sup>116</sup> 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)).

<sup>117</sup> 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.

<sup>118</sup> 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.

<sup>119</sup> *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).

<sup>120</sup> 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*.

(b) of the Communications Act or that DBZ misrepresented its ownership.<sup>121</sup> Staff correctly rejected the Opposing Parties' previous reliance on newspaper articles to support their allegations, and for the same reason we conclude that the articles proffered in the Opposing Parties' supplements lack any probative value.<sup>122</sup> A newspaper article is not an acceptable substitute for the requirement of Section 309(d) of the Communications Act that allegations in a petition to deny be supported by the affidavit of a person with personal knowledge of the facts alleged.<sup>123</sup> Additionally, it is clear from the record here and from the 2009 *pro forma* transfer application that D.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. 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.<sup>124</sup> The Commission has terminated the Tama investigation.<sup>125</sup> 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.<sup>126</sup> As discussed above, the SEC investigation is not relevant to the matters before us absent an adjudicated finding of wrongdoing that is cognizable under the Commission's character policy, and thus Bernard's failure to report the investigation did not violate Section 1.65 of the Rules.<sup>127</sup> For the same reason, the unadjudicated claims at issue in the civil litigation concerning another broadcaster are irrelevant to our determination here, and Schum's allegations regarding the relevance of that proceeding are speculative and lack specificity. The Opposing Parties fail to show that the Fortress financial statement is relevant to the matters before us. Although Schum characterizes DBZ's and its affiliates' actions in the First Circuit proceeding as an unlawful "refusal" to obey the court's directive to list the citizenship of its owners, nothing in the decision supports that conclusion.<sup>128</sup> The federal court orders denying Gruss's motion to dismiss the SEC complaint and denying Bernard National Loan Investors' breach of contract claim, which are the subject of the Requests

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<sup>121</sup> *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5746. In its Opposition to the May 15, 2008 Petition for Leave to File Supplement, Bernard responded to the allegation that DBZ did not disclose to the FCC that a firm identified in the Letter of Offer as a DBZ partner was in fact a partner. Bernard stated that the firm was one of the insulated partners mentioned in Bernard's ownership exhibit and was owned entirely by U.S. citizens. Opposition to Motion for Leave to File Supplement, Response to Supplement, and Request for Administrative Sanctions Against Petitioners (June 4, 2008), at 3.

<sup>122</sup> *Bernard-to-Principle Reconsideration Decision*, 24 FCC Rcd at 5747 (citing *Pikes Peak Broadcasting Co.*, Memorandum Opinion and Order, 12 FCC Rcd 4626, 4630 (1997); *Rothschild Broadcasting, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 7226, 7227 (1995); and *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982)).

<sup>123</sup> *Pikes Peak Broadcasting Co.*, 123 FCC Rcd at 4630. With respect to the newspaper article concerning the sex offender who the Opposing Parties believe was a "large shareholder[]" in the Zwirn Offshore Fund," the Opposing Parties not only have failed to provide an affidavit of a person with knowledge of the facts in question but also have failed to offer any facts indicating that the character of the person in question is legally relevant to the applications under consideration. See Petition for Leave to File Supplement (Nov. 22, 2011) at 13 (stating that the news article indicates that the shareholder met with attorneys regarding potential claims against DBZ for investment losses he incurred as an investor.).

<sup>124</sup> See, e.g., BTC-20090520ACD, Exhibit 2 (demonstrating that ultimate control of Bernard remained with Daniel B. Zwirn).

<sup>125</sup> *Tama Broadcasting, Inc.*, *supra*, 24 FCC Rcd at 1614.

<sup>126</sup> *Id.* at 1618-19.

<sup>127</sup> *General Motors Corp. & Hughes Electronics Corp., Transferors, and the News Corp., Ltd., Transferee*, 19 FCC Rcd at 488; *cf. id.* (Section 1.65 of the Rules does not require applicants to report pending criminal investigations).

<sup>128</sup> The court ordered that Zwirn provide the identity and citizenship of each member solely to establish whether it had "diversity jurisdiction"; at issue was the question of whether any members of the limited liability company were citizens of Rhode Island. *First Circuit Order* at 3-8.

for Official Notice, do not reach any conclusion about the foreign ownership of DBZ<sup>129</sup> or Zwirn's control of Bernard, as neither of these questions is at issue in those matters, and therefore they are not relevant to this proceeding.

#### IV. CONCLUSION

33. Section 309(d) of the Communications Act places on a petitioner seeking denial of an application the burden of demonstrating why grant of the application in question would be inconsistent with the public interest. Notwithstanding their many attempts to do so with numerous untimely and unauthorized pleadings containing a myriad of speculative allegations, the Opposing Parties have simply failed to meet their statutory burden here. For the reasons set forth above, we find that the Opposing Parties have failed to demonstrate any substantive or procedural error by the Bureau or a conflict with any statute, regulation, case precedent, or Commission policy.<sup>130</sup> We therefore will dismiss in part and otherwise deny the Applications for Review, to the extent indicated herein. In addition, we dismiss the motions and petitions for leave to file supplements to the applications for review, the supplements, and the requests for official notice, and in the alternative, we deny them.

#### V. ORDERING CLAUSES

34. Accordingly IT IS ORDERED that the Applications for Review filed on March 20, 2008, and June 19, 2009, by David Schum, *et al.* ARE DISMISSED TO THE EXTENT INDICATED ABOVE AND OTHERWISE DENIED.

35. IT IS FURTHER ORDERED that the May 15, 2008, and September 4, 2008, Motions for Leave to File Supplement to Application for Review filed by David Schum, *et al.*, and the associated supplements ARE DISMISSED and, in the alternative, ARE DENIED.

36. IT IS FURTHER ORDERED that the November 22, 2011; February 27, 2012; and April 2, 2012 Petitions for Leave to File Supplement filed by David Schum and the associated supplements ARE DISMISSED and, in the alternative, ARE DENIED.

37. IT IS FURTHER ORDERED that the November 22, 2011 request of David Schum to withdraw the October 21, 2011 and October 27, 2011 Petitions for Leave to File Supplement and Supplement to Application for Review IS GRANTED.

38. IT IS FURTHER ORDERED that the May 30, 2012 and January 24, 2013 Requests for Official Notice filed by David Schum ARE DISMISSED and, in the alternative, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>129</sup> In the January 24, 2013 Request for Official Notice, Schum does not indicate the relevance of the 2004 loan to the transactions now before the Commission. The financial statement excerpts that Schum provides cover calendar year 2004. The first of the two applications at issue here, DFW-to-Bernard, was filed in 2006. Moreover, Section 310(b) does not proscribe debt interests held by foreign entities, and Schum has not made a *prima facie* showing that the transactions at issue in this proceeding involve foreign debt that should be treated as equity. *See, e.g. Fox Television Stations, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5714, 5719 (1995) (examining numerous factors relevant to determination that debt should be treated as equity).

<sup>130</sup> 47 C.F.R. § 1.115(b).