United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1346 **September Term, 2015**

FILED ON: JUNE 28, 2016

FREE ACCESS & BROADCAST TELEMEDIA, LLC AND WORD OF GOD FELLOWSHIP, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

On Petition for Review of Orders of the
Federal Communications Commission

Before: GRIFFITH and SRINIVASAN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

JUDGMENT

This petition for review from two orders of the Federal Communications Commission was presented to the court, and briefed and argued by counsel. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED AND ADJUDGED that the petition for review be **DISMISSED**.

Petitioners Word of God Fellowship, Inc., and Free Access & Broadcast Telemedia, LLC, petition for review of two orders of the Federal Communications Commission (FCC). *See In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567 (2014); *Second Order on Reconsideration*, 30 FCC Rcd. 6746 (2015). In those orders, the FCC carried out Congress's mandate in the Spectrum Act to develop a process to "shift a portion of the licensed airwaves from over-the-air television broadcasters to mobile broadband providers." *Nat'l Ass'n of Broads. v. FCC*, 789 F.3d 165, 168 (D.C. Cir. 2015); *see also* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112–96, §§ 6001-6703, 126 Stat. 156 (Spectrum Act). The petitioners here challenge the FCC's treatment of low-power television (LPTV) stations in its orders. As the FCC acknowledges, the procedures it adopted to repurpose the licensed airwaves for use by mobile broadband providers will result in many LPTV stations either moving to new channels or shutting down altogether. According to the petitioners, the Spectrum Act prohibited the FCC from affecting LPTV stations in this manner. We do not reach the merits of these claims because they fail on threshold grounds.

We lack jurisdiction over Word of God's challenge because it is not a "party aggrieved" by a final order of the FCC. Our review is governed by the Administrative Orders Review Act, generally known as the Hobbs Act. *See Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40, 42 (D.C. Cir. 1983). Under the Act, "[a]ny party aggrieved by the final order" of the FCC may petition for review of that order. 28 U.S.C. § 2344. We have held that the phrase "party aggrieved" requires petitioners to be parties to the proceedings before the agency. *Simmons*, 716 F.2d at 42; *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) (explaining that the court "does not have jurisdiction" over claims raised by petitioners who were not parties to the agency proceedings). Word of God does not dispute that it did not participate in the agency proceedings and therefore is not a party aggrieved under *Simmons*. Accordingly, we do not have jurisdiction over Word of God's challenge.

Free Access also cannot bring its claims. Free Access is not an LPTV station nor does it own any stake in an LPTV station. Instead, Free Access invested cash in specific LPTV stations and, in return, received options to buy those stations. According to Free Access, its injury is a decrease in the value of its options stemming from the "imminent danger of displacement or outright shutdown" of those LPTV stations due to the FCC's orders. Pet'rs' Br. at 42. Thus, under this theory, Free Access suffers an injury from the orders only insofar as the LPTV stations in which it has options are injured by the orders.

Under principles of corporate law, "[w]here the basis of an action is a wrong to the corporation, redress must be sought in a 'derivative' action." WILLIAM MEADE FLETCHER, 12B FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5908 (2009). A derivative action is an action brought on behalf of the corporation, as compared to an individual action, which is brought in the individual's own name. Generally, a plaintiff may bring an individual action where the injury is "distinct from any injury to the corporation itself." *Labovitz v. Wash. Times Corp.*, 172 F.3d 897, 901 (D.C. Cir. 1999). Free Access's injury is not distinct from the injuries suffered by the LPTV stations in which it owns options. Instead, its injury is "directly tied to the fate" of those LPTV stations. *Id.* at 902. Accordingly, its action must be brought on behalf of the corporation as a derivative action. Free Access has not brought a derivative action here and we must dismiss the petition for review.[1]

Free Access responds that we should excuse it from following general corporate law principles because it is not a shareholder and the corporation owes it no fiduciary duties. According to Free Access, because option-holders are owed no fiduciary duties, they must be allowed to bring individual lawsuits to protect their interests. But the rules regarding individual and derivative actions do not turn on the presence or absence of fiduciary duties. Instead, they focus on whether the basis of the complaint is an injury to the corporation. Indeed, this court has barred suit by guarantors, who are usually owed no fiduciary duties, where they did not suffer an

[1] In deciding whether an action is derivative or individual, courts often look to the relevant state law. *See Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992) ("[T]he question whether the suit should be brought by the [individuals] or the [c]orporation really depends . . . on considerations and conventions of corporate law . . . ."). Free Access does not identify what state law applies here, but it does not dispute that the action it has brought is individual rather than derivative in nature. We do not opine on whether Free Access could bring a derivative action as an option-holder.

"injury independent of the firm's" injury. *Labovitz*, 172 F.3d at 902 (quoting *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1336 (7th Cir. 1989)). And courts bar suits by creditors, who likewise are not generally protected by fiduciary duties, "unless the alleged misconduct causes harm to them separate and distinct from the injury" to the corporation. *Pagán v. Calderón*, 448 F.3d 16, 29 (1st Cir. 2006). Because Free Access has not alleged an injury that is independent of the injury suffered by the LPTV stations in which it owns options, we dismiss the petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk