

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1129

September Term, 2017

FILED ON: JULY 25, 2018

FREE PRESS, ET AL.,

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

ION MEDIA NETWORKS, INC., ET AL.,
INTERVENORS

On Petition for Review of an Order of
the Federal Communications Commission

Before: MILLETT, PILLARD and KATSAS, *Circuit Judges*.

J U D G M E N T

The court considered this petition for review of an order of the Federal Communications Commission on the record from the agency, and the briefs and arguments of the parties. The court has accorded these issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition be dismissed.

Petitioner organizations here challenge a reconsideration order in which the Federal Communications Commission (FCC or Commission) reinstated a discount used to calculate certain television-station owners' compliance with the agency's cap on broadcasters' national audience reach. *See Amendment of Section 73.3555(e) of the Comm'n's Rules, Nat'l Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd. 3390 (2017). In that order, the Commission acknowledged that the discount in question, which applied to ultra-high frequency (UHF) stations, "no longer has a sound technical basis" given the transition to digital transmission. *Id.* at 3395. The FCC nevertheless reinstated the discount pending "a broader review of the [national ownership] cap" itself; the agency concluded it had erred by eliminating the UHF discount before such a review. *Id.*

We do not reach the merits of petitioners’ challenge because they failed to demonstrate their Article III standing to petition this court. Membership organizations may assert standing on behalf of their members, but in order to do so they must show that at least one member “would otherwise have standing to sue in [his or her] own right.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343–44 (1977); see *Summers v. Earth Island Inst.*, 555 U.S. 488, 494–96 (2009). Moreover, our circuit rule, D.C. Cir. R. 28(a)(7), requires petitioners from administrative agencies to include submissions in support of standing “[w]hen the ... petitioner’s standing is not apparent from the administrative record.”

The administrative record here identified a proposed merger (between Sinclair Broadcast Group and Tribune Media Company) that petitioners contend would result in a degree of broadcaster consolidation permissible only with the reinstatement of the challenged UHF discount. See Joint App’x (J.A.) 135–36, 201–03. But the record did not contain—and petitioners’ initial submissions failed to provide—evidence that any member of any petitioner organization is a viewer in an affected market or otherwise stands to be injured by the identified consolidation. Cf. Pet’rs’ Br., Attachment A (representing that petitioner Free Press generally has members who watch television); J.A. 262 n.1 (suggesting that petitioner Prometheus Radio Project “is a collective of media broadcast activists committed to promoting diversity”). As a consequence, petitioners failed to meet the basic requirements of associational standing.

We decline to consider petitioners’ supplemental submissions, filed after oral argument in this matter, because petitioners failed to show, per this court’s order, that they reasonably, though mistakenly, believed that their initial filings were enough to evince associational standing. See *Free Press v. FCC*, No. 17-1129, Dkt. No. 1728084 (Apr. 25, 2018). We therefore dismiss the petition.

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

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk