

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

James A. Kay)	
)	
Petitioner,)	
)	
v.)	Case No. 06-1076 (and
)	consolidated cases)
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

MOTION TO DISMISS

This consolidated proceeding originally involved seven separate cases challenging the Federal Communications Commission’s efforts to reorganize the 800 MHz spectrum band to reduce interference with public safety communications systems caused by commercial users who operate on adjacent frequencies. Two of the cases, Nos. 06-1079 and 06-1081, have previously been dismissed by the Court. The remaining cases have until recently been held in abeyance, but are now ripe for consideration. The FCC respectfully moves the Court to dismiss three of the five remaining consolidated cases – one filed by James A. Kay (No. 06-1076) and two filed by Charles D. Guskey (Nos. 07-1332 and 07-1367).¹ Neither of these Petitioners holds a license to use 800 MHz spectrum, and therefore they cannot demonstrate standing to litigate these cases.

¹ The remaining two cases, brought by Mobile Relay Associates (Nos. 06-1082 and 07-1218), should be litigated on the merits.

BACKGROUND

The consolidated cases involve challenges to the FCC's plan to restructure the 800 MHz spectrum band, which is described in *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 3-7 (D.C. Cir. 2006).

Four cases were originally filed in February 2006, by James A. Kay (No. 06-1076), Preferred Communications Systems (No. 06-1079), Charles D. Guskey (No. 06-1081) and Mobile Relay Associates (No. 06-1082). This Court consolidated the cases, and on August 2, 2006, granted the FCC's motion to dismiss No. 06-1081 for lack of jurisdiction. That same order held the three remaining cases in abeyance pending the FCC's disposition of multiple petitions for administrative reconsideration of the orders under review.

Three additional cases were filed in 2007, by Mobile Relay Associates (No. 07-1218), and Charles D. Guskey (Nos. 07-1332 and 07-1367), after the FCC released the *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 (2007), FCC No. 07-102, which resolved many of the pending petitions for administrative reconsideration of the earlier orders. Those cases were also consolidated, and all pending cases were held in abeyance pending disposition of additional petitions for reconsideration.

In the midst of the various proceedings on 800 MHz restructuring, events transpired that had implications for several of the consolidated cases that had been held in abeyance.

The Preferred Communications Systems, Inc. Licenses. In July 2007, the FCC issued an order designating all of the 800 MHz licenses held by Preferred Communications Systems – the petitioner in No. 06-1079 – for a revocation hearing. *Pendleton C. Waugh, et al.*, Order to Show Cause, 22 FCC Rcd 13363 (2007). Separately, in December 2005, Preferred missed the five-year build-out deadline on which its licenses had been conditioned. *Order to Show Cause* ¶ 15; *id.* n.131. Absent Commission waiver of that deadline – which Preferred sought – Preferred’s licenses would cancel by operation of law. The FCC deferred action on the waiver request pending completion of the revocation proceeding. *Id.* ¶ 56.

In a July 6, 2009 motion, the FCC asked this Court to hold the Preferred and Guskey cases (Nos. 06-1079, 07-1332, and 07-1367) in abeyance until resolution of Commission proceedings related to the fate of Preferred’s licenses. This Court, in an August 7, 2009 Order, granted the FCC’s request and held the consolidated cases in abeyance pending completion of agency proceedings.

On April 11, 2014, the FCC issued an order that terminated the aforementioned license revocation proceeding involving Preferred. *Pendleton C. Waugh*, 29 FCC Rcd 3787 (OGC, April 11, 2014). On April 29, 2014, Preferred

filed an unopposed motion to voluntarily dismiss its case (No. 06-1079), which the Court granted on May 6, 2014.

James A. Kay Licenses. In 2002, the FCC ordered that Kay's 800 MHz licenses be revoked after finding that Kay had participated in the unlawful transfer of control of certain 800 MHz stations and lacked candor in his submissions to the Commission. *James A. Kay, Jr.*, 17 FCC Rcd 1834 (2002). This Court affirmed that decision in *Kay v. FCC*, 396 F.3d 1184 (D.C. Cir. 2005).

Kay subsequently asked the FCC to rescind the revocation order and restore his 800 MHz licenses (Kay offered to give up other licenses and pay a monetary forfeiture in exchange). The FCC denied his request on April 12, 2010, and ordered the licensees to cease operation no later than 11 days after release of its decision. *See James A. Kay, Jr. and Marc Sobel*, Memorandum Opinion and Order, 25 FCC Rcd 4068 (2010), *recon. dismissed*, Report and Order, 25 FCC Rcd 7639 (2010), *appeal dismissed*, *Kay v. FCC*, 2010 WL 4340464 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2913 (2011). On April 23, 2010, the FCC's subordinate Wireless Telecommunications Bureau performed the administrative task of updating the agency's Universal Licensing System to reflect the cancellation of Kay's 800 MHz licenses. *Id.*

ARGUMENT

The Court should dismiss the three cases filed by James A. Kay (No. 06-1076) and Charles D. Guskey (Nos. 07-1332 and 07-1367) for lack of jurisdiction because these litigants have failed to demonstrate standing.

In order to invoke the jurisdiction of a federal court, a party must have standing. Standing involves “both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To satisfy the “irreducible constitutional minimum of standing,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the petitioner must make a three-part showing: (1) that it suffers an injury that is actual or “certainly impending;” *id.* at 561, 564 n.2; (2) that the injury is fairly traceable to the challenged action; and (3) that the injury is likely to be redressed by a favorable judicial decision. *See id.* at 560-61; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

Prudential standing requirements are additional, court-imposed limits on the type of party or action that can invoke the authority of federal courts. *Warth*, 422 U.S. at 499; *see also Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (explaining that the “Court has developed a complementary rule of self-restraint”). One such prudential limitation is that a plaintiff “cannot rest his claim to relief on the legal rights or interests of third parties”; rather, a claimant may only assert legal rights

and interests that are his own. *LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011) (quoting *Warth*, 422 U.S. at 499). The foundational principle behind this third-party limitation is that a plaintiff must show that “he himself is injured.” *Barrows*, 346 U.S. at 255-56.

Under this framework, neither Guskey nor Kay has standing to litigate. Neither Guskey nor Kay holds any 800 MHz licenses. Not surprisingly, then, their papers in this Court do not (and cannot) establish that they have suffered any concrete injury caused by the FCC’s orders restructuring the 800 MHz spectrum band. Nor can they establish standing by attempting to rely on a financial interest in entities holding 800 MHz licenses. It is well-established that a Petitioner lacks standing to enforce rights belonging to a third party. Thus, the Court should dismiss the Guskey cases (Nos. 07-1332 and 07-1367) and the Kay case (No. 06-1076) for lack of jurisdiction.

I. GUSKEY LACKS STANDING.

Guskey is not a licensee. As recited in his petitions for review, Guskey’s two interests in this case are: (1) as a member of the general public; and (2) as an interest holder in Preferred. Pet. Rev., D.C. Cir. No. 07-1367 (filed Sept. 17, 2007) at 4. The first interest is plainly insufficient to confer standing. Guskey’s “generalized interest” in the FCC’s efforts to restructure the 800 MHz spectrum “is too abstract to constitute a ‘case or controversy’ appropriate for judicial

resolution.” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); *see also Capitol Legal Found. v. Commodity Credit Corp.*, 711 F.2d 253, 258 (D.C. Cir. 1983) (“A sincere, vigorous interest in the action challenged, or in the provisions of law allegedly violated, will not do to establish standing if the party’s interest is purely ideological, uncoupled from any injury in fact, or tied only to an undifferentiated injury common to all members of the public.”); *Coal. for the Pres. of Hispanic Broad. v. FCC*, 931 F.2d 73, 80 (D.C. Cir. 1991) (holding that “viewers ... suing as guardians of the national interest” lacked standing to challenge FCC-sanctioned transfer of licenses to avoid prohibition against alien ownership of broadcast facilities).

Guskey’s second interest – as a vague, unspecified “interest holder” in Preferred – is insufficient as well. Nowhere in his papers does Guskey explain how *he* is injured by the FCC Orders restructuring the 800 MHz band, nor does he explain how vacatur of those Orders would redress any purported injury to *him*. Instead, Guskey’s petitions for review make clear that his claimed “injuries” are entirely derivative of injuries allegedly suffered by Preferred, the holder of 800 MHz licenses. *See, e.g.*, Petition for Review, Case No. 07-1367 (filed Sept. 17, 2007) at 4 (“The treatment of Preferred in the FCC Orders is inequitable, discriminatory, anti-competitive and not in accordance with the stated objectives of the Proceeding.”); *id.* 5 (“The improper treatment of Preferred is, in large part, a

result of the FCC's varying treatment of EA licensees."); *id.* 6 ("In part, the FCC's improper treatment of Preferred stems from Preferred not being in operation and the FCC's differential treatment of operating vs. non-operating licensees."). That, however, is insufficient to overcome the prudential limitation on standing, which holds that a claimant may only assert legal rights and interests that are his own. *See Am. Civil Liberties Union v. FCC*, 823 F.2d 1554, 1560, n.6 (D.C. Cir. 1987) (cable subscriber could not rely on alleged violations of the constitutional rights of cable operators to establish standing). Because Guskey has failed to sufficiently demonstrate an injury to him (not Preferred), he lacks standing, and the Court should dismiss Case Nos. 07-1332 and 07-1367 for want of jurisdiction.

II. KAY LACKS STANDING

Kay also has not demonstrated Art. III standing; like Guskey, he fails at the first stage of the standing inquiry. After Kay brought suit against the FCC, the Commission revoked all of the 800 MHz licenses directly held by Kay. Those revocations were affirmed through all administrative and judicial appeals. *See* p. 4, above. Because Kay currently holds no 800 MHz licenses, he is not injured by the FCC's efforts to restructure the 800 MHz band. As such, he lacks Art. III standing to challenge the FCC Orders at issue in these consolidated cases, thus depriving this Court of jurisdiction.

CONCLUSION

The Court should dismiss the Guskey cases (Nos. 07-1332 and 07-1367) and the Kay case (No. 06-1076) for want of jurisdiction because those petitioners have not demonstrated standing.

Respectfully submitted,

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July 14, 2014

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CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on July 14, 2014, I electronically filed the foregoing Motion To Dismiss with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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