22-14274

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

GRAY TELEVISION, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3, Petitioner Gray Television, Inc. ("Petitioner" or "Gray") submits the following Certificate of Interested Persons and Corporate Disclosure Statement.

To the best of Petitioner's knowledge, the following is a list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Atlanta Assembly, LLC, *Subsidiary of Gray Media Group, Inc.*
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To the best of Petitioner's current knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

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INTRODUCTION

The FCC's Forfeiture Order imposes an unprecedented penalty on Gray Television, Inc. ("Gray") based on its purchase of the CBS network affiliation and related programming from KTVA(TV) in the Anchorage Transaction. In its response brief ("R.B."), the FCC fails to refute that it (1) exceeded statutory and constitutional limitations on its authority, (2) found a regulatory violation where none occurred, (3) penalized Gray without fair notice of the agency's novel interpretations of the regulation, and (4) erroneously calculated the forfeiture penalty. Instead, the FCC improperly relies on arguments it did not advance below and doubles down on defending the improper expansion of its authority.

First, the Forfeiture Order exceeded the FCC's authority over license transfers under 47 U.S.C. § 310(d) because the Anchorage Transaction undisputedly involved *no* license transfer. (O.B. at 20–28.) Contrary to the FCC's assertions (R.B. at 26, 33–34), its "licensing authority" is inapposite because Note 11 does not govern the grant or renewal of licenses. The law is clear that the FCC can rely neither on its ancillary authority under 47 U.S.C. § 303(r) or § 154(i) nor on policy reasons to assume authority Congress plainly did not grant in § 310(d). The FCC is also wrong (R.B. at 34) that 47 U.S.C. § 405(a) deprives this Court of jurisdiction to address the FCC's lack of § 310(d) authority. Section 405(a) is non-jurisdictional, and the agency had ample opportunity to address Gray's argument in its response to the

Notice of Apparent Liability ("NAL") that the FCC lacked § 310(d) authority.

The Forfeiture Order also exceeded limitations on the FCC's authority under 47 U.S.C. § 326 and the First Amendment, which prohibit the FCC from interfering with programming content, as it seeks to do here. (O.B. at 28–32.) The FCC incorrectly relies on rational basis review (R.B. at 38–43), but Note 11 does not govern "scarce" license allocation; it targets programming decisions, including network affiliations. The FCC fails to carry its "constitutional burden" to show that its targeting of Gray's programming choices furthered any purported interest in promoting competition. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011).

Second, the FCC erroneously found a Note 11 violation by redefining the regulation in the order that it defends. The FCC quite literally changed the standard for determining a station's ranking to disregard Gray's showing that it owned two top-four stations in the Anchorage DMA at the time of the Transaction and therefore did not violate Note 11. (O.B. at 33–38.) The FCC also improperly redefined and expanded Note 11 to prohibit any transaction that creates a "new" top-four "combination" regardless of whether the transaction "results in" a station owning two Top Four Stations, as the rule reads and the dissenting Commissioner explained. (*Id.*) The FCC's finding of an "independent" violation based on its view that the Anchorage Transaction was the "functional equivalent" of a license transfer because

it purportedly left KTVA(TV) with a "bare license" was also plainly erroneous under Note 11's text. (O.B. at 38–40.)

Third, the Forfeiture Order must be vacated because the FCC gave no notice of its new "most recent ratings available" or "new" top-four "combination" interpretations of Note 11, and penalized Gray's reasonable interpretation. (O.B. at 40–46.) In so doing, the FCC violated the principle that an agency must give fair notice of prohibited conduct *before* imposing penalties. *See Trinity Broad. of Fl., Inc. v. FCC*, 211 F.3d 618, 628–630 (D.C. Cir. 2000) (vacating FCC's denial of license application due to the FCC's failure to provide fair notice).

Fourth, the FCC botched its forfeiture calculation. (O.B. at 46–54.) The FCC points to its statutory authority to defend its daily base forfeiture penalty (R.B. at 43) but ignores Gray's argument that it departed from its analogous precedents that did *not* impose a daily penalty. The FCC attempts to defend its adjustment analysis but fails to dispute that it manufactured a new "egregiousness" justification only *after* Gray responded to the NAL. (R.B. at 44.) The FCC asserts that it considered Gray's good faith, but neither that empty boilerplate statement nor the FCC's incompetent evidence can sustain its erroneous "substantial economic gain" finding.

Accordingly, the Court should grant Gray's petition and vacate the Forfeiture Order.

ARGUMENT

I. THE FCC EXCEEDED ITS AUTHORITY IN APPLYING NOTE 11 TO THE ANCHORAGE TRANSACTION.

A. The FCC Lacked Authority Over the Anchorage Transaction.

1. Section 405 Does Not Bar Judicial Review of the FCC's Lack of Statutory Authority Over the Anchorage Transaction.

The FCC is wrong that 47 U.S.C. § 405(a) deprives this Court of jurisdiction over the argument that the FCC lacks statutory authority to regulate the "functional equivalent" of a license transfer. (R.B. at 37.) The assertion rests on the false premise that the FCC had no opportunity to consider the issue because Gray purportedly did not raise it below. (*Id*. at 34.) This is incorrect. Gray argued to the FCC that its "authority over license transfers does not encompass station affiliation shifts," A58, the FCC "would need a jurisdictional theory other than its unrelated [§] 310(d) authority," A60, and the FCC "cannot justify its proposed actions in the *NAL* as ancillary to its [§] 310(d) authority over license transfers," *id*. The issue was squarely before the FCC; the agency simply refused to address it.

Even if Gray had not raised this issue below, that would not deprive the Court of jurisdiction. Section 405(a) is not jurisdictional because Congress did not "clearly state" that it is. *Arbaugh v. Y & H Corp*., 546 U. S. 500, 515 (2006). The statute merely provides that "[t]he filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, . . . except where the party seeking such review . . . relies on questions of fact or law upon which the [FCC] . .

. has been afforded no opportunity to pass." 47 U.S.C. § 405(a). This provision lacks "unambiguous jurisdictional terms," such as the word "jurisdiction." *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1113 (2023). The omission of that term is meaningful because Congress used it in related provisions.[1] *See id.* at 1112 (statute not jurisdictional because it omitted jurisdictional terms used in related statutes).

Consistent with this conclusion, the D.C. Circuit has long held that § 405(a) "constitutes 'an exhaustion requirement.'" *M2Z Networks Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009). The FCC cites a case applying the D.C. Circuit's interpretation. *See Worldcall Interconnect, Inc. v. FCC*, 907 F.3d 810, 820 (5th Cir. 2018). As the D.C. Circuit explains, "§ 405[] commands only that the [FCC] be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party." *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972). Here, § 405(a) is satisfied because Gray raised "the issue" of the FCC's authority over the Anchorage Transaction, and the issue "was necessarily implicated" in the FCC's decision. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122

[1] *See* 47 U.S.C. § 401(a) ("The district courts . . . shall have *jurisdiction*, upon application of the Attorney General . . . at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus . . . ." (emphasis added)); *id.* § 402(c) ("Upon filing of such notice, the court shall have *jurisdiction* of the proceedings and of the questions determined therein . . . ." (emphasis added))).

(D.C. Cir. 2008).

Moreover, even assuming Gray had to object specifically to the FCC's "functional equivalent" theory (it did not) and failed to do so, exhaustion is excused because parties "are not required to raise 'futile' arguments" under § 405(a). *See Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 967 n.6 (D.C. Cir. 2014) (rejecting FCC's assertion that argument was "not properly before" the court because "the FCC has decisively" addressed the issue); *M2Z Networks*, 558 F.3d at 558 (same). The FCC definitively rejected the argument that it lacked "explicit authority" to promulgate Note 11.[2] The NAL invoked that reasoning, A76, as Gray acknowledged in its Request for Cancellation, A58. Thus, the issue is properly reviewed here.

2. The FCC Had No Authority Over the Anchorage Transaction Because There Was No License Transfer.

Congress did not confer authority on the FCC over the "functional equivalent" of a license transfer. Section 310(d) is the ***only*** provision that speaks to the FCC's authority over license transfers, and its text is the starting point. *See Southern Co. v. FCC*, 293 F.3d 1338, 1344 (11th Cir. 2002) (starting with statutory text to ascertain whether Congress addressed authority asserted by FCC). As Gray explained, nothing in § 310(d)'s text gives the FCC authority over the "functional

[2] *2014 Quadrennial Regulatory Review – Review of the FCC's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 31 F.C.C.R. 9864, 9882 n.122 (2016) ("Second Order").

equivalent" of a license transfer. (O.B. at 21–22). The FCC concluded ***nearly 10 years ago*** that it ***lacks*** § 310(d) authority in cases that "do not involve the assignment or transfer of a station license."[3]

The FCC's implausible assertion that "there is no reason to believe" that Congress did *not* grant it authority over the "functional equivalent" of a license transfer (R.B. at 37) cannot be squared with statutes in which Congress expressly granted the FCC authority to regulate the "functional equivalent" of specific conduct. *See* 47 U.S.C. § 332(d)(3); *id*. § 225(a)(3), (b)(1). The FCC conspicuously ignores these statutes, but they confirm Congress is deliberate when granting the authority the FCC now claims. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally or purposely in the disparate inclusion or exclusion."). Absent authority from Congress, it is irrelevant that the FCC feels "powerless" over the "functional equivalent" of a license transfer. (R.B. at 37); *see Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (FCC has "only those authorities conferred

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[3] *In the Matter of 2014 Quadrennial Regul. Rev. F Rev. of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 29 F.C.C.R. 4371, 4391 ¶ 47 (2014) ("*FNPRM*"). The FCC avoids the word "swaps" throughout its brief, but repeatedly concedes that "affiliation exchanges" and "affiliation acquisitions" "do not involve license transfers." (R.B. at 20, 23.)

. . . by Congress.”).

Moreover, the FCC cannot fall back on “ancillary authority” under §§ 303(r) and 154(i) whenever it wants to do more than Congress allowed. (O.B. at 25–28.) Under the reasoning in *Comcast Corp. v. FCC*, the FCC’s reliance on general rulemaking authority in promulgating Note 11 was improper because § 310(d)’s text makes clear Congress did not intend to grant the FCC authority over the “functional equivalent” of a license transfer. 600 F.3d 642, 661 (D.C. Cir. 2010) (addressing§ 154(i)). Indeed, the FCC’s attempt to distinguish *Motion Picture Association of America, Inc. v. FCC* backfires because that case expressly ***rejected*** the FCC’s reliance on §§ 303(r) and 154(i) to assume substantive authority Congress did not grant. 309 F.3d 796, 806 (D.C. Cir. 2002) (concluding that § 303(r) “cannot carry the weight of the Commission’s argument” because “[t]he FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations” and § 154(i) was “not a stand-alone basis of authority”). That holding applies with equal force here given the FCC’s concession that it lacks § 310(d) authority over transactions that do not involve license transfers.

The FCC’s policy reasons for adopting Note 11 certainly cannot justify invoking ancillary authority to expand § 310(d). *See* Second Order, 31 F.C.C.R. at 9882 (claiming that Note 11 “clos[e]s a potential loophole and prevent[s] circumvention” of FCC rules); (R.B. at 35 (same)). It is well settled that “an agency

may not rewrite clear statutory terms to suit its own sense of how [a] statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).

In a last attempt to salvage Note 11, the FCC turns to "its licensing authority" underlying "all of its broadcast ownership rules." (R.B. at 34–35.) But this authority is the authority to grant and renew licenses. *See* 47 U.S.C. §§ 301, 307, 308. In that context, the FCC may consider the "public interest" in making a *licensing* decision, *id.* § 309(a), and sanction *license applicants*, *id*. § 312.

There is no licensing action here to which the agency might tether public interest considerations. Even if there were, the FCC did not rely on its "licensing authority" in the Second Order when it adopted Note 11 or in the Forfeiture Order when it applied Note 11 to the Anchorage Transaction. The FCC relied only on its "general rulemaking authority," Second Order, 31 F.C.C.R. at 9882 n.122 (rejecting argument that FCC "has no explicit statutory authority to regulate affiliation swaps" by invoking §§ 154(i) and 303(r)); A11 (same), which, as discussed, cannot sustain Note 11. The FCC's post hoc rationalizations about its licensing authority cannot sustain the Forfeiture Order. *See Hispanic Info. & Telecomm., Inc. v. FCC*, 865 F.2d 1289, 1297 n.13 (D.C. Cir. 1988) ("*Hispanic Info.*") ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action.").

Nor can the FCC claim that Note 11 is "tethered" to its licensing authority simply because a network affiliation transaction purportedly "implicate[s] the local

television ownership rule." (R.B. at 36.) Application of the local television ownership rule requires an application to the FCC and results in a licensing decision by the FCC. 47 C.F.R. § 73.3555(b)(1)(ii). The FCC, however, ***divorced*** Note 11's prohibition from ***any*** license application, grant, or renewal. *See id*. § 73.3555 n.11. The FCC relies heavily on a policy justification that it is closing a "loophole," *i.e.*, that parties can "evade" the top-four rule when purchasing programming because they need not apply to the FCC as they must when consummating a license transaction. But there is no loophole because the FCC has the authority to renew licenses. 47 C.F.R. § 73.1020(a). Assuming the agency has authority to address top-four combinations, it could do so at the time of a license *renewal*. This is consistent with the FCC's understanding of its authority when it promulgated rules restricting cross-ownership of newspapers and broadcast stations. Because a licensee did not need to apply to the FCC before purchasing a newspaper, the FCC permitted licensees to purchase and hold newspapers until their next license renewal, at which point the FCC would evaluate the combination. *See In the Matter of Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules*, 50 F.C.C.2d 1046, 1076 n.25 (1975).

In short, Note 11 is a freestanding and unbounded prohibition on certain programming purchases that has ***no*** basis in the FCC's licensing authority, and the FCC cannot defend it by relying on cases upholding ownership restrictions under its

authority to grant and renew licenses. (*See* O.B. at 27–28.)[4]

B. The FCC Exceeded Limitations on its Authority Under § 326 of the Communications Act and the First Amendment By Penalizing Gray's Programming Choices.

In the Forfeiture Order, the FCC conceded that it found a Note 11 violation due to "Gray's acquisition of KTVA(TV)'s ***programming***, including the CBS affiliation, and its placement of ***that programming*** on the primary stream of KYES-TV." A4 (emphasis added). The FCC has failed to justify this punishment of Gray's programming choices.[5] *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 650 (1994) ("[T]he FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."); (O.B. at 28–32).

The FCC attempts to shield its Forfeiture Order from appropriate

[4] *See FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978) ("*NCCB*") (addressing FCC's authority to promulgate regulations interpreting the "public interest" standard); *United States v. Storer Broadcasting Co*., 351 U.S. 192, 203–04 (1956) (addressing FCC's authority to impose restrictions on granting licenses); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 218 (1943) ("*NBC*") (same); *Cellco P'ship v. FCC*, 700 F.3d 534, 542–43 (D.C. Cir. 2012) (addressing FCC's authority to alter terms of existing license). *NBC* is also inapposite here because that case upheld restrictions on the *grant of a license*. 319 U.S. at 196.

[5] *See Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (commercial and noncommercial broadcasters "are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking" over "the content or selection of programs to be broadcast").

constitutional scrutiny by advocating for the "deferential" rational basis standard that courts have applied to its "ownership rules." (R.B. at 39.) That is incorrect. Rational basis review applies to license ownership rules because they implicate the "scarcity of broadcast frequencies," *i.e.*, rules governing who may possess a license. *See NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1220 (11th Cir. 2022); *see also NCCB*, 436 U.S. at 799 ("The physical limitations of the broadcast spectrum are well known . . . . we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' . . . .").

Note 11, however, does not govern license allocation but rather targets the network ***affiliations*** a licensee seeks to obtain and, as the Forfeiture Order underscores, the ***related programming***. Network affiliations and related programming are self-evidently not "broadcast frequencies" licensed by the FCC. Thus, cases sustaining ownership rules under rational basis review are inapposite. *See Sinclair Broad. Group v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002) (applying rational basis review to sustain local ownership order concerning common ownership of television stations in the same DMA); *Prometheus Radio Project*, *Project v. FCC*, 652 F.3d 431, 465 (3d Cir. 2011) (rejecting First Amendment challenge to media ownership rules).

The FCC argues Note 11 is "content neutral" because it seeks to prevent evasion of the local television ownership rule (R.B. at 39–40), but the FCC's

statements show that Note 11 *targets programming*, and therefore must pass intermediate scrutiny. *See Cablevision Sys.*, 649 F.3d at 710 (applying intermediate scrutiny to programming access rules). For example, the FCC asserts that "top four stations are usually affiliated with the four largest national networks (ABC, CBS, FOX, and NBC)." (R.B. at 4.) It also opined in the Second Order that these affiliations "have a distinctive ability to attract larger primetime audiences on a regular basis." 31 F.C.C.R. at 9952. And that "distinctive ability" is based on the programming offered by these networks. The Forfeiture Order makes this point abundantly clear by using the word "programming" to encompass the "CBS affiliation." A4. And because Note 11 targets programming, this case is unlike *Prometheus Radio*, which rejected a First Amendment challenge to a rule that merely "single[d] out television stations." 652 F.3d at 465.

The FCC's reliance on *Ruggiero v. FCC*, is misplaced. 317 F.3d 239 (D.C. Cir. 2003). The "character qualification" rule at issue there made pirate broadcasters ineligible for certain licenses "without regard to any content," but rather because of the applicant's "unlicensed operation of any station." *Id*. at 244. That rule is unlike Note 11, which the FCC applied only because of Gray's programming choices.

Note 11 fails intermediate scrutiny because the FCC did not and cannot meet its burden to show that Note 11's application to the Anchorage Transaction "furthers an important or substantial governmental interest." *Turner Broad. Sys.*, 512 U.S. at

662; (O.B. at 30–31). The FCC now contends that the July Comscore 2020 data shows that "Gray's purchase threatened competition in Anchorage by substantially increasing the concentration of market power." (R.B. at 42); A68. The FCC did not rely on this data in the Forfeiture Order, and cannot do so here. A1–15; *see Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1287 (11th Cir. 2013) ("An agency's action must be upheld, if at all, on the basis articulated by the agency . . . ."). Equally important, the FCC does not dispute that Gray *still operates* the CBS network affiliation in the Anchorage DMA, so application of Note 11 had no effect on competition. The Note 11 "violation" ended when Gray, with FCC approval, moved the CBS affiliation to a low-power station in Anchorage from which it still multicasts the CBS programming.[6] (O.B. at 31.) Thus, unlike in *Cablevision Sys.*, the FCC has not "satisfied its constitutional burden." 649 F.3d at 712.

II. THE FCC ERRONEOUSLY FOUND THAT GRAY VIOLATED NOTE 11.

A. The FCC's Improper Mid-Enforcement Redefinition of Note 11 Cannot Establish that Gray Violated the Regulation.

Under a straightforward interpretation of Note 11, the applicable ranking rule, and the Second Order, Gray did not violate Note 11. The Anchorage Transaction did not "result in" Gray owning two of the top-four rated stations in the DMA at the

[6] The FCC's reference to a request for public comment it made ***five years ago*** on whether to change the local television station ownership rule to include multicast channels, is a red herring. (R.B. at 42.)

time the agreement was executed. 47 C.F.R. § 73.3555 n.11; *see also* Black's Law Dictionary, *Result* (10th ed. 2014) ("result in" means "[t]o be a physical, logical, or legal consequence; to proceed as an outcome or conclusion"). When the agreement was executed, KTUU-TV was ranked first in the Anchorage DMA, A6, and KYES-TV fourth, A5, 68. Because Gray owned two top-four stations when the Anchorage Transaction was executed, the transaction did not ***result in*** Gray owning two of the top-four rated stations. (O.B. at 34–35.)

To engineer a Note 11 violation, the FCC essentially created a new regulation with (1) an availability requirement in the ranking rule, and (2) a prohibition on "new" top-four "combinations." A4–5; (O.B. at 36–38). These errors warrant vacatur. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587–88 (2000) (agency cannot "create de facto a new regulation" through reinterpretation).

1. The FCC's Improper Redefinition of the Ranking Rule.

The FCC asserts that its refusal to consider Gray's July 2020 Comscore data was based on a reasonable interpretation of the ranking rule. (R.B. at 12, 21.) This is incorrect. The FCC fails to identify any ambiguity in the ranking rule, nor does any ambiguity exist. *See Landau v. RoundPoint Mortg. Servicing Corp.*, 925 F.3d 1365, 1369–70 (11th Cir. 2019) ("If [the Court's] review of the regulatory language unambiguously answers the question at issue, that is the end of the matter."). As explained, 47 C.F.R. § 73.3555(b)(1)(ii) establishes the relevant ranking method,

and the Second Order applies this method "at the time of the agreement." Gray provided July 2020 Comscore data for KYES-TV under that unambiguous rule.

The FCC's assertion that the Second Order does not "address[] how to determine" the "new affiliate's pre-consummation ranking" (R.B. at 19) is simply a "convenient litigating position[]" that the Court must reject.[7] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). The FCC cannot claim the Second Order "does not dictate" how to determine KYES-TV's "pre-consummation" ranking (R.B. at 19) because the FCC did not reject the July 2020 Comscore data on this basis. *See Ala. Envtl. Council*, 711 F.3d at 1287. Instead, the FCC found the data "not relevant" because "the cumulative July 2020 ratings were still underway and could not have been compiled." A5. The Forfeiture Order must stand or fall on *that* basis, not on the FCC's post hoc rationalization. *See Hispanic Info.*, 865 F.2d at 1297 n.13.

Similarly, the FCC's assertion that the "language and purpose" of the "ownership rules" support the FCC's "refusal to credit Gray's" July 2020 Comscore data (R.B. at. 20) fails because the FCC did not reject the data on this basis either. *See Ala. Envtl. Council*, 711 F.3d at 1287. In any event, the FCC ignores fundamental differences between the rules. The FCC asserts that, under the local television ownership rule, it declines to consider "more recent data . . . available"

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[7] If the FCC were correct that the ranking rule is ambiguous, then the Forfeiture Order must be vacated because the FCC failed to provide fair notice to Gray ***before*** applying its new interpretation of the rule. *See infra* Part III.A.

after an application is filed. (R.B. at. 20.) But the ownership rule on which the FCC relies requires parties to file an application with the FCC *before* a transaction is consummated. 47 C.F.R. § 73.3555. By contrast, Note 11 does not require any application to the FCC. The FCC's review under Note 11 is, by design, *after the fact*. Given that design, the FCC arbitrarily interpreted the rule as excluding data concerning a station's ranking at the time an agreement is executed. (R.B. at 18, 21.)

2. The FCC's Novel Rule Against "New" Top-Four "Combinations."

The FCC attempts to defend its "alternative" finding that Gray violated Note 11 by creating a "new" top-four "combination," but this is also meritless.[8] (R.B. at 21.) The FCC argues that Gray's ownership of the first and second ranked stations was a "consequence" of the Anchorage Transaction and "resulted in" a prohibited combination. (R.B. at 22.) This circular argument ignores Note 11's language; the words "change" and "result in" plainly presuppose that an entity did *not* own two top-four stations at the execution of an agreement but owned two top-four stations *after* execution. *See* 47 C.F.R. § 73.3555 n.11; Second Order, 31 F.C.C.R. at 9885 n.141. The FCC resists this plain language with the post hoc assertion that the

[8] The FCC incorrectly asserts that Gray argues for an "exempt[ion]" under Note 11 because Gray already owned two top-four stations. (R.B. at 12, 25.) Gray argues only that the Anchorage Transaction did not violate Note 11's plain text. (O.B. at 35.)

"focus" of Note 11 is "ultimately on the state of affairs after a change in network affiliation[s]." (R.B. at 22–23.) This assertion cannot be squared with Note 11, and is otherwise improper because it appears nowhere in the Forfeiture Order. *See Hispanic Info.*, 865 F.2d at 1297 n.13.

The FCC relies on policy-based justifications for its stretched application of Note 11 by asserting that a literal interpretation would allow Gray to evade the FCC's rules. (R.B. at 24–25.) Not so. Gray followed the plain text; it simply did not anticipate the FCC's new interpretation. Regulation by aspiration is not permitted, nor can policy reasons justify the FCC's reinterpretation of Note 11; "[a]n agency must abide by its regulations as written until it rescinds or amends them." *See Legal Envtl. Assistance Found., Inc. v. EPA*, 276 F.3d 1253, 1264 (11th Cir. 2001).

B. The FCC Erroneously Found that Gray "Independently Violated" Note 11 Through the "Functional Equivalent" of a License Transfer.

The FCC's back-up finding "on alternative and independent grounds" that Gray violated Note 11 because the Anchorage Transaction was the "functional equivalent" of a license transfer (A8) also requires vacatur.[9]

[9] Contrary to the FCC's assertion (R.B. at 12), § 405(a) does not deprive this Court of jurisdiction. *See supra* Part I.A.1. The FCC satisfied § 405(a) when it purported to find an "independent" violation of Note 11 on this ground. *See EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 997 (D.C. Cir. 2013) (discussion in FCC's order satisfied § 405(a)). Moreover, the legal arguments here do not raise new factual questions

As an initial matter, the FCC is wrong that Gray "abandon[ed]" the argument that the Anchorage Transaction was not the "functional equivalent" of a license transfer. (R.B. at 12.) The Second Order described only network *affiliation swaps* "as the functional equivalent of a license transfer." 31 F.C.C.R. at 9883. In responding to the NAL, Gray argued that the Anchorage Transaction "didn't violate this 'functional equivalence' standard." A46. Gray's argument here that the Anchorage Transaction was not an affiliation swap clearly preserved Gray's objection. (O.B. at 44 (asserting that the Anchorage Transaction "involved no affiliation swap").)

The Forfeiture Order is otherwise erroneous. In the Order, the FCC shifted from its prior interpretation of affiliation swaps as the "functional equivalent" of a license transfer and adopted a new interpretation that the Anchorage Transaction left the counterparty with little more than a "bare license." (A8.) That shift in reasoning was arbitrary and departed from the FCC's "bare license" precedents, which hold that retaining a license and transmission facilities is *not* a bare license.[10] (O.B. at 39–40.) The FCC concedes that the selling broadcaster retained its license, retained the "KTVA(TV) transmission facilities," and "secured a programming source and

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and are supported by the record. *See Ramirez v. Sec'y, Dep't of Transp.*, 686 F.3d 1239, 1250 (11th Cir. 2012) (considering issue raised for first time).

[10] The FCC's reliance on these precedents renders nonsensical its assertion that these precedents "ha[ve] no bearing on this case." (R.B. at 27.)

resumed operations on September 2, 2021" under that license. A2; A8. Thus, the FCC's conclusion that the Anchorage Transaction was the "functional equivalent" of a license transfer because it left the seller with something "short of" a bare license was arbitrary.

III. THE FCC PENALIZED GRAY WITHOUT FAIR NOTICE.

A. The FCC Gave No Notice of Its Novel Redefinitions of Note 11.

The Forfeiture Order violates the canon that "agencies . . . may not retroactively change the rules at will." *NetworkIP*, 548 F.3d at 316. After Gray explained why the Anchorage Transaction did not "result in" a Note 11 violation, the FCC changed the rules by redefining the ranking rule and adopting a novel interpretation that Note 11 prohibits "new" top-four "combinations." A4–5; (O.B. at 40–42). Even assuming the FCC at some point intended Note 11 to have these meanings, it may not impose a sanction under an interpretation it "intended but did not adequately express." *Gates & Fox Co., Inc., v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (vacating agency sanction where the regulation did not give fair notice); *see also FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 250, 252 (2012) (vacating FCC orders for lack of fair notice, including one that imposed a forfeiture and another that found a violation but did not impose forfeiture).

Moreover, contrary to the FCC's assertions (R.B. at 31), its erroneous interpretation of Note 11 was not the "most natural." *See supra* Part II.A. As

Commissioner Simington's dissent persuasively explained, the ordinary meaning of "result in" did *not* support the FCC's conclusion that Gray violated Note 11. A17–18. Thus, the FCC's reliance on *NetworkIP* is misplaced because the FCC's interpretation was not the most natural. 548 F.3d at 123–25.

The FCC fails to address its "unfair surprise" in redefining the ranking rule to penalize Gray. *See Kisor*, 139 S. Ct. at 2406. The FCC did not identify the ratings data on which it relied *until the Forfeiture Order was issued*. *Compare* A5, *with* A76. Only then did the FCC rely on the June 2020 Nielsen data and insert an "availability" requirement into the ranking rule to reject Gray's ranking data. A5. The FCC now faults Gray for not producing June 2020 Comscore data (R.B. at 18 n.4), but this Court is "limited to [the] record that was before" the FCC. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 521 n.* (D.C. Cir. 2009). Despite Gray's proper reliance on Comscore data, the FCC did not address the June 2020 Comscore data, nor did it give Gray the opportunity to provide that data.

B. The FCC Unfairly Penalized Gray for Its Reasonable Interpretation of the Rule Against Swaps.

The Forfeiture Order violates the fundamental principle that "[t]he FCC . . . cannot . . . punish a member of the regulated class for reasonably interpreting Commission rules" without giving "full notice of its interpretation." *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (vacating order dismissing applications). As explained (O.B. at 43–44), the FCC penalized Gray's reasonable interpretation

of Note 11 as a "Rule Against Swaps," which followed from the FCC's statements in the Second Order.[11]

First, the FCC is wrong that Note 11's text foreclosed Gray's reasonable interpretation. The FCC points to the phrases "any agreement" and "acquires" in Note 11 (R.B. at 28), but ignores that Note 11 incorporates the Second Order, and the Second Order's more than 30 references to "affiliation swaps." 31 F.C.C.R. at 9881–9885; 47 C.F.R. § 73.3555 n.11. Those references were formal FCC statements contemporaneous with Note 11's adoption. *See United States v. Lachman*, 387 F.3d 42, 58–59 (1st Cir. 2004) (party raising fair notice objection may rely on "formal contemporaneous agency interpretations"). The FCC cannot ignore these statements by pointing to the single reference to "sale" buried in the Second Order, especially given that the reference is followed by two references to affiliation swaps. Second Order, 31 F.C.C.R. at 9883; *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993) (stating that the FCC "[can]not . . . bury what it believes to be the heart of its order" and vacating order dismissing applications).

The FCC's assertion that pre-Second Order "history" undermines Gray's argument is meritless. The FCC points to its 2010 request for comment and its 2014 reference to "sale" when discussing "affiliation swaps." (R.B. at 29–30.) The FCC

[11] The FCC's arguments that non-public statements concerning Gray's Lincoln, Nebraska transaction do not raise fair notice issues (R.B. at 32–33) are inapposite to the FCC's improper penalization of Gray's reasonable interpretation of Note 11.

did not rely on this "history," however, when it rejected Gray's fair notice objection and cannot rely on it here. A9–10; *see Hispanic Info.*, 865 F.2d at 1297 n.1. Moreover, Note 11 incorporates the Second Order, *not* these stale statements.[12] *See* 47 C.F.R. § 73.3555 n.11.

Second, in a glaring misstatement, the FCC claims that Gray has "abandoned" the argument that the Second Order intended to prohibit "circumstances" like the Hawaii Transaction. (R.B. at 30.) That is incorrect. Gray was "entitled to rely" on the Second Order's identification of the Hawaii transaction, *Trinity Broad.*, 211 F.3d at 619, and did so by detailing why the Anchorage Transaction had *no resemblance* to the Hawaii Transaction. (O.B. at 44 & n.16.)

IV. THE FCC ERRONEOUSLY IMPOSED AN UNPRECEDENTED MAXIMUM FORFEITURE PENALTY.

The FCC erroneously imposed a maximum daily base forfeiture for the entire period of the purported Note 11 violation. (O.B. at 47.) None of the FCC's unauthorized transfer of control precedents supported the imposition of such a penalty. (O.B. at 46–48.) The FCC does not dispute this, which alone warrants vacatur. *See McHenry v. Bond*, 668 F.2d 1185, 1193 (11th Cir. 1982) (agency's unexplained departure from precedents is arbitrary). The FCC's assertion that it merely refused "to adjust the forfeiture downward" (R.B. at 44) is irrelevant to its

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[12] The FCC's 2014 statements support Gray because they *add* to the sea of "affiliations swap" references.

erroneous *daily* penalty.[13]

The FCC also erred in its adjustment analysis. *First*, the FCC purported to "affirm" an egregiousness finding it never made in the NAL.[14] *Contrast* A14, *with* A79–80. The FCC does not identify any egregiousness finding in the NAL because *no* such finding exists. (R.B. at 45.) The FCC asserts that it "reasonably rejected" Gray's arguments that Note 11 did not apply to the Anchorage Transaction (R.B. at 46), but in fact, the FCC concluded that Gray violated Note 11 only *after* (and apparently because) Gray explained its reasonable interpretation of Note 11. *Compare* A14, *with* A80. The FCC's assertion that Gray's "remedial measures . . . do not mitigate its culpability" is irrelevant (and wrong) because the agency did not rely on this reasoning in the Forfeiture Order. A13–15; *see Hispanic Info*., 865 F.2d at 1297 n.1. Moreover, Gray's point concerns its good faith and cooperation—not the mere fact of remedial measures.

Second, there is no dispute that Gray's good faith *is* a relevant factor to adjustment. *See* 47 C.F.R. § 1.80(b)(10), Table 3 ("good faith" is relevant); (O.B.

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[13] The FCC's case is inapposite because it did not concern an improperly calculated penalty. *SBC Comm'cns, Inc. v. FCC*, 373 F.3d 140, 151–52 (D.C. Cir. 2004) (addressing violation of "clear terms" of a "merger condition" for which the company bargained).

[14] Contrary to the FCC's assertion (R.B. at 45), § 405(a) does not deprive this Court of jurisdiction. *See supra* Part I.A.1. The Forfeiture Order's discussion of a non-existent egregiousness finding satisfies § 405(a). *See EchoStar*, 704 F.3d at 997 (discussion in FCC's order satisfied § 405(a).

at 49–50). The FCC's threadbare assertion that it considered Gray's good faith rings hollow. *Compare* R.B. at 46, *with* A11–15. The FCC's further assertion that Gray's good faith was "counterbalanced" by the upward adjustment factors fails given the FCC's reliance on a flawed egregiousness finding. (O.B. at 48–49); A12.

Finally, the FCC's assertion that "a reasonable person" could conclude that the Anchorage Transaction "produced substantial economic gain" for Gray (R.B. at 46) cannot salvage the FCC's incompetent evidence.[15] *See AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996) ("[S]ubstantial evidence is more than a mere scintilla."). The standard is not whether a reasonable person might think Gray realized substantial economic gain, but whether there is evidence showing it did.

Here, there is *no evidence* supporting the FCC's finding. Statements in a Form 10K concerning Gray's expectations for multiple transactions over a three-year period cannot show substantial economic gain from *one transaction*. (O.B. at 53). And the FCC cannot show that an October 2020 PBS News Hour clip describing spending on television political advertising had any connection to the Anchorage Transaction. *See Finberg v. Dep't of Agric.*, 6 F.4th 1332, 1337 (D.C. Cir. 2021) (no substantial evidence where agency "completely failed to make any factual

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[15] The FCC's cursory assertion that § 405(a) "bars" Gray's challenge to the FCC's "substantial economic gain" finding, (R.B. at 46–47), is also baseless. The Forfeiture Order's discussion of that finding satisfies § 405(a). *See EchoStar*, 704 F.3d at 997.

findings connecting Finberg and the business's failure to pay its suppliers"). Gray detailed the record evidence of economic conditions in Alaska that *undercut* the FCC's "substantial economic gain" finding (A32–34, A66), but the FCC ignored it. (O.B. at 52–53; R.B. at 47); *see AT&T Corp*., 86 F.3d at 248 (FCC's decision was unsupported by substantial evidence where the record contained contrary undisputed evidence).

CONCLUSION

For the foregoing reasons and those in Gray's opening brief, Gray requests that the Court grant the Petition and vacate the Forfeiture Order.

Dated: September 13, 2023

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH FRAP 32(g)(1)

Undersigned counsel certifies that this Brief complies with the applicable type volume limitations in Rule 32(a)(7). This brief contains 6,500 words, exclusive of the components that are excluded from the word count limitation in Rule 32(f). This certificate was prepared in reliance upon the word-count function of the word processing system (Microsoft Word) used to prepare this brief. This brief complies with the typeface and type style requirements of Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using font size 14 Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2023, I served the foregoing document on all parties through the appellate CM/ECF system for the United States Court of Appeals for the Eleventh Circuit.

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