ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1500

In The United States Court Of Appeals
For The District Of Columbia Circuit

NUEVA ESPARANZA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

G-TOWN RADIO, *et. al.*,
Intervenors for Appellee.

On Appeal from an Order
of the Federal Communications Commission

BRIEF FOR INTERVENORS

G-town Radio, Germantown Life Enrichment Center, and Germantown United Community Development Corporation

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June 20, 2016

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties

All parties, intervenors and amici appearing before this court are listed in the Brief for Appellee Federal Communications Commission.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellee Federal Communications Commission.

(C) Related Cases

Related cases are listed in the Brief for Appellee Federal Communications Commission.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to the United States Court of Appeals for the District of Columbia Rule 26.1 and Federal Rule of Appellate Procedure 26.1, the organizations below respectfully submit this Corporate Disclosure Statement.

G-town Radio, Germantown Life Enrichment Center and Germantown United Community Development Corporation respectfully state that each of them is a nonprofit organization with no parent corporations or stock.

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GLOSSARY

FCC or **Commission**	Federal Communications Commission
Bureau	FCC Media Bureau
LPFM	Low Power FM Radio
MX	Mutually Exclusive
GLEC	Germantown Life Enrichment Center
GUCDC	Germantown United Community Development Corporation
SPRC	South Philadelphia Rainbow Committee
NEI or **Appellant**	Appellant Nueva Esperanza, Inc.
SJLP	NAACP Social Justice Law Project
LCRA	Local Community Radio Act
ITFS	Instructional Television Fixed Service

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to Circuit Rule 28(d)(2), Intervenors G-town Radio, Germantown Life Enrichment Center ("GLEC") and Germantown United Community Development Corporation ("GUCDC") (collectively, the "Germantown Intervenors") adopt Appellee Federal Communications Commission's ("FCC") Statement of the Case. This supplemental statement is intended to provide additional relevant information which can assist this Court in resolution of the case.

Germantown Intervenors are three small, community-oriented nonprofit organizations in Philadelphia, Pennsylvania. Together with a fourth organization, the South Philadelphia Rainbow Committee ("SPRC"), they have entered into a collaborative air time-sharing agreement in accordance with FCC policies and recommendations encouraging such collaboration.

The Germantown Intervenors and a number of other organizations applied to the FCC for construction permits to operate a low power FM ("LPFM") radio station in the Philadelphia area. Because the laws of physics permit only one station to transmit a signal without interference, the Commission applied the time-tested point system it had designed to resolve such "mutually exclusive" applications. As is common in densely populated communities, several applicants received the maximum point score and were therefore tied.

As explained below, FCC rules and policies encourage tied applicants to "time-share" the station (*i.e.*, divide the airtime among themselves) in order to aggregate their points and thereby break the tie. Accordingly, the Germantown Intervenors agreed amongst themselves and with SPRC, another tied applicant, (The Germantown Intervenors and SPRC are collectively referred to herein as the "Time-Share Applicants") to adopt such a time-sharing arrangement. The time-share enabled these groups to prevail over two other applicants—Appellant Nueva Esperanza, Inc. ("NEI") and the NAACP Social Justice Law Project ("SJLP").

Understanding the regulatory and historical context in which this appeal arises helps to explain why the appeal is groundless. NEI's argument, which is entirely predicated on the misreading of a staff member's unauthoritive informal blog post, is not predicated on any FCC rules or policies. It does not square with the Commission's own reading of its rules, which draws support from both the text of those rules and their underlying policies.

A. The Battle for LPFM.

The LPFM service was one way that the FCC addressed the wave of radio industry consolidation[1] in the wake of the Telecommunications Act of 1996.[2]

[1]As of 1996, no one operator controlled more than 65 stations. *Review of the Radio Industry, 2001*, Mass Media Bureau Report, at 3 (2001), *available at* http://transition.fcc.gov/mb/policy/docs/radio01.pdf. "As of March 2001, the two

Commentators and the FCC itself recognized that the resulting dominance of radio by large corporations came at a cost to localism and diversity, two of the Commission's key policy goals. Then-Chairman William Kennard noted: "When hundreds of stations are owned by just one person or company, service to local communities and coverage of local issues lose out."[3] Indeed, facilitating localism in broadcast content and promoting diversity in media ownership have historically been important parts of the FCC's public interest mission.[4]

The Commission recognized that creating a new category of noncommercial, low power radio stations could be part of the answer. Technological progress had so dramatically reduced the cost of broadcasting equipment that hundreds of individuals and noncommercial groups were both able and eager to deliver the

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largest radio group owners consisted of 972 and 257 radio stations, while the third, fourth and fifth largest held 210, 185 and 97, respectively." *Id.*, at 4.

[2] Pub. L. No. 104-104, §202(a), 110 Stat. 56, 110 (1996). *See id.*, Section 202(a)(eliminating limits on the total number of stations one owner could hold) and Section 202(b)(1)(raising limits on the number of stations one owner could hold in a specific market).

[3] Eric Klinenberg, *Fighting for Air: The Battle to Control America's Media* 256 (2007)(quoting Kennard).

[4] *See, e.g.*, *En Banc Programing Inquiry*, 44 F.C.C. 2303, 2310-11 (1960) (promoting localism in broadcast content in pursuit of the public interest); *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order*, 17 F.C.C. 288, 290 (1953)(promoting diverse ownership of broadcast stations in pursuit of the public interest).

locally relevant radio that big commercial companies would not.[5] Because new equipment was also better able to stay "on frequency," it became easier to squeeze new stations into vacant spaces without causing undue interference. A station operating at low power would only reach a few miles, so the station's owner would have a strong incentive to air intensely local content; and if station ownership were limited to noncommercial entities, advertisers' priorities would not dilute that incentive.[6] Moreover, by limiting the new stations to low power, the FCC could ensure the stations would not interfere with incumbent full-power FM operations.[7] Commissioner Gloria Tristani observed: "Under the First Amendment, this is the best kind of response - the answer is more speech, not less."[8] Thus, in 2000, the FCC created the LPFM service, tailoring its rules to ensure that stations would be owned by a diverse set of local, noncommercial groups.[9]

Before the FCC could begin to license the first LPFM stations, however, incumbent broadcasters fought back, claiming that the new entrants would interfere

[5] Laurie Kelleher, *Low Power, High Intensity: Building Communities on the FM Dial*, Columbia Journalism Review, Sept./Oct. 2003, at 32.
[6] *Creation of Low Power Radio Service*, *Report and Order*, 15 FCCRcd 2205, 2213 ¶17 (2000)("*1st Order*").
[7] *Creation of a Low Power Radio Service*, *Notice of Proposed Rulemaking*, 14 FCCRcd 2471 ¶1 (1999)("*1st NPRM*").
[8] *1st Order*, 15 FCCRcd at 2237 (*Separate Statement of Commissioner Tristani*).
[9] *Id.*, 15 FCCRcd 2205 at 2205 ¶1.

harmfully with incumbent full power FM broadcasts.[10] Incumbents successfully convinced Congress to pass an appropriations rider setting new interference thresholds for LPFM stations that were so stringent as to effectively prohibit the service in major urban markets.[11] The law also directed the FCC to investigate the interference issue by initiating a study.[12] The results of that study ultimately proved that most of the interference claims were groundless,[13] but the restrictions nevertheless remained law. Thus, even as the FCC proceeded to license hundreds of LPFM stations, big cities had to wait.

Based on the success of the newly created stations,[14] the absence of interference problems from new LPFM stations in suburban and rural areas and the results of the Congressionally mandated study, LPFM advocates ultimately persuaded Congress to pass the Local Community Radio Act ("LCRA") in 2010. The LCRA lifted what had proved to be unnecessary restrictions, and set the stage for a new window of LPFM licensing that would finally bring the service to major

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[10] Klinenberg, *supra* note 3, at 254–55.
[11] *See* District of Columbia Appropriations Act, 2001, Pub. L. No. 106-553, §632(a), 114 Stat. 2762A-1, 2762A-111 (2000).
[12] *Id*. §632(b).
[13] *See generally* MITRE Corp., *Experimental Measurements of the Third-Adjacent Channel Impacts of Low-Power FM Stations*, MM Docket No. 99-25 (filed June 30, 2003).
[14] By 2007, the Media Bureau had granted 1,286 LPFM construction permits, and 809 LPFM stations were up and running. *Creation of a Low Power Radio Service, Third Report and Order*, 22 FCCRcd 21912, 21917 ¶10 (2007).

cities like Philadelphia.[15] It was this new licensing window that gave rise to the issue now before this Court.

B. The Point System and the Voluntary Time-Sharing Tie-Breaker.

From its inception, the FCC has dealt with mutually exclusive applications for scarce spectrum. For decades, the primary mechanism it employed was to hold evidentiary hearings. However, over time, such comparative hearings became increasingly unworkable, as they were time-consuming and expensive and there were not always useful means of determining which applicants would in fact be superior. In a few instances, the FCC employed lotteries, but these proceedings were plagued by massive numbers of applications, many of them from unscrupulous parties seeking to game the system. In 1993, Congress first gave the FCC authority to use auctions to award some licenses. Since then, auctions have become the preferred, if imperfect, mechanism for awarding commercial spectrum licenses.[16] But auctions are not a useful means of selecting applicants for non-commercial uses, where deep pockets should not be the determinant of the outcome.

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[15] Pub. L. No. 111-371, §2, 124 Stat. 4072.

[16] *See generally, FCC Report to Congress on Spectrum Auctions*, WT Docket 97-150, at pp. 6-12 (rel. Oct. 9, 1997)(providing "A History of Comparative Hearings, Lotteries, and Auctions"), available at http://wireless.fcc.gov/auctions/data/papersAndStudies/fc970353.pdf.

The Commission considered various means of resolving such "mutually exclusive" (or "MX") application proceedings to decide how best to fulfill its policy objectives of quickly and efficiently awarding licenses by means which promote localism and diversity to the greatest possible extent. Based on successful experience with Instructional Television Fixed Service ("ITFS"), an educational television service, the Commission rejected using comparative hearings, auctions[17] and lotteries in favor of a point system.[18] "Like lotteries," the Commission said

> point systems have the potential to be fast, inexpensive and administratively efficient. Unlike lotteries, however, point systems make possible the selection of applicants based on objective criteria designed to best advance the public interest in the particular service at issue.[19]

Shortly after the Commission adopted the point system for LPFM, it followed a similar course for full-power non-commercial stations.[20]

To resolve the inevitable ties, the Commission again sought a procedure "with the potential to advance [its] goals for the new service."[21] It decided to allow tied MX applicants to aggregate their points by agreeing to time-share the station.[22]

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[17] Auctions "skew the allocation of licenses away from noncommercial entities that are more likely to serve underrepresented sections of the community." *1st Order*, 15 FCCRcd at 2209 ¶5.
[18] *Id*., 15 FCCRcd at 2259 ¶137.
[19] *Id*., 15 FCCRcd at 2260 ¶138.
[20] *Reexamination of the Comparative Standards for Noncommerical Educational Applicants*, 15 FCCRcd 7386 (2000).
[21] *1st Order* 15 FCCRcd at 2264 ¶148.
[22] *Id*., 15 FCCRcd at 2263 ¶147.

The Commission found this solution to be "practical" and "efficient" given "the localized nature of the LPFM service."[23] Moreover, time-sharing would "increas[e] the number of new broadcast voices…advanc[ing] our interest in promoting additional diversity in radio…through the LPFM service."[24] In fact, the FCC encouraged groups to plan for a time-sharing outcome in advance of applying: "In cases where individual parties are interested in applying for stations but do not have sufficient programming to meet the minimum operating hour requirements, we encourage those parties to find other applicants with whom they could share the license."[25]

Over the years, the point system has proven to be effective for ITFS, full-power noncommercial stations and LPFM. In the first round of LPFM applications, the Commission was able to process several thousand applications and, over the course of just a few years, award hundreds of licenses.

Once the LCRA created the opportunity for a thousand or more new stations, the FCC sought to identify opportunities to improve the application process based on its experience and that of industry participants.[26] After taking comments, the Commission saw fit to make some adjustments to the way it resolved MX

[23] *Id*., 15 FCCRcd at 2263 ¶148.
[24] *Id*.
[25] *Id*., 15 FCCRcd at 2276 ¶182.
[26] *See Implementation of the Local Community Radio Act of 2010*, *Fourth Further Notice of Proposed Rule Making*, 27 FCCRcd 3315, 3316 ¶1 (2012).

applications, but it reaffirmed its commitment to voluntary time-sharing as a way to break point system ties among MX applicants.[27] In doing so, it emphasized that its choice supported its goal of providing LPFM applicants "as much flexibility as possible," and it therefore encouraged applicants who wished to broadcast for fewer hours to coordinate with other applicants who want to use more airtime.[28]

Thus, the FCC chose to allow voluntary time-sharing because that system would best suit noncommercial applicants and best promote localism and diversity. The Commission's statements show that it deliberately tailored each aspect of the MX resolution process to serve those objectives, and affording time-share participants flexibility by allowing them to share resources and application strategies was an important component of that approach. Even as it reviewed and revised other aspects of the LPFM application process, it held fast to the voluntary time-sharing solution for MX applications in a conscious effort to keep its system as flexible as possible for small and thinly resourced noncommercial groups.

C. Bringing LPFM to Germantown.

During the 2013 filing window, G-town Radio, GLEC and GUCDC each sought a construction permit to operate an LPFM station in Philadelphia. The

[27] *Creation of a Low Power Radio Service*, *Sixth Report and Order*, 27 FCCRcd 15402, 15474 ¶195 (2012)("*6th Order*").
[28] *Id.* ("[P]ooling resources with a timeshare applicant wishing to use more time would result in more diversity and more efficient use of spectrum.").

three groups recognized that LPFM presented a unique opportunity to further their respective Germantown-oriented missions while diversifying the radio landscape of greater Philadelphia.[29] In their LPFM applications, each group discussed its specific plans for LPFM.

G-town Radio, a nonprofit Internet radio station, educates the people of Germantown on local issues, hosts local political debates, plays music catering to various groups in the community and highlights the work of Germantown's artistic community.[30] It seeks to broadcast via LPFM because streaming "pales in comparison to LPFM's ability to reach into the homes of the rich, poor, young, old and everyone in between."[31] It also plans to partner with local schools to teach children radio production.[32]

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[29] One of America's most historic neighborhoods, Germantown is a 3.3-square-mile area in Northwest Philadelphia that was the birthplace of the anti-slavery movement, the site of one of the largest Revolutionary War battles and the temporary home of President George Washington in the early years of the republic. David W. Young, *Historic Germantown: New Knowledge in a Very Old Neighborhood*, The Encyclopedia of Greater Philadelphia, http://philadelphiaencyclopedia.org/archive/historic-germantown-new-knowledge-in-a-very-old-neighborhood-2/ (last visited Feb. 4, 2016). Today, the area is home to 14 historic sites and a largely African-American community. *Id.*

[30] G-town Radio, *Application for Construction for a Low Power FM Broadcast Station*, Form 318, Attachment 2, *G-town Radio LPFM Application Information* (Nov. 14, 2013)("*G-town Application*")(JA 60).

[31] *Id.*

[32] *Id.*

GLEC is a nonprofit that operates a community center out of a historic building in Germantown.[33] Formerly affiliated with the YMCA, GLEC now operates independently with a mission of improving the quality of life of residents across physical, intellectual, social and cultural dimensions.[34] It would leverage LPFM to educate the community on wellness and nutrition, cover the activities of local sports teams and partner with local organizations like the Boy Scouts to further build participation and civic engagement in the media.[35]

GUCDC promotes and aids in the revitalization of the Central Germantown Business Corridor.[36] LPFM would allow the group to share best practices with businesses and to inform visitors to historic Germantown about top sites and local dining and shopping options.[37] The group is also planning a daily show featuring tips on how to preserve and maintain historic buildings.[38]

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[33] *About Us*, Germantown Life Enrichment Center, http://s429043955.initial-website.com/about-us/ (last visited Feb. 4, 2016).
[34] GLEC, *Application for Construction for a Low Power FM Broadcast Station*, Form 318, Attachment 2, *GLEC Proposed Educational Radio Programming* (Nov. 14, 2013)(JA 32–33).
[35] *Id*.
[36] Garlen Capita, *About Germantown United*, Germantown United Community Development Corp., http://germantownunitedcdc.org/about/ (last visited Feb. 4, 2016).
[37] GUCDC, *Application for Construction for a Low Power FM Broadcast Station*, Form 318, Attachment 2, *Programming Descriptions* (Nov. 14, 2013)(JA 47).
[38] *Id*.

SPRC, which joined the Germantown Intervenors during the MX timeshare phase, is based in Grays Ferry, a small community in South Philadelphia that was historically an important Schuylkill River crossing.[39] The area has long been a hotbed for racial tension, and SPRC was formed to address some of the products of that tension, which have included abandoned houses, drug use and crime.[40] SPRC President Robert Willbowe assists young men with criminal backgrounds in finding employment and engaging the youth in productive activities that keep them off the streets.[41] The group would leverage LPFM to broadcast neighborhood news and local music as well as multilingual content from the neighborhood's rich array of ethnic groups, including Laotian, Khmer, Mexican, Spanish, Bhutanese, Korean, Chinese, Indonesian, Vietnamese, Arabic and French programming.[42]

Although each of the Germantown applicants was prepared to operate an LPFM station on its own, each also recognized that other, non-Germantown groups

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[39] *About Grays Ferry*, Plan Philly, http://planphilly.com/neighborhoods/grays-ferry (last visited Feb. 4, 2016).
[40] Amanda L. Snyder, *A Brighter Rainbow*, South Philly Review, http://www.southphillyreview.com/news/a_brighter_rainbow-73883942.html (July 2, 2009); Fred Durso, Jr., *Stopping the Storm*, South Philly Review, http://www.southphillyreview.com/news/stopping_the_storm-73710782.html (Aug. 3, 2006).
[41] *See* Snyder, *supra* note 40.
[42] SPRC, *Application for Construction for a Low Power FM Broadcast Station*, Form 318, Attachment 2, *Proposed Schedule of Programming* (Nov. 14, 2013)(JA 108).

would likely apply for the same license.[43] After reviewing the FCC's rules, these groups decided that "their best chance at operating a station dedicated to Germantown was by working together at the outset with plans to potentially aggregate points during the mutually exclusive stage so that they might share time on a single station."[44] G-town Radio also elected to share its existing studio and its antenna with the other applicants from Germantown, recognizing that doing so would assist all of the groups in achieving their common goal of bringing LPFM to Germantown.[45]

When the MX phase began, the Germantown Intervenors found themselves in a tie with several groups, so they reached out to one of them—SPRC, with which none of the Germantown Intervenors had had any prior contact—and together the four groups agreed to time-share the license.[46] The agreement enabled these applicants to aggregate their points and thereby break the tie to prevail over a competing time-share group comprised of NEI and SJLP. By Public Notice dated September 5. 2014, the Commission's Media Bureau determined that there were

[43] *Consolidated Opposition to Petitions to Deny*, at 3 (Oct. 20, 2014)(JA 140).
[44] *Id*.
[45] *G-town Application* (JA 60).
[46] *Opposition to Petition to Reconsider*, at 3–4 (Mar. 2, 2015)(JA 209–210).

seven "tentative selectees," thereby triggering a 30 day window for filing of challenges and a 90 day window for submission of time-share agreements.[47]

D. Allegations Against the Germantown Applicants.

Pursuant to 47 C.F.R. §73.3584, NEI and SJLP petitioned the Media Bureau to deny applications of the Germantown Intervenors and a fourth applicant not a party to these proceedings (collectively, "Georgetown Applicants"). NEI and SJLP argued, *inter alia*, that they violated a supposed FCC policy prohibiting LPFM applicants from discussing time-sharing at any time prior to the MX phase.[48] There is no such prohibition in the Commission's rules, nor can one be found in any of the FCC's many LPFM Orders and NPRMs; instead, NEI posited that the prohibition lurks in the penumbra of 47 C.F.R. §73.3520, which says that an applicant or its successor or assignee may not file a second application while its first application is still pending.[49]

Contrary to Appellant's implications, Appellant's Br. at 20, there was no subterfuge in the manner in which the Georgetown Applicants collaborated among themselves and, later, with SPRC. In their opposition to the Petition to Deny, the

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[47] *See* Public Notice, *Commission Identifies Tentative Selectees in 111 Groups of Mutually Exclusive Applications Filed in the LPFM Window*, 29 FCCRcd 10847 (2014)(JA109-19).
[48] *Petition to Deny LPFM Applications BNPL-20131114AKY, BNPL-2013114ANP, BNPL-2013114AMR, and BNPL-20131114AMB*, at 1 (Oct. 6, 2014)(JA 127).
[49] *Id*.

Georgetown Applicants identified what they understood to be permissible application practices, confirmed in a blog post by Media Bureau chief Bill Lake stating that "Organizations in a community could apply separately – for the same or different frequency – knowing that they may decide later to aggregate points so they can negotiate a time-share agreement if the Commission determines that they are tied with the highest point total in the same mutually exclusive group."[50] The groups then described how they "proceeded under practices endorsed by the Commission" by "working together at the outset with plans to potentially aggregate points during the [MX] stage so that they might share time on a single station" and "agree[ing] to list the same studio space and antenna location on their applications."[51]

In its reply to the oppositions to the petition to deny, NEI, for the first time, also raised the Bill Lake Blog Post. Ignoring the portion cited by the Georgetown Applicants, NEI attempted to draw further support for its theory from what the Media Bureau later called "selective quotation" of an inapplicable portion of the post.[52] Rejecting NEI's arguments, the Media Bureau held that "there is no Rule

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[50] Bill Lake, *The Low Power FM Application Window is Fast Approaching*, FCC Blog, http://www.fcc.gov/blog/low-power-fm-application-window-fast-approaching (Sept. 30, 2013, 06:04 PM)("Bill Lake Blog Post")(JA 16–17).
[51] *Consolidated Opposition to Petitions to Deny*, at 3 (Oct. 20, 2014)(JA 140).
[52] *Reply of Petitioners to Consolidated Opposition to Petitions to Deny*, at 2 (Oct. 28, 2014)(JA 160); LPFM MX Group 304, *Order Denying Petition to Deny*, Ref

prohibiting LPFM applicants from filing separate applications with the goal of arriving at a timeshare agreement."[53] It further held that the blog post is "informal staff advice" and therefore "not authoritative,"[54] while also noting that, in any event, the blog post "specifically approved of" point aggregation planning at the application stage.[55]

NEI and SJLP petitioned for reconsideration, but the Media Bureau again rejected their theory that the FCC prohibited pre-MX-phase time-share discussions.[56] The Bureau reiterated its warning against relying on a blog post.[57] It also reiterated that, even if the blog post were authoritative, it could not be reasonably read as prohibiting anything the Germantown Applicants did.[58]

When NEI applied to the full Commission for review of the Bureau's decision, the FCC promptly and unanimously denied the application.[59] The

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1800B3-ATS, at n. 21. (Jan. 15, 2015); ("*Staff Decision*")(JA 187); Bill Lake Blog Post (JA 16–17).

[53] *Staff Decision* at 5 (JA 188).

[54] *Id.* at n. 21 (JA 187).

[55] *Id.* at 4 (JA 187).

[56] *LPFM MX Group 304, Order Denying Petition for Reconsideration*, Ref 1800B3-IB, at 4 (July 16, 2015) ("*Reconsideration*")(JA 217)("There is no such policy.").

[57] *Id.* ("The Blog Post would . . . be non-authoritative even had it expressed the proposition Petitioners allege.").

[58] *Id.* ("[T]he Time-Share Applicants' filing of separate applications and aggregation of points were consistent with the relevant portion of the Blog Post.").

[59] *LPFM MX Group 304*, 30 FCCRcd 13983, 13985 (2015) ("*FCC Decision*")(JA 238).

Commission agreed with the Bureau that "[n]either the Rules nor the LPFM Blog Post prevented the Germantown Applicants from agreeing to aggregate their comparative points prior to filing their applications."[60] It upheld, moreover, the Bureau's determination that the blog post was "informal staff advice and not authoritative."[61] Going further, the FCC noted that it knows how to prohibit "collusive communications" where it has such a prohibition in mind.[62]

Now, NEI challenges the FCC's reading of its own rules as "contrary to law, clearly erroneous, arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence."[63]

SUMMARY OF ARGUMENT

Intervenors adopt the arguments in the brief of Appellee Federal Communications Commission.

The ruling Appellant seeks would overturn decades of precedent and undermine the very rule of law. Parties' reliance on informal advice of agency staff, which sometimes can be erroneous, is not a new phenomenon. It is a necessary component of any administrative scheme that an agency operates from its official pronouncements; if any party could solicit advice from staff, perhaps

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[60] *Id.*
[61] *Id.*
[62] *Id.* at n. 9 (JA 238)(citing 47 C.F.R. §1.2105(c), which prohibits certain communications between auction bidders).
[63] *Notice of Appeal* at 2.

from multiple staff members, seeking to obtain a satisfactory answer and then rely upon it, the inevitable result would be inconsistency, uncertainty and disregard for normal processes.

The informal blog post that Appellant seeks to have treated as binding precedent does not say what Appellant claims it says. Even if that were not so, Appellant's argument that the informal blog post must be treated as binding precedent is based on this Court's decision in *Alaska Professional Hunters*. However, that case was abrogated by the Supreme Court and, in any event, does not help Appellant because it is wholly distinguishable.

Over the last two decades, the Internet has proved to be a transparent and effective means for the government to transmit and explain its activities. It has facilitated rather than "subvert[ed]" the administrative process. By attaching dangerous consequences to routine agency outreach, the ruling that Appellant seeks would erect an unfortunate barrier to open government, and is unwarranted by law or policy.

This Court should not reach the merits of Appellant's alternative argument that it lacked fair notice of the Commission's policy on time-sharing. Section 405(a) of the Communications Act adopts an unforgiving jurisdictional requirement that an argument may not be presented to this Court if it has not first

been presented to the agency. Appellant did not directly or indirectly raise its notice argument below.

ARGUMENT

Appellant's argument is that an informal blog post from an agency staff member is a binding agency pronouncement that has the same weight as any officially published, and vetted, agency *Public Notice*, rule or adjudicatory decision. Appellant claims that the blog post prohibits applicants to discuss possible time-share agreements prior to filing and that the agency does not understand its own rules and policies as they are supposedly established by the blog post.

As the FCC properly says,[64] this case really must begin and end with what the agency's rules and policies actually are, not what Appellant would like them to be. The Commission has cogently shown that no agency rule or policy precludes otherwise qualified LPFM applicants[65] from consulting with each other in contemplation of the likelihood – and in many instances, near certainty – that there will be ties among MX applicants and that the ultimate disposition will require parties to enter into time-sharing agreements. It has also demonstrated that the

[64] FCC Br. at 18.
[65] Appellant Nueva Esperanza does not here dispute that the four time-sharing parties are qualified to be licensees.

Commission's actual policy – which encourages parties to collaborate to develop time-shares – is entirely reasonable.

Appellant's argument rests entirely on the flawed premise that the informal blog post prohibits applicants from communicating about the possibility of future time-share agreements. That argument quickly falls apart because the Commission has definitively ruled that the informal blog post does not stand for what Appellant says it does. Moreover, even if the informal blog post could be read as Appellant wishes, it is fundamental administrative law that parties relying on informal advice do so at their own risk and may not seek relief if the advice turns out to be erroneous.

Because the Commission has thoroughly addressed and disposed of these and Appellant's other arguments, Intervenors seek here only to amplify upon two points the Commission has addressed. First, Intervenors discuss Appellant's claim that the informal blog post has the force of law. Second, Intervenors elaborate on the fact that Appellant has waived its right to argue that it lacked fair notice of the Commission's relevant policies.

I. THE INFORMAL BLOG POST DOES NOT HAVE THE FORCE OF LAW.

Like many federal and state agencies, the FCC regularly deals with many thousands of applicants and regulated parties. In the case of the FCC, this includes untold numbers of consumers of telephone and wireless companies and radio and

TV viewers. It must, necessarily, develop robust outreach policies to disseminate and explain its activities. Such practices are essential to good governance and to keeping down the cost of government by minimizing the need for one-to-one communications. In the twenty-first century, an agency's website has become the primary vehicle for those seeking general information.

As important as websites can be for distributing notice of formal agency actions and general informal advice on the entire range of its activities, their existence does not change the fact that an agency develops and communicates its regulatory policies through carefully drafted rules, interpretations, policy statements and interpretations which are officially released and, in most cases, published. The FCC issues a "Daily Digest" of such activities,[66] publishes its decisions in the FCC Record and, in the case of rulemakings and certain other matters, the Federal Register.

The ruling Appellant seeks would overturn decades of precedent and undermine the very rule of law. Parties' reliance on informal advice of agency staff, which sometimes can be erroneous, is not a new phenomenon. It is a necessary component of any administrative scheme that an agency operates from its official pronouncements; if any party could solicit advice from staff, perhaps from multiple staff members, seeking to obtain a satisfactory answer and then rely

[66] *See* https://www.fcc.gov/proceedings-actions/daily-digest.

upon it, the inevitable result would be inconsistency, uncertainty and disregard for normal processes. The FCC has rejected efforts to rely upon such informal staff guidance on countless occasions.[67]

As the Commission discusses in its brief at pages 46-49, Appellant has found one case which, it claims, provides support for its argument that the informal blog post should be treated as definitive agency policy. However, that case, *Alaska Professional Hunters Association v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), *abrogated by Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199 (2015), has been abandoned by the Supreme Court of the United States and, in any event, would not support Appellant's reliance upon it.

Alaskan Professional Hunters relied upon this Court's now-discredited doctrine enunciated in *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997) to hold that an agency level "Notice to Operators" signed by the FAA's Associate Administrator for Regulation and Certification and duly

[67] *See, e.g., Lewis J. Paper*, 28 FCCRcd16553, 16557 (2013); *Kojo Worldwide Corporation*, 24 FCCRcd 14890, 14895-96 (2009); *Communications Vending Corporation of Arizona, Inc.*, 17 FCCRcd 24201, 24215 (2002); *Hinton Telephone Company*, 10 FCCRcd 11625, 11637 (1995); *Livingston Radio Company*, 10 FCCRcd 574, 575 (1994)(all citing *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991)).

published in the Federal Register, was a binding precedent and should not have been issued without notice and comment.[68]

In *Perez*, the Supreme Court expressly abrogated *Paralyzed Veterans* and, with it, *Alaska Professional Hunters*.[69] In a footnote, Appellant blandly states that "*Perez* did not affect the portion of *Alaska Professional Hunters* that addresses the question of authoritativeness of agency guidance."[70] However, there is not a word in the *Alaska Professional Hunters* decision indicating that its holding about the binding nature of the action was severable from its discussion of the corollary, that this also required notice and comment. Moreover, the Supreme Court did, indeed, deal directly with the principle upon which Appellant seeks to rely, holding that

> The absence of notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[71]

In any event, to the extent that anything remains of *Alaska Professional Hunters*, the case offers no help to Appellant. There are several material distinctions that, taken together, demonstrate that the informal blog post should not

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[68] *Alaska Professional Hunters*, 117 F.3d at 1033 (citing *Compliance with Parts 119, 121 and 135 by Alaskan Hunt and Fish Guides Who Transport Persons by Air for Compensation or Hire*, 63 Fed.Reg. 4 (1998)).
[69] *Perez*, 135 S.Ct at 1206-1209.
[70] Appellant's Br. at 33, n.6.
[71] *Perez*, 135 S.Ct at 1204 (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).

be afforded treatment as an authoritative agency precedent. First, it was not listed in the agency's Daily Digest or published in the FCC Record or the Federal Register. Second, Appellant cannot possibly claim that it had been placing "substantial and justifiable reliance on a well-established agency interpretation."[72] Third, in light of the fact that the Commission regards the third paragraph of the blog post as informing the fourth paragraph upon which Appellant seeks to rely, Appellant cannot argue that the informal blog post was a clear and "definitive" statement of agency policy.[73] Finally, in this instance, interested parties had previously been given the opportunity to comment on the issue of prior consultation and had, in fact, submitted comments on the issue, which the Commission chose not to follow.[74]

The FCC has thoroughly explained why Appellant's extensive reliance on this Court's *Appalachian Power* decision is misplaced. FCC Br. at 48-52. However, Intervenors do wish to address the passage from that decision quoted at pages 35-36 of Appellant's brief:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad

[72] "A fundamental rationale of *Alaska Professional Hunters* was the affected parties' substantial and justifiable reliance on a well-established agency interpretation." *MetWest, Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 1999).
[73] *Honeywell International, Inc. v. NRC*, 628 F.3d 568, 579 (D.C. Cir. 2010).
[74] *6th Order*, 27 FCCRcd at 15474 ¶195.

> language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. "It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures." Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995). The agency may also think there is another advantage—immunizing its lawmaking from judicial review.[75]

In this introductory *dictum*, Judge Randolph was expressing legitimate concerns about how administrative agencies can circumvent the requirements of the APA and undermine the decisionmaking process by precluding public participation. This is an important admonition. However, it simply does not apply to the circumstances in this case. The manner in which the FCC worked to create and implement the LPFM service is the antithesis of what troubled Judge Randolph. In the case of LPFM, the FCC managed to create hundreds of new, community-based radio stations, working with thousands of small non-profit organizations, few of them represented by counsel. The agency conducted

[75] Appellant's Brief at 35-36 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (footnote omitted)).

rulemakings, obtained thousands of comments from ordinary citizens and devised an efficient and low-cost scheme to get these new small radio stations licensed and on the air as quickly as possible. The process, including extensive outreach through seminars, blog posts and plain language fact sheets, could not have been more transparent and inclusive. Appellant's characterization of the issuance of a single informative blog post as a sign that "without checks, agencies' release of guidance on the Internet can effectively subvert the notice and comment process and judicial review…," could not be more inapt.

There is one other thing to observe about the quoted passage. Its citation to Professor Pierce's 1995 law review article darkly suggests that the Internet may become a vehicle for undermining the administrative process rather than assisting it. Notably, however, that has not proven to be the case, and there do not appear to be any subsequent judicial references to that article or this passage in *Appalachian Power*. To the contrary, over the last two decades, the Internet has proved to be a transparent and effective means for the government to transmit and explain its activities. It has facilitated rather than "subvert[ed]" the administrative process. By attaching dangerous consequences to routine agency outreach, the ruling that Appellant seeks would erect an unfortunate barrier to open government, and is unwarranted by law or policy.

II. APPELLANT'S NOTICE CLAIM IS NOT PROPERLY BEFORE THIS COURT.

Appellant maintains that, even if the Commission were correct that the Time-Share Applicants' collaboration was permissible, the Commission's decision must nonetheless be reversed because the Commission did not give adequate notice of its interpretation.[76] The Commission thoroughly debunked this argument on the merits.[77] However, this Court need not bother to assess this question, as the argument is not properly before this Court.

The exhaustion of remedies provision in Section 405(a) of the Communications Act is very unforgiving. It provides that

> The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review...relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

In addition, Section 1.115 of the Commission's rules[78] expressly provides that applications for review must "concisely and plainly state the questions presented for review."[79]

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[76] Appellant's Br. at pp. 37-39.
[77] FCC Br. at pp. 53-56.
[78] 47 CFR §1.115.
[79] This provides a separate exhaustion requirement that would be alone sufficient to justify dismissal as to the notice issue. *See Enviromentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011).

Appellant did not raise a notice issue in its Petition to Deny (JA 127-133), its Petition for Reconsideration of the Media Bureau's decision (JA192-200)[80] or its Application for Review to the full Commission (JA 220-230). Because it failed to raise, much less preserve, any notice issue by including it in the Application for Review or by filing a Petition for Reconsideration with the full Commission, this Court lacks jurisdiction to consider the question.

The unpaginated Application for Review in this case raised two issues. One, relating to the Media Bureau's authority to decide the question, was dismissed as moot and, in any event, lacking merit.[81] The only other issue was that "*Alternatively, the Bureau's Denial of NEI's Petition in the July Order was Contrary to Established Commission Rules and Policy.*"[82] There is no claim or adversion to a lack of notice.[83] Thus, the Court should not reach the merits of this argument.

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[80] Even if Appellant had raised the issue with the staff, that would not have been sufficient. "[A]n issue cannot be preserved for judicial review by simply raising it before a Bureau of the FCC. It is 'the Commission' itself that must be afforded the opportunity to pass on the issue." *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274-279 (D.C. Cir. 1997).

[81] *FCC Decision*, 30 FCCRcd at 3, n.10 (JA 239).

[82] JA 226-228.

[83] Even if there had been some offhand reference to notice, "[t]he Commission 'need not sift pleadings and documents to identify' arguments that are not 'stated with clarity' by a petitioner." *Bartholdi Cable*, 114 F.3d at 279 (citation omitted).

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Circuit Rule 32(e)(2)(B) and this Court's order of February 20, 2015 because this brief contains 6444 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and Circuit Rule 32 (e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14.

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CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, hereby certify that on June 20, 2016, I filed the foregoing Intervenors Brief with the Clerk for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are register CM/ECF users will be served by that system.

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