ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1060

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

THE VIDEOHOUSE, INC.; FIFTH STREET ENTERPRISES, LLC; WMTM, LLC

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders
of the Federal Communications Commission

BRIEF FOR PETITIONERS

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Dated: February 25, 2016

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 18(a)(4), Petitioners certify as follows:

A. Parties

The petitioners appearing before this Court are The Videohouse, Inc.; Fifth Street Enterprises, LLC; and WMTM, LLC. The FCC and the United States are the only respondents in this Court. There are no other parties or *amici curiae* at this time.

B. Rulings Under Review

The rulings under review are:

- Report and Order, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd. 6567 (rel. June 2, 2014), 79 Fed. Reg. 48442 (Aug. 15, 2014);
- Second Order on Reconsideration, *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (rel. June 19, 2015), 80 Fed. Reg. 46824 (Aug. 6, 2015);
- Order on Reconsideration, *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (rel. Feb. 12, 2016);

- All related final orders and rules issued by the FCC in the proceeding captioned *In the Matter of Expanding the Economic and Innovative Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268.

C. Related Cases

This case is related to *In re The Videohouse, Inc.*, No. 15-1486, and *In re The Videohouse, Inc.*, No. 16-1051.

In *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015), this Court addressed a petition for review challenging other aspects of one of the FCC orders at issue in this case. While the Court's opinion describes the general structure of the incentive spectrum auction challenged in this case, that case did not involve the specific issues and subsequent FCC orders and proceedings at issue here.

Counsel is aware of additional cases before this Court challenging the Second Order on Reconsideration, but these cases do not appear to be related to this matter. *See Mako Communications, LLC v. FCC*, No. 15-1264; *Beach TV Properties, Inc. v. FCC, et al*, No. 15-1280; *Free Access & Broadcast Tel., et al v. FCC, et al*, No. 15-1346.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 18(a)(4) and 26.1, Petitioners state as follows:

Petitioner The Videohouse, Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in its stock.

Petitioner Fifth Street, LLC's parent companies are Local Media TV of Pittsburgh, LLC and Foxwood Partners LLC. No publicly held company has a 10% of greater ownership interest in its stock. The parent company of Local Media TV of Pittsburgh, LLC is Local Media TV Holdings, LLC, the members of which are Loop Partners V, Inc., Columbia Capital Equity Partners V (QP), L.P., Telecom Local Media, LLC, and Loop Media, LLC. The Shareholders of Loop Partners V, Inc. are Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. The general partner of Columbia Capital Equity Partners V (QP), L.P. Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. is Columbia Capital Equity Partners V, L.P. The general partner of Columbia Capital Equity Partners V, L.P. is Columbia Capital V, LLC and the limited partner is Columbia Capital, L.P.

Petitioner WMTM, LLC's parent company is Local Media TV Holdings, LLC. No publicly held company has a 10% of greater ownership interest in its

stock. The members of Local Media TV Holdings, LLC are Loop Partners V, Inc., Columbia Capital Equity Partners V (QP), L.P., Telecom Local Media, LLC, and Loop Media, LLC. The Shareholders of Loop Partners V, Inc. are Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. The general partner of Columbia Capital Equity Partners V (QP), L.P. Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. is Columbia Capital Equity Partners V, L.P. The general partner of Columbia Capital Equity Partners V, L.P. is Columbia Capital V, LLC and the limited partner is Columbia Capital, L.P.

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App.	Appendix
CBPA	Community Broadcasters Protection Act of 1999
Class A Report & Order	Report & Order, *Establishment of a Class A Television Service*, 15 FCC Rcd. 6355 (Apr. 4, 2000)
FCC	Federal Communications Commission
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NPRM	Notice of Proposed Rulemaking, GN Docket No. 12-268 (2012)
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Second Order on Reconsideration	Second Order on Reconsideration, GN Docket No. 12-268 (June 19, 2015)
Videohouse 2014 Petition	Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (filed Sept. 15, 2014)

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this challenge to orders of the Federal Communications Commission ("FCC" or "Commission") pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The final orders under review are the Order on Reconsideration, GN Docket No. 12-268 (Feb. 12, 2016) ("Reconsideration Order") [Appendix ("App.") 1020]; the Second Order on Reconsideration, GN Docket No. 12-268 (June 19, 2015) ("Second Order on Reconsideration) [App. 745]; and the Report & Order, GN Docket No. 12-268 (June 2, 2014) ("Report & Order") [App. 212]. Petitioners timely filed their petition for review. 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES

(1) Whether the FCC's 2014 decision to hinge auction eligibility and repacking protection upon the retroactive imposition of a 2012 deadline for the filing of an FCC form that the FCC instructed licensees to delay in filing was arbitrary and capricious and contrary to law.

(2) Whether the FCC subjected Petitioners to disparate treatment as compared with similarly situated entities.

(3) Whether the FCC's other asserted rationales for denying Petitioners auction eligibility and repacking protection are meritless.

STATUTES AND REGULATIONS

The FCC orders are reprinted in the Appendix. Other applicable statutes and are contained in an Addendum per Circuit Rule 28(a).

PRELIMINARY STATEMENT

"The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a [judicial] check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). Judicial scrutiny of agency action has always been warranted and necessary because the effects of administrative law "on people's lives are extraordinary." Patricia M. Wald, *Judicial Review in the Time of Cholera*, 40 Admin. L. Rev. 659, 670 (1997); *id*. ("[T]he courts play a vital role in keeping the rule of law intact in this enormous and still growing area."). The need for judicial scrutiny has only grown as the ever-expanding federal bureaucracy "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 499 (2010).

This case underscores why judicial scrutiny of agency action is essential to protecting the rule of law. It involves an upcoming Federal Communications Commission market-based incentive auction authorized by the Spectrum Act. This auction has three phases, the first of which is a "reverse auction to determine the

amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights." 47 U.S.C. § 1452(a)(1). For broadcasters who decline to surrender their spectrum rights in the reverse auction, the Spectrum Act "authorizes the FCC to undertake a 'repacking' process." *Nat'l Ass'n of Broad. ("NAB") v. FCC*, 789 F.3d 165, 170 (D.C. Cir. 2015). In this second phase, the FCC "will reassign those broadcasters to new channels in a different (and smaller) band of spectrum," *id.*, with the surrendered spectrum being made available for new uses, 47 U.S.C. § 1452(b). The FCC must give repacking "protection" to certain stations by "mak[ing] all reasonable efforts to preserve … the coverage area and population served of each broadcast television licensee." *Id.* The third and final phase is a "forward auction" to "offer the recovered spectrum to wireless carriers." *NAB*, 789 F.3d at 170. Importantly, the auction will commence on March 29, 2016.

In 2014, the FCC ruled that the Spectrum Act requires the agency to afford repacking protection only to full power and Class A broadcast television facilities licensed as of February 22, 2012 (the date of enactment of the Spectrum Act) or for which an application for a license to cover (*i.e.*, a license to broadcast) was on file with the Commission by that date. Report & Order ¶¶ 185-89 [App. 297-99]. The Commission also held that the Spectrum Act authorized it to afford the same protection to other broadcast facilities on a discretionary basis. *Id.* ¶ 189 [App.

299]. This case concerns the Commission's line-drawing efforts in determining which Class A-eligible low-power television ("LPTV") stations would be eligible for the reverse auction and entitled to such discretionary protection.

The FCC's course of action here has been "an entirely outcome-driven process"—a regulatory "game of gotcha" marked by shifting rationales and disparate treatment of similarly situated entities. Reconsideration Order at 19-20 (Pai, C., dissenting) [App. 1038-39]. The Commission began this enterprise by setting a "deadline" (February 22, 2012) by which licensees of Class A-eligible LPTV stations had to file with the FCC a Form 302-CA—an application to convert a station from LPTV to Class A status—in order to become eligible to participate in the reverse auction and obtain repacking protection. The problem: this was no deadline at all, because the FCC announced it some 27 months after the fact. The FCC thus deprived Petitioners notice of this "deadline" and the legal consequences that would flow from the failure to meet it. On top of that, during the relevant time period, FCC staff had been instructing licensees to delay in filing Form 302-CA. The FCC thus created the very circumstances that it ultimately used to bar Petitioners from participating in the reverse auction.

At the time it set this "deadline" for determining auction eligibility and repacking protection, the FCC made an exception for one station—KHTV (Los Angeles)—affording it auction eligibility and repacking protection based on its

diligent efforts to convert to Class A status. Petitioners had been equally diligent in seeking to convert to Class A status and thus were equally entitled to auction eligibility and repacking protection. Accordingly, they sought similar relief, but the FCC denied their request. The FCC ruled that Petitioners' requests were procedurally deficient because they were insufficiently detailed to provide a basis for relief. Yet at the same time, the FCC used Petitioners' requests as the basis to afford auction eligibility and repacking protection to twelve other stations that had never made requests at all.

The FCC's treatment of Latina Broadcasters ("Latina") underscores its disparate treatment of similarly situated entities. Just days after ruling that Latina was similarly situated to Petitioners and not entitled to discretionary protection, *see* Second Order on Reconsideration at ¶ 53 n.183 [App. 768], the FCC reversed course and deemed Latina eligible for the auction and entitled to repacking protection, *see Office of Engineering & Technology Releases Final Version of TVStudy & Releases Baseline Coverage Area & Population Served Information Related to Incentive Auction Repacking*, 30 FCC Rcd, 6964, 6979 (June 30, 2015) [App. 838]. Remarkably, the FCC did so without explanation, and without so much as mentioning its contrary ruling less than two weeks earlier. Weeks later, the FCC majority again reversed course and dropped Latina from the auction.

Reconsideration Order at ¶¶ 20-22 [App. 1033-35]. All of this administrative lurching about happened without *any* change in circumstances.

This regulatory "game of gotcha" must end. The Court should hold unlawful and set aside the Reconsideration Order and direct the Commission to grant the Reconsideration Petition.

STATEMENT OF THE CASE

A. The Community Broadcasters Protection Act (CBPA)

In 1999, Congress passed the Community Broadcasters Protection Act of 1999 ("CBPA"), Pub. L. No. 106-113, § 5008, 113 Stat. 1501, 1501A-594, to preserve low-power television ("LPTV") stations that serve small communities across the country. Congress noted that a number of LPTV stations had "operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available," but those stations faced an "uncertain future." *Id.* Because LPTV stations had secondary spectrum status, "they [could] be displaced by full-service TV stations that seek to expand their own service area, or by new full-service stations seeking to enter the same market." Report & Order, *Establishment of a Class A Television Service*, 15 FCC Rcd. 6355 ¶ 4 (Apr. 4, 2000) ("Class A Report & Order"). Congress also recognized that the forthcoming conversion from analog to digital television would have "significant

adverse effects on many [LPTV] stations" because there were "few, if any, available replacement [digital] channels." *Id*.

To address these concerns, the CBPA granted certain LPTV stations "primary" access to spectrum and ordered the FCC to promulgate regulations establishing a "Class A television license" that would be available to qualifying LPTV stations. *Id*. ¶ 5. These Class A licensees would be subject to "the same license terms and renewal standards as full-power television licensees, and … be accorded primary status as television broadcasters as long as they continue[d] to meet [certain] requirements." *Id*. The CBPA also created "certification and application procedures for low-power television licensees seeking Class A designation[] and prescribe[d] the criteria low-power stations must meet to be eligible for a Class A license." *Id*.

As relevant here, the CBPA provided that the FCC "may not grant a Class A license to an LPTV station for operation between 698 and 806 megahertz (television broadcast channels 52-69)." 47 U.S.C. § 336(f)(6)(A). Thus, only LPTV stations operating on channels in the "core spectrum" (television broadcast channels 2 through 51) would be eligible for Class A status. *Id*. However, the CBPA also ordered the FCC to grant Class A status to those stations operating outside of the core spectrum if the FCC later assigned them a channel within the core spectrum. *Id*. The CBPA explicitly states that Class A licenses are permanent

"as long as the station continues to meet the requirements for a qualifying low-power station." 47 U.S.C. § 336(f)(1)(A).

On April 4, 2000, following the passage of the CBPA, the FCC issued an order allowing LPTV stations authorized on channels 52-59 "the opportunity to obtain Class A status" if they could "locate a replacement channel within the core spectrum." Class A Report & Order ¶ 100. Importantly, the FCC recognized that the CBPA "does not impose a time limit on the filing of such applications" and therefore, the FCC would not "impose any time limit on the filing of a Class A application by LPTV licensees operating on channels outside the core." *Id*.

B. Petitioners' Diligence in Moving to Class A Status

During the relevant time frame, Petitioners diligently sought to transition to Class A status. But Commission staff in the Video Division modified the process by which LPTV stations could convert to Class A status. Before 2011, LPTV stations that wished to construct digital facilities for their newly acquired in-core channels and to convert to Class A status could: (1) file for a LPTV digital construction permit and then (2) file Form 302-CA to convert that LPTV station to a Class A station immediately after obtaining the LPTV construction permit. But sometime in 2011, the Video Division began instructing LPTV stations that the only way to accomplish such a conversion was to obtain a digital construction permit for a LPTV station, build out the station under that LPTV construction

permit, and obtain a license to cover that LPTV station, all before filing Form 302-CA to convert the LPTV station to a Class A station. *See* Report & Order ¶ 235 n.730 [App. 318]; Reconsideration Order at 18-20 (Pai, C., dissenting) [App. 1037-39]; Petition for Reconsideration of Abacus Television, GN Docket No. 12-268, at 5 (Sept. 15, 2014) ("Abacus 2014 Petition") [App. 711]; Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268, at 6-7 (filed Sept. 15, 2014) ("Videohouse 2014 Petition") [App 701-02]; Reconsideration Petition at Exhibit 1 (Abacus Petition for Eligible Entity Status at 7; WMTM Petition for Eligible Entity Status at 2) [App. 941, 944].

1. Videohouse (WOSC)

Videohouse is a licensee of Digital Class A Station WOSC-CD ("WOSC"). WOSC broadcasts on digital Channel 26 in Pittsburgh, Pennsylvania. WOSC provides quality programming to its communities of license—including, among other things, children's programming, programming of interest to the elderly and disabled, locally produced, locally originated programming, and other programs of interest to the viewing public, as well as Emergency Alert Service messages.[1]

[1] Some examples of WOSC's programming are Dragonfly TV, which highlights children "doing" projects with real hands-on experience and demonstrates practical applications of mathematics and science; Think Big, which features top youth inventors who face off against each other in an Invent-Off to see who can come up with the most innovative and creative invention; and Biz Kid$, which focuses on financial literacy and entrepreneurship for teens. *See* Letter from

When the CBPA was enacted in 1999, WOSC was a LPTV station licensed and operating on analog Channel 61. WOSC promptly sought to transition to a digital channel and to obtain Class A status. Shortly after the CBPA outlined the requirements for Class A eligibility in 1999, WOSC timely submitted its statement of eligibility for Class A status and since that time continuously has maintained that status. *See* Videohouse 2014 Petition at 4 [App. 699]; Petition for Reconsideration of The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC, GN Docket No. 12-268 at Exhibit 1 (Videohouse Petition for Eligible Entity Status at 6) (Sept. 2, 2015) ("Reconsideration Petition") [App. 931]. The Commission formally acknowledged that WOSC had certified that, "during the 90-day period ending November 28, 1999," it had: "(1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station or by a group of commonly-controlled low power television stations; and (3) been in compliance with the Commission's regulations applicable to the low power television service."[2]

Thomas McCarthy to Marlene H. Dortch, FCC, at 3 n.5 (Jan. 25, 2016) ("Petitioners' Ex Parte Letter") [App. 1003].

[2] Public Notice, *Certificates of Eligibility for Class A Television Station Status*, DA 00-1224 (June 2, 2000), at App. 20. By making those certifications, WOSC additionally certified compliance with the FCC's public notice rule (47

But as the Commission had predicted, *see* Class A Report & Order, ¶¶ 100-103, Videohouse had significant difficulty locating a suitable in-core digital channel to which it could transfer its station because of a lack of available displacement channels. *See* Videohouse 2014 Petition, at 4-7 [App. 699-702]; Reconsideration Petition at Exhibit 1 (Petition for Eligible Entity Status at 4-5) [App. 929-30]. It was not until 2009—after the 12-year transition from analog to digital operations by full-power television stations[3]—that Videohouse was able to locate and obtain an in-core digital channel. In March 2009, Videohouse applied for a construction permit to build out a digital station on its newly acquired in-core Channel 26. The Commission granted that construction permit in September 2009. Due to unforeseen construction delays and difficulty in obtaining transmission equipment for its new station, Videohouse was unable to complete the digital build-out Channel 26 until January 2013. Consistent with the FCC's revised Class A conversion process, Videohouse filed Form 302-CA to convert its fully

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C.F.R. § 73.3580), and the applicable requirements regarding the maintenance of accessible station files and records (47 C.F.R. §§ 74.765, 74.781).

[3] During this transition, each full-power station was allowed to operate on two channels. One channel continued to provide an analog signal; the second channel provided a digital signal. This dual operation helped to ease the transition for consumers, but because both channels had to receive protection from other broadcasters, spectrum was at a premium in many markets during this transition period. *See FCC Fifth Report & Order In the Matter of Advanced Television Systems and Their Impact on Existing Television Service*, MM Docket No. 87-268, FCC 97-116 (rel. Apr. 21, 1997).

constructed digital station to Class A status on January 15, 2013.[4] On April 30, 2014, that application was granted, and Videohouse obtained Class A status for Channel 26 and therefore primary status pursuant to the CPBA. *See* Videohouse 2014 Petition at 5-7 [App. 700-02]; Reconsideration Petition at Exhibit 1 (Videohouse Petition for Eligible Entity Status at 5-8) [App. 930-33].

2. Fifth Street (WPTG)

Fifth Street is the current licensee of Digital Class A Station WPTG-CD ("WPTG").[5] WPTG broadcasts on digital Channel 49 in Pittsburgh, Pennsylvania. WPTG provides quality programming to its communities of license—including, among other things, children's programming, minority programming, programming of interest to the elderly and disabled, locally produced, locally originated programming, and other programs of interest to the viewing public, as well as Emergency Alert Service messages.[6] WPTG is an affiliate of Bounce TV, "the first African American broadcast network, featuring a programming mix of

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[4] In December of 2012, WOSC was operating at reduced power with Commission authorization. Reconsideration Petition at Exhibit 1 (Videohouse Petition for Eligible Entity Status at 8) [App. 933].

[5] Fifth Street acquired WPTG-CD from Abacus Television on October 2, 2015 as part of a multi-station acquisition and is thus the successor-in-interest to Abacus Television for purposes of this proceeding.

[6] For example, WPTG offers popular syndicated children's programming such as Jack Hannah's Animal Adventures, as well as Animal Atlas, and Animal Explorer. *See* Petitioners' Ex Parte Letter at 3 n.5 [App. 1003].

theatrical motion pictures, sporting events, documentaries, specials, inspirational faith-based programs, off-network series, original programming and more." Petitioners' Ex Parte Letter at 3 n.6 (quoting Bounce TV, *available at* http://www.bouncetv.com/about/) [App. 1003].

When the CBPA was enacted in 1999, WPTG was a LPTV station licensed and operating on analog Channel 69. WPTG promptly sought to transition to a digital channel and obtain Class A status. Shortly after the CBPA outlined the requirements for Class A eligibility in 1999, WPTG timely submitted its statement of eligibility for Class A status and since that time continuously has maintained that status. *See* Abacus 2014 Petition at 4 [App. 710]; Reconsideration Petition at Exhibit 1 (Abacus Petition for Eligible Entity Status at 6) [App. 940]. The Commission formally acknowledged that WPTG had certified that, "during the 90-day period ending November 28, 1999," it had: "(1) broadcast a minimum of 18 hours per day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station or by a group of commonly-controlled low power television stations; and (3) been in compliance with the Commission's regulations applicable to the low power television service."[7]

[7] Public Notice, *Certificates of Eligibility for Class A Television Station Status*, DA 00-1224 (June 2, 2000), at App. 21. By making those certifications, WPTG additionally certified compliance with the FCC's public notice rule (47

Like WOSC, WPTG was unable to locate a suitable in-core channel for digital operations until 2009—after the conclusion of the digital transition for full power stations. WPTG first attempted to secure a construction permit for in-core Channel 32 in 2009. But the FCC denied two different applications for a construction permit for Channel 32 because of concerns about interference with adjacent Channel 33. In 2011, WPTG sought to acquire in-core Channel 49 from the then-licensee of that channel (WLLS-LP). Though the negotiations failed, the FCC ultimately canceled the license for WLLS-LP in March 2012, because it had been off the air for more than one year. Shortly thereafter, WPTG acquired the license for Channel 49. In September 2012, WPTG filed an application for a construction permit for Channel 49, which was granted on December 8, 2012. *See* Abacus 2014 Petition at 3-6 [App. 709-12]; Reconsideration Petition at Exhibit 1 (Abacus Petition for Eligible Entity Status at 4) [App. 938].

In January 2013, WPTG filed an application to convert Channel 49 to Class A status. That application was ultimately granted after WPTG submitted a license application for the underlying LPTV facility, as directed by the Commission, and WPTG obtained Class A status (and therefore primary status under the CBPA) on

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C.F.R. § 73.3580), and the applicable requirements regarding the maintenance of accessible station files and records (47 C.F.R. §§ 74.765, 74.781).

April 25, 2014. *See* Abacus 2014 Petition at 3-6 [App. 709-12]; Reconsideration Petition at Exhibit 1 (Abacus Petition for Eligible Entity Status at 5) [App. 939].

3. WMTM, LLC (WIAV)

WMTM, LLC is the licensee of Digital Class A Station WIAV-CD (WIAV).[8] WIAV broadcasts on digital Channel 44 in Washington D.C. WIAV provides quality programming to its communities of license—including, among other things, children's programming, programming of interest to the elderly and disabled, locally produced, locally originated programming, and other programs of interest to the viewing public, as well as Emergency Alert Service messages.[9]

When the CBPA was enacted, WIAV was a LPTV station licensed and operating on analog Channel 58. Shortly after the CBPA outlined the requirements for Class A eligibility in 1999, WIAV timely submitted its statement of eligibility for Class A status and since that time continuously has maintained its eligibility. *See* Abacus 2014 Petition at 4 [App. 710]; Reconsideration Petition at Exhibit 1 (Abacus Petition for Eligible Entity Status at 6) [App. 940]. The Commission formally acknowledged that WIAV had certified that, "during the 90-day period ending November 28, 1999," it had: "(1) broadcast a minimum of 18 hours per

[8] WMTM acquired WIAV-CD from Asiavision, Inc. ("Asiavision") on April 17, 2015, *see* FCC File No. BALDTL-20140515AGQ, and thus is the successor-in-interest to Asiavision for purposes of this proceeding.

[9] For example, WIAV airs Multiplication Hip Hop, a popular program that teaches children math facts through music.

day; (2) broadcast an average of at least three hours per week of programming produced within the market area served by the station or by a group of commonly-controlled low power television stations; and (3) been in compliance with the Commission's regulations applicable to the low power television service."[10]

Like WOSC, WPTG, and other low-power television stations in spectrum-congested markets, WIAV had difficulty identifying and securing a construction permit on an in-core channel. In November 2007, after continuously preserving its Class A eligibility status for nearly a decade, WIAV filed an application for a construction permit for its newly acquired in-core channel 44. The Commission granted WIAV a digital construction permit for Channel 44 in May of 2008. In June of 2009, WIAV modified this permit to specify an alternate transmitter site. In December 2012, WIAV completed construction of a digital station for Channel 44. On December 31, 2012, WIAV filed an application for a LPTV license to cover its digital station. The Commission granted that license on April 26, 2013. WIAV filed Form 302-CA on November 12, 2013 in order to convert its digital license to Class A status. On March 9, 2015, the FCC granted a Class A license to WIAV, affording WIAV primary status under the CBPA. *See* Opposition of Asiavision,

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[10] Public Notice, *Certificates of Eligibility for Class A Television Station Status*, DA 00-1224 (June 2, 2000), at App. 23. By making those certifications, WPTG additionally certified compliance with the FCC's public notice rule (47 C.F.R. § 73.3580), and the applicable requirements regarding the maintenance of accessible station files and records (47 C.F.R. §§ 74.765, 74.781).

Inc. at 5, GN Docket No. 12-268 (Nov. 9, 2014) [App. 721]; Reconsideration Petition at Exhibit 1 (Asiavision Petition for Eligible Entity Status at 1-3) [App. 943-45].

C. The Spectrum Act

The broadcast television industry completed the congressionally mandated transition from analog to digital transmission in 2009. *See Nat'l Ass'n of Broad. ("NAB") v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015). Many broadcasters, however, could not "take advantage of the opportunities created by the digital transition" because the other offerings in the video programming marketplace (e.g., cable television and the internet) had significantly decreased broadcast television's viewing audience. *Id.* (quoting Notice of Proposed Rulemaking, *In the Matter of Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 27 FCC Rcd. 12,357 ¶ 16 (2012) ("*NPRM*")); *see* App. 8. At the same time, "the use of wireless networks in the United States [was] 'skyrocketing, dramatically increasing demands on both licensed and unlicensed spectrum—the invisible infrastructure on which all wireless networks depend.'" *Id*. (quoting *NPRM* ¶ 1); *see* App. 2. As a consequence, the country faced "a major challenge to ensure that the speed, capacity, and accessibility of … wireless networks keeps pace with these demands in the years ahead.'" *Id*. (quoting *NPRM* ¶ 1); *see* App. 2.

In light of the state of the broadcast television industry, and in response to the nation's growing need for wireless spectrum, Congress enacted the Spectrum Act, which took effect on February 22, 2012. *See* Title VI of the Middle Class Tax Relief and Job Creation Act, Pub. L. No. 112-96, 126 Stat. 156 (2012). The Spectrum Act "authorized the FCC to hold an incentive auction to encourage broadcasters to relinquish their spectrum rights in exchange for incentive payments." *NAB*, 789 F.3d at 169. For broadcasters who decline to give up their spectrum rights in the reverse auction, the Spectrum Act "authorizes the FCC to undertake a 'repacking' process under which it will reassign those broadcasters to new channels in a different (and smaller) band of spectrum." *Id.* at 170. Importantly, the Spectrum Act required the FCC to provide "protection" to certain stations in the repacking process by "mak[ing] all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee." Spectrum Act § 6403(b)(2); 47 U.S.C. § 1452(b)(2). After the Commission recovers a portion of the UHF spectrum, it will then "conduct a forward auction to offer the recovered spectrum to wireless carriers." *NAB*, 789 F.3d at 170.

The Spectrum Act thus authorizes the Commission to conduct a market-based incentive auction. This auction has three phases: (1) a "reverse auction" to incentivize broadcast television licensees to sell their spectrum rights back to the

FCC; (2) a "reorganization" of broadcast TV spectrum to reassign channels and reallocate portions of the spectrum; and (3) a "forward auction" to assign new licenses within the newly reorganized broadcast bands. *See id.* at 168-69.

1. Reverse Auction

Congress directed the FCC to conduct a "reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights." 47 U.S.C. § 1452(a)(1). The Spectrum Act defines "broadcast television licensee" as either "a full power television station" or a "low-power television station that has been accorded primary status as a Class A television licensee under [FCC regulations]." *Id.* § 1401(6). Participation by these stations is entirely "voluntary." *Id.* § 1452(a)(1). The reverse auction will commence on March 29, 2016.

2. Spectrum Repacking Process

For broadcasters who decline to surrender their spectrum rights in the reverse auction, the Spectrum Act "authorizes the FCC to undertake a 'repacking' process." *NAB*, 789 F.3d at 170. In this second phase, the FCC "will reassign those broadcasters to new channels in a different (and smaller) band of spectrum," *id.*, at 170, with the surrendered spectrum being made available for new uses, 47 U.S.C. § 1452(b). The Spectrum Act authorizes the FCC to "make such reassignments of

television channels as the Commission considers appropriate" and to "reallocate such portions of the spectrum as the Commission determines are available for reallocation." *Id.* § 1452(b)(1)(B)(i)-(ii). The FCC must afford repacking "protection" to certain stations by "mak[ing] all reasonable efforts to preserve … the coverage area and population served of each broadcast television licensee." *Id.* Stations without repacking protection are exposed to the threat of imminent "displacement," in which case the licensee must shoulder the costs of moving to a new channel, share a channel using less spectrum, or shut down altogether. Report & Order ¶ 237 [App. 318-19].

3. Forward Auction

The third and final phase is a "forward auction" to "offer the recovered spectrum to wireless carriers." *NAB*, 789 F.3d at 170; *see also* 47 U.S.C. § 1452(c)(1)(A). If the proceeds from this auction do not cover the amount of money owed to the licensees who relinquished their spectrum rights in the reverse auction, plus administrative costs and the channel relocation reimbursements owed to broadcast television licensees, the forward auction is cancelled and no spectrum reorganization may occur. *Id.* § 1452(c)(2).

D. Procedural History

1. The Notice of Proposed Rulemaking (NPRM)

On October 2, 2012, the FCC issued a Notice of Proposed Rulemaking to implement the Spectrum Act. *See NPRM* [App. 1]. Among other things, the FCC

proposed that it would allow those broadcasters who received protection in the repacking process to participate in the reverse auction. *Id*. ¶ 98 [App. 34]. The FCC then proposed an interpretation of the Spectrum Act requiring repacking protection for only full power facilities and Class A facilities (1) that were licensed as of February 22, 2012 or (2) for which an application for a "license to cover" (*i.e.*, a license to broadcast) was on file as of February 22, 2012. *Id*. ¶ 113 [App. 41]. The FCC further indicated that it did not interpret the Spectrum Act "to prohibit the Commission from granting protection to additional facilities where appropriate" on a discretionary basis. *Id.* ¶¶ 113-15 [App. 41].

In response to the NPRM, Ron Bruno, Videohouse's President, filed comments objecting to the "use [of] February 22, 2012 as the date for determining which spectrum usage rights an eligible Class A licensee will be bidding to relinquish in the reverse spectrum auction." Reply Comments of Bruno Goodworth Network, Inc. at 2 (Mar. 11, 2013) [App. 207]. Mr. Bruno argued that using this as the cutoff would "be arbitrary and unsupported by the record" because stations had no advance notice that such drastic consequences would attach to this date and because doing so would unfairly punish those stations (including WOSC-CD) that had "built a substantial portion of [their] digital stations since February 22, 2012." *Id.* [App. 207] He proposed that the FCC "use the date of the commencement of the reverse auction process as the date for Class A Stations licenses to be evaluated

for their reverse auction bid." *Id*. [App. 207] Numerous commenters made similar arguments regarding the impropriety of a retroactive cutoff date *See* Reply Comments of Venture Technologies Group, LLC, at 2, 13-14 (March 12, 2013); Reconsideration Petition at 4-5 n.10 [App. 909-10].

2. Report & Order

On June 2, 2014, the FCC issued an Order adopting rules for the reverse and forward auctions. *See* Report & Order [App. 212]. In particular, the Order addressed which stations would be eligible to participate in the auction and which would be protected in the repacking process. As to eligibility, the FCC determined that it would "limit reverse auction participation to the licensees of full power and Class A television stations that [it would] protect in the repacking process." *Id*. ¶ 350 [App. 361]. In other words, "the rights eligible for voluntary relinquishment [would] be the same as those associated with the facilities that [the FCC would] protect in the repacking process absent relinquishment of those rights." *Id*. [App. 361].

Addressing the stations eligible for protection, the FCC concluded that the Spectrum Act required it to protect only those full power and Class A facilities (1) that were licensed as of February 22, 2012 or (2) for which an application for license to cover was on file as of February 22, 2012. *Id*. ¶ 184 [App. 297]. The FCC also determined that it would protect "certain categories of facilities that were

not licensed or the subject of a pending license to cover application as of February 22, 2012." *Id.* ¶ 194 (identifying categories) [App. 301].

With one notable exception, the FCC determined that it would *not* protect stations (such as WOSC) that are "eligible for a Class A license but that did not file an application for such license until after February 22, 2012, even if the application is granted before the auction." *Id.* ¶ 233 [App. 316]. The FCC refused to extend protection to these stations because it believed that "[p]rotecting such stations would encumber additional spectrum by requiring protection of approximately 100 stations," which, in turn, would "increase[e] the number of constraints on the repacking process and limit[] our flexibility." *Id.* ¶ 234 [App. 316]. The FCC "recognized that these stations have made investments in their facilities," but it nevertheless concluded that these investments did "not outweigh the significant detrimental impact on repacking flexibility that would result from protecting them, especially in light of the failure of such stations to take the steps to obtain a Class A license and remove their secondary status in a timely manner." *Id.* ¶ 134 [App. 307].

The FCC "exercise[d] its discretion to protect one station in this category—KHTV-CD, Los Angeles, California" because that station "made repeated efforts over the course of a decade to convert to Class A status." *Id.* ¶ 235 [App. 317-18]. The FCC quite properly concluded that "the equities in favor of protection of this

station outweigh[ed] the minimal impact that protecting this one facility will have on [its] repacking flexibility." *Id*. [App. 318]

3. Second Order on Reconsideration

On September 15, 2014, Videohouse and Abacus timely sought reconsideration of the Report and Order. *See* Videohouse 2014 Petition [App. 696]; Abacus 2014 Petition [App. 707]. They argued, among other things, that the FCC's refusal to protect their stations in the broadcast television incentive auction: (1) arbitrarily subjected them to disparate treatment as compared to other stations to which the FCC extended discretionary protection; and (2) was based on inaccurate factual findings, *viz*., that there were not "approximately 100 stations" similarly situated to Videohouse and Abacus. *See* Videohouse 2014 Petition at 7-9 [App. 702-04]; Abacus 2014 Petition at 7-9 [App. 713-15]; Supplement to Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 at 8-13 [App. 734-39]; Reply of The Videohouse, Inc. in Support of Petition for Reconsideration, GN Docket No. 12-268 at 2-3 [App. 742-43]. Videohouse and Abacus requested that the FCC protect them in the repacking process and allow them and others similarly situated to participate in the reverse auction. *See* Videohouse 2014 Petition at 9-10 [App. 704-05]; Abacus 2014 Petition at 9 [App. 715].

On June 19, 2015, the FCC issued an order that, among other things, denied Videohouse's and Abacus's petitions for reconsideration. *See* Second Order on

Reconsideration [App. 745]. The FCC asserted procedural and substantive grounds for denying reconsideration. The FCC concluded that the 2014 Petitions were procedurally deficient because Petitioners' requests for protection had not been specific enough. *Id*. ¶ 59 [App. 771-72]. As a substantive matter, the FCC again relied upon the alleged harmful effects of granting protection to the "approximately 100 formerly out-of-core Class A-Eligible LPTV stations that had not filed an application for a license to cover a Class A facility as of February 22, 2012." *Id*. ¶ 54 [App. 769]. Instead of providing "a list of such stations," the FCC stated that "the stations falling in this category can be identified using the Consolidated Database System ('CDBS')." *Id*. [App. 769].

The FCC also rejected Petitioners' argument that they were similarly situated to KHTV-CD (KHTV), a formerly out-of-core Class A-Eligible LPTV station that (like Petitioners' stations) filed an application for a license to cover a Class A facility after February 22, 2012 but which the agency singled out for discretionary protection based on its "repeated efforts" to construct a Class A facility. *Id*. ¶ 59 [App. 771-72]. The FCC principally rejected this argument on procedural grounds, concluding that "petitioners did not attempt to demonstrate in response to the [NPRM] why they should be afforded discretionary protection." *Id*. [App. 771-72]. Alternatively, the FCC distinguished KHTV from the Petitioners' station by crediting KHTV for years earlier having filed two separate applications

for Class A facilities that were ultimately dismissed. *Id*. ¶ 60 [App. 772-73]; Order ¶ 235 n.728 [App. 317].

Finally, the FCC rejected Petitioners' argument that they were similarly situated to other stations to which the FCC had extended discretionary protection in the repacking process. *Id.* ¶ 61 [App. 773]. The FCC found "no basis to revisit" its previous determination that protecting these stations (and not others, such as Petitioners') was appropriate given the equities and "the [minimal] impact on repacking flexibility." *Id*. [App. 773]. Simultaneously, however, the FCC determined that it would protect *additional* stations that "hold a Class A license today" and had an "application to convert an LPTV construction permit to a Class A construction permit" pending or granted as of February 22, 2012" because there were "significant equities in favor of protection of these stations that outweigh the limited adverse impact on our repacking flexibility." *Id*. ¶¶ 53, 62 [App. 768, 774]. The FCC extended this protection despite the fact that *none* of these stations had filed petitions for reconsideration seeking such protection. *Id*. [App. 768, 774].

Notably, the FCC afforded protection to another station that was similarly situated to Videohouse: Latina Broadcasters of Daytona Beach, LLC—licensee of WDYB-CD in Daytona Beach, Florida ("Latina Broadcasters"). Like Videohouse, Latina Broadcasters was an out-of-core Class A-Eligible LPTV station that did not file an application for a Class A license until after February 22, 2012. The

Commission's Second Order on Reconsideration recognized that Latina Broadcasters was in the same situation as Videohouse. *Id*. ¶ 53 n.183 [App. 768]. But because Latina Broadcasters had failed to seek timely reconsideration, the FCC denied its petition on procedural grounds before adding that its petition would otherwise have been denied for the same reasons as Videohouse's reconsideration petition.

Remarkably, when the Commission released a list of channels eligible for the auction less than two weeks later, it had done an about-face with respect to Latina Broadcasters. Without any explanation why it had reversed course and afforded Latina Broadcasters protection, much less why it was entitled to different treatment than Videohouse, the Commission included WDYB-CD on the list of stations eligible for the reverse auction. *See Office of Engineering & Technology Releases Final Version of TVStudy & Releases Baseline Coverage Area & Population Served Information Related to Incentive Auction Repacking*, 30 FCC Rcd, 6964, 6979 (June 30, 2015) [App. 838].

4. Proceedings Before the FCC and this Court that Resulted in the Reconsideration Order

On September 2, 2015, Videohouse, Abacus, WMTM, and KMYA filed a petition for reconsideration of the Second Order on Reconsideration. *See* Reconsideration Petition [App. 904]. They argued, among other things, that the FCC's treatment of out-of-core Class A-eligible stations was based on inaccurate

factual premises; that the FCC had arbitrarily treated similarly situated parties differently; and that the FCC's actions were procedurally improper. *Id*. at 3-18 [App. 908-23]. They asked the FCC to grant their petition for reconsideration, to allow them to participate in the reverse auction, and to extend protection to them in the repacking process. *Id*. at 18 [App. 923].

On December 8, 2015, the FCC began accepting applications from broadcasters to participate in the reverse auction. *See* Public Notice: Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates, DA 15-1296 (Nov. 12, 2015) [App. 956]. Because the FCC had yet to act on the petition for reconsideration, Petitioners were prohibited from submitting their applications to participate in the reverse auction. The application window closed on January 12, 2016 at 6:00 p.m. *See id.* [App. 956].

In order to protect their rights, on December 11, 2015, Petitioners filed an emergency motion to stay with the FCC. Petition for Emergency Stay, GN Docket No. 12-268 (Dec. 11, 2015) [App. 958]. Petitioners asked the FCC to extend the deadline for Petitioners to file applications to participate in the reverse auction pending the agency's disposition of the Reconsideration Petition and judicial review thereof. *Id.* at 4 [App. 961]. Alternatively, Petitioners asked the FCC to allow them to participate in the reverse auction as currently scheduled, including

submitting an application in the window set to close on January 12, 2016, and to extend protection to Petitioners pending the agency's disposition of the Reconsideration Petition and judicial review thereof. *Id.* [App. 961]. Petitioners stated that it would deem the motion denied if the FCC did not act by December 18, 2015. *Id*. [App. 961].

On December 18, 2015, the Commission denied that motion. Order, GN Docket No. 12-268, ¶¶ 8-13 (Dec. 18, 2015) ("Order Denying Stay") [App. 972]. In doing so, the FCC expressly abandoned its assertion that protecting Petitioners would require it to do the same for another 100 similarly situated stations, *id.* ¶ 13 n.41 [App. 977], explaining that this assertion "does not bear on the decisional issue" here. *Id.* ¶ 12 [App. 976-77]. In addition, the FCC defended as procedurally proper its decision to extend discretionary protection to the group of licensees that had not filed reconsideration petitions. In its view, Petitioners' requests to "reconsider the scope of discretionary protection for out-of-core Class A-eligible LPTV stations that now hold Class A licenses" allowed the agency to protect a different group of licensees, *id.* ¶ 13 [App. 977]—even though the FCC found Petitioners' requests for protection insufficiently specific to support the same relief.

On December 22, 2015, Petitioners filed an emergency petition for writ of mandamus. *In re The Videohouse, Inc.*, No. 15-1486 (D.C. Cir. filed Dec. 22,

2015). Petitioners asked the Court to order the FCC to rule on the Reconsideration Petition by Monday, January 4, 2016 so that they could seek emergency judicial relief before the January 12, 2016 application deadline. In highlighting their urgent need for a ruling on the Reconsideration Petition, Petitioners emphasized that the FCC had never offered a rationale for its decision to afford Latina Broadcasters auction eligibility and discretionary protection in the repacking process, much less an explanation why Petitioners should be treated differently. *Id.* at 15-16.

In opposing mandamus, the FCC informed the Court that it had circulated a draft order on December 23, 2015 that would "dispose of the reconsideration petition well before the incentive auction is scheduled to start." Opp. to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-1486, at 14 (filed Dec. 28, 2015). Indeed, the FCC emphasized that, "[if] the Court rules before March 29 that petitioners are eligible to participate in the reverse auction, the Commission will have the ability to ensure that petitioners 'have an opportunity to submit an application to participate in the reverse auction' before the agency commences the auction." *Id.* at 12. Notably, the FCC for the first time asserted that Latina Broadcasters was situated differently than Petitioners because its predecessor in interest had obtained in-core Class A construction permits before February 22, 2012, *id.*, despite the fact that those permits related to a different in-core channel that had been relinquished years earlier. Reconsideration Order ¶ 20

& n.98 [App. 1034]; Petitioners' Ex Parte Letter at 2 & n.2 (Jan. 25, 2016) [App. 1002].

On December 30, 2015, this Court denied mandamus relief "without prejudice to refiling in the event the [FCC] fails to take prompt action on the pending petition for reconsideration." Order, *In re The Videohouse, Inc.*, No. 15-1486, at 1 (Dec. 30, 2015). "Based on the agency's representations," the Court "expect[ed] the [FCC] to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016." *Id*.

As of February 10, 2016, the FCC had not acted on the Reconsideration Petition despite its assurances that mandamus relief would not be necessary to preserve Petitioners' rights. Accordingly, Petitioners renewed their request for mandamus relief by filing a second emergency petition for writ of mandamus on February 11, 2016. The next day, the FCC issued the Reconsideration Order.

5. The Reconsideration Order & Dissenting Statements

In the Reconsideration Order, a divided FCC denied Petitioners auction eligibility and repacking protection. The majority maintained that the requests for relief were procedurally improper despite the agency's continued reliance on the 2014 Petitions as the basis for its *sua sponte* decision to grant auction eligibility

and repacking protection to licensees that never even sought such relief. Reconsideration Order ¶¶ 8-10 [App. 1023-25].

Substantively, the majority stood by its position that it was appropriate to deny auction eligibility and repacking protection to "out of core" Class A-eligible LPTV stations that obtained in-core channels but did not file a license to cover by February 22, 2012, despite acknowledging that KHTV fell "in this category." *Id.* ¶ 3 [App. 1021]. The majority attempted to distinguish Petitioners' efforts to obtain Class A status from those of KHTV by depicting Petitioners as prospectors that sought Class A status only after it became apparent that they could obtain a potential windfall. *Id.* ¶ 13 [App. 1028]. The majority was particularly dismissive of Petitioners' argument that the purported "delay" in filing Form 302-CA resulted from improper instructions from FCC staff, stating only that parties rely on staff advice "at their own risk." *Id.* ¶ 11 n.44 [App. 1026].

Notably, the FCC reversed itself on Latina Broadcasters yet again. After first rejecting Latina Broadcasters' requests for discretionary protection, then changing course and affording such relief, the FCC returned to its original position and abandoned its effort to distinguish Latina Broadcasters' situation from that of Petitioners.

Commissioner Pai dissented, and Commissioner O'Rielly dissented in part. Commissioner Pai criticized the FCC's line-drawing exercise as "an entirely

outcome-driven process" in which the agency "shifted from rationale to rationale" and subjected similarly situated Class A-eligible stations to disparate treatment. *Id.* at 19-20 [App. 1038-39].[11] Moreover, given that Commission staff had instructed stations "that were ready to file a Form 302-CA *not* to do so," the Commission's decision to hinge auction eligibility and repacking protection to a retroactive deadline was arbitrary—a regulatory "game of gotcha." *Id.* at 20 [App. 1039]. Commissioner Pai also disagreed with the majority's procedural rationale for denying relief. Petitioners' requests for discretionary protection could not be procedurally defective given that the Commission relied upon those same requests "to extend discretionary protection to other stations." *Id.* [App. 1039]. Naturally, Commissioner Pai concluded that the outcome itself was "arbitrary." *Id*. [App. 1039].

On February 12, 2016, the same day the FCC issued the Reconsideration Order, Petitioners filed a Petition for Review challenging it, as well as the Report & Order and the Second Order on Reconsideration. On February 21, 2016, Petitioners filed an emergency motion for expedited consideration of this matter, proposing a schedule to complete briefing and have the case resolved prior to the

[11] Commissioner O'Rielly likewise dissented from the FCC's line-drawing exercise, criticizing the FCC for "inappropriately draw[ing] and mov[ing] lines regarding entities receiving discretionary protection." Reconsideration Order at 22 [App. 1041].

March 29, 2016 start date of the auction. On February 23, 2016, the Court issued an order expediting the schedule, with briefing to conclude on April 1, 2016 and oral argument likely to occur in May 2016.

STANDARD OF REVIEW

This Court reviews agency interpretations of statutes they administer under the two-part test set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). "[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 842-43.

Under the Administrative Procedure Act ("APA"), "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusion found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; [or] (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency haring provided by statute." 4 U.S.C. § 706(2). Section 706(2)(A) proscribes irrational agency action, including, among others, when "the agency has relied on

factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency also acts arbitrarily when it "offer[s] insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996).

SUMMARY OF ARGUMENT

The Commission's line-drawing exercise in determining which Class A-eligible LPTV stations would be eligible for the reverse auction and entitled to discretionary protection has been marked by arbitrary and capricious action. 5 U.S.C. § 706(2)(A). The FCC began by tying auction eligibility and repacking protection to whether a Class A-eligible LPTV station had filed Form 302-CA by February 22, 2012. That was not a known "deadline" until it was imposed more than 27 months later on June 2, 2014, which, of course, makes it no deadline at all. It is bad enough that the FCC deprived Petitioners notice of the legal consequences that would flow from making or not making a regulatory filing by that date; this is arbitrary, capricious, and contrary to law in and of itself. Much worse is that the FCC was instructing Class A-eligible LPTV stations in the relevant time period not

to file Form 302-CA but rather to "delay undertaking those efforts." Reconsideration Order at 20 (Pai, C., dissenting) [App. 1039]. The FCC's actions in creating the purported "delay" for which it later penalized Petitioners were arbitrary and capricious, *NLRB v. Bell Aero. Co.*, 416 U.S. 267, 295 (1974), and constitute an illegitimate "game of gotcha," Reconsideration Order at 20 (Pai, C., dissenting) [App. 1039].

Even assuming that imposing a retroactive deadline were legitimate, the FCC's actions were still arbitrary and capricious. This is because the FCC violated a bedrock rule of administrative law by subjecting similarly situated entities to disparate treatment. *See Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently.").

It is difficult to imagine a case that more clearly violates this fundamental tenant of administrative law. As explained above, the FCC acknowledged that KHTV fell within the "category" of "out of core" Class A-eligible LPTV stations that obtained an in-core channel "but did not file for a Class A license to cover by February 22, 2012." Reconsideration Order ¶ 3 [App. 1021]. Yet, the FCC granted discretionary protection to KHTV. *See supra* 23, 25, 32. The Commission majority distinguished KHTV by virtue of its "repeated efforts" to secure an in-core channel

over the source of a decade and the fact that it filed a Form 302-CA only days after February 22, 2012. Reconsideration Order ¶ 3 [App. 1021]. But the Commission failed to give equal consideration to Petitioners' similar efforts to secure a viable in-core channel. In doing so, the FCC unfairly subjected Petitioners (and Latina Broadcasters) to disparate treatment. To be clear, the Commission properly afforded KHTV auction eligibility and repacking protection. But having afforded such relief to KHTV, the FCC must afford it to Petitioners as well.

The FCC unfairly subjected Petitioners to disparate treatment in another respect. As noted above, the FCC ruled that Petitioners' 2014 petitions for reconsideration of the Report & Order were procedurally defective and thus incapable of serving as the basis for affording Petitioners auction eligibility and repacking protection. But the FCC extended discretionary protection to approximately a dozen LPTV stations that never even sought reconsideration, using Petitioners' purportedly procedurally defective Reconsideration Petition as the vehicle for providing such relief with respect to these stations. If Petitioners' requests for discretionary protection truly were insufficiently detailed to provide a basis for relief, then they could not possibly have served as the basis for relief for a dozen other stations that never requested relief in their own right.

STATEMENT OF STANDING

To demonstrate constitutional standing, a petitioner "must show injury in fact that was caused by the conduct of the defendants and that an be redressed by judicial relief." *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007). "Injury in fact" is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 1292 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To carry their burden of proof, petitioners may rely on evidence in the administrative record, or on evidence newly filed in court. *Id*. at 1289.

"[D]irectly regulated parties," such as LPTV stations, "are the most natural challengers for" the rules that govern their conduct. *Shays v. FEC*, 414 F.3d 76, 94 (D.C. Cir. 2005). When a party "is himself an object of the action" at issue, "there is ordinarily little question that the action" has "caused him injury, and that a judgment preventing" the action "will redress it." *Lujan*, 504 U.S. at 561-62.

This case is no exception. The challenged orders directly regulate the licensed Class A stations owned and operated by Petitioners. *See supra* 6-34. The FCC's orders expose Petitioners' stations to the threat of imminent "displacement." *See* Report & Order ¶ 237 [App. 318-19]. As the FCC concedes, "failing to protect certain facilities beyond the statutory floor may deprive viewers of television service they currently receive." *Id*. ¶ 192 (App. 300). "A decision not to protect

certain facilities also may strand the investments broadcasters have made in these facilities, including equipment and construction costs, as well as the payment of legal and engineering costs associated with applying for and licensing a facility, in the justifiable belief that their facilities would be protected in the repacking process." *Id*. (App. 300).

Moreover, the FCC's disparate treatment of Petitioners' stations vis-à-vis other full-power and Class A stations—*e.g.*, including only full-power and Class A stations in the reverse auction and repack, even reimbursing their costs of channel reassignment, *id*. ¶¶ 184-89 (App. 297-99)—puts Petitioners at a competitive disadvantage, which provides an additional basis for Article III standing. *See, e.g.*, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

To remedy these injuries, Petitioners ask this Court to vindicate their rights under the Spectrum Act, Communications Act, and Administrative Procedure Act. The remedies granted by this Court—including vacating the FCC's orders or requiring the FCC to include and protect Petitioners' stations in the spectrum repacking process—would redress Petitioners' imminent injuries.

ARGUMENT

I. The FCC's 2014 Decision to Hinge Auction Eligibility and Repacking Protection Upon the Retroactive Imposition of a 2012 Deadline for the Filing of an FCC Form that the FCC Instructed Licensees to Delay in Filing is Arbitrary and Capricious and Contrary to Law.

The FCC's decision to hinge auction eligibility and discretionary repacking protection upon the retroactive imposition of a "deadline" going back 27 months in time is arbitrary and manifestly unfair. Moreover, the FCC itself created the very circumstances that it now has used to bar Petitioners from participating in the reverse auction. As Commissioner Pai put it: "Media Bureau staff in 2011 advised stations that were ready to file a Form 302-CA not to do so. Now the Commission is turning around and denying those stations repacking protection because they failed to file that form by February 22, 2012." Reconsideration Petition at 20 (Pai, C., dissenting) [App. 1039]. The Commission—not Petitioners—thus caused the delay that it later wielded against Petitioners by deciding in June 2014 that auction eligibility was limited to those who had filed their applications some 27 months earlier. Had the Commission given Petitioners timely notice that they needed to file Form 302-CA by a certain date in order to secure auction eligibility and protection in the repacking process, they would have done so. This amounts to a regulatory "game of gotcha," *id.*, that is arbitrary and capricious and contrary to law. *See NLRB v. Bell Aero. Co.*, 416 U.S. 267, 295 (1974).

To begin, the adoption of a "deadline" that has long since past is, of course, not a deadline at all. The point of an agency deadline (or any deadline) is to provide the affected parties notice that legal consequences will follow from failure to meet it. Denying licensees notice as to the steps they must take to be eligible for the auction, and then penalizing them *ex post* for failing to meet this "deadline," is manifestly unfair and impermissibly retroactive.

The CBPA affords Class A licensees "primary status as television broadcasters" subject to "the same license terms and renewal standards as full-power television licensees," and it sets no deadline by which legacy out-of-core Class-A eligible stations must convert to Class A status. Class A Report & Order ¶ 100. Moreover, the CBPA explicitly mandates that qualified applicants must be afforded Class A licenses, *see* 47 U.S.C. § 336(f)(6)(A) ("If such a qualified applicant for a class A license is assigned a channel within the core spectrum …, the Commission shall issue a class A license."), and that those licenses are permanent "as long as the station continues to meet the requirements for a qualifying low-power station," 47 U.S.C. § 336(f)(1)(A). But by tying repacking protection to a date 27 months in the past, the Commission effectively imposed a deadline for conversion to Class A status. Licensees that did not fortuitously meet this *ex post* "deadline" are now without repacking protection and thus exposed to the threat of imminent "displacement," in which case the licensee must shoulder

the costs of moving to a new channel, share a channel using less spectrum, or shut down altogether. Report & Order ¶ 237 [App. 318-19]. Being deprived of repacking protection thus threatens Petitioners with the loss of all economically beneficial uses of its license and the expenditures made in reliance on them.

Moreover, these licensees will be deprived of the rights associated with Class A status that the CBPA afforded to them. *See* 47 U.S.C. § 336(f)(1)(A), (6)(A); Class A Report & Order ¶ 100 (recognizing the "primary status" of Class A licenses). Because Congress did not authorize the FCC to impose this retroactive "deadline," the Commission exceeded its statutory authority in establishing one. *See Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2011) ("Generally, an agency may not promulgate retroactive rules without express congressional authorization.") (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

Even if the Commission's backward-looking "deadline" were viewed as merely impacting (rather than negating) Petitioners' rights as Class A licensees and injuring their investments made in reliance on the primary status of their licenses, it would still be unsustainable because the "penalty … assessed … might well have been avoided if the agency's [deadline] had been earlier made known." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.); *see also Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir.

1972) ("[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests."). By cutting off Petitioners rights' and stripping from them the value of substantial past investments without any notice of the legal consequences flowing therefrom, the "deadline" is arbitrary and unreasonable. *See U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000).

The arbitrariness of the FCC's action is compounded by the fact that Commission staff specifically instructed licensees to delay in filing Form 302-CA, thereby inducing licensees to file it much later in the conversion process than they otherwise would have. By causing the very delays that the FCC would later use to penalize Class-A eligible stations, the FCC improperly sought to impose new liabilities on licensees "for past actions which were taken in good-faith reliance on [agency] pronouncements." *NLRB*, 416 U.S. at 295.

It is no answer to say that licensees rely on the advice of FCC staff at their "own risk." Reconsideration Order ¶ 11 n.44 (citing *Deleted Station WPHR(FM), Ashtabula, Ohio*, 11 FCC Rcd 8513, 8515 (1996)) [App. 1026]. *Deleted Station* does not provide cover for the Commission's tactics. At most, *Deleted Station* stands for the proposition that regulated entities should be leery of relying on informal agency advice that is contrary at the time given to clear, existing agency

rules. *Id.* In that case, FCC "Form 301," along with agency "rules, decisions, and fee filing guide clearly provide[d] that a fee [wa]s required" for the application filed by a permittee of an unbuilt FM radio station. *Id.* The permittee argued that her failure to file the required fee should be excused because she received "incorrect fee advice from Commission staff." *Id.* But it was not reasonable for her to rely on incorrect advice in the face of a clear rule. *Compare id. with In re Hooten Broad., Inc.*, 13 FCC Rcd. 15023 (1998) (excusing an incorrect filing fee where the regulated entity reasonably relied on out-of-date agency materials).

This case is much different. At the time when Commission staff was instructing licensees to delay filing Form 302-CA, licensees had no way to know the legal consequences that might follow from heeding that advice. The Spectrum Act had not yet become law, and there was no deadline by which legacy out-of-core Class-A eligible stations were required to convert to Class A status. Class A Report & Order ¶ 100. It thus was entirely reasonable for licensees to heed the instructions of FCC staff. Petitioners "ha[d] no opportunity to cure the [agency-manufactured] defect," *Runnells v. Andrus*, 484 F. Supp. 1234, 1238 (D. Utah 1980), so they should not be penalized for failing to meet the FCC's arbitrary "deadline."

II. The Commission Subjected Petitioners to Disparate Treatment as Compared with Similarly Situated Entities.

Even if it were lawful to impose such a manifestly unfair retroactive deadline, the FCC's denial of auction eligibility and repacking protection to Petitioners was arbitrary and capricious nonetheless. It is a bedrock rule of administrative law that subjecting similarly situated entities to disparate treatment violates the APA. *See Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently."). "Deference to agency authority or expertise," this Court has explained, "'is not a license to ... treat like cases differently.'" *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1983)). In short, the FCC "cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly." *Local 777 v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978).

It is difficult to imagine a case that more clearly violates this principle. The FCC acknowledged that KHTV fell within the "category" of "out of core" Class A-eligible LPTV stations that obtained an in-core channel "but did not file for a Class A license to cover by February 22, 2012." Reconsideration Order ¶ 3 [App. 1021]. But the FCC granted discretionary protection to KHTV. *See supra* 23, 25, 32. The FCC majority distinguished KHTV from the rest of this "category" by virtue of its

diligent "efforts" to secure an in-core channel over the source of a decade and the fact that it filed a Form 302-CA only two days after the February 22, 2012 "deadline." Reconsideration Order ¶ 3 & n.12 [App. 1021-22]; *see also* Report & Order ¶ 235 [App. 317-18]. But the Commission failed to give equal consideration to Petitioners' similar efforts to secure a viable in-core channel. In doing so, the FCC unfairly subjected Petitioners to disparate treatment. To be clear, the FCC properly afforded KHTV auction eligibility and repacking protection (especially in light of the inequity of the FCC's arbitrary deadline). But having afforded such relief to KHTV, the FCC must afford it to Petitioners as well.

In the Reconsideration Order, the Commission tried to distinguish Petitioners from KHTV by framing them as prospectors that sought Class A status only after it became apparent that participation in the reverse auction might provide them with a potential windfall. *Id.* ¶ 13 ("Petitioners only sought Class A status after Congress designated such stations as eligible to participate in the auction – and after the date set by Congress to establish entitlement to repacking protection and auction eligibility.") [App. 1028]. This is an untenable position. Shortly after the CBPA outlined the fundamental requirements for Class A eligibility in 1999, Petitioners filed timely certifications of eligibility for Class A status with the Commission. *See supra* 8-17. Although the FCC chooses not to mention this powerful fact in the Reconsideration Order, it long ago formally

acknowledged that Petitioners had "timely filed statements of eligibility, certifying full compliance with [Class A] statutory programming and operational standards" following the passage of the CBPA. *See* Public Notice, *Certificates of Eligibility for Class A Television Station Status*, DA 00-1224 (June 2, 2000), at 1; *id.* at App. 20 (W61CC/Videohouse), 21 (W69CC/Abacus), 23 (WIAV/Asiavision). As the Commission knows, *Petitioners were among the first LPTV licensees in line to start the process to convert to Class A status*, not late-coming profiteers who showed up only after the enactment of the Spectrum Act.

Moreover, Petitioners undertook substantial efforts over several years and spent hundreds of thousands of dollars working to obtain in-core channels, build out new digital stations, and convert to Class A status. This work began long before Congress passed the Spectrum Act in February of 2012. *See* Reconsideration Petition at Exhibit 1 (Videohouse Petition for Eligible Entity Status at 9; Abacus Petition for Eligible Entity Status at 7) [App. 934, 941]; Second Order on Reconsideration ¶ 51 n.177 [App. 767]. Although the digital TV transition somewhat delayed Petitioners' ability to obtain in-core channels, each had obtained an in-core channel by 2009 and had begun the costly, laborious process of transitioning to a Class A digital station. *See supra* 9-12 (WOSC acquired in-core Channel 26 and secured a digital construction permit therefor in 2009), 12-15 (WPTG acquired in-core Channel 32 in 2009 and promptly applied

for a digital construction permit), & 15-17 (WIAV acquired in-core Channel 44 in 2007 and secured a digital construction permit therefor in 2008).[12]

The FCC majority weakly attempts to characterize these efforts as dilatory. But the Commission itself has acknowledged that the digital TV transition seriously constrained the ability of Class A-eligible out-of-core stations from moving into the core, particularly in markets like Pittsburgh and Washington, DC. *See supra* 11 n.3; Reconsideration Order at 17 (Pai, C., dissenting) [App. 1036]; *see also* Class A Report & Order, ¶¶ 100-103.[13] Moreover, that these efforts began

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[12] Moreover, there can be no question that Petitioners are and have been complying with all applicable Class A requirements. When the Commission granted their applications for Class A licenses, those license grants were official recognition that Petitioners are and have been in compliance with all relevant Class A requirements, consistent with the certifications each Petitioner made in connection with filing Form 302-CA.

[13] That the digital TV transition impeded Petitioners' ability to locate available in-core channels cannot properly be held against them. The Court therefore should not credit the FCC's backhanded rejection of Petitioners' claim that the digital TV transition impeded their ability to obtain suitable in-core channels in congested markets. Reconsideration Order ¶ 14 [App. 1028-29]. Moreover, to the extent that the majority implies that Petitioners could have obtained in-core channels more quickly, given that KHTV was able to obtain an in-core channel in the "even more congested Los Angeles market despite the DTV transition," *id.* [App. 1028-29], the Commission is contradicting itself. In addressing the impact each station might have on repacking flexibility, the FCC majority asserts that Petitioners' stations are "particularly likely to impact repacking flexibility because they are located in congested markets such as Pittsburgh and Washington," *id.* ¶ 12 [App. 1022], while KHTV would have only a "limited adverse impact" on the FCC's "flexibility to repurpose spectrum for flexible use through the incentive auction," *id.* ¶ 5. The FCC cannot have it both ways.

several years before the passage of the Spectrum Act and another two years before the FCC first set a deadline regarding auction eligibility demonstrates diligence, not profiteering. Petitioners' diligence thus compares favorably with KHTV's and entitles them to the same auction eligibility and repacking protection.

The FCC's treatment of Latina Broadcasters underscores its disparate treatment of similarly situated entities. Just days after ruling that Latina was similarly situated to Petitioners and not entitled to discretionary protection, *see* Second Order on Reconsideration ¶ 53 n.183 [App. 768], the FCC reversed course and deemed Latina eligible for the auction and entitled to repacking protection, *see Office of Engineering & Technology Releases Final Version of TVStudy & Releases Baseline Coverage Area & Population Served Information Related to Incentive Auction Repacking*, 30 FCC Rcd, 6964, 6979 (June 30, 2015) [App. 838]. Remarkably, the FCC did so without explanation or even mentioning its contrary ruling less than two weeks earlier. Indeed, the FCC never offered any defense for its disparate treatment of Latina and Petitioners until it was forced to do so in response to Petitioners' First Mandamus Petition. *See* FCC Mandamus Opposition at 12. At that point, the FCC asserted that Latina was *not* similarly situated with Petitioners because its predecessor had obtained in-core Class A construction permits before February 22, 2012, *id.*—despite the fact that those permits related to a different in-core channel that had been relinquished years earlier. Weeks later,

the FCC majority again reversed course and dropped Latina from the auction. Reconsideration Order ¶¶ 20-22 [App. 1033-35]. This administrative about-face happened without *any* change in circumstances. The Commission treated Latina itself differently on three occasions during a seven-month period, underscoring the arbitrary and capricious nature of its decisional process. *See* Black's Law Dictionary 112 (8th ed. 2004) (defining "arbitrary" as not guided "by fixed rules, procedures, or law; founded on prejudice or preference rather than on reason or fact"); *id.* at 224 (defining "capricious" as "characterized by or guided by unpredictable or impulsive behavior; contrary to the evidence or established rules of law").

And it bespeaks the FCC majority's fear of having to defend the distinction it previously made to this Court regarding its at-one-time disparate treatment of Petitioners as compared to Latina.

The FCC unfairly subjected Petitioners to disparate treatment in another critical respect. As explained above, the FCC ruled that Petitioners' 2014 petitions for reconsideration of the Report & Order were procedurally defective and thus incapable of serving as the basis for affording Petitioners auction eligibility and repacking protection. *See* Second Order on Reconsideration ¶ 59 [App. 771-72]; Reconsideration Order ¶¶ 8-10 [App. 1023-25]. But the FCC extended discretionary protection to approximately 12 LPTV stations that *never even sought*

reconsideration, using Petitioners' purportedly procedurally defective Reconsideration Petition as the vehicle for providing such relief with respect to these stations. *See* Second Order on Reconsideration ¶¶ 53, 62 [App. 768, 774]; Reconsideration Order ¶¶ 8-10 [App. 1023-25]. Government "cannot … treat similar situations dissimilarly and, indeed, can be said to be at its *most arbitrary* when it does so." *Steger v. Defense Investigative Service*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) (emphasis added). If Petitioners' requests for discretionary protection truly were insufficiently detailed to provide a basis for relief, then they could not possibly have served as the basis for relief for *a dozen other stations that never requested relief in their own right. See supra* 26.

III. The Commission Has Undermined Its Asserted Rationales for Denying Petitioners Auction Eligibility and Repacking Protection.

Aside from the arguments addressed above, the FCC has asserted two rationales for denying relief to Petitioners—one procedural and one substantive. But it has negated both rationales, so neither has any remaining force.

As noted above, in denying protection to Petitioners, the Commission rested in part on procedural grounds, claiming that Petitioners somehow had not made their requests for protection specific enough. *See* Reconsideration Order ¶¶ 8-10 [App. 1023-25]; *see also* Second Order on Reconsideration ¶ 59 [App. 771-72]; Order Denying Stay ¶ 9 [App. 975]. As an initial matter, Petitioners' requests were more than sufficiently specific to support their requests for auction eligibility and

repacking protection, and other commenters pressed the same point. *See supra* 21-22. Yet the Commission has negated this ground as a basis for denying Petitioners relief by defending its decision to extend discretionary protection to similarly situated licensees *that never filed reconsideration petitions* on the basis of Petitioners' requests to "reconsider the scope of discretionary protection for out-of-core Class A-eligible LPTV stations that now hold Class A licenses." Order Denying Stay ¶ 13 [App. 977-78]. If Petitioners' requests for discretionary protection were sufficiently specific to support the grant of discretionary protection to other stations that had not even filed reconsideration petitions, then *a fortiori*, Petitioners' requests were sufficiently specific to warrant granting them the same relief.

Similarly, the FCC has waived a substantive rationale that it previously relied upon in denying discretionary protection to Petitioners. In the Second Order on Reconsideration, the Commission asserted that there were approximately 100 similarly situated stations and denied Petitioners protection because to do so would require it to protect the other stations in this category, which "would increase the number of constraints on the repacking process, thereby limiting [the Commission's] repacking flexibility." Second Order on Reconsideration ¶ 54 [App. 769]; *see also* Report & Order ¶ 234 [App. 316]. Petitioners have demonstrated on reconsideration that the Commission was incorrect in asserting

"that approximately 100 stations would be eligible for protection if the Commission decided to protect" stations like Petitioners ("formerly out-of-core Class A-eligible LPTV stations that obtained Class A licenses after February 22, 2012"). Reconsideration Petition at 7-10 [App. 912-915]; Notice of Ex Parte Communications by Videohouse, et al. at Exhibits 1 & 2, GN Docket No. 12-268 (Nov. 20, 2015). The Commission has no serious rejoinder on this point because it ultimately dropped this factual assertion as a basis for its decision to deny Petitioners protection. Specifically, on December 18, 2015, the Commission entered an order in this proceeding denying a stay request by Videohouse, Fifth Street, and WMTM. Order Denying Stay ¶¶ 8-13 [App. 975-78]. In doing so, the Commission refused to stand by its still-unsubstantiated "estimate" and explained that this assertion "does not bear on the decisional issue" of denying protection to Petitioners. *Id.* ¶¶ 12, 13 n.41 [App. 976-77]. In the Reconsideration Order, the FCC again expressly abandoned this rationale. Reconsideration Order ¶ 16 (reiterating that this assertion "does not bear on the decisional issue presented by the [Reconsideration] Petition") [App. 1030].

* * *

For the reasons set forth above, the FCC has violated Section 706 of the APA by excluding Petitioners from the reverse auction and the repacking process. Accordingly, Petitioners respectfully request that the Court set aside the

Reconsideration Order and direct the Commission to grant the Reconsideration Petition. Under the circumstances of this case, that is the appropriate relief. *See George Hyman Const. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992); *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996).

CONCLUSION

For the foregoing reasons, the Court should hold unlawful and set aside the Reconsideration Order and direct the Commission to grant the Reconsideration Petition.

Dated: February 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 11,799 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

/s/ Thomas R. McCarthy

Thomas R. McCarthy
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February 2016, copies of the foregoing was filed with the Court's CM/ECF filing system and served electronically on all parties.

/s/ Thomas McCarthy

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ADDENDUM

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47 U.S.C. § 336(f)(1)(A)

(f) Preservation of low-power community television broadcasting

(1) Creation of class A licenses

(A) Rulemaking required

Within 120 days after November 29, 1999, the Commission shall prescribe regulations to establish a class A television license to be available to licensees of qualifying low-power television stations. Such regulations shall provide that--

(i) the license shall be subject to the same license terms and renewal standards as the licenses for full-power television stations except as provided in this subsection; and

(ii) each such class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualifying low-power station in paragraph (2).

47 U.S.C. § 336(f)(6)(A)

(f) Preservation of low-power community television broadcasting

…

(6) Interim qualification

(A) Stations operating within certain bandwidth

The Commission may not grant a class A license to a low-power television station for operation between 698 and 806 megahertz, but the Commission shall provide to low-power television stations assigned to and temporarily operating in that bandwidth the opportunity to meet the qualification requirements for a class A license. If such a qualified applicant for a class A license is assigned a channel within the core spectrum (as such term is defined in MM Docket No. 87-286, February 17, 1998), the Commission shall issue a class A license simultaneously with the assignment of such channel.

47 U.S.C. § 1401(6)

Broadcast television licensee

The term "broadcast television licensee" means the licensee of--

(A) a full-power television station; or

(B) a low-power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations.

47 U.S.C. § 1452

(a) Reverse auction to identify incentive amount

(1) In general

The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding under subparagraph (G) of section 309(j)(8) of this title.

(2) Eligible relinquishments

A relinquishment of usage rights for purposes of paragraph (1) shall include the following:

(A) Relinquishing all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel.

(B) Relinquishing all usage rights with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel.

(C) Relinquishing usage rights in order to share a television channel with another licensee.

(3) Confidentiality

The Commission shall take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction under paragraph (1), including withholding the identity of such licensee until the reassignments and reallocations (if any) under subsection (b)(1)(B) become effective, as described in subsection (f)(2).

(4) Protection of carriage rights of licensees sharing a channel

A broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section 338, 534, or 535 of this title on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

(b) Reorganization of broadcast TV spectrum

(1) In general

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission--

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada--

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

(2) Factors for consideration

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

(3) No involuntary relocation from UHF to VHF

In making any reassignments under paragraph (1)(B)(i), the Commission may not involuntarily reassign a broadcast television licensee--

(A) from an ultra high frequency television channel to a very high frequency television channel; or

(B) from a television channel between the frequencies from 174 megahertz to 216 megahertz to a television channel between the frequencies from 54 megahertz to 88 megahertz.

(4) Payment of relocation costs

(A) In general

Except as provided in subparagraph (B), from amounts made available under subsection (d)(2), the Commission shall reimburse costs reasonably incurred by--

(i) a broadcast television licensee that was reassigned under paragraph (1)(B)(i) from one ultra high frequency television channel to a different ultra high frequency television channel, from one very high frequency television channel to a different very high frequency television channel, or, in accordance with subsection (g)(1)(B), from a very high frequency television channel to an ultra high frequency television channel, in order for the licensee to relocate its television service from one channel to the other;

(ii) a multichannel video programming distributor in order to continue to carry the signal of a broadcast television licensee that--

(I) is described in clause (i);

(II) voluntarily relinquishes spectrum usage rights under subsection (a) with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel; or

(III) voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee; or

(iii) a channel 37 incumbent user, in order to relocate to other suitable spectrum, provided that all such users can be relocated and that the total relocation costs of such users do not exceed $300,000,000. For the purpose of this section, the spectrum made available through relocation of channel 37 incumbent users shall be deemed as spectrum reclaimed through a reverse auction under subsection (a).

(B) Regulatory relief

In lieu of reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public.

(C) Limitation

The Commission may not make reimbursements under subparagraph (A) for lost revenues.

(D) Deadline

The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).

(5) Low-power television usage rights

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

(c) Forward auction

(1) Auction required

The Commission shall conduct a forward auction in which--

(A) the Commission assigns licenses for the use of the spectrum that the Commission reallocates under subsection (b)(1)(B)(ii); and

(B) the amount of the proceeds that the Commission shares under clause (i) of section 309(j)(8)(G) of this title with each licensee whose bid the Commission accepts in the reverse auction under subsection (a)(1) is not less than the amount of such bid.

(2) Minimum proceeds

(A) In general

If the amount of the proceeds from the forward auction under paragraph (1) is not greater than the sum described in subparagraph (B), no licenses shall be assigned through such forward auction, no reassignments or reallocations under subsection

(b)(1)(B) shall become effective, and the Commission may not revoke any spectrum usage rights by reason of a bid that the Commission accepts in the reverse auction under subsection (a)(1).

(B) Sum described

The sum described in this subparagraph is the sum of--

(i) the total amount of compensation that the Commission must pay successful bidders in the reverse auction under subsection (a)(1);

(ii) the costs of conducting such forward auction that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title; and

(iii) the estimated costs for which the Commission is required to make reimbursements under subsection (b)(4)(A).

(C) Administrative costs

The amount of the proceeds from the forward auction under paragraph (1) that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title shall be sufficient to cover the costs incurred by the Commission in conducting the reverse auction under subsection (a)(1), conducting the evaluation of the broadcast television spectrum under subparagraph (A) of subsection (b)(1), and making any reassignments or reallocations under

subparagraph (B) of such subsection, in addition to the costs incurred by the Commission in conducting such forward auction.

(3) Factor for consideration

In conducting the forward auction under paragraph (1), the Commission shall consider assigning licenses that cover geographic areas of a variety of different sizes.

(d) TV Broadcaster Relocation Fund

(1) Establishment

There is established in the Treasury of the United States a fund to be known as the TV Broadcaster Relocation Fund.

(2) Payment of relocation costs

Any amounts borrowed under paragraph (3)(A) and any amounts in the TV Broadcaster Relocation Fund that are not necessary for reimbursement of the general fund of the Treasury for such borrowed amounts shall be available to the Commission to make the payments required by subsection (b)(4)(A).

(3) Borrowing authority

(A) In general

Beginning on the date when any reassignments or reallocations under subsection (b)(1)(B) become effective, as provided in subsection (f)(2), and ending when $1,000,000,000 has been deposited in the TV Broadcaster Relocation Fund, the

Commission may borrow from the Treasury of the United States an amount not to exceed $1,000,000,000 to use toward the payments required by subsection (b)(4)(A).

(B) Reimbursement

The Commission shall reimburse the general fund of the Treasury, without interest, for any amounts borrowed under subparagraph (A) as funds are deposited into the TV Broadcaster Relocation Fund.

(4) Transfer of unused funds

If any amounts remain in the TV Broadcaster Relocation Fund after the date that is 3 years after the completion of the forward auction under subsection (c)(1), the Secretary of the Treasury shall--

(A) prior to the end of fiscal year 2022, transfer such amounts to the Public Safety Trust Fund established by section 1457(a)(1) of this title; and

(B) after the end of fiscal year 2022, transfer such amounts to the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

(e) Numerical limitation on auctions and reorganization

The Commission may not complete more than one reverse auction under subsection (a)(1) or more than one reorganization of the broadcast television spectrum under subsection (b).

(f) Timing

(1) Contemporaneous auctions and reorganization permitted

The Commission may conduct the reverse auction under subsection (a)(1), any reassignments or reallocations under subsection (b)(1)(B), and the forward auction under subsection (c)(1) on a contemporaneous basis.

(2) Effectiveness of reassignments and reallocations

Notwithstanding paragraph (1), no reassignments or reallocations under subsection (b)(1)(B) shall become effective until the completion of the reverse auction under subsection (a)(1) and the forward auction under subsection (c)(1), and, to the extent practicable, all such reassignments and reallocations shall become effective simultaneously.

(3) Deadline

The Commission may not conduct the reverse auction under subsection (a)(1) or the forward auction under subsection (c)(1) after the end of fiscal year 2022.

(4) Limit on discretion regarding auction timing

Section 309(j)(15)(A) of this title shall not apply in the case of an auction conducted under this section.

(g) Limitation on reorganization authority

(1) In general

During the period described in paragraph (2), the Commission may not--

(A) involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television channel except--

(i) in accordance with this section; or

(ii) in the case of a violation by such licensee of the terms of its license or a specific provision of a statute administered by the Commission, or a regulation of the Commission promulgated under any such provision; or

(B) reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless--

(i) such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or

(ii) a request from such licensee for the reassignment was pending at the Commission on May 31, 2011.

(2) Period described

The period described in this paragraph is the period beginning on February 22, 2012, and ending on the earliest of--

(A) the first date when the reverse auction under subsection (a)(1), the reassignments and reallocations (if any) under subsection (b)(1)(B), and the forward auction under subsection (c)(1) have been completed;

(B) the date of a determination by the Commission that the amount of the proceeds from the forward auction under subsection (c)(1) is not greater than the sum described in subsection (c)(2)(B); or

(C) September 30, 2022.

(h) Protest right inapplicable

The right of a licensee to protest a proposed order of modification of its license under section 316 of this title shall not apply in the case of a modification made under this section.

(i) Commission authority

Nothing in subsection (b) shall be construed to--

(1) expand or contract the authority of the Commission, except as otherwise expressly provided; or

(2) prevent the implementation of the Commission's “White Spaces” Second Report and Order and Memorandum Opinion and Order (FCC 08-260, adopted November 4, 2008) in the spectrum that remains allocated for broadcast television use after the reorganization required by such subsection.