

Nos. 16-1065 and 16-1069

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

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LATINA BROADCASTERS OF DAYTONA BEACH, LLC,  
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,  
*Respondents.*

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On Petitions for Review of Orders of  
the Federal Communications Commission

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**RESPONDENTS' OPPOSITION  
TO MOTION FOR STAY PENDING REVIEW**

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## GLOSSARY

<b>FCC or Commission</b>	Respondent Federal Communications Commission
<b>Latina</b>	Petitioner Latina Broadcasters of Daytona Beach, LLC
<b>Spectrum Act or Act</b>	Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Tit. VI, 125 Stat. 156, 201-55
<b><i>Order</i></b>	<i>Expanding the Economic &amp; Innovation Opportunities of Spectrum Through Incentive Auctions</i> , 29 FCC Rcd. 6567 (2014), <i>pet. for review denied</i> , 789 F.3d 165 (D.C. Cir. 2015)
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Respondents Federal Communications Commission (FCC or Commission) and the United States of America hereby oppose the emergency motion for a stay pending review filed by Latina Broadcasters of Daytona Beach, LLC (Latina). Latina has not demonstrated that this Court should either delay the FCC's upcoming broadcast spectrum incentive auction (scheduled to commence on March 29, 2016) or direct the FCC to permit Latina, the licensee of television station WDYB, to participate in the auction and be eligible for repacking protection. The FCC's application of the line it drew in exercising its discretionary authority to determine auction eligibility was entirely reasonable, and Latina has no entitlement, equitable or otherwise, to participate in an auction for which it is not eligible.

Latina does not contest the FCC's determination that only licensees of stations that had a full-power or Class A low-power license or application for a license as of February 22, 2012, have a statutory right to participate in the incentive auction and to repacking protection. And there is no dispute that WDYB, which is a low-power station, did not have a Class A license or application for a license as of that date.

As a matter of its discretion, the FCC has extended eligibility to current Class A stations that had a Class A construction permit or application for a permit on file as of February 22, 2012. WDYB was initially included on provisional lists of over 2,200 such stations, but when its eligibility for discretionary protection was called into question, the Commission reexamined the station's regulatory history

and found that, in fact, WDYB was not eligible to participate in the auction or to receive repacking protection. Although WDYB received Class A construction permits in 2002 and 2008, its licensee did not construct the proposed facilities and allowed both permits to expire before February 2012. Instead, in February 2011, Latina filed for a non-Class A construction permit. It subsequently applied for Class A status in November 2012—long after the February 22, 2012 cut-off.

The FCC brought the newly uncovered facts to Latina's attention and provided it with an opportunity to explain why its station should nonetheless be allowed to participate in the auction and protected in the repacking. After considering all of Latina's arguments, the FCC determined that WDYB did not meet the eligibility requirements and should not appear on the lists of eligible stations. Latina has not shown that the Court is likely to reverse that decision, nor is Latina likely to suffer irreparable harm absent a stay. And any delay—which would result either from ordering a stay or from ordering last-minute changes (especially ones that may irreversibly affect the final results)—would harm other parties and the public interest. Latina's motion for a stay pending review should therefore be denied.

## **BACKGROUND**

### **A. The Incentive Auction**

On February 22, 2012, Congress adopted the Spectrum Act. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Tit. VI, 125 Stat. 156, 201-55. The Spectrum Act authorizes the FCC to conduct an incentive



auction to encourage television broadcasters “to relinquish ... some or all of [their] licensed spectrum usage rights” and then reallocate that spectrum for other uses, such as mobile broadband service. 47 U.S.C. §§ 309(j)(8)(G)(i), 1452(a)(1).

The incentive auction comprises “three interdependent initiatives” that “work together.” *Nat’l Ass’n of Broad. v. FCC*, 789 F.3d 165, 168-69, 169-70 (D.C. Cir. 2015). The first element 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). The second involves reorganizing—or “repacking”—the broadcast television spectrum to relocate broadcasters out of a portion of the UHF spectrum and make it available for new uses. *Id.* § 1452(b). The third element is a “forward auction” to assign licenses for use of the recovered spectrum. *Id.* § 1452(c)(1).

The Spectrum Act authorizes “broadcast television licensee[s]” to participate in the reverse auction, 47 U.S.C. § 1452(a)(1), and grants them certain protections in the repacking process, *id.* § 1452(b)(2) (instructing the Commission to “make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served” for covered stations). The Act defines a “broadcast television licensee” as “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 FCC rules. *Id.* § 1401(6).

## B. Proceedings Below

1. **The Initial Order.**<sup>1</sup> In the initial order setting forth the policies and rules for the incentive auction, the FCC identified several categories of stations eligible for repacking protection, *Order* ¶¶ 183-245, and determined that the same eligibility requirements govern participation in the reverse auction, *id.* ¶¶ 354-357.

The Commission concluded that the Spectrum Act mandates protection only for full-power and Class A stations that had a license or application for a license on file as of February 22, 2012, the date the Spectrum Act was enacted. *Order* ¶¶ 184-189 (discussing 47 U.S.C. § 1452(b)(2)). The Commission then determined that it has discretion to grant reverse auction eligibility and repacking protection to certain other stations. *Id.* ¶¶ 190-194.

The Commission granted discretionary protection to one low-power station, KHTV. *Order* ¶¶ 224, 235. KHTV's licensee "made repeated efforts over the course of a decade to convert to Class A status," and "[d]uring this period ... continued to have a Class A license application on file in which it certified that it was meeting, and would continue to meet, all Class A operating requirements." *Id.* ¶ 235 & nn.728-729. But, despite its persistent efforts, KHTV was unable to obtain a suitable channel and file its Class A license application until February 24, 2012, two days after the deadline. *Id.* ¶ 235 & nn.727-730. The Commission de-

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<sup>1</sup> *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567 (2014) (*Order*), *pet. for review denied*, *Nat'l Ass'n of Broad. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

terminated that, “[g]iven the unique circumstances that prevented [KHTV’s licensee] from filing its Class A license application ... until just two days after” the deadline, and its “repeated efforts to convert to Class A status” over a decade beforehand, “the equities in favor of protection of this station outweigh the minimal impact that protecting this one facility will have” on the auction. *Id.* ¶ 235.

**2. The Second Reconsideration Order.**<sup>2</sup> Several parties sought reconsideration of the initial *Order*. One such request came from Latina, the licensee of WDYB. Latina argued that it should be eligible to participate in the incentive auction because its station eventually obtained Class A status, albeit only *after* the February 2012 cut-off, and further argued that WDYB is similarly situated to KHTV. *See* Mot. Exh. 16. The Commission denied Latina’s request. *Second Recon. Order* n.183; *see id.* ¶¶ 50-58 (rejecting argument that stations granted Class A status after the deadline should be protected); *id.* ¶¶ 59-60 (rejecting argument that WDYB and other stations are similarly situated to KHTV).

The Commission did, however, extend auction eligibility and repacking protection to stations “that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012.” *Second Recon. Order* ¶ 62. “By filing an application for a Class A construction permit

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<sup>2</sup> *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 30 FCC Rcd. 6746 (2015) (*Second Recon. Order*). An earlier order on reconsideration, 30 FCC Rcd. 6668 (2015), dealt with certain channel-sharing issues and is not at issue in this case.

prior to February 22, 2012,” these stations “documented efforts prior to passage of the Spectrum Act to ... avail themselves of Class A status,” and they were required to file a Form 302-CA “mak[ing] the same certifications as if they had applied for a license to cover a Class A facility.”<sup>3</sup> *Ibid.* “Thus, prior to the enactment of the Spectrum Act, such stations had certified ... that they were operating like Class A stations” and would continue to do so while the forms remained in effect. *Ibid.*

**3. The Staff Public Notices.** On June 9, 2015, the FCC’s Media Bureau issued a provisional list of over 2,200 “Class A and full power station[s] eligible for protection in the repacking process and relinquishment in the reverse auction.” Mot. Exh. 18. The Bureau intended the list to represent “a complete list of all Class A and full power station facilities eligible for protection in the repacking process and relinquishment in the reverse auction.” *Ibid.* Emphasizing the provisional nature of the list, the Media Bureau established a process for stations that believed themselves wrongly omitted from the list to file a petition for eligible entity status to explain why they nevertheless should have been included on the list. *Ibid.*

Likewise, on June 30, 2015, the FCC’s Office of Engineering and Technology released “a set of baseline data of the coverage area and population served to be

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<sup>3</sup> The FCC employs a two-stage licensing process for broadcast stations. A station first must obtain a construction permit, which authorizes the station to construct its facility. 47 C.F.R. § 73.3533. Once the facility is constructed, the station then must apply for a “license to cover” the permit within 10 days of beginning to broadcast. *Id.* §§ 73.1620(a)(1), 73.3536(a).

protected in the repacking process of all full power and Class A television stations eligible for protection in the repacking process and participation in the incentive auction.” Mot. Exh. 21. This release “emphasize[d] that the list of stations included in the baseline data ... is not the final list of stations eligible for repacking protection.” *Ibid.* Although the *Second Reconsideration Order* denied Latina’s request for reconsideration of the eligibility requirements, WDYB was erroneously included as an eligible station on both staff lists.

**4. The Third Reconsideration Order.**<sup>4</sup> Several low-power stations (but not Latina) that applied for and obtained Class A status only after the Spectrum Act’s enactment petitioned for reconsideration of the *Second Reconsideration Order*. In a December 23, 2015 letter in support of that petition in the administrative docket, as well as in pleadings in support of an unsuccessful petition for mandamus against the Commission in this Court, *see In re The Videohouse, Inc.*, No. 15-1486, the stations argued that they were similarly situated to WDYB and entitled to the same treatment. *See Third Recon. Order* ¶ 20. After Commission staff drew Latina’s attention to the contentions, Latina responded in a series of 11 separate filings, including a 14-page letter on January 22, *see* Mot. Exh. 25, arguing that WDYB met the eligibility requirements and should remain on the eligibility lists.

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<sup>4</sup> *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 31 FCC Rcd. \_\_\_\_, 2016 WL 593209 (rel. Feb. 12, 2016) (*Third Recon. Order*).

The Commission denied the petitioning stations' request to participate in the reverse auction and receive repacking protection. *Third Recon. Order* ¶¶ 11-17. The agency made clear that to be eligible, a low-power station must have had a Class A license or application for a license, or a Class A construction permit or application for such a permit, on file as of February 22, 2012. *Id.* ¶ 11. Each such application would have required the applicant to file a Form 302-CA, which “requires the applicant to certify that it ‘does, and will continue to’ meet all of the ... regulatory requirements that are applicable to Class A stations.” *Ibid.* Without a live Form 302-CA on file, these stations were under no official obligation to comply with the Class A requirements as of February 22, 2012. *Ibid.*

The Commission then determined, upon “[f]urther examination of the record,” that WDYB is not eligible for the reverse auction or repacking protection and should not appear on the eligibility lists. *Third Recon. Order* ¶ 20. WDYB did not have a Class A license or application for a license pending or granted as of February 22, 2012, nor did it have a live Class A construction permit. *Ibid.* WDYB's prior Class A construction permits expired before that date, and its February 2011 application did not seek Class A status or “require a certification that [it] was and would continue to meet all ... requirements that are applicable to Class A stations.” *Ibid.* The Commission did order, however, that if WDYB is displaced from its current channel during the repacking process, Latina will receive priority to file a displacement application to request a replacement channel during the first filing

opportunity after the auction is completed. *Id.* ¶ 22.

**4. The Stay Denial Order.**<sup>5</sup> On February 22, Latina asked the FCC to stay the Incentive Auction or the *Third Reconsideration Order*. Commission staff, acting on delegated authority, denied that request in a written order on February 25. The next day, Latina filed its motion for a stay pending review in this Court.

## ARGUMENT

To qualify for the extraordinary remedy of a stay pending review, Latina must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm absent a stay, (3) a stay will not harm others, and (4) the public interest favors a stay. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Latina has not satisfied these well-settled requirements.

### I. LATINA HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

#### A. WDYB Does Not Meet The Eligibility Requirements And Is Not Similarly Situated To KHTV.

1. Latina is unlikely to prevail on its claim that it should be allowed to participate in the incentive auction.

It is undisputed that WDYB did not have a Class A license or an application for a license as of the February 22, 2012 deadline. *Third Recon. Order* ¶ 20. It therefore was not entitled to mandatory protection under the Spectrum Act.

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<sup>5</sup> *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 31 FCC Rcd. \_\_\_\_, 2016 WL 759849 (Media Bur. Feb. 25, 2016) (*Stay Denial Order*).

Nor was Latina entitled to discretionary protection. WDYB did not have a live Class A construction permit or application “pending or granted as of February 22, 2012,” *Second Recon. Order* ¶ 53. Although WDYB’s prior licensee obtained Class A construction permits in 2002 and 2008, it did not construct the proposed facilities and allowed each of those permits to expire before February 2012. *Third Recon. Order* ¶ 20. Instead, Latina filed an application for a construction permit in February 2011 that did not seek Class A status and was not accompanied by a Form 302-CA certifying that WDYB was complying with Class A requirements.<sup>6</sup> *Ibid.* Latina did not file a Form 302-CA and apply for Class A status until November 2012, long after the cut-off. *Ibid.* WDYB was not under any official commitment to operate like a Class A station as of February 22, 2012. *Cf. id.* ¶¶ 11-12.

2. None of these facts are in dispute. Nevertheless, Latina contends (Mot. 11-12) that the FCC should have protected WDYB because Latina believes the station is similarly situated to another station—KHTV—to which the Commission has extended discretionary protection. But WDYB is not similarly situated to KHTV. *See Stay Denial Order* ¶ 7; *Third Recon. Order* n.99.

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<sup>6</sup> Latina’s statement that the February 2011 application was “for a permit to construct a Class A facility” (Mot. 6) is incorrect. Elsewhere, Latina admits that its application did not include a Form 302-CA with the required certifications and that it later “applied to convert to Class A [status]” in November 2012. Mot. 6 & n.12. Although Latina suggests in a cursory footnote (Mot. n.12) that in failing to file a Class A application it was following advice from unidentified FCC staff, Latina nowhere argues that any such staff guidance would have been binding on the Commission or would be grounds for relief here.



First, KHTV's licensee "made repeated efforts over the course of a decade to convert to Class A status," but was unable to file its Class A license application until two days after the February 22, 2012 cut-off due to "unique circumstances" beyond its control. *Order* ¶ 235 & n.727. WDYB, by contrast, repeatedly abandoned plans to construct a Class A facility: It allowed Class A construction permits to expire in 2005 and 2011, applied for a non-Class A permit instead in February 2011, and then did not seek to convert to Class A status until November 2012. *Stay Denial Order* ¶ 7; *Third Recon. Order* ¶ 20. Latina's claim that WDYB "pursued [Class A] status for more than a decade prior" to the Spectrum Act's enactment (Mot. 12) ignores these facts. The Commission "is entitled to distinguish between KHTV and WDYB" based on the differences in "the licensees' efforts in seeking and obtaining Class A status over the course of more than a decade." *Stay Denial Order* ¶ 7; *see, e.g., Blanca Tel. Co. v. FCC*, 743 F.3d 860, 864-65 (D.C. Cir. 2014) (agency may distinguish between parties based on their relative diligence); *Fla. Inst. of Tech. v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992) (same).<sup>7</sup>

Second, as of the February 22, 2012 enactment of the Spectrum Act, KHTV had a live Form 302-CA on file with the FCC, whereas WDYB did not. *See Stay*

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<sup>7</sup> The Commission also permissibly distinguished KHTV on the ground that KHTV's licensee timely presented the facts and circumstances justifying its protection in response to the Notice of Proposed Rulemaking, whereas Latina did not come forward with these arguments until after the *Order*. *Stay Denial Order* ¶ 7; *Third Recon. Order* ¶¶ 8-9, n.99; *Second Recon. Order* ¶ 59, n.183.

*Denial Order* ¶ 7; *Third Recon. Order* n.99. This form certified that KHTV was operating like a Class A station and required it to continue complying with all Class A requirements. *Third Recon. Order* ¶ 11; *Second Recon. Order* ¶ 62. It is true, as Latina notes (Mot. 12), that KHTV's Form 302-CA was associated with a license application that by February 2012 was no longer grantable and was later dismissed. But the application was not dismissed until July 2012, so "[u]ntil th[at] time, including on February 22, 2012, the certification ... remained ... in effect," and KHTV remained under an official obligation to comply with all Class A requirements. *Stay Denial Order* n.33; see *Second Recon. Order* n.218; *Order* n.728. WDYB, by contrast, had no live Form 302-CA on file, and its February 2011 construction permit application did not certify that it was complying with Class A requirements or create any obligation for it to do so.

The FCC has "wide discretion to determine where to draw administrative lines," which are generally upheld unless they "are patently unreasonable, having no relationship to the underlying regulatory problems." *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002). The Commission did not abuse its discretion in drawing or adhering to the administrative lines here.

**B. Latina's Due Process Argument Is Meritless.**

Latina likewise is unlikely to prevail on its due process argument. Due process requires only that a party receive notice and an opportunity to be heard. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Mullane*

*v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). Here, Latina received actual notice that WDYB's eligibility was being examined, and it received ample opportunity (which it fully exercised) to be heard in response.

Latina complains (Mot. 2, 10) that it never received "formal notice" that WDYB's eligibility was under review—but it conspicuously fails to mention that, shortly after questions arose about WDYB's eligibility, Commission staff contacted Latina's counsel to notify it of the relevant filings and allow it to respond. *Stay Denial Order* ¶ 6. In addition, these filings appeared in a docketed proceeding in which Latina had actively participated and in support of a petition for reconsideration of an order addressing WDYB's eligibility. Latina thus had "notice reasonably calculated, under all the circumstances," *Mullane*, 339 U.S. at 314, to apprise it that WDYB's eligibility had come into question.

Between December 31 and February 5, moreover, Latina filed eleven separate letters with the Commission, amounting to 44 pages, setting forth in detail its arguments for why WDYB should remain in the auction and receive repacking protection. *Stay Denial Order* ¶ 6 & n.21-22. And during that same period, Latina's counsel met with Commission staff at least five separate times, either in person or by phone, to discuss WDYB's eligibility. *Ibid.*

In sum, there can be no serious question that Latina had actual notice that WDYB's eligibility was under review and had ample opportunity to respond.

### C. Latina's Estoppel Argument Is Meritless.

Latina is also unlikely to prevail on its contention that the FCC is estopped from reexamining WDYB's eligibility.

“A private party asserting estoppel against the United States Government must demonstrate ... that the [government] has engaged in ‘affirmative misconduct.’” *LaRouche v. FEC*, 28 F.3d 137, 142 (D.C. Cir. 1994); accord *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009). The FCC engaged in no such misconduct when it sought to ensure that its application of discretionary protection to Class A television stations accurately reflected the facts underlying each station's regulatory history. There is no indication that the FCC meant to mislead Latina with the provisional eligibility notices, and agencies have a well-settled power to correct their inadvertent mistakes “to the ends of justice.” 47 U.S.C. § 154(j); *Am. Trucking Ass'n v. Frisco Co.*, 358 U.S. 133, 145 (1958); *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41 (D.C. Cir. 1980); see also, e.g., *Fla. Inst. of Tech.*, 952 F.2d at 553-54 (staff's mistaken issuance of list did not give petitioner “rights it would not otherwise enjoy”).<sup>8</sup>

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<sup>8</sup> Latina's insinuations that the FCC unnecessarily or even purposefully delayed ruling on WDYB's eligibility (Mot. 17, 19) are unfounded. Questions concerning WDYB's eligibility first arose in a filing in this Court on December 22, 2015, and in an administrative filing on December 23. Commission staff then notified Latina's counsel of those filings and engaged in extensive communications with Latina throughout the next seven weeks, and the Commission then promptly issued an order addressing WDYB's ineligibility on February 12.

Nor can Latina meet the other requirements for equitable estoppel. A party claiming equitable estoppel “must ... establish[] that there was a ‘definite’ representation to the party claiming estoppel; that the latter ‘relied on its adversary’s conduct...’; and that the reliance was ‘reasonable.’” *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000) (quoting *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984)). Latina seeks to rely on provisional eligibility notices issued by Commission staff,<sup>9</sup> but “the eligibility notices that Latina cites emphasized that they were neither final nor intended to decide eligibility issues.” *Third Recon. Order* ¶ 21; *see also Stay Denial Order* ¶ 8 & n.38. As Latina was aware, moreover, the underlying eligibility requirements were still subject to a pending petition for reconsideration at all relevant times. Latina therefore cannot show that it reasonably relied on any definite representation by the agency.

## **II. LATINA HAS NOT SHOWN IRREPARABLE HARM.**

In addition to Latina’s inability to demonstrate a likelihood of success on the merits, a stay is not warranted because Latina cannot show a likelihood of irreparable harm that is “both certain and great”; “actual and not theoretical.” *Wis.*

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<sup>9</sup> Latina claims that the FCC represented that WDYB was eligible on “seven occasions” (Mot. 7-8), but each of those alleged representations was based on the provisional eligibility lists. Apart from these provisional lists, Latina points (Mot. 8 & n.21) to the FCC’s statement in its opposition to a petition for mandamus in *In re The Videohouse, Inc.*, No. 15-1458, that Latina was one of the stations protected in the auction. That statement, which was an accurate description of the provisional eligibility lists, was filed on December 28, 2015, long *after* the investments that Latina invokes to show detrimental reliance.

*Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). “Bare allegations of what is likely to occur are of no value[,] since the court must decide whether the harm will *in fact* occur.” *Ibid.* (citation omitted). Latina has failed to show that the loss of opportunity to participate in the reverse auction or of repacking protection would cause it irreparable harm that satisfies this Court’s “high standard for irreparable injury,” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

1. Latina’s inability to participate in the reverse auction does not constitute irreparable harm. The reverse auction may present a valuable economic opportunity, but it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.” *Wis. Gas*, 758 F.2d at 674. Latina’s inability to participate in the reverse auction does not deprive WDYB of the value of its existing business, nor does it preclude Latina from later selling WDYB’s broadcast license or other assets to any interested buyer outside the incentive auction. The inability to participate in a particular auction does not deprive a broadcaster of any fundamental right or constitute any irreparable harm. *Cf. ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46-47 (D.D.C. 2014) (loss of an economic opportunity generally does not amount to irreparable injury unless it is likely to force a company out of business).

2. Latina’s speculation that WDYB “would likely cease to exist without [repacking] protection” (Mot. 3) because it is “unlikely to get a replacement channel” after the conclusion of the auction (Mot. 2) is wholly unsupported.

The risk that a television station would be displaced from its current channel depends on a host of factors that Latina does not even attempt to analyze—including the number of broadcasters that participate in the reverse auction, the amount of spectrum that the auction clears, and the particular channel reassignments made in the repacking process. *Stay Denial Order* ¶ 9; cf. *Wis. Gas*, 758 F.2d at 675 (alleged injury only “speculative and hypothetical” where petitioner has “not attempted to provide any substantiation”). In the sole exhibit Latina cites in support of this argument, Latina’s owner—who does not purport to have any expertise in the mechanics of the auction or the repacking process—attests only that Latina faces a “realistic possibility” of displacement and that it “may well lose” the ability to broadcast. Soto Decl. ¶¶ 15-16. That is a far cry from the *likelihood* of irreparable harm necessary to obtain a stay pending review.

Even if WDYB were displaced from its current channel during repacking, moreover, it could file a displacement application for a suitable replacement channel. *Stay Denial Order* ¶ 9. Indeed, because WDYB eventually obtained Class A status after the Spectrum Act was enacted, WDYB will be given the first opportunity to file a displacement application, maximizing its chances of obtaining a replacement channel. *Third Recon. Order* ¶ 22. The Commission also has other tools to help allow Latina to remain on the air, such as permitting WDYB to enter into a channel-sharing agreement with another broadcaster, or granting Latina’s pending application to relocate WDYB from Daytona Beach to Orlando (where

additional channels may be available post-auction). *See Stay Denial Order* ¶ 22 & n.47. If Latina eventually prevails on the merits, the Court can require the FCC to take all such measures to make a replacement channel available.<sup>10</sup>

### III. A STAY WOULD HARM THIRD PARTIES AND THE PUBLIC INTEREST.

1. Staying the incentive auction would create substantial hardship for other parties. The incentive auction has been years in the making, and participants were notified of the March 29 start date more than six months ago. Any unnecessary delay, especially this close to the start of the auction, would cause substantial harm to those who have made significant investments, secured financing, and delayed other business plans based on the current schedule. *See Stay Denial Order* ¶ 10.

There is also a compelling public need to conduct the incentive auction with dispatch to help meet the increasing demand for spectrum-based services, *Stay Denial Order* n.51, consistent with Congress's command that spectrum auctions shall promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public ... without administrative or judicial delays," 47 U.S.C. § 309(j)(3)(A). Any stay of the auction would thereby impair the public interest.

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<sup>10</sup> *Cf. FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301 (1995) (Stevens, J., in chambers) ("[A]llowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that [Latina] overcomes the presumption of validity that supports the FCC regulations and prevails on the merits."); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The possibility that ... corrective relief will be available at a later date ... weighs heavily against a claim of irreparable harm.").



2. Allowing Latina to participate on a provisional basis would likewise delay the incentive auction and impair its ability to achieve its important public-interest objectives. At this late date, an order requiring Latina to be included in the auction and given repacking protection would delay the start of the auction by several weeks, because it would alter the conditions that must be satisfied at each step in the auction (such as interference restrictions) and require Commission staff to modify the auction to address these new constraints. Unlike traditional auctions, moreover, the interdependent structure of the incentive auction means that the additional constraints imposed by including Latina may irreversibly affect the auction results—the amount of spectrum recovered, the selection of winning bidders, and the amounts those bidders are paid for their spectrum—even if Latina ultimately chooses not to bid or is found ineligible after the auction has begun.<sup>11</sup>

Furthermore, allowing Latina to participate even on a provisional basis would invite a flood of eleventh-hour petitions to the Commission and this Court

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<sup>11</sup> Latina observes (Mot. 3-4, 18) that if an eligible station becomes subject to a license validity proceeding or downgrade order that jeopardizes its eligibility, the auction rules allow the station's licensee to continue to participate on a provisional basis while that proceeding or order is under review. *See Order* ¶¶ 225, 363-364. That process is unavailable to Latina because it did not meet the eligibility requirements as of the cut-off date, and its later-acquired license is neither being contested or downgraded. *Stay Denial Order* ¶ 11. The FCC has never suggested that every station that contested a Commission decision relating to eligibility would be permitted to participate in the auction pending the resolution of its appeal, and extending provisional eligibility so broadly would invite scores of ineligible licensees to pursue litigation, undermine the timely conduct of the auction, and frustrate the purposes of the Spectrum Act. *Ibid.*

from stations claiming to be similarly situated to WDYB and to be entitled to similar relief. WDYB's erroneous inclusion on the provisional eligibility lists already prompted several other ineligible stations to demand the same treatment, *see Third Recon. Order* ¶ 20, and those parties (and perhaps others) intend to renew that demand if the Court orders the FCC to include Latina in the auction.<sup>12</sup> If the Commission were required to include these additional ineligible stations in the auction, it would need to delay the start of the reverse auction by several months or more,<sup>13</sup> and the additional constraints would increase the costs of the reverse auction and hinder the incentive auction's ability to achieve its objectives. *See Order* ¶ 193.

In sum, because “the harm to the public caused by a nationwide postponement of the auction would outweigh [any] possible harm to” Latina, *FCC v. Radiofone, Inc.*, 516 U.S. 1301, 1301-02 (1995) (Stevens, J., in chambers), the public interest weighs heavily against granting any stay.

## CONCLUSION

Latina's motion for a stay pending review should be denied.

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<sup>12</sup> *See* Emergency Motion for Stay Pending Appeal 16-17, *Videohouse, Inc. v. FCC*, No. 16-1060 (D.C. Cir. filed Mar. 3, 2016) (arguing that if Latina receives relief, other licensees are entitled to like relief).

<sup>13</sup> Among other things, the FCC would need to review and process new applications, recalculate opening bid prices, assess possible broadcast interference (from one television station to another) and interservice interference (from television broadcasts to wireless phones and vice versa), generate the necessary constraints, and modify the auction system to implement these changes.

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Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I, Scott M. Noveck, hereby certify that on March 4, 2016, I filed the foregoing Opposition to Motion for Stay Pending Review with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system and by causing an original and four paper copies to be hand-delivered to the Clerk's Office. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ Scott M. Noveck

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