ORAL ARGUMENT SCHEDULED FOR MAY 9, 2016

No. 16-1060 (Consolidated with No. 16-1071)

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

REPLY BRIEF FOR PETITIONERS

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Dated: April 1, 2016

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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
LPTV	Low-Power Television
NPRM	Notice of Proposed Rulemaking, GN Docket No. 12-268 (2012)
Order Denying Stay	Order, GN Docket No. 12-268 (Dec. 18, 2015)
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Reconsideration Petition	Petition for Reconsideration of The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC, GN Docket No. 12-268 (Sept. 2, 2015)
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Videohouse 2014 Petition	Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (filed Sept. 15, 2014)

INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") digs in its heels, despite every indication that it erred by denying repacking protection to Petitioners. The Court should reject the FCC's manipulation of its process to deprive Petitioners of equal treatment. There can be no question that stations that are similarly situated to Petitioners' stations have been allowed to participate in the reverse auction. That is a classic APA violation.

First, and most notably, the FCC tries to bury its disparate treatment of Latina Broadcasters vis-à-vis Petitioners in a footnote. But before the rulemaking began, Latina Broadcasters and Petitioners were in the exact same position: they were out-of-core Class A-Eligible LPTV stations that did not file an application for a Class A license until after February 22, 2012. After Petitioners exposed the FCC's decision to grant Latina Broadcasters under-the-table protection, and defeated the agency's meager attempts to defend this disparate treatment, the FCC reversed course, and stripped Latina Broadcasters of protection *solely to prevent Petitioners from succeeding before this Court*. Now that the Court has granted Latina Broadcasters a stay (indicating its likely success on the merits), the agency is left in an indefensible position. If Latina Broadcasters is entitled to protection, and it is, so are Petitioners.

Second, the FCC strains to find meaningful differences between KHTV and Petitioners, but none exist. The FCC argues that it properly denied Petitioners' claims on procedural grounds because Petitioners did not present their arguments in a timely fashion. But the FCC is wrong as a factual matter; Petitioners did make these arguments. It also is wrong as a legal matter; its disparate treatment of other similarly situated entities shows it has refused to enforce its rules equally. The FCC's substantive arguments fare no better. Petitioners were just as diligent as KHTV and, accordingly, cannot be denied protection on that basis. The decision to protect KHTV and other similarly situated stations but not Petitioners' stations was arbitrary and capricious.

Finally, the FCC mischaracterizes the retroactivity problems by claiming that it was merely using past information for subsequent decisionmaking. That is simply not what happened. Petitioners had vested rights to the same benefits as full-power television licensees and other Class A stations in 2013. By stripping Petitioners of these rights, based on a deadline of which Petitioners had no notice, the FCC improperly enacted a retroactive rule that cannot stand. The fact that it was the Commission's staff that caused Petitioners to miss that retroactive deadline only makes the violation more egregious.

ARGUMENT

I. If Latina Broadcasters Receives Protection, Then Petitioners Must Too.

The FCC seeks to bury in two footnotes, *see* FCC Br. 16 n.8, 38 n.16, the most arbitrary and unfair action it took in this case: namely, its disparate treatment of Latina Broadcasters vis-à-vis Petitioners' stations. But that should come as no surprise. If the Court ultimately grants protection to Latina Broadcasters—as it should (and as it has already done on a provisional basis)—then Petitioners are entitled to equal treatment. The FCC is unable to offer any legitimate argument to the contrary. Indeed, it removed Latina Broadcasters from the auction in the first place to solve this problem.

When the FCC began its rulemaking, Latina Broadcasters and Petitioners were similarly situated stations, as the Commission itself recognized. *See* App. 768; *see also* FCC Br. 38 n.16. Like Petitioners, 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. *See* Pet. Br. 26-27. In its Second Order on Reconsideration, the FCC treated Latina Broadcasters like Petitioners by denying protection to their station. Pet. Br. 27.

Remarkably, however, when the FCC released a list of channels eligible for the auction less than two weeks later, it had—*without any explanation*—quietly reversed course and protected Latina Broadcasters. Pet. Br. 27. Petitioners' stations

did not receive the same protection. *Id.* Petitioners sought reconsideration raising this issue of disparate treatment with the FCC—a reconsideration petition to which the Commission refused to respond. *See* Pet. Br. 27-28.

In December 2015, Petitioners thus filed a petition for writ of mandamus in this Court. Petitioners argued that they had a right to relief because they were similarly situated to Latina Broadcasters and, accordingly, should receive similar protection. Pet. Br. 30. The FCC responded by arguing, for the first time, that Latina Broadcasters was entitled to protection because, while it had not submitted a Class A application, it had obtained in-core Class A construction permits before February 22, 2012, and Petitioners had not. Opp. to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc*., No. 15-1486, at 8 n.2 (filed Dec. 28, 2015). Both in their reply brief in support of mandamus and before the Commission, Petitioners argued that this was not a basis for distinction. *See* Reply to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc*., No. 15-1486, at 4 n.2 (filed Dec. 29, 2015); App. 958.

Returning to the drawing board, the FCC found itself in a predicament: after protecting Latina Broadcasters—a station similarly situated to Petitioners' stations—how could it justify denying Petitioners' reconsideration petition when the merits of the dispute reached this Court? After all, it is a bedrock rule of administrative law that an agency "cannot, despite its broad discretion, arbitrarily

treat similar situations dissimilarly." *Local 777 v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978). The Commission's path forward should have been clear: it should have protected Petitioners' stations too.

Instead, the FCC "decide[d] to ignore Will Rogers' famous advice: 'If you find yourself in a hole, stop digging.'" App. 1036 (Pai, C., dissenting). The FCC decided to *again* change course. Instead of granting protection to Petitioners, it *stripped* Latina Broadcasters of protection. Pet. Br. 32. In doing so, the Commission claimed that "further examination of the record" revealed that Latina Broadcasters was not entitled to protection because it "did not have an application for a Class A authorization pending or granted as of February 22, 2012." App. 1033-34. The FCC did not explain how that position could be squared with the representation it made to this Court in the initial mandamus proceeding, why an "examination of the record" would have revealed anything different when no facts had changed, or why it had included Latina Broadcasters in the auction in the first place. The Commission simply abandoned ship.

Latina Broadcasters, like Petitioners, filed a petition for review and a motion for a stay. *See Latina Broadcasters of Daytona Beach, LLC v. FCC*, D.C. Cir. Nos. 16-1065 & 16-1069. And just weeks ago, this Court granted the stay of the order removing Latina Broadcasters from the auction and ordered the FCC to permit Latina Broadcasters "to participate provisionally … subject to the outcome of

judicial review." *See Latina Broadcasters of Daytona Beach, LLC v. FCC*, D.C. Cir. Nos. 16-1065 & 16-1069. In other words, Latina Broadcasters is in the auction because, among other reasons, it is "likely to prevail" on the merits of its petition for review. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

That outcome would bring the case full circle. Petitioners began this case claiming that it was similarly situated to Latina Broadcasters. As the FCC now acknowledges, *see* FCC Br. 38 n.16, Petitioners were right. And yet somehow Latina Broadcasters are entitled to protection and they are not. Accordingly, if the Court ultimately determines that Latina Broadcasters is entitled to protection, then Petitioners must receive the same relief. *See Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996).

The FCC's only response is that a judicial decision affording protection to Latina Broadcasters would be irrelevant because the disparity would be "the result of the Court's order granting Latina Broadcasters' request for injunctive relief pending review." FCC Br. 38. But there is no basis for drawing this distinction. The FCC removed Latina Broadcasters from the auction *only to prevent Petitioners from receiving protection*. If Latina Broadcasters prevails, which appears likely based on the stay, it is because it is legally entitled to protection. If it is, then so are Petitioners. The case is no more complicated than that.

The FCC cites no authority that it may properly subject Petitioners to disparate treatment merely because its attempts to injure a similarly situated entity were thwarted by the Court. Nor could it. The FCC concedes that had it never removed Latina Broadcasters from the auction, Petitioners would have had a winning APA claim based on disparate treatment. Petitioners' APA claim is no weaker because Latina Broadcasters was made whole through judicial review.[1] The two cases must rise or fall together.

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

As previously explained, *see* Pet. Br. 45-51, the FCC subjected Petitioners to disparate treatment as compared to other similarly situated stations as well. Most notably, after rightly affording KHTV auction eligibility and repacking protection, the Commission refused to extend that same relief to Petitioners—even though KHTV (like Petitioners) fell within the same "category" of "out of core" Class A-eligible LPTV stations that obtained an in-core channel "but did not file for a Class

[1] That the Court has afforded injunctive relief to Latina Broadcasters but not to Petitioners is immaterial. Petitioners sought a stay of the auction, while Latina Broadcasters merely requested to participate provisionally in the auction. As the FCC concedes, Latina Broadcasters' requested relief imposed a much lower burden on the agency and third parties. *See* FCC Opp. to Mot. to Stay at 17-20; FCC 28(j) Letter to Court at 1. The fact remains that the two entities are similarly situated for purposes of the APA even if they were not similarly situated with regard to the availability of temporary injunctive relief.

A license to cover by February 22, 2012." App. 1021. Having protected KHTV, the FCC needed to protect Petitioners.

The FCC draws distinctions that are factually inaccurate and in any event legally irrelevant. To begin, the FCC claims that Petitioners did not respond to the NPRM's request for comment on whether other stations should qualify for repacking protection. FCC Br. 32. But this is wrong. Petitioners sought repacking protection in response to the NPRM. *See* Pet. Br. 21-22. Indeed, Videohouse's President expressly sought protection for WOSC and several other stations, arguing that adopting February 22, 2012 as the date for determining auction eligibility and repacking protection would be unfair to stations like WOSC that had been building out digital stations and undertaking the process to convert to Class A status but would not be finished until after that date. App. 207.

The FCC's argument that it properly denied the reconsideration petitions because it "determined that the petitions were based on arguments that could have been—but were not—presented at an earlier stage in the proceeding," FCC Br. 39, thus clearly misses the mark. It is true, of course, that Petitioners did not argue that the FCC should not treat them differently vis-à-vis KHTV. But that is because the agency had yet to take such action and had given no indication that only certain stations would receive such treatment. Petitioners' arguments were placed before the Commission at the first opportunity.

In any event, what Petitioners did and did not argue is of no moment because the FCC has blatantly refused to apply its rules equally as against similarly situated entities. At the same time the FCC denied Petitioners' reconsideration petitions, it extended discretionary protection to similarly situated licensees—despite the fact that these licensees *never filed reconsideration petitions*. In fact, the FCC used Petitioners' purportedly untimely reconsideration petition as the basis for granting protection to entities that failed to seek reconsideration at all. Or, as the FCC puts it, Petitioners "opened the door for the FCC to modify its rules to protect more Class A stations." FCC Br. 37. That is a remarkable—and untenable—proposition. If timeliness was the basis for distinguishing Petitioners from KHTV, how could the FCC grant discretionary protection to stations that did not *ever*—much less belatedly—seek discretionary relief? Using Petitioners' reconsideration petition as the vehicle for doing so just adds insult to injury.

If Petitioners' requests for discretionary protection were sufficient for the Commission to grant discretionary protection to these stations, it necessarily was sufficient to grant the same relief to Petitioners. Clearly, then, the FCC does not have a "'well-established policy of not considering matters that are first raised on reconsideration.'" FCC Br. 31 (quoting App. 1025). It is arbitrary and capricious to enforce procedural standards in disparate fashion against similarly situated entities. *See Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777

(D.C. Cir. 2005) (finding arbitrary and capricious an agency's decision to apply different standards to shippers and carriers seeking to vacate a rate prescription). Like its actions with Latina Broadcasters, *see supra* 3-7, the FCC is manipulating its rules to achieve its desired outcome.[2]

The FCC's substantive arguments fare no better. The FCC purports to distinguish Petitioners from KHTV by their relative diligence in converting to Class A status. The FCC's position boils down to faulting Petitioners for not finding an available station until 2009. FCC Br. 33-35. But the FCC is aware that the digital TV transition inhibited LPTV stations from finding available in-core stations. Pet. Br. 11. That a station in the Los Angeles market became available to KHTV earlier than one became available in the Pittsburgh market, for example, demonstrates only the two stations' relative fortuity—not their relative diligence. Moreover, the Commission ignores the fact that Petitioners timely submitted their statement of eligibility for Class A status in 1999 and since that time continuously have maintained that status. Pet. Br. 10, 13, 15. The Commission states that these certifications are not alone sufficient to obtain a Class A license. FCC Br. 35. But that misses the point. The point is, of course, that Petitioners (like KHTV) began

[2] The FCC makes its procedural argument both as a reason to treat Petitioners differently from KHTV, *see* FCC Br. 31-33, and as a standalone justification for denying Petitioners' reconsideration petitions, *see* FCC Br. 36-38. Both arguments fail for the same reasons.

the process of converting to Class A status in 1999, which the Commission formally acknowledged in 2000. Pet. Br. 10-17. Again, just like KHTV, they expended considerable time and expense for several years before the passage of the Spectrum Act advancing through that process. Pet. Br. 9-17. And of course, the Commission ultimately granted Class A status to Petitioners after concluding that they had continuously maintained their Class A eligibility status for more than a decade. Petitioners thus 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. And their diligence in moving to Class A status should be honored in the same way the FCC properly honored KHTV's diligence by affording them auction eligibility and repacking protection.

Finally, the FCC claims that the entities are different because KHTV filed an application for a Class A license "just two days after enactment of the Spectrum Act, but Petitioners did not apply for Class A licenses until January 2013, almost a year after enactment of the Spectrum Act." FCC Br. 33 (citation omitted). But this is a distinction without a difference. As previously explained, neither KHTV nor Petitioners knew that the FCC would use the enactment of the Spectrum Act (February 22, 2012) as a basis for repacking protection until after the fact.

The cases on which the FCC relies are therefore inapposite. *See* FCC Br. 35. In both cases, the regulated entities *knew of the deadlines beforehand and knew of*

their need to be diligent. *See Blanca Tel. Co. v. FCC*, 743 F.3d 860, 865-66 (D.C. Cir. 2014) ("The petitioners did have notice of both the original September 2006 deadline and the provisions of the FCC's general waiver standard. A party that files for waiver on the day of a deadline will never know in advance how much leeway, if any, an agency will retrospectively grant."); *Fla. Inst. Of Tech. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992) ("The Institute is 'innocent' only if one starts near the end of the story … *after* the Institute's lack of diligence caused it to miss the November 14, 1984, cut-off date and lose its rights to a comparative hearing with Palm Bay."). That is not the case here. Even if Petitioners were less "diligent" than KHTV—which they were not—that would still be an arbitrary and capricious measure for providing repacking protection.[3]

III. The Commission's Retroactive Imposition of a 2012 Deadline Was Arbitrary and Capricious.

As previously explained, *see* Pet. Br. 40-44, the FCC's decision to hinge auction eligibility and repacking protection on a backward-looking "deadline" is impermissibly retroactive—both as a matter of primary retroactivity and secondary retroactivity. The FCC's arguments to the contrary miss the mark.

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[3] The FCC argues that it "reasonably concluded that the equities in this case did not warrant discretionary protection of petitioners' stations" because they were not diligent in seeking Class A status. FCC Br. 40-42. But even if accurate—which it is not—this justification cannot serve as an "independent ground for its decision" given the agency's disparate treatment of Petitioners as compared with KHTV. *See supra* 10-12.

First, the FCC's actions fail under the primary retroactivity analysis. A rule is primarily retroactive if it "takes away or impairs vested rights." *Arkema Inc. v. E.P.A.*, 618 F.3d 1, 7 (D.C. Cir. 2010). "The critical question is whether the interpretation established by the new rule 'changes the legal landscape.'" *Id.* (citation omitted). "If a new rule is 'substantively inconsistent' with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively." *Id.* (quoting *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002)). "Even where a rule merely narrows 'a range of possible interpretations' to a single 'precise interpretation,' it may change the legal landscape in a way that is impermissibly retroactive." *Id.* (quoting *National Mining I*, 177 F.3d at 8).

That is what the Commission did here. As the FCC has long recognized, the CBPA affords Class A licenses "the same license terms … as full-power television licensees." Report & Order, Establishment of a Class A Television Service, 15 FCC Rcd. 6355, ¶ 5 (Apr. 4, 2000) ("Class A Report & Order"). In fact, the statute mandates that qualified stations be afforded Class A licenses, 47 U.S.C. § 366(f)(6)(A), and that those licenses be permanent as long as the station meets the applicable requirements, *id.* § 366(f)(6)(A). For these reasons, Petitioners were in line to obtain the same rights as full-power television licensees and other Class A stations when they completed the prerequisites and filed their Form 302-CAs in

January 2013 (WOSC and WPTG) and November 12, 2013 (WIAV). Pet. Br. 9-17. That means that Petitioners had a vested right to the same benefits as full-power television licensees and other Class A stations in 2013.

The Commission altered those vested rights on June 2, 2014, when it refused to grant Petitioners repacking protection. In other words, on June 1, 2014, Petitioners had the same rights as full-power television licensees and other Class A stations. The next day, the Report & Order "impair[ed]" those "vested rights acquired under existing laws" based on a "transaction[] … already past," *i.e.*, the date on which Petitioners submitted their Form 302-CAs. *Landgraf v. USI Film Prods.,* 511 U.S. 244, 269, 271 (1994). This impairment makes the FCC's actions improperly retroactive.

The FCC contends that Petitioners have "no legally protectable interest in repacking protection" and, therefore, the agency's actions cannot be retroactive. *See* FCC Br. 24-25. But that is not true. As explained above, the CBPA vested Petitioners with the same rights as full-power television licensees and all other Class A stations. And the Spectrum Act did nothing to change these rights. Indeed, Section 1452(b)(5) of the Spectrum Act expressly barred the FCC from administering the Auction's repacking phase to "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). The FCC thus was not

"using past information for subsequent decisionmaking." FCC Br. 24 (citation omitted). It was clawing back rights retroactively.[4]

Even if Petitioners lacked "vested rights"—which is not the case—the FCC's actions also fail under the secondary retroactivity analysis. An agency action is secondarily retroactive when it "upsets expectations based in prior law." *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 159 (D.C. Cir. 2010). "A secondarily retroactive rule is valid only to the extent it is reasonable—both in substance and in being made retroactive." *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000). A rule is "unreasonable" if it (1) "upset[s] petitioners' reasonable reliance interests" or (2) "make[s] worthless substantial past investment incurred in reliance upon the prior rule." *Bell Atl. Tel. Companies v. F.C.C.*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring)). The FCC fails both tests.

First, Petitioners reasonably relied on the prior regulatory regime. As explained above, the CBPA provided in 1999 for Class A stations to have "the same license terms and renewal standards as full-power television licensees." Class A Report & Order ¶ 5. Accordingly, it was reasonable for Petitioners to

[4] The FCC acknowledges that Congress did not give it the authority to impose retroactive rules. *See* FCC Br. 22-30; Pet. Br. 42. As a consequence, if the Court determines that the FCC imposed a retroactive rule, that is the end of the matter. *See* Pet. Br. 42; *Arkema*, 618 F.3d at 7 ("Generally, an agency may not promulgate retroactive rules without express congressional authorization.").

believe they would receive those same license terms when they applied to become Class A stations. This was not a scenario where "the state of the law has never been clear, and the issue has been disputed since it first arose." *Bell Atl.*, 79 F.3d at 1207; *see also id.* (finding no reliance interests when petitioners "made their … decisions in the face of considerable uncertainty"). Rather, when Petitioners sought to obtain Class A status, the legal landscape was clear: Qualified stations that sought and obtained Class A Status would enjoy the same rights as full-power television licensees and established Class A stations.

Second, the FCC's actions "ma[de] worthless substantial past investment" that Petitioners "incurred in reliance upon the prior rule." *Bell Atl.*, 79 F.3d at 1207. Following the passage of the CBPA in 1999, Petitioners each began the long, expensive process toward obtaining Class A status. *See* Pet. Br. 9-17. That significant investment will be lost if, after finally obtaining Class A status, Petitioners are not granted repacking protection. Petitioners will instead face the threat of imminent "displacement" if they cannot be repacked in a new portion of spectrum. If that occurs, they must shoulder the costs of moving to a new channel, share a channel using less spectrum, or shut down completely. Pet. Br. 20. Indeed, the FCC previously acknowledged that denying protection to Petitioners may force Petitioners to shut down, cause "viewers [to] los[e] the services of these stations,"

and "strand the investments [Petitioners] have made in their existing facilities." App. 300; *see also* Pet. Br. 20.

Moreover, the unreasonableness of the FCC's retroactive "deadline" is only heightened by the Commission's own actions in inducing licensees to delay in filing Form 302-CA and thus miss that "deadline" when the FCC ultimately imposed it two years later. Pet. Br. 32-33; *see also* Reconsideration Petition at 20 (Pai, C., dissenting) ("Media Bureau staff advised stations that were ready to file a Form 302-CA *not* to do so."). The FCC does not deny that the Media Bureau instructed licensees to delay filing Form 302-CA or that Petitioners and other licensees heeded those instructions.[5] In other words, the FCC does not deny that it caught Petitioners in a regulatory "game of gotcha." *Id.*; *see also* Brief of LPTV Spectrum Rights Coalition as Amicus Curiae at 1-13. Rather, the FCC faults Petitioners for obeying the Media Bureau's instructions, arguing that those instructions conflicted with a passing "statement in a 2000 order that [the FCC] would 'require' stations seeking Class A status 'to file a Class A application simultaneously' with an application for an in-core construction permit." FCC Br. 29. But the FCC never actually imposed such a requirement on out-of-core stations seeking to obtain Class A status. Indeed, the FCC cites no rule adopting such a

[5] That licensees could have filed Form 302-CA before the Commission started instructing them to delay the filing thereof (FCC Br. 29) is thus beside the point.

requirement nor identifies any station that was denied Class A status for failing to satisfy this supposed requirement.[6]

Thus, as Petitioners explained previously, it was entirely reasonable for licensees to heed the instructions of FCC staff. Pet. Br. 40-44; *see also In re Hooten Broad., Inc.*, 13 FCC Rcd. 15023 (1998) (reasonable reliance on inaccurate FCC guidance excusing noncompliant filing). Petitioners "ha[d] no opportunity to cure the [agency-manufactured] defect," *Runnells v. Andrus*, 484 F. Supp. 1234, 1238 (D. Utah 1980), and they should not be penalized for failing to meet the FCC's arbitrary and unreasonable "deadline."

* * *

Importantly, there is no dispute here as to the proper remedy if Petitioners prevail on the merits. By not contesting the issue, the Commission has conceded

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[6] That there was no contrary rule is undoubtedly why the FCC has abandoned its reliance on *Deleted Station WPHR(FM)*, 11 FCC Rcd 8513 (1996)—the only authority the FCC relied upon in the Reconsideration Order for the proposition that regulated entities rely on staff advice "at their own risk." Reconsideration Order at ¶ 11 n.44. In *Deleted Station*, it was unreasonable for a permittee of an unbuilt FM radio station to rely on agency fee advice that ran counter to existing FCC "rules" and "decisions." 11 FCC Rcd at 8515. The FCC's new citations are distinguishable for the same reason. *See* FCC Br. 29. In *Malkan FM Assocs. v. FCC*. 935 F.2d 1313 (D.C. Cir. 1991), the Court deemed it unreasonable to rely on staff advice that ran counter to clear rules set out in Commission regulations and an international treaty, *id.* at 1318. In *P&R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984), the Court deemed it unreasonable for a regulated entity to rely on staff advice where the staff member "cautioned … that the FCC might not agree with his position," *id.* at 931.

that the appropriate remedy is to vacate the Reconsideration Order and grant the Reconsideration Petition. Pet. Br. 53-54; *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: April 1, 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).

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/s/ Thomas R. McCarthy

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2016, copies of the foregoing were filed with the Court's CM/ECF filing system and served electronically on all parties.

/s/ Thomas McCarthy

Thomas McCarthy
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