Nos. 15-1264, 15-1346

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

MAKO COMMUNICATIONS, LLC, FREE ACCESS & BROADCAST TELEMEDIA, LLC, and WORD OF GOD FELLOWSHIP, INC., *et al.,*

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*

Respondents.

EMERGENCY JOINT MOTION TO STAY ADMINISTRATIVE PROCEEDINGS PENDING APPELLATE REVIEW

(Ruling Requested by March 28, 2016)

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.
Commission	Federal Communications Commission
FCC	Federal Communications Commission
LPTV	Low-Power Television
NPRM	Notice of Proposed Rulemaking
Spectrum Act	Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified in part at 47 U.S.C. §§ 1451-57
White Spaces	Frequencies in the television spectrum bands in locations not used by licensed broadcast services on which the FCC in 2008 authorized use by unlicensed digital devices under Subpart H of its Part 15 Rules. 47 C.F.R. §§ 15.701 through 15.7127. White spaces devices are formally known "as unlicensed Television Band Devices." *Id*. § 15.701.
WiFi	A digital communications service and associated devices operating in the unlicensed 2.4 GHz and 5 GHz spectrum bands in accordance with Part 15 of the FCC's Rules and the Institute of Electrical and Electronics Engineers' (IEEE) 802.11x suite of technical standards, often referred to as "wireless broadband."

Pursuant to FED. R. APP. P. 18(a) and Circuit Rule 18(a), Free Access & Broadcast Telemedia, LLC ("Free Access"), Word of God Fellowship, Inc. ("Word of God") and Mako Communications, LLC ("Mako" and, collectively, "Joint Petitioners") respectfully move this Court to stay implementation of the FCC's incentive spectrum auction orders (the "Orders")[1]—including the reverse auction scheduled to commence on March 29, 2016—pending full judicial review of these two related cases: No. 15-1264 (consolidated with No. 15-1280) and No. 15-1346. Because briefing is complete and argument will be heard in eight weeks,[2] a stay of limited duration is both necessary to protect Joint Petitioners from irreparable harm and manifestly in the public interest.

INTRODUCTION

Part of the Federal Communications Commission's ("FCC" or "Commission") efforts to fashion the nation's first-ever incentive spectrum auction, the Orders (i) contravene the express terms of the agency's underlying statutory

[1] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd. 6567 (rel. June 2, 2014) ("*First Report & Order*"); *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268, Second Order On Reconsideration, 30 FCC Rcd. 12016 (rel. June 19, 2015).

[2] The Court declined to consolidate these two cases but ruled that it will hear them together, before a single panel, on May 5, 2016. Orders, Nos. 15-1264, 15-1346 (D.C. Cir. Feb. 8, 2016 and March 8, 2016).

authority (the Spectrum Act of 2012),[3] (ii) reverse decades of settled FCC policy on the "secondary" status of licensed low-power television ("LPTV"), and (iii) will eliminate the channels currently used by countless LPTV stations, forcing many if not most larger-market LPTV licensees to shut down—a fact the agency concedes.

This case fully satisfies the requirements for a stay. Joint Petitioners are likely to succeed on the merits because the Commission disregarded the command of 47 U.S.C. § 1452(b)(5), which prohibits the FCC from reorganizing broadcast spectrum in the auction in a way that would "alter the spectrum usage rights of low-power television stations." The FCC asserts that LPTV stations are subject to so-called "displacement" simply because they are "secondary" licensees. This result-oriented conclusion distorts and impermissibly redefines the concept of secondary licensees, which are "secondary" *only* to other licensed services, and then *only* for purposes of interference; LPTV indisputably enjoys priority, by both FCC rule and an unbroken chain of agency precedent, as against unlicensed wireless services that the FCC's orders unlawfully attempt to prioritize.

The FCC's unprecedented decisions arise in large part from the agency's desire to clear-cut the television spectrum band, maximizing the spectrum to be sold to new licensees. The agency concurrently seeks to re-allocate additional TV spectrum for unlicensed use, *e.g.,* white spaces devices, WiFi and wireless

[3] Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified in part at 47 U.S.C. §§ 1451-57.

broadband. Because it can achieve those objectives only by treating LPTV service—a centerpiece for 35 years of the Commission's core diversity and localism broadcasting policies—as if it were non-existent, starting the auction before the legality of the FCC's approach can be reviewed would put in motion a sequence of interrelated auction events that will imminently and irreparably harm the Joint Petitioners, indeed nearly all LPTV licensees and investors, with no practicable financial or judicial recourse.

The relatively brief delay of a stay pending this Court's decision will not have any adverse impact on the auction.[4] The Spectrum Act requires that the auction be "conducted" before the "the end of fiscal year 2022," 47 U.S.C. § 1452(f)(3), with payments due only thereafter. A brief postponement to consider challenges to the Commission's mistreatment of LPTV will not prevent timely completion of the auction. The public interest thus strongly favors a stay.

PRELIMINARY STATEMENT

Four years ago Congress passed the Spectrum Act, authorizing a three-phase process for the FCC to reclaim spectrum voluntarily from broadcasters and make it available for new uses. Pub. L. No. 112-96, Tit. VI §§ 6401-14, 126 Stat. 156, 222-37 (2012). Congress prescribed an approach comprising (i) a "reverse auction" to

[4] On March 2, 2016, Joint Petitioners asked the FCC for the same relief sought here (FED. R. APP. P. 18(a)(1)) and informed the Commission that they would consider the petition denied if it did not act by March 8, 2016. The FCC did not dispose of that petition for stay.

incentivize broadcast television licensees to sell their spectrum rights back to the FCC; (ii) a "reorganization" of broadcast TV spectrum to reassign channels and reallocate portions of the spectrum; and (iii) a "forward auction" to assign new licenses within the newly reorganized broadcast bands.

This process and its complex underlying mechanics have been explained in detail by Joint Petitioners in their briefs and by the FCC in the Orders and related proceedings, such as the pending *Vacant Channel NPRM*.[5] Of key importance is that the FCC has chosen, and reaffirmed, to exclude LPTV from the spectrum reorganization phase (oddly dubbed "repack" by the Commission) and not to exercise its discretion to include LPTV in the reverse auction. *See, e.g., In re The Videohouse, Inc.,* Order On Reconsideration, GN Docket No. 12-268, FCC 16-12 (rel. Feb. 12 2016) ("*Videohouse Order*") (reiterating determination not to "protect LPTV stations in the repacking process or make them eligible for the reverse auction"), *petition for review and motion for stay pending sub nom. The Videohouse, Inc. v. FCC,* No. 16-1060 (D.C. Cir.)

[5] *Amendment of Parts 15, 73, and 74 of the Commission's Rules to Provide for the Preservation of One Vacant Channel In the UHF Television Band for Use by White Space Devices and Wireless Microphones*, Notice of Proposed Rule-making, 30 FCC Rcd. 6711, 6712 (2015) (proposing that LPTV licensees be required to "demonstrate that their proposed new, displacement, or modified facilities would not eliminate the last vacant UHF television channel for use by [unlicensed] white space devices and wireless microphones in an area.")

The Commission's determination not to include LPTV stations in the spectrum reorganization, and its recognition that a substantial number of LPTV stations will as a result be forced to go dark ("displaced"), are beyond dispute. The FCC explained that even with respect to so-called "out-of-core" Class A stations (*i.e.,* those formerly operating on channels 52-59), "protecting" these stations would "encumber" additional spectrum, "thereby increasing the number of constraints on the repacking process and limiting [its] flexibility to repurpose spectrum for flexible use."[6] The FCC consequently determined to include "full-power and Class A television stations only" in the reorganization, stating that for all other LPTV stations it would not "extend protection in the repacking process."[7]

The Commission has conceded that LPTV will "be greatly impacted by repacking" in that "[m]any [LPTV] stations will be displaced from their current operating channel."[8] Because "[o]nly a limited number of available channels may exist following the repacking process, [thus] limiting the relocation options available to displaced [LPTV] stations,"[9] most of those stations will be forced to cease broadcasting. The FCC believes that the loss of LPTV service is "out-

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[6] *Videohouse Order* ¶ 3, *citing First Report & Order* ¶ 234.

[7] *First Report & Order* ¶ 232-35; *accord, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268, ¶¶ 98, 118 (rel. Oct, 2, 2012) ("*Incentive Auction NPRM*").

[8] *Incentive Auction NPRM,* App. B, ¶ 30.

[9] *Id. ¶ 358.* The Commission admitted that the record "demonstrates the potential for a significant number of LPTV . . . stations to be displaced as a result of the auction and repacking process." *First Report & Order* ¶ 657.

weighed by the detrimental impact that protecting LPTV…stations would have on the repacking process and on the success of the auction."[10] But the FCC never identified, even by citation, what Spectrum Act goals are threatened by including LPTV in the reorganization or what constitutes auction "success" under the Act.

STANDARD OF REVIEW

This Court will stay the effectiveness of an order pending review, applying the four-factor test reaffirmed in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008), when a petitioner demonstrates: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.[11] *See CSX Transp., Inc. v. Williams,* 406 F.3d 667, 670 (D.C. Cir. 2005); Order, *Global Tel*Link v. FCC,* No. 15-1461 (D.C. Cir. March 7, 2016) (staying caps on inmate calling rates). The Court balances these factors, with no single factor being dispositive.

ARGUMENT

As Commissioner Pai commented on the Court's most-recent stay of an FCC order, at this agency it is unfortunate that:

> [p]olitical expedience trumps everything else; the rule of law is ridiculed rather than respected; and bipartisan compromise is rejected in

[10] *First Report & Order* ¶ 237.

[11] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

> favor of a party-line vote. Thankfully, we can still count on the federal courts to rebuke an agency untethered to the rule of law.[12]

Joint Petitioners' two pending cases before this Court are another sad illustration of the FCC's disregard for its statutory authority and, more pointedly here, express constraints on that power specifically imposed by Congress.

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.

The Spectrum Act prohibits the FCC from reallocating broadcast spectrum in a manner that would "alter the spectrum usage rights of low-power television stations." 47 U.S.C. § 1452(b)(5). Yet the Orders will completely extinguish many LPTV stations, *e.g.*, *First Report & Order* ¶ 237, while giving priority for use of that and other "vacant" spectrum to unlicensed devices and uses that are, by regulation and a string of FCC decisions, "secondary" to licensed LPTV services.

The FCC's mistreatment of LPTV in the Orders is based on the false premise that LPTV stations are not "protected" by the Act; it contradicts the statute's plain language and undermines a long history of promoting investment in LPTV service and diversity in broadcast ownership. *See* Opening Br. in No. 15-1264, at 20-26 (filed Dec. 4, 2015); Opening Br. in No. 15-1346, at 44-58 (filed Jan. 11, 2016); Reply Br. in No. 15-1264, at 3-25 (filed Feb. 26, 2016); Reply Br. in No. 15-1346, at 3-6, 17-22 (filed Mar. 7, 2016).

[12] Statement of FCC Commr. Ajit Pai On the D.C. Circuit Once Again Staying the FCC's Attempts to Regulate Inmate Calling Rates, at 1 (Mar. 7, 2016), *available at* http://ht.ly/ZdTwR.

The Commission's determinations violate the Spectrum Act's explicit, unambiguous terms ensuring LPTV licensees' spectrum usage rights. The FCC exceeded its discretion by deciding to wipe out LPTV service in order to achieve policy goals rooted not in Congress's legislation but, rather, in the agency's prior *National Broadband Plan* proposals, which have no force of law.[13] The FCC's crabbed portrayal of § 1452(b)(5) renders the provision totally devoid of meaning and raises significant constitutional concerns by depriving LPTV owners and investors of all economic use of their stations.

A. The Commission refused to include LPTV stations in the auction and spectrum reorganization despite § 1425(b)(5)'s proviso that the Act's reorganization provisions shall not "be construed to alter the spectrum usage rights of low-power television stations." The FCC asserted that "[t]his provision simply clarifies the meaning and scope of [the statute]; it does not limit the Commission's spectrum management authority." *First Report & Order* ¶ 239.

Yet where "Congress has directly spoken to the precise question at issue," the agency "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). The source of the Commission's power to reorganize broadcast spectrum is § 1452(b). By providing that this subsection may not "alter" LPTV's spectrum

[13] FCC, *Connecting America: The National Broadband Plan* (2010), available at https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

rights, Congress unmistakably limited the scope of that power. Eliminating the channels on which "many" or even a "significant number" of LPTV stations broadcast is the epitome of altering their spectrum usage rights. Since Congress has stated clearly that LPTV stations cannot be "displaced" without alternative channels—under § 1452(b)(5) they plainly may not—the Commission's refusal to include LPTV in the second phase of the auction is facially unlawful.

B. As addressed at length in Petitioners' merits briefs, the Commission's assertion that § 1452(b)(5) is merely "a rule of statutory construction, not a limit on the Commission's authority," *Second Order On Reconsideration* ¶ 68, lacks either coherence or textual basis. *See, e.g.*, Reply Br. in No. 15-1346, at 17-27. By protecting LPTV's "usage rights," Congress limited the FCC's powers and, thus, the scope of its discretion. The FCC's response that only full-power stations are "protected" by the Act misconstrues § 1452(b)(2); that subsection (titled "Factors For Consideration") simply "preserves," where "resonabl[y]" possible, a station's geographic coverage, but offers no protection of current or future channel assignments. *NAB v. FCC*, 789 F.3d 165, 168-69 (D.C. Cir. 2015).

Where Congress intended not to require inclusion of LPTV stations in a phase of the auction, it did so specifically, protecting only "broadcast television licensees"—a new term encompassing full-power and Class A stations but not LPTV. 47 U.S.C. § 1401(6). When Congress actually limited a provision to these

entities, it said so. *Id.* § 1452(b)(4) (directing FCC to reimburse broadcast television licensees' relocation costs). Yet instead of phrasing its provisions in terms of "broadcast television licensees," the Act's reorganization subsection speaks of reassigning "television *channels*" and reallocating portions of "*spectrum.*" *Id.* § 1452(b)(1) (emphases added). That distinction is significant because the FCC's view improperly reads the more limited scope of subsections (b)(4) into (b)(1) and (b)(5), which contain no such limitation.

The FCC never addresses what it believes that § 1452(b)(5) means. The agency's approach is thus not an interpretation but the *absence* of statutory construction, for the FCC nowhere states how § 1452(b)(5)'s terms actually affect the Act's meaning. This violates the "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). The Commission's *sub silentio* assertion to the contrary represents an impermissible refusal to construe the statute.

If there is any rationale underlying the FCC's application of § 1452(b)(5), it apparently is that LPTV licensees do not, in fact, enjoy any spectrum usage rights because they are formally classified as "secondary" broadcasters. *E.g., First Report & Order* ¶ 239; FCC Br. in No. 15-1264, at 22-30. That is a red herring. "Secondary status means that low power stations may not create objectionable interference

to full service television stations."[14] The Commission cannot explain how LPTV's secondary status for *interference* purposes justifies eliminating LPTV licensees' channels, for the benefit of unlicensed services, and why the displacement of LPTV stations is not an alteration of spectrum usage rights. *See* Reply Br. in No. 15-1346, at 17-19, 22, 27.

Extending the "secondary" concept from one that requires an interfering LPTV station to relocate channels into a rule that LPTV has no spectrum rights even in the absence of interference is inconsistent with the FCC's long-standing policy that licensed services are primary relative to unlicensed services.[15] As Mako summarized:

> LPTV is secondary only to full power and Class A stations… The FCC never identified broadband use as a "primary service" before 2012. It cannot lawfully do so now because such a new use cannot enjoy primacy over LPTV when Congress unambiguously prohibited any alteration of LPTV broadcasters' rights.

Opening Br. in No. 15-1264, at 20-26. The agency's revisionist approach is a breathtaking distortion of "secondary" status, which is (i) merely a regulatory concept for interference purposes, and (ii) applies only when an LPTV station is

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[14] *Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 48 Fed. Reg. 21478, 21479 (1983).

[15] As a licensed service, LPTV is primary relative to all unlicensed services, such as WiFi broadband, "white spaces" services and other "Part 15" devices (47 C.F.R. § 15.1 *et seq.*). Unlicensed services are prohibited from causing harmful interference to licensed services. 47 C.F.R. § 15.5(b).

actually interfering with another licensed communications service. Reply Br. in No. 15-1346, at 6-11, 17-21.

C. The Commission's view of the Spectrum Act vests the agency with power to destroy the economic value of any LPTV station by stripping LPTV broadcasters of their spectrum. If the FCC were empowered to summarily shut down LPTV as part of the auction, that would deprive a station's owners and investors of "all economically beneficial or productive use of" their property—raising serious questions under the Fifth Amendment. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001); *Penn. Cent. Transp. Co. v. N.Y.*, 438 U.S. 104, 124 (1978). It is unnecessary for the FCC's to implicate such grave constitutional problems. Were the Commission to interpret § 1452(b)(5) as preserving LPTV stations' rights, the statute's plain meaning, these constitutional infirmities would be avoided. The FCC's failure to adopt the natural interpretation of the Act is unreasonable. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002) ("[T]he constitutional avoidance canon…trumps *Chevron* deference.").

D. The FCC exceeded its authority by proposing to disenfranchise LPTV service in order to achieve goals rooted not in the enabling legislation but, rather, in its own *National Broadband Plan*—concepts that have never been adopted as Commission rules or policies. The FCC claims authority to sell more spectrum in the forward auction than it reclaims in the reverse auction. As NAB commented in

a related docket, this "turns the Commission's unlicensed rules on their head" by "prioritizing unlicensed services over licensed LPTV and translator stations currently providing service to their communities."[16] Nevertheless, the FCC specifically rejected Free Access's objection that the Commission cannot "repurpose more spectrum than is vacant before the reverse auction or than is relinquished in the reverse auction," *First Report & Order* ¶ 67 n.255, with the circular rationale that this "would require protection of LPTV stations in the repacking process." *Id*.

That decision is irrational because it reverses the longstanding priority of *licensed* broadcasters' spectrum usage rights over *unlicensed* spectrum uses. It improperly elevates the Commission's unofficial *National Broadband Plan* to the status of law, which it is not.[17] The APA's requirement that an agency provide "reasoned explanation" compels the FCC, which it did not, to "display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Tel. Stations, Inc.,* 129 S. Ct. 1800, 1810-11 (2009) (emphasis in original).

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[16] Reply Comments of the National Association of Broadcasters, MB Docket No. 03-185, at 2 (filed Feb. 2, 2015).

[17] This *National Broadband Plan* is not official FCC policy and was never voted on by the Commission. As Commissioner McDowell emphasized at the time, "the Plan offered up today for Congress's review represents a tremendous amount of hard work and thoughtfulness. However, it does not carry with it the force and effect of law." *Statement of FCC Commr. Robert M. McDowell,* DOC-296912A1, at 1 (Mar. 10, 2010).

While the FCC believes the Act's objective was to repurpose spectrum for unlicensed broadband and wireless, that is explicitly **not** the case. Under § 309(j)(8)(G) of the Communications Act (47 U.S.C. § 309(j)(8)(G)), added by § 6403 of the Spectrum Act, the FCC "may encourage a licensee to relinquish voluntarily some or all of its licensed spectrum usage rights *in order to permit the assignment of* ***new initial licenses*** *subject to flexible-use service rules*…" Neither the Spectrum Act nor the relevant congressional conference report contains any provision reciting the Act's purpose; as in *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942), "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage." *See* Reply Br. in No. 15-1346 at 3-6 and 22-24. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Reg. Group v. EPA*, 143 S. Ct. 2427, 2446 (2014).[18] The FCC in contrast admits that "many" LPTV stations "will" be displaced without an alternative channel, while it cavalierly refuses to project the size, geographic dispersion or diversity impacts of this so-called "displacement."

[18] The FCC cannot claim to have "examine[d] the relevant data" per *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), because the agency (a) refused to analyze of the impact of its auction structure on LPTV, and (b) has not incorporated the results of its auction simulations and models into the record. Opening Br. in No. 15-1346 at 73 & n.17.

II. PETITIONERS FACE IRREPARABLE HARM ABSENT A STAY.

Absent a temporary stay, Joint Petitioners will be excluded from the auction and spectrum reorganization without meaningful judicial review. The Commission has repeatedly recognized that as a result of the Orders, "many" LPTV stations "will" be "displaced," *i.e.,* will lose the channels on which they broadcast, and that there will not be enough spectrum remaining for them to relocate.[19] If the Orders are not stayed, Joint Petitioners will lose millions of dollars in revenue, along with options for buying controlling interests in other LPTV stations, with no means of recouping these losses when they ultimately prevail in their appeals.

The injury involved here is thus "certain to occur in the near future," *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam), and plainly constitutes irreparable harm. The extinguishment of broadcasting rights will necessarily force large numbers of LPTV licensees to cease operating, *i.e.,* to "go dark." Hence, "[t]he harm to [Joint Petitioners] in the absence of a stay would be…destruction in [their] current form as a provider of [LPTV services]." *Holiday Tours*, 559 F.2d at 843; *Wisc. Gas,* 758 F.2d at 674 (even "[r]ecoverable monetary loss" constitutes irreparable harm "where the loss threatens the very existence of

[19] *See, e.g., Videohouse Order* ¶ 3; *First Report & Order* ¶¶ 232-35; *Incentive Auction NPRM* ¶¶ 98, 118. The Commission has from the start of this proceeding conceded that LPTV will "be greatly impacted by repacking" in that "[m]any [LPTV] stations will be displaced from their current operating channel." *Incentive Auction NPRM,* App. B, ¶ 30.

the movant's business"). Further, as LPTV licensees, including religious broadcasters such as Word of God, are exercising important free speech rights, irreparable injury is satisfied because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 US 347, 373 (1976).

The FCC staff's conclusion that "appropriate [judicial] relief would be available at a later date," *Latina Broad. Stay Order* ¶ 9 & n.43 (citing *FCC v Radiofone, Inc.,* 516 U.S. 1301 (1995) (single-Justice decision denying stay)),[20] is meritless. Nothing in the Communications Act or equity empowers a court to unwind the results of an auction by calling "do-overs." As Justice Frankfurter observed in the context of staying an FCC broadcasting order, "[n]o court can make time stand still." *Scripps-Howard Radio*, 316 U.S. at 9. Consequently, while judicial relief should be available for decisions, such as payment deadlines, that *post-date* the completion of the auction, *see US Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000) (challenge to post-auction changes to rules for C-block auction financing), that is not the situation here.

[20] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,* GN Docket No. 12-268, Order Denying Stay Motion ¶ 5 & n.15 (Media Bur. rel. Feb. 25, 2016) ("*Latina Broad. Stay Order*"), *motion for stay and petition for review pending sub nom. Latina Broadcasters of Daytona, LLC v. FCC,* No. 16-1069 (D.C. Cir. filed Feb. 26, 2016).

There is nothing this Court could reasonably do to unscramble the eggs once the Commission's auction omelet starts cooking. *Omnipoint Corp. v. FCC,* 78 F. 3d 620, 627 (D.C. Cir. 1996) (staying C-Block auction prior to commencement). All three phases of the incentive spectrum auction are integrally related, making the entire auction a unitary process that cannot practicably be divided later. The auction train is leaving the station; after March 29, the Court loses any realistic ability to rearrange the cars on—let alone stop—that runaway train.

III. THE PUBLIC INTEREST STRONGLY FAVORS A STAY, WHICH WILL NOT INJURE ANY THIRD PARTIES.

The balance of hardships and the public interest also favor a stay. A stay would delay the reverse auction and possibly postpone the spectrum reorganization, but not deprive any full-power or Class A broadcaster of the ability to sell its spectrum in the auction. The Spectrum Act gives the Commission more than *six and one-half additional years*—until fiscal year 2022—to finish the auction; a delay of a few months while this Court considers challenges will not prevent the auction's timely completion. This is not a case where there is an "urgent necessity for rapid administrative action under the circumstances," *Northwest Airlines v. Goldschmidt,* 645 F.2d 1309, 1321 (D.C. Cir. 1981), or an auction Congress dictates must be concluded "without administrative or judicial delays." *Omnipoint,* 78 F. 3d at 629 (citing 47 U.S.C. § 309(j)(3)(A)); *id.* at 630 (for C-Block auction, "the Commission was under a congressional deadline to act quickly").

The public interest unmistakably favors a stay. Treating LPTV, a centerpiece for more than 35 years of the Commission's core diversity and localism policies, as if those licensees were non-existent is a startling departure from the FCC's approach to broadcasting. The public interest in diversity, epitomized by LPTV, indicates that of all the stay criteria, the public interest weighs decisively in favor of a stay. *See, e.g., Prometheus Radio Project v. FCC,* 373 F. 3d 372 (3d Cir. 2004) (staying Commission's media concentration rule changes in order to preserve diversity and localism).

Importantly, the one and only step required for the Commission to remedy the imminent harm to LPTV is simple, indeed trivial. All that is necessary is to load the FCC's existing television database, which includes all LPTV stations and engineering details, into its auction software, commonly known as TVStudy.[21] This requires no laborious effort whatever and demonstrates that far from delaying the auction, including LPTV in the "repack" would have no impact on the agency's ability to complete the auction within the next six 1/2 years.

[21] The Commission's "TV Query Broadcast Station" database (*see* https://www.fcc.gov/media/television/tv-query) includes all licensed broadcast facilities. The *TVStudy* software "is designed for making rapid coverage and interference calculations involving many stations and provides highly-detailed outputs" to be used in the "repack" evaluation of television channel allocations. *See* Public Notice*, Office of Engineering And Technology Releases And Seeks Comment On Updated OET-69 Software,* ET Docket No. 13-26, GN Docket No. 12-268, DA 13-1381 at 3 (OET rel. Feb. 4, 2013), *available at* http://ht.ly/YQCRy.

The arguments advanced by *amici* and intervenors in *Latina Broad. of Daytona,* No. 16-1069, that *they* face irreparable harm from a stay are without merit. The injuries these non-parties project are financial—the costs of keeping consultants on retainer, the time value of money raised to bid in the forward auction (not yet scheduled), and "uncertainty" affecting their business plans as device manufacturers. None of these injuries is irreparable and none prevents any broadcaster from participating in the reverse auction, whether commenced on March 29 or a few months later. Since reverse auction bids are not owed compensation until, years from now, after the forward auction concludes—and only if it generates adequate funds, 47 U.S.C. §§ 1452(c)(2), (f)(2), (f)(5)—these arguments do not change the public interest considerations warranting a stay.

Absent a stay, the FCC enjoys the opportunity to follow the unwarranted lead of other federal agencies by imposing new, questionable policies on regulated industries, permanently affecting private rights, before judicial review. The EPA, for example, responded to its loss in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), by declaring that the decision was moot because industry had already sunk the costs for compliance. Reuters, *U.S. Top Court Rules Against Obama Admin. Over Air Pollution Rule* (Jun. 29, 2015), *available at* reut.rs/1TrjlaT; *see Indiana State Police Pension v. Chrysler*, 130 S. Ct. 1015 (2009) (vacating 2d Cir. decision as

moot where completion of federal bailout left aggrieved pension without judicial remedy). The Court should not countenance that same lawless result in these cases.

In a recent order in a related case, the Court stressed the importance of ensuring that parties challenging the FCC's auction Orders be "allow[ed]…to seek judicial review with *an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.*" Order Denying Mandamus Relief, *In re Videohouse, Inc.*, No. 15-1486 (D.C. Cir. Dec. 30, 2015). A brief stay of the Orders, to maintain the *status quo* while the Court hears Joint Petitioners' cases, is the only way they (and the other parties moving to stay the Orders) can receive such *meaningful* judicial review, not review that will be rendered moot by the FCC's actions in the meantime.

CONCLUSION

The Court should stay the Orders and the FCC's incentive spectrum auction prior to March 29, 2016, pending completion of review on the merits.

[Signature and counsel listings on next page]

Respectfully submitted,

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