

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

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

Petitioners,

v.

FEDERAL COMMUNICATIONS  
COMMISSION, and

UNITED STATES OF AMERICA,

Respondents.

Case Nos. 16-1060, 16-1071

**LATINA BROADCASTERS OF DAYTONA BEACH, LLC'S  
STATEMENT AS *AMICUS CURIAE* IN SUPPORT OF NEITHER  
PARTY CONCERNING PETITIONER THE VIDEOHOUSE,  
INC.'S EMERGENCY MOTION FOR STAY PENDING APPEAL**

**(RULING REQUESTED BY MARCH 11, 2016)**

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March 8, 2016

## **CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Latina Broadcasters of Daytona Beach, LLC (“Latina”) hereby certifies as follows:

### **I. Parties and Amici**

The Petitioners in these cases are The Videohouse, Inc.; Fifth Street Enterprises, LLC; and WMTM, LLC.

Respondents are the Federal Communications Commission (“FCC”) and the United States of America.

The LPTV Spectrum Rights Coalition has appeared as *amicus curiae* in support of the Petitioners. As of the date of this filing, counsel is not aware of any other *amici curiae* or any intervenors.

### **II. Rulings Under Review**

The rulings under review are set forth in the Certificate of Parties, Rulings, and Related Cases contained in the Brief for Petitioners filed in these cases on February 25, 2016.

### **III. Related Cases**

Related cases are set forth in the Certificate of Parties, Rulings, and Related Cases contained in the Brief for Petitioners filed in these cases on February 25, 2016, with the addition of the following:

Latina has filed Petitions for Review of the FCC order captioned *In the Matter of Expanding the Economic and Innovation Opportunities Spectrum Through Incentive Auctions, Order on Reconsideration*, FCC 16-12, GN Docket No. 12-268 (rel. Feb. 12, 2016), 81 Fed. Reg. 8843 (Feb. 23, 2016) (“*Order*”), which is among the orders challenged by the Petitioners here.<sup>1</sup> Those cases are *Latina Broadcasters of Daytona Beach, LLC v. FCC*, Nos. 16-1065, 16-1069 (consolidated).

In addition, Walker Broadcasting, Inc. filed a mandamus action in this Court related to other matters concerning the television broadcast incentive auction involved in this case. That case is *In re Walker Broadcasting, Inc.*, No. 16-1066.

/s/ David S. Wachen

David S. Wachen

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<sup>1</sup> To the extent necessary, Latina has also sought review of the FCC order captioned *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, GN Docket No. 12-268, 29 FCC Rcd. 6567 (2014), 79 Fed. Reg. 48442 (Aug. 15, 2014) (“*Auction Order*”), and all related final orders and rules issued by the FCC in the proceeding bearing the same caption. Petitioners here also challenge the *Auction Order* and related final orders.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Latina Broadcasters of Daytona Beach, LLC (“Latina”) states as follows: Latina has no parent company, and no publicly held company has a 10% or greater ownership interest in its stock.

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## TABLE OF AUTHORITIES

\*Authorities upon which Petitioner chiefly relies are marked with asterisks.

### **Other Authorities**

- \* *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, Order on Reconsideration, 31 FCC Rcd. \_\_\_\_, 2016 WL 593209 (rel. Feb. 12, 2016), 81 Fed. Reg. 8843 (Feb. 23, 2016) ..... 2, 6-7
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- \* Petitioner’s Reply in Support of Emergency Motion for Stay Pending Appeal, *Latina Broadcasters of Daytona Beach, LLC v. FCC*, Case Nos. 16-1065, 1069 (consolidated) (D.C. Cir. filed Mar. 7, 2016) ..... 1-2, 4
- Petitioner The Videohouse, Inc’s. Emergency Motion for Stay Pending Appeal, *The Videohouse, Inc. v. FCC*, No. 16-1060, 16-1071 (consolidated) (D.C. Cir. filed Mar. 3, 2016) ..... 1-3, 6

**STATEMENT OF IDENTITY AND INTEREST IN CASE**

Latina Broadcasters of Daytona Beach, LLC (“Latina”) respectfully submits this Statement as *amicus curiae*. Latina operates WDYB-CD, a Class A broadcast television station in Daytona Beach, Fla. Latina is owned by Nora Crosby Soto, a Hispanic woman who used her own money to form a broadcast company to serve the Latino community.

Like Petitioners, Latina has filed Petitions for Review with this Court challenging the FCC’s Order on Reconsideration of February 12, 2016 (“*Order*”). On February 26, 2016, Latina filed an Emergency Motion for Stay Pending Appeal, which is fully briefed and upon which a ruling is requested by March 11, 2016. Latina’s Motion seeks a stay of the *Order* pending judicial review of Latina’s Petitions, or, in the alternative, a stay of the upcoming broadcast television spectrum incentive auction (“*Auction*”).

Petitioner The Videohouse, Inc. (“Videohouse”) filed the instant Motion seeking a stay of the entire Auction. In its Motion papers, Videohouse refers in several places to Latina, and the circumstances surrounding Latina’s Petitions for Review and Stay Motion. Latina files this Statement not to take a position as to whether the Court should grant or deny Videohouse’s Motion, but solely to clarify the FCC’s treatment of Latina with respect to its eligibility to participate in the Auction, and related matters to the extent they are discussed by Videohouse in its

Motion.

Prior to filing this Statement, Latina sought and received the consent of all parties.

**STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

Pursuant to Fed. R. App. P. 29(c)(5), Latina states that no party's counsel authored this Statement in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this Statement; and no person, other than Latina or its counsel, contributed money that was intended to fund preparing or submitting this Statement.



Latina Broadcasters of Daytona Beach, LLC (“Latina”) files this Statement as *amicus curiae* not to take a position as to whether the Court should grant or deny The Videohouse, Inc.’s (“Videohouse”) Emergency Motion for Stay Pending Appeal (“Motion” or “Mot.”), but solely to clarify the FCC’s treatment of Latina with respect to its eligibility to participate in the upcoming broadcast television spectrum incentive auction (“Auction”) and repacking, and related matters to the extent they are discussed by Videohouse in its Motion.

### **PRELIMINARY STATEMENT**

In its Motion, Videohouse refers to Latina in an apparent attempt to benefit from the FCC’s obvious mistreatment of Latina’s station, WDYB-CD. In so doing, however, Videohouse misapprehends the FCC’s previous treatment of WDYB. While Latina takes no position regarding whether Videohouse is entitled to a stay, Latina seeks to clarify and correct the record as it pertains to WDYB.

On February 26, 2016, Latina filed its own Emergency Motion for Stay Pending Appeal with regard to its previously filed Petitions for Review with this Court (Case Nos. 16-1065, 16-1069).<sup>2</sup> Unlike Videohouse, Latina primarily seeks a

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<sup>2</sup> The circumstances of Latina’s Petitions for Review and emergency motion for stay pending appeal are discussed in detail in Latina’s emergency motion and reply in support of that motion, filed on February 26 and March 7, 2016 respectively. See Petitioner’s Emergency Motion for Stay Pending Appeal, *Latina Broadcasters of Daytona Beach, LLC v. FCC*, Case Nos. 16-1065, 1069 (consolidated) (D.C. Cir. filed Feb. 26, 2016) (“Latina Stay Mot.”); Petitioner’s Reply in Support of Emergency Motion for Stay Pending Appeal, *Latina Broadcasters of Daytona*

stay of the FCC's Order on Reconsideration of February 12, 2016 ("*Order*"),<sup>3</sup> the effect of which would be to allow Latina to participate provisionally in the Auction pending adjudication of Latina's Petitions for Review. Only if the Court is unwilling or unable to stay the *Order* does Latina request a stay of the Auction. As Latina makes clear in its motion papers, Latina primarily seeks a stay of only the *Order*, which would allow the Auction to begin on March 29, 2016, as currently scheduled.

Videohouse also misinterprets the *Second Order on Reconsideration*<sup>4</sup> to the extent Videohouse contends that the FCC "deemed Latina similarly situated with Petitioners." Mot. 7. The FCC did not make any such finding in that order.

While both Latina and Petitioners have filed Petitions for Review with this Court challenging the *Order*, the circumstances of Latina and Petitioners are different in that, among other things, Latina was Auction eligible prior to the *Order*, but Petitioners were not. Therefore, it is not necessarily the case, as Videohouse asserts, that "if the Court determines that Latina is likely to prevail on

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*Beach, LLC v. FCC*, Case Nos. 16-1065, 1069 (consolidated) (D.C. Cir. filed Mar. 7, 2016) ("*Latina Stay Reply*").

<sup>3</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Order on Reconsideration, FCC 16-12, GN Docket No. 12-268, 81 Fed. Reg. 8843 (rel. Feb. 12, 2016) ("*Order*").

<sup>4</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd. 6746 (2015) ("*Second Order on Reconsideration*" or "*Declaratory Ruling*").

its stay motion, this would necessarily mean that Petitioners are likely to succeed on the merits.” Mot. 17. The Court should address Latina’s and Videohouse’s Motions (and Petitions) on their own merits.

## ARGUMENT

### **I. THE FCC DID NOT FIND LATINA AND PETITIONERS SIMILARLY SITUATED, AND DID PROTECT LATINA**

In footnote 183 of the FCC’s *Second Order on Reconsideration*—the only place in that order where the FCC specifically mentioned Latina—the FCC did not find that Latina and Petitioners were similarly situated as to whether they should be eligible for the Auction and protected in the repack. While noting that Latina “present[ed] arguments similar to those raised in the Abacus and Videohouse Petitions as to why the Commission should have decided in the *Incentive Auction R&O* to protect their stations in the repacking process,” the FCC did not consider the arguments of Latina and another station owner, Asiavision, Inc., finding the arguments moot because of its dismissal of the other petitions. The FCC said:

[T]o the extent Asiavision and Latina argue that the Commission should treat all similarly situated Class A stations the same if the Abacus and Videohouse Petitions are granted, their arguments are moot in light of our dismissal and denial of the Abacus and Videohouse Petitions. *See* Asiavision Opposition; Latina Partial Opposition. We will nonetheless treat these pleadings as informal comments.

*Second Order on Reconsideration* ¶ 53 n.183. At no place in that order did the FCC say that Latina and Petitioners were similarly situated factually.

In a separate part of that same order, the FCC issued a declaratory ruling extending Auction eligibility and repacking protection to “stations in addition to [KHTV] 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.” *Declaratory Ruling* ¶ 62. Latina met both criteria. Latina Stay Mot. 7-8; Latina Stay Reply 1, 5-6. Consistent with its declaratory ruling, the FCC on seven occasions over nine months affirmed that WDYB was among those stations to be protected, including on official lists and other documents identifying WDYB as an eligible station, and at a meeting with FCC officials, who confirmed that WDYB was eligible in accordance with the *Declaratory Ruling*. Most recently, in a brief to this Court filed on December 28, 2015, the FCC represented that it had extended protection to “stations in addition to KHTV-CD 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.” FCC Opp’n, *In re Videohouse*, No. 15-1486, at 7-8 (D.C. Cir., filed Dec. 28, 2015). It elaborated that “[o]ne of those stations is WDYB-CD.” *Id.* n.2 (emphasis added). In so doing, the FCC said that the circumstances surrounding Latina’s station were distinguishable from those of Petitioners’ stations. *Id.* at 7-8.

Thus, contrary to Videohouse’s assertion, there was no mistake in the FCC’s determination that WDYB was Auction and repack eligible. Nevertheless, the FCC, without proper notice to Latina and an opportunity to be heard, improperly

did an about-face on WDYB's eligibility in its *Order*. That is the subject of Latina's appeal.

## **II. THE MERITS OF LATINA'S CASE ARE DIFFERENT FROM THE MERITS OF PETITIONERS' CASE**

While it may be the case that both Latina and Petitioners succeed on the merits of their cases, it does not necessarily follow that if the Court concludes that Latina is likely to prevail on the merits, then the Court must conclude that Petitioners are likely to prevail on the merits of their case. Without getting into the merits of Petitioners' appeal, Latina's case rests, in part, on matters that are unique to Latina. Unlike Petitioners, the FCC previously determined that Latina was Auction eligible, making seven representations to that effect, including to this Court.

Specifically, Latina's challenge rests partially on the FCC's denial of due process to Latina in stripping WDYB of eligibility in the *Order*, and Latina's reasonable reliance on the FCC's prior representations concerning Latina's eligibility. These arguments do not apply to Petitioners. Latina also argues that the FCC unjustifiably discriminated against Latina by excluding WDYB from protection while including KHTV. Although Petitioners make a similar type of argument, the similarities between WDYB and KHTV, and Petitioners' stations and KHTV are different. In the case of WDYB, the FCC in its *Order* improperly attempted to apply a new standard for considering WDYB's eligibility, and

incorrectly ruled that WDYB did not meet that standard. Latina has challenged this in its appeal. As FCC Commissioner Pai concluded in his dissent: “The decision to remove protection from Latina while maintaining it for KHTV is utterly indefensible.” *Order* at 21. To be clear, Latina does not challenge the decision to protect KHTV, but instead argues that, having decided to do so, the FCC must protect WDYB as well.

### **III. LATINA PRIMARILY SEEKS A STAY OF THE *ORDER*, WHILE VIDEOHOUSE SEEKS A STAY OF THE ENTIRE AUCTION**

The notion that if the Court issues a stay as to Latina it must also issue a stay as to Videohouse, *see* Mot. 16-17, is also incorrect, given that the primary relief the parties are seeking is different: a stay of the *Order* versus a stay of the Auction. Prior to the *Order*, the FCC considered WDYB Auction eligible. In contrast, the FCC has always considered Videohouse’s WOSC (and Petitioners’ other stations) ineligible. Petitioners filed their petition for reconsideration in September 2015 in an attempt to become Auction eligible. In the *Order*, the FCC not only denied Petitioners’ claims to eligibility, but also took it upon itself to improperly remove WDYB’s eligibility (even though no one asked the FCC to consider WDYB’s eligibility).

The narrow relief that Latina is principally seeking—a stay of the *Order* so that WDYB can provisionally participate in the Auction when it begins on March 29, 2016—is unique to Latina. This is so because WDYB is the only station whose

eligibility was altered in the *Order*. Because Videohouse's WOSC has never been eligible, a stay of the *Order* would not affect its eligibility status. Thus, Videohouse's Motion is aimed at staying the entire Auction to preserve its ability to participate should Petitioners succeed on appeal.

Latina, by contrast, seeks a stay of the Auction only as a last resort, in the event that the Court will not or cannot stay the *Order*. As Latina makes clear in its papers, it does not need a stay of the Auction and does not seek any delay of the Auction if the Court stays the *Order*. While the stay that Videohouse seeks would preserve Latina's ability to obtain judicial review and not be deprived of its ability to participate in the Auction and repacking, a stay of the *Order*—a much less disruptive stay than a stay of the Auction—would also achieve this for Latina.

March 8, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of March, 2016, a copy of the foregoing was filed with the Court's CM/ECF filing system and served electronically on all parties.

*/s/ David S. Wachen*

\_\_\_\_\_  
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