

No. 15-1486

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

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

Petitioners.

**REPLY IN SUPPORT OF EMERGENCY
PETITION FOR WRIT OF MANDAMUS**

(RULING REQUESTED BY DECEMBER 31, 2015)

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
GLOSSARY	iv
INTRODUCTION	1
ARGUMENT	2
I. The FCC’s Opposition Confirms That Refusing To Rule On The Reconsideration Petition By January 4, 2016 Would Constitute Unreasonable Delay.	2
II. The FCC Cannot Refute That Petitioners Will Suffer Irreparable Harm Without A Writ Of Mandamus.	5
CONCLUSION	9
CERTIFICATE OF COMPLIANCE	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES**Page****CASES**

<i>Her Majesty the Queen in Right of Ontario v. EPA</i> , 912 F.2d 1525 (D.C. Cir. 1990).....	5
<i>In re al-Nashiri</i> , 791 F.3d 71 (D.C. Cir. 2015).....	3
* <i>In re Am. Rivers & Idaho Rivers United</i> , 372 F.3d 413 (D.C. Cir. 2004).....	4
<i>Oil, Chem. & Atomic Workers Int’l Union v. Zegeer</i> , 768 F.2d 1480 (D.C. Cir. 1985).....	5

OTHER AUTHORITIES

FCC Public Notice, <i>Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016</i> (Oct. 15, 2015)	7, 8
Reverse Auction (Auction 1001) Workshop, Applying to Participate—FCC Form 177 (Dec. 8, 2015)	6

* Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

FCC

Federal Communications Commission

INTRODUCTION

Petitioners have been forced to seek mandamus relief in this Court because the Federal Communications Commission (“FCC”) has unreasonably failed to act on a Reconsideration Petition that has been pending for months and which involves legal issues that the agency has reviewed and concluded are unlikely to prevail on the merits. More importantly, the FCC now explains that it circulated a draft order resolving the Reconsideration Petition on December 23, 2015, and is poised to act on it. Yet instead of simply doing so, and ensuring that Petitioners’ rights are not impaired, the FCC asks the Court to deny mandamus relief with no assurance of agency action in advance of March 29, 2016, the date the auction is set to begin, let alone by January 4, 2016. The Court should not be swayed.

At this point, the only reason for not resolving the Reconsideration Petition would be to deny Petitioners the chance to seek ordinary judicial review, if not to thwart effective judicial review entirely. Such a refusal to act is the epitome of unreasonable delay. The FCC’s alternative—a second mandamus petition to stay the auction while the Reconsideration Petition remains unresolved indefinitely—is intolerable. Petitioners should not be forced to lurch from one emergency posture to another when timely agency action allows for an orderly process. Only action by January 4, 2016 ensures Petitioners can present the merits of their case before the

application window closes and they suffer irreparable harm. The Court should order the FCC to act.

ARGUMENT

I. The FCC's Opposition Confirms That Refusing To Rule On The Reconsideration Petition By January 4, 2016 Would Constitute Unreasonable Delay.

As previously explained, *see* Emergency Petition for Writ of Mandamus (“Pet.”) 22-24, if the FCC does not rule on the Reconsideration Petition until after (or shortly before) January 12, 2016, the FCC will have “unreasonably delayed” in issuing a decision. The FCC’s opposition provides confirmation. The agency now reports that, “on December 23, 2015, a draft order addressing the pending reconsideration petition was circulated to the Commissioners for a vote.” Opposition to Emergency Petition for Writ of Mandamus (“Opp.”) 14. Accordingly, there can be no doubt that the FCC is *able* to rule on the reconsideration petition by January 4, 2016. The FCC notably does not argue otherwise.

For good reason. The FCC already tentatively rejected the Reconsideration Petition in denying the Emergency Motion for Stay. *See* Appendix (“A”) A-972-80. In that order, issued only a week after the motion was filed, the FCC extensively addressed the Reconsideration Petition, concluding that Petitioners had “failed to demonstrate that they are likely to succeed on the merits” and that “most

of the arguments they raise[d] [had] already been considered and rejected by the Commission.” A-975-78. Given these conclusions, the FCC’s failure to rule on the Reconsideration Petition at the same time was unusual. The Reconsideration Petition had been pending for months before the stay motion was filed.

The FCC’s refusal to act on the Reconsideration Petition by January 4, 2016 therefore could only be attributable to unreasonable delay designed to thwart Petitioners’ ability to expedite a petition for review challenging final agency action and, if necessary, file a motion to stay the auction pending its resolution. *See* Pet. 27 n.2. Indeed, the FCC candidly suggests that the Court should deny mandamus relief because Petitioners can seek to stay the auction under the All Writs Act while the Reconsideration Petition remains pending indefinitely. *See* Opp. 13-14. Putting aside that this type of emergency motion is not an “adequate alternative remedy,” *In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015), the FCC should not be permitted to force Petitioners—and the Court—to jump from one mandamus posture to another. Not when the agency has failed to offer the Court *any* reason why it would be unable to act by the date that would permit orderly review through established and regular procedures.¹

¹ On December 23, 2015, Petitioners filed a short ex parte letter with the FCC. *See* Opp. 10. The FCC has given no indication that this filing could possibly delay the resolution of the Reconsideration Petition.

Worse still, failure to grant mandamus relief here could thwart judicial review altogether. Lack of final agency action until it is too late would deny Petitioners the ability to seek review in this Court of the disparate treatment of Petitioners as compared to KHTV-CD and Latina Broadcasters. Pet. 14-15.²

In the context of this case, then, failure to rule on the Reconsideration Petition by January 4, 2016 would be unreasonable. *See In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (“There is no per se rule as to how long is too long to wait for agency action, but a reasonable time for agency action is typically counted in weeks or months, not years.” (citation omitted)). The Reconsideration Petition has been pending for months, the FCC has concluded that

² The Commission’s attempt to distinguish Latina Broadcasters for the first time by footnote here, Opp. 7 n.2, is meritless. The Commission is correct that WDYB-CD in Daytona Beach, Florida (currently licensed to Latina Broadcasters) had obtained in-core Class A permits several years ago. What the Commission leaves out, however, is that those Class A permits were obtained by different licensees (Tiger Eye Finance/Tiger Eye Broadcasting) and related to a different in-core channel (channel 28) that was relinquished long ago. *See* Application For Class A Television Broadcast Station Construction Permit Or License (Tiger Eye Finance) (granted Jan. 18, 2002), and Application For Class A Television Broadcast Station Construction Permit Or License (Tiger Eye Broadcasting) (granted Dec. 2, 2008), both available at http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdb/pubacc/prod/app_list.pl?Facility_id=41375. Indeed, Latina Broadcasters’ recently granted Class A application does not even mention channel 28, only that Latina sought to move from its then out-of-core channel 53 to its newly acquired in-core channel 14. *See* Application For Class A Television Broadcast Station Construction Permit Or License (Latina Broadcasters) (granted Oct. 23, 2014), available at http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdb/pubacc/prod/app_list.pl?Facility_id=41375.

it is unlikely to succeed, and a draft order resolving it circulated nearly two weeks before the date upon which action is requested. In none of the cases upon which the FCC relies, *see* Opp. 11, was the delayed agency action as straightforward and procedurally advanced as here. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1529 (D.C. Cir. 1990) (requesting “petitions for rulemaking to the EPA ... to promulgate endangerment and reciprocity findings pursuant to section 115 of the Clean Air Act”); *Oil, Chem. & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (requesting “radiation standards rulemaking”). Petitioners have an indisputable right to timely resolution of the Reconsideration Petition.

II. The FCC Cannot Refute That Petitioners Will Suffer Irreparable Harm Without A Writ Of Mandamus.

As previously explained, *see* Pet. 23-25, the FCC’s filing window for registering to participate in the auction runs from December 8, 2015 through January 12, 2016 at 6:00 pm. *See* A-957. After January 12, 2016, the FCC will review the applications to participate in the auction and, based on the commitments of qualified bidders, begin setting a national spectrum clearing target. *See* A-223. Petitioners seek a ruling by January 4, 2016 in order to have sufficient time to protect their legal rights before the close of the auction window. *See* Pet. 27 n.2.

The FCC’s argument for why Petitioners will not suffer irreparable harm in the absence of judicial intervention misses the mark. Remarkably, the FCC claims

that its own filing window is no deadline at all, because even if the Petitioners miss this deadline “the Commission will have the ability to ensure that petitioners have an opportunity to submit an application to participate in the reverse auction before the agency commences the auction.” Opp. 12. (citation omitted). According to the FCC, then, it can delay ruling on the Reconsideration Petition until March 29, 2016, *viz.*, the date on which the auction will commence. *Id.*

But the FCC’s argument directly contradicts the agency’s prior reasoning for establishing the pre-auction application deadline. In the *Order*, the FCC established strict deadlines for submitting an application to participate in the reverse auction. *See* A-397 (determining that “no [pre-auction] application would be accepted if, by the initial deadline, the applicant had failed to make the required certifications”). And the FCC has subsequently stressed that “Applications must be submitted **prior** to 6:00 PM ET on Tuesday, January 12, 2016.” Reverse Auction (Auction 1001) Workshop, Applying to Participate—FCC Form 177 at 45 (Dec. 8, 2015) (emphasis in original) (“Reverse Auction Workshop”), *available at* wireless.fcc.gov/auctions/incentive-auctions/Reverse_Auction_Workshop_Slides.pdf.

The FCC imposed these deadlines in order to ensure the timely processing of reverse auction applications prior to the start of the auction. As the Commission has explained, the time between the application deadline (January 12, 2016) and

the start of the auction (March 29, 2016) is needed so that Commission staff can “process all timely submitted applications to determine whether the application is complete as to each station the applicant identified to relinquish spectrum usage rights,” identify any necessary corrections, inform applicants about the “deadline for resubmitting corrected applications [and] ... any potential FCC liabilities with respect to a particular station that cannot be resolved before the reverse auction.” FCC Public Notice, *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, at ¶ 61 (Oct. 15, 2015). As the Commission put it, this time is needed “to address concerns regarding information provided by applicants, and ... to assure their eligibility to participate, without unduly limiting participation by qualified parties.” A-397.

Notably, the Commission has prohibited applicants from making “major changes to [their] pre-auction application” after the application deadline, such as “changes in ownership of the applicant or the licensee that would constitute an assignment or transfer of control,” concluding that “[p]recluding such changes in ownership after the submission of the application would ensure that all of the relevant parties are clearly identified for the purposes of applying the reverse auction rules, including the rule prohibiting certain communications” A-089, A-397. Indeed, the FCC rejected a proposal “that any otherwise-eligible broadcast television licensee who initially opted not to participate in the reverse auction

ought to be able to enter the ‘ongoing’ reverse auction without first applying to participate.” A-398. In doing so, the FCC explained that “the application process is critical to determining whether a broadcast television licensee is both technically and legally qualified to participate in the reverse auction. Allowing broadcast television licensees who have not applied to participate in the reverse auction, and thus have not been vetted by Commission staff, to enter the ‘ongoing’ auction presents an unwarranted risk that ineligible parties might bid in the auction and would add unnecessary complexity to the reverse auction design.” *Id.*

Underscoring the importance of the application deadline, the Commission has repeatedly emphasized that “**Late applications will not be accepted.**” FCC Public Notice, *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, at ¶ 59 (Oct. 15, 2015) (emphasis in original); see also Reverse Auction Workshop at 45 (same).

In seeking resolution from this Court by January 4, 2016, Petitioners have taken the FCC at its word—“**Late applications will not be accepted**” because the application deadline “is critical to determining whether a broadcast television licensee is both technically and legally qualified to participate in the reverse auction.” The FCC should not be permitted to delay ruling on the Reconsideration Petition by disclaiming its prior deadlines and reasoning.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus ordering the FCC to rule on Petitioners' pending petition for reconsideration of the FCC's Second Order on Reconsideration by Monday, January 4, 2016.

Dated: December 29, 2015

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:

(i) complies with the page limitations of Fed. R. App. P. 21(d), excluding the parts of the brief exempted by Fed. R. App. P. 21(a)(2)(C); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December 2015, copies of the foregoing was filed with the Court's CM/ECF filing system and served electronically on all parties.

/s/ Thomas McCarthy

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