

No. 16-1051

**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.

RENEWED EMERGENCY PETITION FOR WRIT OF MANDAMUS

(RULING REQUESTED BY FEBRUARY 18, 2016)

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Dated: February 11, 2016

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 18(a)(4), Petitioners certify as follows:

A. Parties

The petitioners appearing before this Court are The Videohouse, Inc.; Fifth Street Enterprises, LLC; and WMTM, LLC. The FCC is the only respondent in this Court. There are no other parties or *amici curiae* at this time.

B. Rulings Under Review

Petitioners challenge the FCC's failure to rule on Petitioners' petition for reconsideration of the FCC's Second Order on Reconsideration, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC 14-50 (rel. June 19, 2015) ("*Second Order on Reconsideration*"), in which the FCC denied Petitioners (1) the opportunity to participate in the reverse auction phase of an upcoming incentive auction for broadcast spectrum; and (2) discretionary protection in the spectrum repacking process.

C. Related Cases

This case is related to *In re The Videohouse, Inc.*, No. 15-1486. Petitioners initiated that action on December 22, 2015 when they filed a petition for mandamus in this Court, seeking an order requiring the FCC to rule on Petitioners' petition for reconsideration of the *Second Order on Reconsideration*. See Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-

1486 (D.C. Cir. Filed Dec. 22, 2015) (“First Mandamus Petition”). The Court denied the First Mandamus Petition “without prejudice to refile in the event the [FCC] fails to take prompt action on the pending petition for reconsideration.” Order, *In re The Videohouse, Inc.*, No. 15-1486 (Dec. 30, 2015). Relying on “the agency’s representations,” the Court emphasized that it expected the Commission to “rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.” *Id.*

This Court has previously considered a case concerning the same FCC proceeding in *National Association of Broadcasters v. FCC*, 789 F.3d 165 (D.C. Cir. 2015). However, that case considered issues unrelated to this matter.

Counsel is aware of additional cases before this Court challenging the *Second Order on Reconsideration*, but these cases do not appear to be related to this matter. See *Mako Communications, LLC v. FCC*; No. 15-1264; *Beach TV Properties, Inc. v. FCC, et al*, No. 15-1280; *Free Access & Broadcast Tele., et al v. FCC, et al*, No. 15-1346.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 18(a)(4) and 26.1, Petitioners state as follows:

Petitioner The Videohouse, Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in its stock.

Petitioner Fifth Street, LLC's parent companies are Local Media TV of Pittsburgh, LLC and Foxwood Partners LLC. No publicly held company has a 10% of greater ownership interest in its stock. The parent company of Local Media TV of Pittsburgh, LLC is Local Media TV Holdings, LLC, the members of which are Loop Partners V, Inc., Columbia Capital Equity Partners V (QP), L.P., Telecom Local Media, LLC, and Loop Media, LLC. The Shareholders of Loop Partners V, Inc. are Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. The general partner of Columbia Capital Equity Partners V (QP), L.P. Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. is Columbia Capital Equity Partners V, L.P. The general partner of Columbia Capital Equity Partners V, L.P. is Columbia Capital V, LLC and the limited partner is Columbia Capital, L.P.

Petitioner WMTM, LLC's parent company is Local Media TV Holdings, LLC. No publicly held company has a 10% of greater ownership interest in its

stock. The members of Local Media TV Holdings, LLC are Loop Partners V, Inc., Columbia Capital Equity Partners V (QP), L.P., Telecom Local Media, LLC, and Loop Media, LLC. The Shareholders of Loop Partners V, Inc. are Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. The general partner of Columbia Capital Equity Partners V (QP), L.P. Columbia Capital Equity Partners V (NON-US), L.P., and Columbia Capital Equity Partners V (Co-Invest), L.P. is Columbia Capital Equity Partners V, L.P. The general partner of Columbia Capital Equity Partners V, L.P. is Columbia Capital V, LLC and the limited partner is Columbia Capital, L.P.

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REQUEST FOR EXPEDITION

Pursuant to Rule 27(f), Petitioners request the Court's expedited action on this Petition. As set forth below, Petitioners will suffer irreparable injury if the FCC does not rule on the pending petition for reconsideration on or before Friday, February 19, 2016. After that time, Petitioners may be unable to obtain "judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016." Order, *In re The Videohouse, Inc.*, No. 15-1486 (Dec. 30, 2015).

In opposing the First Mandamus Petition, the FCC assured the Court that mandamus relief would be unnecessary to preserve Petitioners' rights of judicial review. That is because the FCC promised to "dispose of the reconsideration petition well before the incentive auction is scheduled to start" on March 29, 2016. Opp. to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-1486, at 14 (filed Dec. 28, 2015). Indeed, the FCC emphasized that, "[if] the Court rules before March 29 that petitioners are eligible to participate in the reverse auction, 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." *Id.* at 12.

Expressly relying on "the agency's representations," the Court denied the First Mandamus Petition "without prejudice to refiling in the event the [FCC] fails

to take prompt action on the pending petition for reconsideration.” Order, *In re The Videohouse, Inc.*, No. 15-1486 (Dec. 30, 2015). Specifically, the Court advised the parties that it “expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.” *Id.*

For there to be “an opportunity for meaningful relief,” of course, the FCC must rule sufficiently in advance of March 29, 2009 for the petition for review to be resolved on the merits through expedited briefing. As a result, time is running out. As set forth below, a ruling thus is needed by February 19, 2016 in order to afford the parties 7 days for their respective principal briefs, to afford Petitioners 3 days for their reply brief, and to afford the Court three weeks to resolve the case before the March 29, 2016 deadline:

FCC order disposing of reconsideration petition:	February 19, 2016
Brief of Petitioners:	February 26, 2016
Brief of Respondent FCC:	March 4, 2016
Reply Brief of Petitioners:	March 7, 2016. ¹

¹ Petitioners would forgo argument if doing so would facilitate expeditious resolution of the case. *See* D.C. Cir. Rule 34(j)(1).

Accordingly, a decision from this Court is needed by **Thursday, February 18, 2016**, ordering the FCC to rule on the petition for reconsideration by **Friday, February 19, 2016**. Petitioners respectfully request an expedited briefing schedule to accommodate these deadlines.

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GLOSSARY

CBPA	Community Broadcasters Protection Act of 1999
Commission or FCC	Federal Communications Commission
FCC Opposition to Mandamus	Opp. to Emergency Petition for Writ of Mandamus, <i>In re The Videohouse, Inc.</i> , No. 15-1486 (filed Dec. 28, 2015)
First Mandamus Petition	Emergency Petition for Writ of Mandamus, <i>In re The Videohouse, Inc.</i> , No. 15-1486 (D.C. Cir. Filed Dec. 22, 2015)
LPTV	Low-Power Television
Order	Report and Order, <i>In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions</i> , 29 FCC Rcd. 6567 (2014)
Second Order on Reconsideration	Second Order on Reconsideration, <i>Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions</i> , FCC 14-50 (rel. June 19, 2015)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition under the Hobbs Act, 28 U.S.C. § 2342, and the Communications Act, 47 U.S.C. § 402, which provide the Court with jurisdiction over Federal Communications Commission (“FCC” or “Commission”) actions. This Court has jurisdiction to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), which authorizes the Court to issue all writs necessary or appropriate in aid of its jurisdiction. *See, e.g., In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004).

STATEMENT OF RELIEF SOUGHT

Petitioners respectfully request a writ of mandamus ordering the FCC to rule on Petitioners’ petition for reconsideration of the FCC’s Second Order on Reconsideration, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC 14-50 (rel. June 19, 2015) (“Second Order on Reconsideration”) by Friday, February 19, 2016.

STATEMENT OF THE ISSUES

Whether Petitioners are entitled to a writ of mandamus ordering the FCC to rule on Petitioners’ petition for reconsideration of the FCC’s Second Order on Reconsideration by Friday, February 19, 2016.

STATEMENT OF THE FACTS

Because this is a renewed petition for mandamus, and in the interest of brevity, Petitioners respectfully refer the Court to the First Mandamus Petition (and

its accompanying Appendix) and otherwise dispense with a lengthy recitation of the statutory background of the Community Broadcasters Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999), and the Spectrum Act, Title VI of the Middle Class Tax Relief and Job Creation Act, Pub. L. No. 112-96, 126 Stat. 156 (2012), as well as the regulatory background of the rapidly approaching incentive auction. *See generally* First Mandamus Petition at 2-18; Appendix, *In re The Videohouse, Inc.*, No. 15-1486 (filed Dec. 22, 2015). The facts most pertinent to this mandamus petition are as follows:

The Spectrum Act authorizes the FCC to conduct an incentive auction to “encourage” television broadcasters “to relinquish some or all of [their] licensed spectrum usage rights” for the purpose of reallocating broadcast television spectrum for other uses (such as mobile broadband service). 47 U.S.C. § 309(j)(8)(G)(i). This incentive auction has three phases: (1) a “reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights,” 47 U.S.C. § 1452(a)(1); (2) the repacking of broadcast television spectrum in order to move broadcasters from a portion of their spectrum to make it available for new uses, *id.* § 1452(b); and (3) a “forward auction” to assign licenses for use of the reallocated spectrum, *id.* § 1452(c)(1). The reverse auction phase will commence on March 29, 2016.

The FCC has barred Petitioners from participating in the reverse auction and denied them discretionary protection in the repacking process. *See* Report and Order, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567, at ¶¶ 233-34 (2014) (“*Order*”); *Second Order on Reconsideration* at ¶¶ 53-61. As a consequence, Petitioners face the prospect of losing out on “a once-in-a-lifetime opportunity for broadcasters,” *Order* at ¶ 3, in which millions of dollars are at stake, *see* *Incentive Auction Opportunities for Broadcasters: Prepared for the FCC by Greenhill 25* (Feb. 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0206/DOC-331911A2.pdf (showing proposed opening bid prices for the Pittsburgh and Washington, D.C. markets). Petitioners also face the loss of their spectrum rights in the repacking process, along with hundreds of thousands of dollars they spent building out their stations and transitioning to in-core digital channels in compliance with FCC regulations. *See* *Reconsideration Petition* at Exhibit 1; *Second Order on Reconsideration* at ¶ 51 n.177.

While denying Petitioners this relief, the FCC afforded auction eligibility and repacking protection to those stations that “hold a Class A license [on June 19, 2015] and that had an application for a Class A construction permit pending or granted as of February 22, 2012.” *Second Order on Reconsideration* at ¶ 53. The FCC gave two reasons for affording auction eligibility and repacking protection to

these stations but not to Petitioners—one procedural and one substantive. The FCC’s asserted procedural ground was its claim that Petitioners had not made their requests for relief specific enough. *See* Second Order on Reconsideration at ¶ 59; Order Denying Stay at ¶ 9. The FCC’s substantive reason was that affording auction eligibility and repacking protection to Petitioners would require it to protect the other 100 stations in this category, which “would increase the number of constraints on the repacking process, thereby limiting [the FCC’s] repacking flexibility.” Second Order on Reconsideration at ¶ 54; Report and Order, *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd. 6567, 6671, ¶ 234 (2014).

The FCC has since negated or abandoned both grounds for denying relief to Petitioners. Letter from Thomas R. McCarthy, Counsel for Petitioners, to Marlene Dortch, FCC, at 1-3 (Dec. 23, 2015), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=60001362297> (quoting Order Denying Stay Motion, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, at ¶¶ 12, 13 (Dec. 18, 2015)). Worse still, the FCC has granted two similarly situated stations—KHTV-CD and Latina Broadcasters of Daytona Beach, LLC—auction eligibility and protection in the repacking process. Each is a formerly out-of-core Class A-Eligible LPTV station that, like Petitioners, did not file an application for a license to cover its new in-core station until *after*

February 22, 2012. *Order* at ¶ 235; Application For Class A Television Broadcast Station Construction Permit Or License, *available at* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/app_list.pl?Facility_id=41375. Accordingly, of the 421 Class A stations in existence, only *four* are presently barred from participating in the auction and denied protection in the repacking process: Videohouse, Abacus, WMTM, and KMYA. Letter from Thomas R. McCarthy to Marlene Dortch, FCC, No. 12-268 (Jan. 23, 2016).

On September 2, 2015, Videohouse, Abacus, WMTM, and KMYA filed a petition for reconsideration of the Second Order on Reconsideration. *See* Petition for Reconsideration of The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC, GN Docket No. 12-268 (Sept. 2, 2015) (“Reconsideration Petition”). They argued, among other things, that the FCC’s treatment of out-of-core Class A-eligible stations was based on inaccurate factual premises; that the FCC had arbitrarily treated similarly situated parties differently; and that the FCC’s actions were procedurally improper. *Id.* at 3-18.

On December 11, 2015—in order to protect their rights in the face of a then-approaching January 12, 2016 deadline for applications to participate in the reverse auction—Petitioners sought an emergency stay from the FCC. On December 18, 2015, the FCC denied the motion, primarily on the ground that Petitioners are unlikely to succeed on the merits of the Reconsideration Petition. Order Denying

Stay Motion, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, at ¶¶ 8-13 (Dec. 18, 2015) (“Stay Order”).

On December 22, 2015, Petitioners filed the First Mandamus Petition. Petitioners asked the Court to order the FCC to rule on the pending reconsideration petition by Monday, January 4, 2016 so that they could seek emergency judicial relief before the January 12, 2016 application deadline. In opposing mandamus, the FCC argued, among other things, that “expiration of the ... application window does not foreclose judicial relief (if warranted), particularly since the reverse auction itself is not scheduled to commence until March 29, 2016.” Opp. to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-1486, at 2 (filed Dec. 28, 2015) (“FCC Mandamus Opposition”). The FCC further informed the Court that it had circulated a draft order on December 23, 2015 that would “dispose of the reconsideration petition well before the incentive auction is scheduled to start.” *Id.* at 14. Indeed, the FCC emphasized that, “[if] the Court rules before March 29 that petitioners are eligible to participate in the reverse auction, 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.” *Id.* at 12.

On December 30, 2015, this Court denied mandamus relief “without prejudice to refiling in the event the [FCC] fails to take prompt action on the pending petition for reconsideration.” Order, *In re The Videohouse, Inc.*, No. 15-1486, at 1 (Dec. 30, 2015) (*see* Addendum to Petition). The Court added that, “[b]ased on the agency’s representations ... the Court expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.” *Id.*

Since then, Petitioners have repeatedly urged the FCC to keep its word. *See* Letter from Thomas R. McCarthy to Marlene Dortch, FCC, No. 12-268, at 2 (Jan. 7, 2016); Letter from Thomas R. McCarthy to Marlene Dortch, FCC, No. 12-268, at 3 (Jan. 23, 2016); Letter from Thomas R. McCarthy to Marlene Dortch, FCC, No. 12-268, at 6 (Jan. 25, 2016).² On February 4, 2016, Petitioners advised the FCC’s Office of General Counsel of their intent “to refile a petition for mandamus with [this Court] if the Commission does not rule on the [Reconsideration] Petition

² *See* FCC Electronic Comment Filing System (ECFS), *available at* http://apps.fcc.gov/ecfs/comment_search_solr/doSearch?proceeding=12-268&applicant=&lawfirm=&author=&disseminated.minDate=&disseminated.maxDate=&received.minDate=&received.maxDate=&dateCommentPeriod.minDate=&dateCommentPeriod.maxDate=&dateReplyComment.minDate=&dateReplyComment.maxDate=&address.city=&address.state.stateCd=&address.zip=&daNumber=&fileNumber=&bureauIdentificationNumber=&reportNumber=&submissionType=&__checkbox_exParte=true.

by 5:00 pm on Monday, February 8, 2016.” Letter from Thomas R. McCarthy to Jonathan Sallet, FCC (Feb. 4, 2016).

As of February 10, the FCC had not acted on the reconsideration petition despite its assurances that mandamus relief would not be necessary to preserve Petitioners’ rights and notwithstanding the assurances of timely action it gave this Court nearly two months ago. Indeed, that the FCC was able to address the merits of the Reconsideration Petition in adjudicating the stay motion within seven days, while refusing to resolve the Reconsideration Petition *for another 55 days*, suggests the FCC hopes to run out the clock.

Petitioners were thus left with no choice but to renew their request for mandamus relief. After February 19, 2016, Petitioners will be foreclosed from participating in the reverse auction and thus can never “return some or all of their broadcast spectrum usage rights in exchange for incentive payments.” Order ¶ 1. In addition, Petitioners will forever lose their existing spectrum rights with protection in the repacking process, as they are likely to be displaced with little chance of securing a replacement channel following the post-auction repack.

REASONS WHY THE WRIT SHOULD ISSUE

Mandamus relief is available when three conditions are met: “(1) the mandamus petitioner must have ‘no other adequate means to attain the relief he desires’; (2) the mandamus petitioner must show that his right to the issuance of

the writ is ‘clear and indisputable’; and (3) the court, ‘in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.’” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) (quoting *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004)). This Court has not hesitated to grant mandamus when an agency’s failure to act will cause irreparably injury. It should do so here.

I. MANDAMUS RELIEF IS THE ONLY ADEQUATE REMEDY.

Petitioners have diligently exhausted all alternative avenues for relief, and mandamus is the only way to protect their rights. On September 2, 2015, Petitioners filed the Reconsideration Petition. On December 11, 2015, as the deadline for applying to participate in the reverse auction was rapidly approaching, Petitioners sought an emergency stay from the FCC. On December 18, 2015, the FCC denied that motion, concluding that Petitioners were unlikely to prevail on the merits. On December 22, 2015, because the FCC had not ruled on the petition for reconsideration, Petitioners filed the First Mandamus Petition.

In response, the FCC informed the Court that it had circulated a draft order on December 23, 2015 resolving the Reconsideration Petition and assured the Court it would “dispose of the reconsideration petition well before the incentive auction is scheduled to start.” Opp. to Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-1486, at 14 (filed Dec. 28, 2015). If “the Court

rules before March 29 that petitioners are eligible to participate in the reverse auction,” the FCC emphasized, it “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.” *Id.* at 12.

Notwithstanding Petitioners’ expressed fears that the FCC’s behavior “could only be attributable to unreasonable delay designed to thwart Petitioners’ ability to expedite a petition for review challenging final agency action,” Reply in Support of Emergency Petition for Writ of Mandamus, *In re The Videohouse, Inc.*, No. 15-1486, at 3 (filed Dec. 29, 2015), the Court took the FCC at its word. Order, *In re The Videohouse, Inc.*, No. 15-1486 (Dec. 30, 2015). “Based on the agency’s representations,” the Court denied the First Mandamus Petition without prejudice and advised the parties that it “expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016.” *Id.* The Court invited Petitioners to renew their request for mandamus relief “in the event the [FCC] fails to take prompt action on the pending reconsideration petition.” *Id.*

It has now been more than seven weeks since the FCC circulated a draft order. The window for judicial review of that order “before March 29,” FCC Mandamus Opposition at 12, is closing quickly. Put simply, the FCC’s assurances

of pre-March 29 judicial review and resolution of any order disposing of the pending reconsideration petition are meaningless if it does not rule by February 19, 2016. *See supra* v-vii. Without a ruling by that date, the “opportunity for meaningful relief before the incentive auction commences on March 29, 2016” will be lost. Order, *In re The Videohouse, Inc.*, No. 15-1486 (Dec. 30, 2015). Mandamus relief is necessary to protect Petitioners’ rights.

II. PETITIONERS’ RIGHT TO ISSUANCE OF THE WRIT IS CLEAR AND INDISPUTABLE.

Petitioners’ right to the writ they seek is also “clear and indisputable.” This is especially so given the FCC’s representations to this Court that it would ensure that Petitioners would be able to secure judicial review in advance of the March 29 deadline. FCC Mandamus Opposition at 12, 14. Although “[m]andamus is an extraordinary remedy reserved for extraordinary circumstances, ... [a]n administrative agency’s unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citation omitted). The Court thus “will interfere with the normal progression of agency proceedings to correct ‘transparent violations of a clear duty to act,’” *id.* (quoting *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000)). “It is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action.” *TRAC v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984).

In considering whether to intervene, the Court “must satisfy [itself] that the agency has a duty to act and that it has ‘unreasonably delayed’ in discharging that duty.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 418. The Court typically evaluates whether there has been unreasonable delay, in turn, by examining the *TRAC* factors: (1) “the time agencies take to make decisions must be governed by a ‘rule of reason’; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’” *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *TRAC*, 750 F.2d at 80). Given the posture of this proceeding, where the FCC avoided a mandamus remedy only by assuring the Court that it would act promptly on the Reconsideration Petition, it is clear that mandamus relief is warranted.

First, there is no doubt that the FCC has a duty to act on the Reconsideration Petition. Under the FCC's rules, "[a]ny interested person may petition for reconsideration of a final action in a [rulemaking] proceeding." 47 C.F.R. § 1.429(a). "Where the action was taken by the Commission, the petition *will be acted on* by the Commission." *Id.* (emphasis added). An agency is bound by its regulations so long as they remain operative. *See United States v. Nixon*, 418 U.S. 683, 696 (1974).

Second, if the FCC does not rule on the Reconsideration Petition until after February 19, 2016, the FCC will have "unreasonably delayed" in discharging its duty. *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)). Indeed, the FCC's delay is already unreasonable, given that the Reconsideration Petition has been pending for over five months, the FCC concluded nearly two months ago that it is unlikely to succeed, and a draft order resolving it circulated over seven weeks ago. At this point, the only reason for not resolving the Reconsideration Petition would be to thwart judicial review. Such a refusal to act is the epitome of unreasonable delay.

But what makes the right to relief especially clear here is "the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80; *see also Cutler*

v. Hayes, 818 F.2d 879, 898 (D.C. Cir. 1987) (“[P]erhaps most critically, the court must examine the consequences of the agency’s delay.”). “The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from avoidable delay.” *Id.* “Economic harm is clearly an important consideration and will, in some cases, justify court intervention.” *Id.* “Lack of alternative means of eliminating or reducing the hazard necessarily adds to unreasonableness of a delay.” *Id.*

As the FCC has made clear, “[t]he auction presents a once-in-a-lifetime opportunity for broadcasters.” *Order* ¶ 3. The reverse auction is a “unique financial opportunity” that will allow broadcasters to “to return some or all of their broadcast spectrum usage rights in exchange for incentive payments.” *Id.* ¶ 1. Millions of dollars are at stake for Petitioners. This is not an economic injury that can be remedied after-the-fact. If Petitioners are unable to participate in the reverse auction, they will forever lose this unique opportunity to sell their spectrum rights and participate in this historic auction. The FCC claims that Petitioners’ harm is speculative because it is not clear that their stations will be displaced following the auction and repacking process. *See Stay Order* at ¶ 16. But this claim rings hollow given the FCC’s position that stations without protection may be stripped of their spectrum licenses without any compensation or other relief. *Order* at ¶¶ 232-235; *id.* at ¶ 234 (conceding that Petitioners would lose substantial investments if not

afforded protection). Without issuance of the writ, then, Petitioners will forever lose their ability to protect their existing spectrum rights, along with hundreds of thousands of dollars they previously spent building out their stations and transitioning to an in-core digital channel in compliance with FCC regulations. *See supra* 3.

At the same time, the “nature and extent of the interests prejudiced by delay” are minimal to nonexistent. *TRAC*, 750 F.2d at 80. Other interested parties will not suffer if the mandamus petition is granted. Petitioners do not seek to stop the reverse auction or the forward auction. On the contrary, Petitioners seek to participate in the auction on the same terms as everyone else. Petitioners seek only a timely ruling on the Reconsideration Petition so that they may, if necessary, preserve their rights through judicial review. This request for relief will impose few, if any, burdens on interested parties. Indeed, given that the FCC was able to resolve the stay motion within seven days primarily based upon its assessment of the merits, it should have resolved the Reconsideration Petition by now. There is no legitimate reason why the FCC has not done so and cannot do so by February 19, 2016—a full two months later.

Moreover, issuing the writ will benefit the public interest by preserving the ability of Petitioners to participate in the reverse auction. Barring Petitioners from participating in the reverse auction and denying them protection will not further the

goals of Congress and the FCC. The reverse auction is designed to “facilitat[e] the voluntary return of spectrum usage rights” so that the FCC can “recover a portion of ultra-high frequency (‘UHF’) spectrum for a ‘forward auction’ of new, flexible-use licenses suitable for providing mobile broadband services.” *Order* ¶ 1. By encouraging “[p]ayments to broadcasters that participate in the reverse auction,” the FCC can “strengthen broadcasting by funding new content, services, and delivery mechanisms.” *Id.* And by “making more spectrum available for mobile broadband use, the incentive auction will benefit consumers by easing congestion on the Nation’s airwaves, expediting the development of new, more robust wireless services and applications, and spurring job creation and economic growth.” *Id.* All these goals would be furthered by allowing Petitioners to participate in the reverse auction and granting them protection in the repacking process. The public interest clearly supports the issuance of the writ.

Finally, there will be little, if any, “effect of expediting delayed action on agency activities of a higher or competing priority.” *TRAC*, 750 F.2d at 80. Petitioners do not ask for the FCC to adopt, for example, a new rule. The FCC is already intimately familiar with this topic. All the agency needs to do is “grant the petition for reconsideration in whole or in part or ... deny or dismiss the petition” and then issue an order “contain[ing] a concise statement of the reasons for the action taken.” 47 C.F.R. § 1.429(i). A draft order doing just that has been on

circulation at the FCC for seven weeks. There is no legitimate reason why the FCC cannot issue a ruling on the Reconsideration Petition right away without impacting any of their other priorities.

III. ISSUANCE OF THE WRIT IS APPROPRIATE UNDER THE CIRCUMSTANCES.

Last, the issuance of the writ is “appropriate under the circumstances.” As explained, Petitioners will be irreparably harmed unless this Court grants mandamus relief. If the FCC waits until after February 19, 2016, to rule on the Reconsideration Petition, Petitioners will have no ability to obtain judicial review.

Additionally, neither interested parties nor the agency will suffer by issuance of a writ ordering the FCC to rule on the Reconsideration Petition. Moreover, the general public will benefit because issuing the writ would ensure that the Spectrum Act’s goals of transferring spectrum from broadcast stations to wireless carriers are not undermined by improperly excluding broadcast stations from the auction. The FCC should not be permitted to run out the clock. Petitioners are entitled to a ruling on the Reconsideration Petition, and they are entitled to meaningful judicial review of that ruling. This is precisely the type of urgent situation in which mandamus relief is needed.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus ordering the FCC to rule on Petitioners' Reconsideration Petition by Friday, February 19, 2016.

Dated: February 11, 2016

Respectfully submitted,

By: /s/ Thomas R. McCarthy

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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.

/s/ Thomas R. McCarthy

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February 2016, copies of the foregoing Petition for a Writ of Mandamus were served on the following parties in the manner indicated:

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ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1486**September Term, 2015****FCC-14-50****Filed On:** December 30, 2015

In re: The Videohouse, Inc., et al.,

Petitioners

BEFORE: Kavanaugh, Pillard, and Wilkins, Circuit Judges**ORDER**

Upon consideration of the petition for a writ of mandamus, the opposition thereto, and the reply, it is

ORDERED that the petition be denied without prejudice to refiling in the event the Federal Communications Commission fails to take prompt action on the pending petition for reconsideration. Under the circumstances presented here, petitioners have not shown the agency's delay to be so unreasonable as to warrant the extraordinary remedy of mandamus. See In re: Monroe Commc'ns Corp., 840 F.2d 942, 945 (D.C. Cir. 1988); Telecommunications Research and Action Ctr. v. FCC, F.2d 70, 80 (D.C. Cir. 1984). Based on the agency's representations, see Opposition at 2, 14, the Court expects the Commission to rule on the pending reconsideration petition promptly, so as to allow petitioners to seek judicial review with an opportunity for meaningful relief before the incentive auction commences on March 29, 2016. See FCC 15-78 Public Notice, 30 FCC Rcd 8975 (2015).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert J. Cavello
Deputy Clerk