

No. 16-1060

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

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

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

EMERGENCY MOTION FOR STAY PENDING APPEAL

(RULING REQUESTED BY MARCH 11, 2016)

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Dated: March 3, 2016

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GLOSSARY

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|------------------------------------|---|
| Abacus 2014 Petition | Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Sept. 15, 2014) |
| App. | Appendix |
| CBPA | Community Broadcasters Protection Act of 1999 |
| Class A Report & Order | Report & Order, <i>Establishment of a Class A Television Service</i> , 15 FCC Rcd. 6355 (Apr. 4, 2000) |
| FCC | Federal Communications Commission |
| LPTV | Low-Power Television |
| NPRM | Notice of Proposed Rulemaking, GN Docket No. 12-268 (2012) |
| Order Denying Stay | Order, GN Docket No. 12-268 (Dec. 18, 2015) |
| Petitioners' Ex Parte Letter | Letter from Thomas McCarthy to Marlene H. Dortch, FCC (Jan. 25, 2016) |
| Reconsideration Order | Order on Reconsideration, GN Docket No. 12-268 (Feb. 12, 2016) |
| Reconsideration Petition | Petition for Reconsideration of The Videohouse, Inc., Abacus Television, WMTM, LLC, and KMYA, LLC, GN Docket No. 12-268 (Sept. 2, 2015) |
| Report & Order | Report and Order, GN Docket No. 12-268 (June 2, 2014) |
| Second Order on Reconsideration | Second Order on Reconsideration, GN Docket No. 12-268 (June 19, 2015) |
| Videohouse 2014 Petition | Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (filed Sept. 15, 2014) |

Petitioner The Videohouse, Inc. (“Videohouse”) respectfully requests, pursuant to Federal Rule of Appellate Procedure 18(a) and D.C. Circuit Rule 18(a), that this Court stay the upcoming broadcast television spectrum incentive auction (“Reverse Auction”) pending resolution of this case on the merits. Because the Court previously ordered expedited consideration of this case, such a stay would be of limited duration. On February 29, 2016, Videohouse moved the Federal Communications Commission (“FCC” or “Commission”) for the same relief sought here and informed the FCC that it would consider this motion denied if the FCC were to take no action by March 2, 2016. The FCC took no action by then.

Because the Reverse Auction will begin on March 29, 2016, Videohouse requests that the Court rule on this Motion by March 11, 2016 so that Videohouse can preserve its ability to seek further relief. Moreover, this Motion should be considered together with the stay motion filed by Latina Broadcasters of Daytona Beach, LLC (“Latina”) in Case No. 16-1069, and that Motion seeks a ruling by March 11, 2016. *See infra* 12.¹

INTRODUCTION

The Reverse Auction—“a once-in-a-lifetime opportunity for broadcasters,” Order on Reconsideration, GN Docket No. 12-268, ¶ 3 (Feb. 12, 2016)

¹ Petitioners have notified the Clerk of the Court and opposing counsel of this motion by telephone. Opposing counsel has authorized Petitioners to state that the FCC and the United States oppose the motion.

(“Reconsideration Order”)—will begin on March 29, 2016. In a series of orders, the FCC has denied auction eligibility and discretionary protection in the spectrum repacking process to The Videohouse, Inc.; Fifth Street Enterprises, LLC; and WMTM, LLC (“Petitioners”). *See id.*; Second Order on Reconsideration, GN Docket No. 12-268 (June 19, 2015) (“Second Order on Reconsideration”); Report & Order, GN Docket No. 12-268 (June 2, 2014) (“Report & Order”).

Because the auction start date is rapidly approaching, Videohouse is compelled to file this emergency motion for a stay pending resolution of this case on the merits. Such a stay requires satisfaction of a four-part test: (1) likelihood of success on the merits; (2) whether the movant will suffer irreparable injury in the absence of a stay; (3) whether the stay will cause substantial harm to other parties; and (4) whether the stay is in the public interest. *See Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Because the Court already has granted expedited review of this case, Petitioners necessarily have “demonstrate[d] that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge.” D.C. Cir. Handbook 33. It thus is necessary to show here only that a stay is in the public interest and will not cause harm to others. As explained below, a relatively brief stay is warranted.

BACKGROUND

The Community Broadcasters Protection Act of 1999. Congress passed the Community Broadcasters Protection Act of 1999 (“CBPA”), Pub. L. No. 106-113, § 5008, 113 Stat. 1501, 1501A-594, to preserve low-power television (“LPTV”) stations serving small communities. While LPTV stations benefited the public by “providing broadcasting to their communities that would not otherwise be available,” they faced an “uncertain future,” *id.*, because they could “be displaced by full-service TV stations that seek to expand their own service area, or by new full-service stations seeking to enter the same market.” Report & Order, Establishment of a Class A Television Service, 15 FCC Rcd 6355 ¶ 4 (Apr. 4, 2000). Congress also found that converting from analog to digital television would have “significant adverse effects on many [LPTV] stations” as “few, if any, [had] available replacement [digital] channels.” *Id.* To address these concerns, the CBPA granted LPTV stations “primary” access to spectrum and ordered the FCC to issue regulations establishing a “Class A television license,” *id.* ¶ 5, for those LPTV stations operating in the “core spectrum,” *i.e.*, channels 2 through 51, *id.* ¶ 96 (citing 47 U.S.C. § 336(f)(6)(A)). But the CBPA also ordered the FCC to grant Class A status to those stations operating “out of core” if the FCC later assigned them a channel within the core spectrum. *Id.*

On April 4, 2000, the FCC ruled that LPTV stations on channels 52-59 would be afforded “the opportunity to obtain Class A status” if they could “locate a replacement channel within the core spectrum.” *Id.* ¶ 100. If an LPTV station located an in-core channel, the FCC required the station “to file a Class A application simultaneously with its application for modification of license to move to the in-core channel.” *Id.* ¶ 103. Importantly, because the CBPA “does not impose a time limit on the filing of such applications,” the FCC explained that it could not “impose any time limit on the filing of a Class A application by LPTV licensees operating on channels outside the core.” *Id.*

Shortly after the CBPA outlined the requirements for Class A eligibility, Petitioners each certified their compliance therewith. Brief for Petitioners, *The Videohouse, Inc. v. FCC*, No. 16-1060, at 10, 13, 14-15 (Feb. 25, 2016) (“Pet. Br.”). Although the digital TV transition delayed many LPTV stations from attempting to move “in core” and obtain Class A status, Petitioners each located an in-core station and began the process to obtain Class A status no later than 2009. *Id.* at 11, 14, 16. Before 2011, LPTV stations that wished to construct digital facilities for their newly acquired in-core channels and convert to Class A status could file for a LPTV digital construction permit and then file Form 302-CA to convert that LPTV station to a Class A station immediately after obtaining the construction permit. But in 2011, without public notice, FCC staff began

instructing LPTV stations that the only way to accomplish such a conversion was to obtain a digital construction permit for a LPTV station, build out the station under that LPTV construction permit, and obtain a license to cover that LPTV station, all before filing Form 302-CA to convert the LPTV station to Class A. Report & Order at ¶ 235 n.730.

The Spectrum Act of 2012. The Spectrum Act, which was enacted on February 22, 2012, authorized the FCC to hold an incentive auction “to encourage broadcasters to relinquish their spectrum rights in exchange for incentive payments.” *NAB v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015). This auction will have three phases: (1) a “reverse auction” to incentivize broadcast television licensees to sell their spectrum rights back to the FCC; (2) a “reorganization” or “repacking” of broadcast TV spectrum to reassign channels and reallocate portions of the spectrum; and (3) a “forward auction” to assign new licenses within the newly reorganized broadcast bands. *See id.* at 168-69. Importantly, the Spectrum Act required the FCC to provide “protection” to certain stations in the repacking process by “mak[ing] all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee.” Spectrum Act § 6403(b)(2); 47 U.S.C. § 1452(b)(2).

FCC Proceedings. On June 2, 2014, the FCC adopted the Report & Order, outlining rules for the auction. 29 FCC Rcd 6567. The order “limit[ed] reverse

auction participation to the licensees of full power and Class A television stations that [it would] protect in the repacking process.” *Id.* ¶ 350. The FCC concluded that it was obligated to protect only stations that were (1) licensed as of February 22, 2012 or (2) for which an application for a “license to cover” (*i.e.*, license to broadcast) was on file by that date. *Id.* ¶ 184. The FCC found that the Spectrum Act authorized it to afford repacking protection (and thus auction eligibility) on a discretionary basis to other “facilities that were not licensed or the subject of a pending license to cover application as of February 22, 2012.” *Id.* ¶ 194.

The FCC denied protection to stations, like Petitioners’, that were “eligible for a Class A license but that did not file an application for such license until after February 22, 2012.” *Id.* ¶ 233. According to the FCC, “[p]rotecting such stations would encumber additional spectrum by requiring protection of approximately 100 stations,” which would “increase the number of constraints on the repacking process and limit[] our flexibility.” *Id.* At the same time, the FCC exercised its discretion to protect one station—KHTV-CD (“KHTV”)—reasoning that it had “made repeated efforts over the course of a decade to convert to Class A status” and thus that “the equities in favor of protection of this station outweigh[ed] the minimal impact that protecting this one facility will have on [its] repacking flexibility.” *Id.* ¶ 235. On September 15, 2014, Petitioner Videohouse and Abacus timely filed petitions for reconsideration (the “2014 Petitions”).

On June 19, 2015, the FCC issued the Second Order on Reconsideration, denying the 2014 Petitions. As a procedural matter, the FCC found the 2014 Petitions deficient, claiming that Petitioners somehow had not made their requests for protection specific enough. *Id.* ¶ 59. As a substantive matter, the FCC again relied on its unsubstantiated statement “that there are approximately 100 formerly out-of-core Class A-Eligible LPTV stations that had not filed an application for a license to cover a Class A facility as of February 22, 2012.” *Id.* ¶ 54. In addition, the FCC rejected Petitioners’ argument that they were similar to KHTV, although Petitioners likewise spent years searching for a viable in-core channel to build and operate a Class A facility. *Id.* ¶ 60.

The FCC rejected the same arguments as advanced by another licensee of a Class A-eligible LPTV station—Latina Broadcasters of Daytona Beach, LLC (“Latina”). The FCC deemed Latina similarly situated with Petitioners (*i.e.*, neither had filed an application for a license to cover its new in-core station on or before February 22, 2012, Second Order on Reconsideration, at ¶ 53 n.183), with the only difference being that Latina had filed its petition for reconsideration out of time. *Id.* At the same time, the FCC decided to afford protection to a group of stations that “hold a Class A license today” and had an “application to convert an LPTV construction permit to a Class A construction permit” pending or granted as of February 22, 2012” because there were “significant equities in favor of protection

of these stations that outweigh the limited adverse impact on our repacking flexibility.” *Id.* ¶¶ 53, 62. The FCC extended this protection even though none of these stations had sought reconsideration.

Remarkably, when the FCC released a list of stations eligible for the auction less than two weeks later, it did an about-face with respect to Latina. Without any public notice or explanation why it had reversed course and afforded Latina protection, the FCC included its station on the list of eligible stations. Pet. Br. 27.

On September 2, 2015, Petitioners sought reconsideration of the Second Order on Reconsideration. On December 11, 2015, Petitioners filed a motion to stay with the FCC, asking the agency to extend that deadline pending the agency’s disposition of the Reconsideration Petition and judicial review thereof. On December 18, 2015, the FCC denied that motion. Order Denying Stay Motion, GN Docket No. 12-268 (Dec. 18, 2015). In so doing, the FCC abandoned its assertion that protecting Petitioners would require it to do the same for another 100 similarly situated stations, *id.* at ¶ 13 n.41, explaining that this assertion “does not bear on the decisional issue” here. *Id.* at ¶ 12. In addition, the FCC defended as procedurally proper its decision to extend discretionary protection to the group of licensees that had not filed reconsideration petitions. In its view, Petitioners’ requests to “reconsider the scope of discretionary protection for out-of-core Class A-eligible LPTV stations that now hold Class A licenses” allowed the agency to

protect a different group of licensees, *id.* at ¶ 13—even though the FCC found Petitioners’ requests insufficiently specific to support the same relief.

Mandamus Proceedings. On December 22, 2015, Petitioners filed an emergency petition for writ of mandamus. *In re The Videohouse, Inc.*, No. 15-1486 (D.C. Cir. filed Dec. 22, 2015). Petitioners asked the Court to order the FCC to rule on the Reconsideration Petition by Monday, January 4, 2016. In highlighting their urgent need for agency action, Petitioners emphasized that the FCC had never offered a rationale for its decision to afford Latina auction eligibility and discretionary protection in the repacking process, much less an explanation why Petitioners should be treated differently. *Id.* at 15-16.

In opposing mandamus, the FCC 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.” *Opp. to Emergency Petition for Writ of Mandamus, In re The Videohouse, Inc.*, No. 15-1486, at 14 (filed Dec. 28, 2015). 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. Notably, the FCC for the first time asserted that Latina was situated differently than Petitioners because its predecessor in interest had obtained

in-core Class A construction permits before February 22, 2012, *id.*—despite the fact that those permits related to a different in-core channel that had been relinquished years earlier. Reconsideration Order, at ¶ 20 & n.98.

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). “Based on the agency’s representations,” the Court “expect[ed] the [FCC] 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.* As of February 10, the FCC had not acted on the Reconsideration Petition. Accordingly, Petitioners renewed their request for mandamus relief by filing a second emergency petition for writ of mandamus on February 11, 2016. The FCC issued the Reconsideration Order *the next day*.

The FCC’s Reconsideration Order & Dissenting Statements. A divided FCC denied Petitioners auction eligibility and repacking protection. The majority maintained that the requests were procedurally improper even while the agency continued to rely on the 2014 Petitions as the basis for *sua sponte* granting auction eligibility and repacking protection to approximately a dozen licensees that never sought such relief. *Id.* ¶¶ 8-10. Substantively, the majority reiterated that it would

deny auction eligibility or repacking protection to “out of core” Class A-eligible LPTV stations that obtained in-core channels but did not file a license to cover by February 22, 2012, despite acknowledging that KHTV fell “in this category.” *Id.* ¶

3. The majority attempted to distinguish Petitioners’ efforts to obtain Class A status from those of KHTV by depicting them as prospectors that sought Class A status only after it became apparent that they could obtain a potential windfall. *Id.*

¶ 13. Notably, the FCC reversed itself on Latina—again. After first rejecting Latina’s requests for discretionary protection and then changing course and affording such relief to Latina, the FCC reverted to its original position, abandoning any distinction between Latina and Petitioners.

Commissioner Pai dissented, and Commissioner O’Rielly dissented in part. Commissioner Pai criticized the FCC’s line-drawing as “an entirely outcome-driven process” in which the agency “shifted from rationale to rationale” and subjected similarly situated Class A-eligible stations to disparate treatment. *Id.* at 19-20. Moreover, given that staff had instructed stations “that were ready to file a Form 302-CA not to do so,” hinging auction eligibility and repacking protection to a retroactive deadline was arbitrary—a regulatory “game of gotcha.” *Id.* at 20. He also disagreed with the rationales for denying relief. Petitioners’ requests could not be procedurally lacking given the FCC’s reliance on them “to extend discretionary protection to other stations.” *Id.* at 20.

Procedural History. On February 12, 2016, the same day the FCC issued the Reconsideration Order, Petitioners filed a Petition for Review challenging it, the Report & Order, and the Second Order on Reconsideration.² On February 21, 2016, Petitioners filed an emergency motion for expedited consideration of this matter. On February 23, 2016, the Court issued an order expediting the case, with briefing to conclude on April 1, 2016 and oral argument likely to occur in May 2016. On February 25, 2016, Petitioners filed their opening merits brief.

In the mean time, Latina filed a petition for review on February 19 2016, challenging its exclusion from the reverse auction on multiple grounds. On February 26, 2016, Latina filed an emergency motion for stay, seeking an order, by March 11, 2016, either: (a) reinstating its application to participate in the reverse auction; or (b) staying the reverse auction. *See Latina Broadcasters of Daytona Beach, LLC v. FCC*, No. 16-1069, at 1-2 (D.C. Cir. filed Feb. 26, 2016).

ARGUMENT

The Court evaluates a motion for stay pending appeal under the familiar four-part test: (1) likelihood of success on the merits; (2) whether the movant will suffer irreparable injury in the absence of a stay; (3) whether the stay will cause

² Petitioners filed a second petition for review in response to the publication of the Second Order on Reconsideration in the Federal Register. *The Videohouse, Inc. v. FCC*, No. 16-1071 (Feb. 26, 2016). The Court consolidated the two petitions. *Order, The Videohouse, Inc. v. FCC*, No. 16-1060 (Feb. 26, 2016).

substantial harm to other parties; and (4) whether the stay is in the public interest. *See Holiday Tours*, 559 F.2d at 843. “These factors interrelate on a sliding scale and must be balanced against each other. If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998) (citations and quotations omitted). All of these requirements are met here.

I. Petitioners Are Likely To Succeed On The Merits.

To make this showing, one need only raise “questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.” *Holiday Tours*, 559 F.2d at 844. That “modest standard” is met here. *Comm. on Judiciary of U.S. House of Reps. v. Miers*, 542 F.3d 909, 912 (D.C. Cir. 2008) (Tatel, J., concurring).

As an initial matter, both the FCC and the Court already have recognized that Petitioners meet this standard. Before expediting an appeal, the Court will ensure “that the decision under review is subject to substantial challenge.” D.C. Cir. Handbook at 33. In responding to Petitioners’ motion to expedite, the FCC declined to contend that the orders under review were subject to substantial challenge. Indeed, the FCC did not dispute that expedited review was appropriate, instead objecting only to the particular schedule Petitioners had proposed. FCC Opp. to Motion to Expedite at 1-4. And in ordering expedited review of the case,

the Court necessarily determined that the FCC orders under review are “subject to substantial challenge.” There can be no dispute, then, that this appeal raises a substantial question. Especially given Petitioners’ strong showing on the other stay factors, *infra* at 18-20, no more is required. A stay thus is appropriate because Petitioners raise “a serious legal question,” “little if any harm will befall other interested persons, or the public,” and “denial of the order would inflict irreparable injury on the movant.” *Holiday Tours*, 559 F.2d at 844.

In any event, Petitioners have demonstrated a likelihood of success on the merits. *First*, the decision is arbitrary and capricious because of the retroactive “deadline” the FCC imposed with regard to the date by which stations would need to submit an application to convert from LPTV to Class A status in order to be eligible for the auction. Pet. Br. 40-44. “Generally, an agency may not promulgate retroactive rules without express congressional authorization.” *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2011) (citation omitted). But even if the FCC had statutory authority to impose some deadline, the agency was still obligated to give affected parties notice of the deadline *before* imposing it. *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.). Here, the FCC did not set the February 22, 2012 deadline until 27 months after it had passed. Pet. Br. 4, 40. By cutting off Petitioners’ rights and stripping them of the value of substantial

investments without any advance notice of the legal consequences of not filing certain forms by that date, the FCC violated the APA. *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000). The FCC's retroactivity problem is exacerbated by the fact that its staff instructed licensees to delay in filing Form 302-CA, thereby inducing them to file it much later in the conversion process than they would have. By causing the very delays the FCC would later use to penalize Class A-eligible stations, it improperly sought to impose new liabilities on licensees "for past actions which were taken in good-faith reliance on [agency] pronouncements." *NLRB v. Bell Aero. Co.*, 416 U.S. 267, 295 (1974).

Second, the FCC's decision to allow KHTV—but not Petitioners' stations—to participate in the auction arbitrarily "treat[s] similar situations dissimilarly." *Local 777 v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978); see Pet. Br. 45-51. The FCC acknowledged that KHTV fell within the "category" of "out of core" Class A-eligible LPTV stations that obtained an in-core channel "but did not file for a Class A license to cover by February 22, 2012." Reconsideration Order ¶ 3. The FCC tried to distinguish KHTV by virtue of its "repeated efforts" to secure an in-core channel over the course of a decade and the fact that it filed a Form 302-CA only days after February 22, 2012. *Id.* But the FCC failed to give equal consideration to Petitioners' similar efforts to secure a viable in-core channel, thereby subjecting Petitioners to disparate treatment. Pet. Br. 46-48. To be clear, the FCC properly

afforded KHTV auction eligibility and repacking protection. But having afforded such relief to KHTV, the FCC must afford it to Petitioners as well.

Third, the FCC's reasons for rejecting Petitioners' request for discretionary protection do not pass muster. Pet. Br. 51-54. The FCC ruled that Petitioners' 2014 reconsideration petitions were insufficiently detailed and thus procedurally defective. But the FCC protected a dozen LPTV stations that *never even sought reconsideration*, using Petitioners' purportedly defective petition as the vehicle for doing so. If Petitioners' requests were insufficiently detailed, then they could not possibly have served as the basis for relief for stations that never requested relief at all. The FCC also previously claimed that there were approximately 100 similarly situated stations and including Petitioners would require it to protect these other stations, which "would increase the number of constraints on the repacking process, thereby limiting [the FCC's] repacking flexibility." Second Order on Reconsideration at ¶ 54. The FCC since has abandoned that claim, conceding that its substantive basis for excluding Petitioners "does not bear on the decisional issue presented by the [Reconsideration] Petition." Reconsideration Order at ¶ 16. In sum, neither of these reasons can withstand APA review.

Finally, if the Court determines that Latina is likely to prevail on its stay motion, this would necessarily mean that Petitioners are likely to succeed on the merits. "A long line of precedent has established that an agency action is arbitrary

when the agency offered insufficient reasons for treating similar situations differently.” *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996). Before the FCC and in their first mandamus petition, Petitioners argued that the decision to include Latina—but not Petitioners’ stations—in the auction clearly violated this bedrock rule of administrative law. Pet. Br. 30. The FCC’s failed attempt to slip Latina into the auction without explanation, in the hope no one would notice, only underscored the obviousness of the violation. *See Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1097 (D.C. Cir. 2012) (“To sum up, the Board failed to reasonably explain and justify its deviation from its longstanding entire-system exception. Under the APA, the Board’s decision is therefore arbitrary and capricious.”).

After a tepid attempt (in response to the first mandamus petition) to defend its disparate treatment of similarly situated stations, the FCC conceded the point and removed Latina from the auction; the agency recognized it could not hold the line it drew. *See supra* 11. Latina has now challenged the FCC’s decision and sought a stay pending appeal. If the Court concludes Latina is likely to prevail on any of its claims, Petitioners thus are likely to prevail too given the FCC’s concession. In this circumstance, one follows *a fortiori* from the other.

II. The Balance Of Harms And The Public Interest Support A Stay.

Videohouse easily satisfies the remaining three factors. It will clearly suffer irreparable harm without a stay. “The auction presents a once-in-a-lifetime opportunity for broadcasters.” Reconsideration Order ¶ 3. It is a “unique financial opportunity” that will allow broadcasters “to return some or all of their broadcast spectrum usage rights in exchange for incentive payments.” *Id.* ¶ 1. Millions of dollars are therefore at stake. Moreover, stations without repackaging protection may be stripped of their licenses without any compensation or other relief. Order ¶¶ 232-235; *id.* ¶ 234 (acknowledging that stations will lose substantial financial investments without repackaging protection).

Once the reverse auction begins, there will be no way to remedy their injuries. Indeed, it appears no court has ever vacated the results of an FCC auction after it has taken place. If excluded from the auction, then, Videohouse will forever lose the unique opportunity to sell their spectrum rights and/or receive repacking protection. Such unrecoverable economic losses constitute irreparable harm. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 675 (D.C. Cir. 1985). The fact that the Court granted expedited review, *see* D.C. Cir. Handbook at 33 (explaining that the Court “grants expedited consideration very rarely” and that the “movant must demonstrate that the delay will cause irreparable injury”), and that the FCC has

repeatedly encouraged Petitioners to seek a stay in order to protect their legal rights, *infra* at 19, confirms that they will suffer irreparable harm without a stay.

Second, in contrast to the irreparable harm in the absence of a stay, the FCC will suffer little—or likely no—harm if the auction is delayed while this matter is litigated. Congress passed the Spectrum Act more than four years ago and the FCC has until 2022 to complete the three-step auction process. *See* 47 U.S.C. § 1452(f)(3). The FCC’s ability to timely complete the auction will not be remotely jeopardized. Indeed, the stay being sought here is quite short. The briefing will be complete by April 1, 2016, and argument will likely be in May 2016. Given this highly expedited schedule, the FCC will suffer no harm from having the first phase of the auction process modestly delayed.

Moreover, the balance tips decisively in favor of a stay given that it is the FCC’s actions that necessitated this motion. It took one mandamus petition to force the FCC to agree to timely dispose of the Reconsideration Petition, and, remarkably, it took a second mandamus petition to force the FCC to actually fulfill that promise. Pet. Br. 31. Then, in response to the motion to expedite, the FCC objected to the proposed “breakneck” schedule and suggested they should instead seek a “stay pending judicial review.” FCC Response to Motion to Expedite at 1, 3. There is a “strong presumption favoring judicial review of administrative action.” *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Accordingly, the Court

has expressed concern when an agency appears to engineer resolution of a matter before it in order “to avoid judicial review.” *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 733 (D.C. Cir. 1992). This is just such a case.

Finally, the public interest will benefit if a stay is granted. Proceeding with the auction without Petitioners will not further Congress’s or the FCC’s goals. The reverse auction is designed to “facilitat[e] the voluntary return of spectrum usage rights” so that the Commission 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.” Report & Order at ¶ 1. Moreover, 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 auction and by granting them protection in the repacking process.

CONCLUSION

For the foregoing reasons, this motion for stay should be granted.

Dated: March 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 2016, copies of the foregoing was filed with the Court's CM/ECF filing system and served in the following manner:

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