

No. 16-1060

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

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

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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**REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING  
APPEAL**

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

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**GLOSSARY**

FCC	Federal Communications Commission
LPTV	Low-Power Television
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)

Three months ago, Videohouse petitioned this Court for mandamus relief, requesting that the Court order the FCC to issue a ruling on Videohouse's pending petition for reconsideration ("Reconsideration Petition"), through which Videohouse sought to obtain eligibility in the upcoming spectrum auction ("Auction") and protection in the spectrum-repacking process. Relying on the FCC's assurances that an order was forthcoming and that the agency could allow Videohouse into the auction if the Court ruled in its favor before March 29, the Court denied mandamus relief but advised the FCC that it "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." Order, *In re The Videohouse, Inc.*, No. 15-1486, at 1 (Dec. 30, 2015). Over the next seven weeks, the FCC took no action, forcing Videohouse to return to the Court and again seek mandamus relief. The next day, the FCC denied the Reconsideration Petition.

Videohouse promptly filed a petition for review and an emergency motion for expedited consideration, arguing that the orders under review are subject to "substantial challenge" and that Videohouse would be irreparably harmed in the absence of relief. Mot. 13-14, 18-19. The FCC did not contest either point. Rather, the FCC argued only that there was insufficient time to consider the case. The FCC suggested that Videohouse instead should seek a stay of the auction if it needed

relief before the auction start date. Mot. 19. In other words, the FCC had not acted on the Reconsideration Petition promptly enough to ensure meaningful judicial review before March 29—despite its earlier promises to the contrary.

The Court granted expedited review, setting out a highly expedited schedule for resolution of the case on the merits. But because that schedule runs past the start of the Auction, Videohouse filed the present motion, seeking a stay of the Auction’s start date—a stay of relatively limited duration given the expedited schedule. In opposition, the FCC now argues that a stay would be improper because it would harm the FCC, auction participants, and the public interest.

The FCC has created the circumstances in which Videohouse has been forced to seek a stay of the Auction. Ignoring its previous assurances of meaningful judicial review, it now cites those circumstances as a reason to defeat Videohouse’s claim via procedural maneuvering rather than on the merits. The FCC thus is trying to force Videohouse into the ultimate “game of gotcha.” Reconsideration Order at 20 (Pai, C., dissenting). But Videohouse should not be forced to play it. The Court should grant the motion to stay.

## **ARGUMENT**

### **I. Videohouse Is Likely To Prevail On The Merits.**

The FCC does not deny its previous concession that expedited review is appropriate in this case, which of course means “that the decision under review is

subject to substantial challenge.” D.C. Cir. Handbook at 33. Videohouse need show no more than that. Emergency Mot. for Stay Pending Appeal at 13. The FCC suggests that because the Court did not adopt Videohouse’s proposed expedited schedule means that the Court’s ordering of a different highly expedited schedule has no significance. Of course, this is irrelevant given the FCC’s concession that its rulings at issue are “subject to substantial challenge.” But the FCC is wrong in any event. The Court grants expedited consideration only “very rarely” and for “strongly compelling” reasons. D.C. Cir. Handbook at 33. Especially when coupled with the FCC’s concessions, it is clear that Videohouse raises “questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation.” *Holiday Tours*, 559 F.2d at 844.

Though this is sufficient to proceed to the remaining factors in the traditional stay analysis, it is worth highlighting that the FCC is wrong on the merits. The FCC attempts to defend its arbitrary and unfair imposition of backward-looking deadline by citing *Ass’n of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859 (D.C. Cir. 1992) (*AACS*). But *AACS* endorsed the Department of Education’s consideration of “past [loan] default rates” in making forward-looking determinations regarding regulated schools’ continued eligibility for the Higher Education Act’s “Guaranteed Student Loan” program, and only because (1) the text of the Student Loan Default Prevention Initiative Act required it; and (2) the

schools had no legitimate expectation of continued eligibility for the program. *Id.* at 863, 864-65. *AACS* thus does not come close to supporting the FCC's retroactive imposition of a backward-looking deadline for filing an agency form (Form 302-CA) that some 27 months later would be used for determining auction eligibility and repacking protection. Indeed, no case supports it.

Worse still, as Videohouse explained previously, is that the FCC caused parties like Videohouse to miss that retroactively imposed backward-looking deadline by instructing licensees to delay filing Form 302-CA until the end of the process of obtaining an in-core channel, building out a digital station, and converting it to Class A status. Notably, the Commission cited *Deleted Station WPHR(FM)*, 11 FCC Rcd 8513, 8515 (1996), in the Reconsideration Order for the proposition that regulated entities rely on staff advice "at their own risk." Reconsideration Order at ¶ 11 n.44. But the FCC no longer relies on *Deleted Station* now that Videohouse has explained why it is inapposite. Pet. Br. 43.

Unsurprisingly, then, the Commission cites no authority in defense of this action. All it can say in its defense is that "Videohouse cannot plausibly claim that licensees had any basis for relying on staff advice in 2011 to preserve their rights to participate in an auction that did not yet exist." FCC Opp. 11. This is, of course, true. But it makes Videohouse's case—not the Commission's. It demonstrates that when Videohouse heeded the FCC's instructions, it did not know (and could not

have known) that it was walking into a regulatory trap—at least until years later when the Commission ensnared it by tying auction eligibility and repacking protection to an until-then unknown deadline it had encouraged licensees to miss. The Commission’s weak defense of its retroactive backward-looking deadline only confirms Videohouse’s likelihood of success on the merits.

The Commission’s defense of its disparate treatment of Videohouse fares no better. The FCC purports to distinguish Videohouse from KHTV by their relative diligence in converting to Class A status. But the FCC’s position boils down to faulting Videohouse for not finding an available station until 2009. FCC Opp. 13. But the Commission is well aware that the digital TV transition inhibited LPTV stations from finding available in-core stations. Pet. Br. 11. That a station in the Los Angeles market became available to KHTV earlier than one became available in the Pittsburgh market demonstrates only the two stations’ relative fortuity—not their relative diligence. Moreover, the FCC ignores the fact that Videohouse timely submitted its statement of eligibility for Class A status in 1999 and since that time continuously has maintained that status. Pet. Br. 10. Since 1999, then, Videohouse (like KHTV) has been in the process of converting to Class A status. In short, Videohouse is likely to prevail on its “similarly situated” claim.<sup>1</sup>

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<sup>1</sup> Commission’s procedural attack on this claim (FCC Opp at 12) is meritless. Mot. 16; Pet. Br. 33, 37, 50-52.

The Commission cannot deny that Videohouse is also similarly situated to Latina and thus has no serious response to Videohouse's argument that it is entitled to a stay if Latina's stay motion is granted. As explained previously, the FCC took the position before this Court that Latina was situated differently than Petitioners because Latina's predecessor had obtained in-core Class A construction permits before February 22, 2012. After realizing this was an illegitimate basis for distinguishing Latina from Petitioners, the Commission did an about-face and stripped Latina of its eligibility and repacking protection. This is tantamount to an admission that Latina and Videohouse are similarly situated. Mot. 16-17; Pet. Br. 5-6, 49-50. If Latina is likely to prevail on any of its claims, then Petitioners are too.

## **II. Videohouse Will Suffer Irreparable Harm In The Absence Of A Stay.**

Videohouse will suffer irreparable harm without a stay. Mot. 18-19. The FCC does not dispute that Videohouse will lose a "valuable economic opportunity" if excluded from the Auction. FCC Opp. 15. The FCC instead argues it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Id.* (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). That general rule does not apply, however, where the economic loss is unrecoverable. *Robertson v. Cartinhour*, 429 F. App'x 1, 3 (D.C. Cir. 2011); *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004) ("[C]ourts

have recognized that economic loss may constitute ‘irreparable harm’ where a plaintiff’s alleged damages are unrecoverable.”). Economic loss thus qualifies as irreparable harm when “adequate compensatory or other corrective relief will” *not* “be available at a later date, in the ordinary course of litigation.” *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). That is the case here because the APA does not provide for monetary damages. *Cohen v. United States*, 650 F.3d 717, 735 (D.C. Cir. 2011).

The FCC also wrongly suggests that unrecoverable economic loss, in order to constitute irreparable harm, must likely “force a company out of business.” FCC Opp. 16. Economic loss qualifies where it “‘threatens the very existence of the movant’s business,’ *Wis. Gas*, 758 F.2d at 674, *or* where the claimed economic loss is unrecoverable.” *Safari Club Int’l v. Jewell*, 47 F. Supp. 3d 29, 36 (D.D.C. 2014) (citation omitted and emphasis added). This understanding follows logically from the governing legal standard. Where the loss threatens the business’s existence, whether damages are theoretically recoverable later is immaterial. And where the business will suffer “irretrievable monetary losses,” they need only have a “serious” effect to constitute irreparable harm. *Gulf Oil Corp. v. Dep’t of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981); *Odebrecht Const., Inc. v. Sec’y, Florida Dep’t of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).

Regardless, Videohouse meets both standards. Exclusion from the Auction not only will have a serious effect—a point not in dispute—it likely will force Videohouse out of business. If Videohouse participates in the Auction, its spectrum can be sold for a significant sum of money. Reconsideration Order ¶ 1 (describing participation in the Auction as a “unique financial opportunity”). If Videohouse is unable to sell its spectrum, it will receive “repacking” protection. That is, the FCC “will reassign those broadcasters” who participate in the Auction but are unable to sell their spectrum “to new channels in a different (and smaller) band of spectrum.” *NAB*, 789 F.3d at 170. If Videohouse is excluded from Auction, however, it will be in imminent danger of being forced off the air. As the FCC has explained, the absence of repacking protection “will result in some viewers losing the services of these stations, may strand the investments displaced LPTV and TV translator licensees have made in their existing facilities, and may cause displaced licensees that choose to move to a new channel to incur the cost of doing so.” Report & Order ¶ 237. All of these harms are irreparable.

The FCC’s responses all fall short. Other than misstating the relevant law on when unrecoverable economic loss constitutes irreparable harm, the FCC offers *no* response as to the significant monetary loss Videohouse will suffer by missing out on the “once-in-a-lifetime opportunity” to sell its spectrum in the Auction. Order on Reconsideration ¶ 3. As to the many harms Videohouse will suffer in the

absence of repacking protection, the FCC will only say that it *might* be possible for it to remain in business on a relocated channel. FCC Opp. 16-17. But this runs contrary to the FCC's claim that denying Videohouse repacking protection was necessary because otherwise the "congested" Pittsburgh market would "significantly constrain" the Commission's ability to repack and repurpose spectrum in the Auction. Reconsideration Order ¶ 12. The Commission cannot have it both ways; if the Pittsburgh market is too congested to fit Videohouse in the repack, then it is difficult to believe that there will be spectrum left over for Videohouse afterward.

### **III. The Balance Of Harms And Public Interest Both Support A Stay.**

The FCC claims that the Auction should proceed as scheduled because it "has been years in the making, and participants were notified of the March 29 start date more than six months ago." FCC Opp. 18. In the same vein, the FCC and its *amici* argue that a stay "would upend the settled plans of [third parties] that have made significant investments, secured financing, and delayed other business proposals based on the current schedule." FCC Opp. 18. However the FCC frames it, delaying the Auction may inconvenience to the FCC and third parties, but that is not the measure of whether Videohouse is entitled to a stay pending appeal. Because Videohouse has made the requisite showing on the merits and will suffer irreparable harm, it is entitled to relief unless the harm to interested parties clearly

tips the balance the other way. But these harms pale in comparison to the harms Videohouse faces, Mot. 19-20, especially considering that the requested stay would only be for a short period of time given the expedited schedule the Court ordered.

Moreover, the FCC created the conditions that have resulted in Videohouse being forced to seek a stay. Had the FCC acted on the Reconsideration Petition promptly, there would have been no need for Videohouse to seek a stay. The FCC should not be permitted to rely on claims of harm to third parties resulting from its own inaction as a basis for defeating Videohouse's request for a brief stay.

But to the extent the FCC is concerned about the purported harms to third parties, the Commission can avert those harms without imposing irreparable harm on Videohouse. If a stay is granted, the Commission simply could allow Petitioners to participate in the Auction on a provisional basis, *see* Latina Stay Reply 9-10, which would prevent irreparable harm to Videohouse and cause no harm to others.

Last, the FCC argues that there is "a compelling public need to conduct the incentive auction with dispatch to help meet the increasing demand for spectrum-based services." FCC Opp. 19. But Congress' exempted the Auction from 47 U.S.C. § 309(j)(15)(A), affording the FCC until the 2022 to complete it. *Id.* § 1452(f)(4). That a short stay will somehow jeopardize Congress's goal is meritless.

### **CONCLUSION**

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

Dated: March 9, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th 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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