

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In re	)	
	)	
Public Notice Announcing the Opening of	)	DA 17-911
the Second Filing Window for Eligible	)	MB Docket No. 16-306
Full Power and Class A Television Station—	)	GN Docket No. 12-268
October 3 Through November 2, 2017	)	

To: Chief, Incentive Auction Task Force  
Chief, Media Bureau

**PETITION FOR RECONSIDERATION**

WMTM, LLC (“WMTM”), the licensee of WIAV-CD, Washington D.C. (Facility ID 168063) (“WIAV”), hereby submits this Petition for Reconsideration of the Public Notice announcing the opening of the second filing window for eligible full power and Class A television stations, released September 20, 2017 (“Second Window PN”).<sup>1</sup> Prior to opening the second filing window, the Media Bureau must (i) dismiss all applications impermissibly filed in the first priority filing window and (ii) require the amendment of eligible applications with ineligible technical parameters filed in the first priority filing window.

In the Incentive Auction Order and subsequent public notices, the Commission set out a clear process by which a full power or Class A television station could apply for its repack facility and upgrades to that facility.<sup>2</sup> This process was divided into three filing windows: the Initial Filing Window, the First Priority Filing Window and the Second Filing Window.

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<sup>1</sup> Incentive Auction Task Force and Media Bureau Announce the Opening of the Second Filing Window for Eligible Full Power and Class A Television Station—October 3 through November 2, 2017, DA 17-911, MB Docket No. 16-306, GN Docket No. 12-268 (Sept. 20, 2017) (“Second Window PN”).

<sup>2</sup> See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6567, 6795, ¶ 556 (2014) (subsequent citations omitted) (“Incentive Auction Order”); *Id.* at 6794, ¶¶ 554-55; see also Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast

In the Initial Filing Window, stations that received a new channel assignment as a result of the incentive auction were required to submit a construction permit application for the technical facilities specified in the Closing and Channel Reassignment Public Notice (“Initial Filing Window”).<sup>3</sup>

After the Initial Filing Window concluded, the Commission directed the Media Bureau to open a priority window for a discrete group of applications (“First Priority Filing Window”). Eligibility to file in the First Priority Filing Window was limited to a small group of stations that met the following criteria:

(1) 25 reassigned stations that were “unable to construct” the specified facilities assigned to them in the *Closing and Channel Reassignment Public Notice* and, therefore, received a waiver of the requirement to file in the Initial Filing Window; (2) any reassigned station, band changing station, or non-reassigned station entitled to protection in the repacking process that is predicted to experience a loss of population served in excess of one percent as a result of the repacking process; and (3) Class A stations that did not receive protection and were displaced in the repacking process.<sup>4</sup>

Stations that met the eligibility criteria could “request expanded facilities or an alternate channel.”<sup>5</sup> Applications filed in the First Priority Filing Window were required to protect the applications that were filed in the Initial Filing Window.

The Commission has now announced the opening of the Second Filing Window (the “Second Filing Window”) barely two weeks after the close of the First Priority Filing

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Transition, Public Notice, 32 FCC Rcd 858, 866-67, ¶¶ 27-28, 869-70, ¶¶ 35-38 (IATF/MB 2017) (“Procedures PN”).

<sup>3</sup> See Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced, Public Notice, 32 FCC Rcd 2786 (2017) (“Closing and Channel Reassignment Public Notice”).

<sup>4</sup> Incentive Auction Task Force and Media Bureau Announce the Opening of the First Priority Filing Window for Eligible Full Power and Class A Television Stations from August 9 through September 8, 2017, DA 17-724, MB Docket No. 16-306, GN Docket No. 12-268 (July 31, 2017) (“First Priority PN”).

<sup>5</sup> *Id.* at para. 3 (*emphasis added*); see also Incentive Auction Order at ¶ 554; 73.3700(b)(2)(i)(ii).

Window. In this window, “any reassigned station or band changing station may file an amendment to its initial construction permit application, if still pending, or a modification to its construction permit, if granted, to seek an alternate channel or expanded facilities...”<sup>6</sup> Importantly, all stations that file in this window must protect the applications filed in the Initial Filing Window as well as the applications filed in the First Priority Filing Window.

Before the Commission can begin accepting applications in the Second Filing Window, the agency must resolve several clear violations of the procedures of the First Priority Window. These violations, if left unaddressed, would allow several deficient First Priority Filing Window applications to be afforded protection—for which they are not entitled—from applications submitted in the Second Filing Window.

First, the Commission must identify and dismiss applications filed by stations not eligible to participate in the First Priority Filing Window. Next—and essential to the integrity of the Second Filing Window—the Commission must identify the stations that applied both for an alternate channel and for expanded facilities, thus violating the rules and regulations governing the First Priority Filing Window by jumping in front of stations eligible only for the Second Filing Window. Additionally, certain stations that were not themselves eligible to participate in the First Priority Filing Window, but that agreed to move to alternate channels to facilitate the move of a Channel 14 station, also applied inappropriately for expanded facilities in the First Priority Filing Window. These stations must amend their applications to bring them into technical compliance with the rules governing the First Priority Filing Window before the Second Filing Window opens.

WMTM understands the concerns and hardships of utilizing Channel 14 and does not oppose allowing a Channel 14 station to engineer channel change solutions with other stations to find a workable channel. However, there is no justification for allowing all of the stations in a Channel 14 repack chain that do not otherwise meet the eligibility criteria for the First Priority Filing Window to seek maximized facilities in advance of the

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<sup>6</sup> Second Filing Window PN.

Second Filing Window. The Incentive Auction Order is clear – a station that is allowed to file in the First Priority Filing Window “may request either an alternate channel or expanded facilities,”<sup>7</sup> not both. Unfortunately, the Media Bureau has not been as clear in its subsequent guidance to participants in the First Priority Filing Window. In the Procedures PN,<sup>8</sup> the Media Bureau indicated that an “Unable to Construct” station may file “for an alternate channel and/or expanded facilities in the first priority window.”<sup>9</sup> However, this appears to have been an error as the Bureau provided “no notice” that it was seeking to change the rules established in the Incentive Auction Order which allowed stations eligible for the First Priority Filing Window to apply for “either an alternate channel or expanded facilities.”<sup>10</sup> Adding to the confusion, the First Priority Window PN, consistent with the language of the Incentive Auction Order, correctly indicated that eligible stations may apply for “expanded facilities *or* an alternate channel.”<sup>11</sup> To resolve the situation and ensure fairness to all applicants, prior to opening the Second Filing Window, the Media Bureau must require that those stations that filed applications during the First Priority Filing Window specifying expanded facilities on their alternate channels amend such applications to specify replication facilities on their alternate channels.

WMTM encourages the Incentive Auction Task Force and the Media Bureau to act promptly to dismiss or require the amendment of applications impermissibly filed during the First Priority Filing Window or to delay the opening of the Second Filing

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<sup>7</sup> Incentive Auction Order at ¶ 554 (*emphasis added*).

<sup>8</sup> Procedures PN at ¶ 27.

<sup>9</sup> Id.

<sup>10</sup> In determining whether notice was adequate under the logical outgrowth test, courts will consider whether parties “should have anticipated that such a requirement might be imposed.” *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000). Here, “there was no notice” that the Commission considered allowing stations eligible for the First Priority Window to request both an alternate channel and expanded facilities, “deny[ing] affected parties an opportunity for meaningful and informed comment.” *Amendment of Part 101 of the Commission’s Rules to Modify Antenna Requirements for the 10.7 - 11.7 GHz Band*, Report and Order, 22 FCC Rcd 17153, ¶ 24 (2007). Because agencies may not “use the rulemaking process to pull a surprise switcheroo on regulated entities,” the Commission must abide by the interpretation set forth in the *Incentive Auction Order*. *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C.Cir.2005).

<sup>11</sup> First Priority PN (*emphasis added*)

Window until the Media Bureau has had an opportunity to do so. There is simply no reason to rush to open the Second Filing Window while there are improper applications pending that will needlessly constrain the already difficult task of identifying alternate channels or expanded facilities. The stations that have waited their turn and followed the clearly established process to seek an alternate channel or expanded facilities should not be harmed by stations that filed prematurely.

Respectfully submitted,

WMTM, LLC

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